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THE ORGANIZATIONAL OMBUDSMAN'S QUEST FOR PRIVILEGED COMMUNICATIONS

*Kendall D. Isaac**

I. THE ORGANIZATIONAL OMBUDSMAN

The role of an ombudsman¹ dates back to Sweden and the 1700s.² The role in its more pure governmental advocacy form was introduced in the United States in the 1960s.³ When the American Bar Association (“ABA”) first recognized the role of ombudsmen in its 1969 Resolution, there was no contemplation of what we now know as an organizational ombudsman.⁴ Organizational (sometimes called “corporate”) ombudsmen did not start rapidly spreading until more than a decade later, culminating into the formation of the Corporate Ombudsman Association (which later became The Ombudsman Association and then later, via merger with the University and College Ombuds Association [“UCOA”], the International Ombudsman Association in 2005)⁵ and its promulgation of a Code of Ethics in 1986.⁶ Today organizational

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1. While some strictly prefer the gender-neutral term ombudsperson, this author will periodically refer to the position as the ombudsman, ombudsmen, or the ombuds office in order to stay true to the historical term of art as well as the name of choice for the primary professional organization for this profession, The International Ombudsman Association. The usage of the term ombudsman is not intended to be offensive, and this author hopes none of the readers are offended.

2. Charles L. Howard, *THE ORGANIZATIONAL OMBUDSMAN: ORIGINS, ROLES AND OPERATIONS: A LEGAL GUIDE* 1-4 (A.B.A. ed., 2010).

3. *Id.* at 6 (referencing a 1961 article by Professor Kenneth Culp Davis appearing in the *Pennsylvania Law Review*).

4. *Id.* at 7-9.

5. *Chronology of Organization Names - COA, TOA, UCOA, and IOA*, <http://www.ombudsassociation.org/About-Us/IOA-Leadership-and-Organization/Board-of-Directors/Our-History.aspx> (last visited Oct. 19, 2014).

6. Howard, *supra* note 2, at 30.

ombuds' offices can be found in many Fortune 1000 companies,⁷ on the campuses of colleges and universities across the country,⁸ and within hospitals and other healthcare-related entities.⁹

While both the governmental ombudsman¹⁰ and the organizational ombudsman relied heavily on the principles of independence and confidentiality,¹¹ the governmental ombudsman was less likely to be impartial and informal.¹² Instead, the governmental ombudsman was typically more of an advocate for the people and was charged with speaking out, sometimes critically, against agencies and officials, as well as formally investigating any acts or omissions on the part of these agencies and officials.¹³ This level of formality routinely found in governmental ombuds' offices is typically not needed or wanted within non-governmental organizations, because they are usually replete with more formalized channels for investigations and advocacy, such as human resources, ethics and compliance, and corporate legal departments.¹⁴

While each model of ombuds' office can have a major impact on dispute resolution and needs to have wide latitude as it relates to the ability to engage in confidential communications, a court-recognized confidentiality privilege is paramount in the realm of organizational ombudsman, especially when one considers the need for organizations to better manage their corporate ethical and environmental culture and litigation exposure, all of which can serve to reduce an already overcrowded court-system.

7. *Research Shows More US Corporations Adopting ADR, Including Ombuds*, THE OMBUDS BLOG (Apr. 1, 2013), <http://ombuds-blog.blogspot.com/2013/04/research-shows-more-us-corporations.html>.

8. See Stefan B. Kalina, *The Organizational Ombudsman: Origins, Roles, and Operations - A Legal Guide* by Charles L. Howard, 3 NYSBA N.Y. DISPUTE RESOLUTION LAWYER 61-62 (2010).

9. See *Generally Effectiveness of the State Long Term Care Ombudsman Programs*, Institute for Health & Aging, June 2001 (showing the presence of ombudsmen within hospitals and other health-care related entities).

10. Governmental ombudsman can also be referred to as classical ombudsman. Howard Gadlin, *Some Thoughts on Informality*, 5 JOURNAL OF THE INTERNATIONAL OMBUDSMAN ASSOCIATION 33 (2012).

11. *Id.* at 31, 33-34.

12. *Id.*

13. *Id.* at 33.

14. See *id.*

II. THE BENEFITS OF OMBUDS PROGRAMS TO COMPANY DISPUTE RESOLUTION EFFORTS

The benefits of ombuds programs are well-recognized:

[i]n a highly competitive, global and ever-changing business environment, business leaders and boards are striving to enhance governance, risk mitigation and business ethics in order to protect organizational reputation and assets, comply with legislation and regulations, ensure trust of employees, customers, shareholders and the community, and provide an ethical work environment.¹⁵

Workplace issues can easily morph into court cases, with cases of fraud, corruption, theft, and discrimination frequenting judicial dockets.¹⁶ Therefore, it is important for companies to incorporate dispute resolution processes and judges to have a healthy level of understanding of and respect for these processes not only for corporate viability but also to avoid waste of precious judicial resources.

Ombuds programs help address these issues in the workplace: from being a sounding board to employees to actually bringing concerns to management in an attempt to effectuate change. Ombudsmen can have a direct positive impact on some very unsightly statistics. These statistics include companies being subjected to on average \$6.4 million in punitive damage award in racial discrimination cases, as well as companies assuming the cost of turnover, estimated at 150% of an employee's salary, due to concerns with workplace incivility and stress.¹⁷ Considering the fact that employees spend 2.8 hours per week dealing with conflict, equating to approximately \$359 billion in paid hours (based on an average hourly rate of \$17.95) in 2008 in the United States, it becomes easy to understand the tremendous financial ramifications of unchecked problems.¹⁸

Effective human resource offices, legal departments, compliance offices, and ethics hotlines certainly can help with these workplace concerns, but they should only be a piece of the dispute resolution strategy and not the entire plan. While all of these channels are open to employees, the human resource department is commonly utilized.

15. Randy Williams & Arlene Redmond, *An Ombuds Program: A Governance and Ethics Best Practice*, HUM. RES. INST., Jan. 2005, at 1, 1.

16. *See id.* at 2-3.

17. *See id.*

18. Jennifer Lawler, *The Real Cost of Workplace Conflict*, ENTREPRENEUR (June 21, 2010), <http://www.entrepreneur.com/article/207196>.

However, when the comfort level with bringing complaints to human resources is low, the workplace problems either go unreported or unresolved or both, whether independently or together being problematic. In an eye-opening survey of 263 cross-cultural employees regarding their level of trust with certain dispute resolution processes, only 37.8% of the employees would trust their internal dispute resolution process to handle the problem, whereas 65% would feel comfortable with a neutral third-party to resolve the dispute.¹⁹ This survey suggests that internal processes such as human resources are not seen as neutral enough to properly resolve the disputes, and external, neutral measures that are less structured and contentious than litigation are desired. This is where ombuds programs can be beneficial because of their neutrality.²⁰

An organizational ombudsman traditionally is an employee who acts as a trusted intermediary between the disputing parties within an organization.²¹ Indeed, the word ombudsman means “representative.”²² The person in this position, if viewed as truly impartial and having direct access to the most powerful people within the organization, can have real influence in the dispute recognition and subsequent resolution process. The fact that ombudsmen also have the capability to keep conversations confidential is also seen as a positive, especially for employees who initially wish to vent in a more informal manner and venue without having definitive action immediately taken relative to the concern.²³ This contrasts with human resource representatives who routinely advise employees that they are obligated to investigate accusations and must give the alleged offender the opportunity to rebut the allegation, which destroys confidentiality and possibly exacerbates

19. Suzy Fox & Lamont E. Stallworth, *Employee Perceptions of Internal Conflict Management Programs and ADR Processes for Preventing and Resolving Incidents of Workplace Bullying: Ethical Challenges for Decision-Makers in Organizations*, 8 EMP. RTS. & EMP. POL'Y J. 375, 389-391, 395 (2004). Interestingly, the judicial system was viewed even less favorably at 35.7%. *Id.*

20. See *IOA Standards of Practice*, INT'L OMBUDSMAN ASS'N, http://ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf (last visited Oct. 19, 2014).

21. *Just who is an Ombudsman?*, REDIFF BUSINESS (Aug. 25, 2009, 5:23 PM), <http://business.rediff.com/report/2009/aug/25/perfin-just-who-is-an-ombudsman.htm>.

22. *Office of the Ombudsman*, UNIV. OF CAL. IRVINE, <http://www.ombuds.uci.edu/homepage.shtml> (last visited Oct. 20, 2014).

23. *IOA Code of Ethics*, INT'L OMBUDSMAN ASS'N, http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/Code_Ethics_1-07.pdf (last visited Oct. 6, 2014).

the conflict.²⁴ Knowing that the conversation can be confidential and that the ombudsman will not retain any records or notes of the conversation—similar to how a mediator destroys notes post-mediation—can ease the mind of a paranoid employee.

The role also gives the employee base a greater sense of empowerment by being able to sit down with a person who has direct access to the CEO and board, as opposed to being relegated to a human resource representative who might be several hierarchal steps removed from the top of the food chain.²⁵ Even in companies that have a vice president of HR, that individual might be more strategically focused and may not get involved in day-to-day employee issues, and thus, may be inaccessible to the average employee. Having an ombudsman on staff, who could partner with, yet remain totally independent from the human resource, corporate legal, and ethics/compliance departments, can help companies more efficiently and economically resolve disputes still in their infancy.

Although some view ombudsmen who work for an organization with skepticism (wondering how a person can be independent and neutral while being paid by the organization), properly set up programs where the ombuds do not actively participate in formal decision-making processes should not pose problematic.²⁶ Additionally, there is certainly a benefit from having a person intimately familiar with the inner-workings of the institution. This knowledge can allow the ombudsman to be effective in implementing change by knowing which power players to engage and how to navigate potential political landmines an external ombudsman would not be privy to.²⁷

III. THE CHALLENGE WITH CONFIDENTIALITY

Organizational ombudsmen pride themselves on providing four critical characteristics to the workplace dispute resolution equation: impartiality, independence, informality, and confidentiality.²⁸ While all four attributes are imperative to a well-run department, perhaps the most

24. See Rosanna Nadeau, *The 10 Key Components: Effective HR Workplace Investigation*, HR C-SUITE, <http://www.hrcsuite.com/career-management/investigations> (last visited Oct. 20, 2014).

25. *Frequently Asked Questions*, I'NTL OMBUDSMAN ASS'N, <http://www.ombudsassociation.org/Resources/Frequently-Asked-Questions.aspx> (last visited Oct. 20, 2014).

26. See Williams, *supra* note 15, at 6.

27. See *id.* at 7.

28. *IOA Standards of Practice*, *supra* note 20.

important of these is confidentiality. Without confidentiality, ombudsmen can be subjected to motions to produce documents from employees who formerly utilized the office and from third parties wanting to pierce the confidentiality of communications between the ombudsperson and employee.²⁹ For example, in *Folb v. Motion Picture Industry Pension & Health Plans* the plaintiff asserted wrongful discharge and whistleblowing retaliation against the employer.³⁰ The employer, in turn, stated that the termination was not pretextual and was justified due to Mr. Folb's alleged sexual harassment of co-worker Vivian Vasquez.³¹ In an attempt to prove this was untrue, Mr. Folb filed a motion for the production of mediation documents regarding a potential sexual harassment claim Ms. Vasquez might bring against the employer based upon Mr. Folb's actions.³² Despite the possible relevance of the mediation records, the court surmised that, pursuant to the Jaffee factors,³³ the records deserved confidentiality protections.³⁴ While the aforementioned case ended appropriately, a more clearly defined privilege can certainly help stave off subsequent attempts to impede necessary confidentiality.

This article is not meant to be an exhaustive look at the various court cases rendering opinions on a potential ombudsman confidentiality privilege, however, a couple high profile cases bear mentioning. Often cited by opponents to such a privilege is the 1997 Eighth Circuit decision in *Carman v. McDonnell Douglas Corporation*.³⁵ In this case, Frank Carman sued McDonnell Douglas Aircraft Corporation alleging age discrimination after he lost his position due to a reduction in force.³⁶ During the discovery process, Mr. Carman requested documents, some of which the employer refused to provide, alleging protection under an "ombudsman privilege."³⁷ In denying Mr. Carman's motion to compel

29. *See id.*

30. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1166 (C.D. Cal. 1998).

31. *Id.*

32. *Id.* at 1167.

33. *Jaffee v. Redmond*, 518 U.S. 1, 10-13 (1996) (determining whether a federal confidentiality privilege exists, the Supreme Court created a test requiring an analysis of four factors: (1) whether the asserted privilege is rooted in the imperative need for confidence and trust; (2) whether the privilege would serve the public ends; (3) whether the evidentiary detriment caused by the exercise of the privilege is modest; and (4) whether the denial of the federal privilege would frustrate a parallel privilege adopted by the states).

34. *Folb*, 16 F. Supp. 2d at 1170-79.

35. *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997).

36. *Id.* at 791.

37. *Id.*

the documents, the District Court invoked the ombudsman privilege and granted the employer's motion for summary judgment.³⁸

On appeal the Eighth Circuit reviewed the ombuds issue.³⁹ The court recognized the ombudsman was not structurally independent: the ombudsman was paid by the employer and allegedly the head of the ombudsman office held the position of company vice-president.⁴⁰ The court also expressed concern that the employer did not provide evidence of the effectiveness of the ombuds office as a dispute resolution mechanism, how it differed from other available dispute resolution mechanisms, and how a lack of the confidentiality privilege would otherwise impair the effectiveness of the office.⁴¹ Based on the lack of convincing evidence proffered to the court, the judgment of the district court granting an ombudsman privilege was reversed.⁴²

On the other side of the coin, the Eleventh Circuit's decision in *Van Martin v. United Technologies* represents an acknowledgment of the privilege.⁴³ In this case, the Eleventh Circuit affirmed the lower court's order granting a protective order to the employer shielding the ombudsman from having to produce evidence in the case.⁴⁴ While this case is somewhat helpful, especially considering it is a circuit court case decision, it should be noted that it is unpublished, and therefore, lacks binding precedential value.⁴⁵ The handful of other cases finding that a privilege exists are district court level cases.⁴⁶

While some courts, such as the Eleventh Circuit in *Van Martin*, have found that an ombuds privilege exists,⁴⁷ more courts, notably the Eighth Circuit in *Carman* and the Tenth Circuit in *Miller v. Regents of the University of Colorado*,⁴⁸ have sided with denying such a privilege. Ombudsmen serve as a separate and independent outlet outside of the procedural mechanisms (i.e. offices of notice for the purposes of imputing legal knowledge of an issue onto the organization) most organizations use.⁴⁹ As such, the communications between ombudsmen

38. *Id.*

39. *Id.* at 792.

40. *Id.* at 792-93.

41. *Id.*

42. *Id.* at 794-95.

43. *Van Martin v. United Techs.*, 141 F.3d 1188 (11th Cir. 1998).

44. Howard, *supra* note 2, at 243.

45. *Van Martin*, 141 F.3d 1188.

46. See Howard, *supra* note 2, at 243-44.

47. *Id.*

48. *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997); *Miller v. Regents of the Univ. of Colo.*, No. 98-1012 (10th Cir. July 19, 1999).

49. Eric S. Adcock, *Federal Privilege in the Ombudsman's Process*, 8 CHARLESTON L. REV.

and office visitors should be deemed confidential and outside the scope of these same procedural mechanisms.⁵⁰

Confidentiality is important in the ombuds model for many of the same reasons it is critical in the mediation model.⁵¹ Mediation requires candor,⁵² and so does the ombuds model. Paralleling the mediation model, candor is necessary because it is impossible to extract the baseline positions and interests of the parties if they are constantly looking over their shoulders.⁵³ Similar to mediation, the ombuds model lacks the safeguards present in legal proceedings (i.e., qualified counsel and specific rules of evidence and procedure), which results in parties making statements without the expectation that they will later be bound by them.⁵⁴ Ombuds communications, like mediation communications, needs to be protected so that it will not become a discovery device against naïve participants if the communications were not inadmissible.⁵⁵ Lastly, and perhaps most importantly, organizational ombudsmen like mediators should to be neutral in both fact and perception, as the potential for the ombudsmen to turn adversary in a subsequent legal proceeding would impair open communication.⁵⁶

IV. TRANSFORMATIVE MEDIATION AND THE MEDIATION PRIVILEGE

Ombudsmen are more akin to mediators than one might think. Sure, ombudsmen do mediate disputes between employees in a facilitative mediation manner, but when you compare the role of an ombudsman with the role of a transformative mediator you will see many similarities. Transformative mediators aim to “strengthen people’s capacity to see and consider the perspectives of others,” enabling those “in conflict to develop a greater degree of both self-determination and responsiveness to others[] while they explore solutions to specific issues.”⁵⁷ Transformative mediators tend to spend

1, 6-7 (2013).

50. *Id.* at 7.

51. Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1, 1 (1988) (explaining the reasons for protecting confidentiality in mediation).

52. *See id.*

53. *Id.*

54. *Id.* at 2.

55. *Id.*

56. *See Id.*

57. *See* CARRIE MENKEL-MEADOW, ET AL., *MEDICATION: PRACTICE, POLICY, AND ETHICS* 251 (Erwin Chemerinsky et al. eds., Aspen Publishers 2006).

substantially more time with their clients trying to help them understand the root of the problem and to see each other's perspective so that they can work together to foster a more productive future.⁵⁸ This works well in situations like family units and employment relationships, where there is a high likelihood for a long-term relationship between the parties. In contrast, mediators who follow a facilitated or problem-solving approach are more prone than transformative mediators to work with parties who are less likely to covet a long-term relationship, and more likely to opt for a resolution of the dispute and a complete severing of the relationship.⁵⁹

Like transformative mediators, ombudsmen focus on party empowerment.⁶⁰ The goal of both is to heal relationships.⁶¹ This healing focus is extremely important in the employment context where co-workers may have to learn how to co-exist for many years. With this backdrop in mind, it seems plausible that ombudsmen could more effectively argue for a confidentiality privilege by piggybacking their assertions on the similarities between their role and that of the transformative mediator.

A. The Mediator Privilege Model

Mediators, including but not limited to the transformative style of mediation, enjoy a qualified mediation privilege.⁶² The source of this privilege varies. One such source is the Uniform Mediation Act of 2003, disseminated by the National Conference of Commissioners on Uniform State Laws.⁶³ Although it has only been enacted by eleven states and the

58. See Gary Paquin & Linda Harvey, *Therapeutic Jurisprudence, Transformative Mediation and Narrative Mediation: A Natural Connection*, 3 FLA. COASTAL L.J. 167, 168 (2002).

59. See *id.* at 168, 170 (stating that the transformative approach to mediation is as concerned with relationship issues as they are with settlement and that both a facilitated and problem-solving approach "tend to be short term and focus on the substance of the dispute" and "can lead to more rapid, but weaker agreements"). Facilitative mediation focuses primarily on the interest of the parties—one can imagine an emphatic counsler "attempting to repair their shattered relationship." Kenneth M. Roberts, *Mediating the Evaluative-Facilitative Debate: Why Both Parties are Wrong and a Proposal for Settlement*, 39 LOY. U. CHI. L.J. 187, 195 (2007). Evaluative mediation "focuses on the legal rights of the parties and evaluates the merits of each party's claim," which makes their primary concern resolution. *Id.*

60. See Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 56 (2005).

61. See *id.*; see also Paquin, *supra* note 58, at 168.

62. See DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT*, 308 (1st ed. Aspen Pub. 2008).

63. See *id.* at 308-09. In addition, rules of evidence provide disclosure protection during the negotiation process. *Id.* at 308.

District of Columbia so far,⁶⁴ the majority of the remaining states have enacted similar statutes.⁶⁵ Additionally, where no such statute exists, courts have referred to the Uniform Mediation Act (“UMA”) as a persuasive document supporting requests for a mediator confidentiality privilege.⁶⁶ It should be noted that the UMA’s definition of mediation appears to be broad enough to encompass communications with an ombudsman.⁶⁷ Oftentimes, parties seeking the services of an ombudsman might be also considering the viability of entering into mediation.

Another source that provides protection against subsequent disclosure of settlement proceedings is Federal Rule of Evidence (“FRE”) 408.⁶⁸ Additionally, the rule—does not preclude disclosure of settlement information for any purpose other than proof of “liability for, invalidity of, or amount of a [disputed] claim.”⁶⁹ There are multiple sources mediators can tap in order to request a confidentiality privilege. While the privilege is qualified and not infallible, having sources like the UMA to rely upon is better than nothing, and by far better than what ombudsmen can currently rely on.

B. *The Need to Develop an Ombuds Model Likely to Receive the Privilege*

Currently, only a piecemeal approach to a confidentiality privilege exists. Besides an attempt to creatively utilize the broad language of the UMA, another approach frequently invoked is FRE 501.⁷⁰ Courts, such as *Kientzy v. McDonnell Douglas Corp.*, have interpreted this rule as requiring the court to look at the claim of privilege by interpreting the

64. See *Mediation Act Legislative Enactment Status*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/LegislativeMap.aspx?title=Mediation%20Act> (last visited Oct. 21, 2014).

65. See Gary Provencher, *The Uniform Mediation Act: An Analysis of Current State Acts*, THE MAYHEW-HITE REPORT ON DISPUTE RESOLUTION AND THE COURTS (2007), <http://moritzlaw.osu.edu/epub/mayhew-hite/vol5iss1/student.html>.

66. See David Tomeo, *Be Careful What You Say: One Court’s Look at Confidentiality Under the Uniform Mediation Act*, 31 SETON HALL LEGIS. J. 65, 66 (2007).

67. See UNIF. MEDIATION ACT § 2 (amended 2003). See Section 2(2), which states that “‘Mediation communication’ means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.” See Section 2(3), which states that “‘Mediator’ means an individual who conducts a mediation.”

68. See FED. R. EVID. 408.

69. FRENKEL, *supra* note 62, at 310 (alteration in original).

70. FED. R. EVID. 501.

principles of the common law in light of reason and experience:

(1) the communication must be one made in belief that it will not be disclosed; (2) confidentiality must be essential to the maintenance of the relationship between the parties; (3) the relationship should be one that society considers worthy of being fostered; and (4) the injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation.⁷¹

Yet another approach is to consider the scope of the Administrative Dispute Resolution Act ("ADRA").⁷² However, while this Act provides for the creation of alternative dispute mechanisms, such as ombuds programs to combat issues and controversies involving federal administrative agencies, it does not specifically allow for a confidentiality privilege for ombudsmen.⁷³

In an attempt to better secure a privilege, Ombudsmen would be wise to start requiring visitors to sign confidentiality agreements. These agreements, which are very prevalent in the practice of mediation, provide an added level of legal protection for mediators wishing to protect the confidentiality of discussions with the parties.⁷⁴ While it might seem counter-intuitive to have an employee require a fellow co-worker to sign a confidentiality agreement before they talk, this formality is no different than having employees sign other documents like general new-hire employment contracts, accident waivers to participate in company outings or sporting events, or signing an acknowledging receipt of ethics training or receipt of an employment policies handbook. Courts are more prone to accept arguments of confidentiality when they can also be couched in contract law.⁷⁵

Giving consideration to the *Carman* decision,⁷⁶ a slightly more radical concept is the idea of employee-funded ombuds offices. This

71. *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 571 (E.D. Mo. 1991). While the subsequent *Carman* decision took issue with the outcome in *Kientzy* regarding the viability of the ombudsman privilege, *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997), FRE 501 may provide an avenue to the ombudsman privilege.

72. 5 U.S.C. § 571 (2006).

73. Harold J. Krent, *Federal Agency Ombuds: The Costs, Benefits, and Countenance of Confidentiality*, 52 ADMIN. L. REV. 17, 19-20 (2000).

74. See John Ford, *Confidentiality Issues In the Workplace Mediation: What Every HR Manager Should Know*, MEDATE.COM (Sept. 2001), <http://www.mediate.com/articles/workedit4.cfm> (looking into the importance of confidentiality agreements and how they promote communication).

75. See *id.* (showing even where confidentiality agreements are limited in certain state courts, a person may still recover if a confidentiality agreement is breached through breach of contract).

76. See *Carman*, 114 F.3d 790.

would increase the ability of organizations to declare true independence of the office. Funding could be accomplished by assessing employees a nominal fee per paycheck. Again considering contract law, if an employee agreed as a condition of employment to an assessment of an amount such as one dollar per paycheck to fund an ombuds services, an employer with ten-thousand employees would then have the ability to allot \$240,000 per year towards the ombuds office (assuming the employees are paid on a bi-weekly basis). As a final thought on *Carman*, clearly organizations should guard against giving ombudsmen additional titles, especially those signifying leadership and decision-making capacity, such as vice-president, and ombuds offices should keep aggregate data statistics (to guard any details which would violate confidentiality with any specific office visitor). These statistics can be provided to a reviewing court in a later dispute to show the types and volume of cases the office handles and provide a glimpse into the effectiveness of the office.

C. The Need to Educate Legislators and the Judiciary

In order for the possibility of a true ombuds privilege to exist, the need to educate is ever present. For example, in *Gazzano v. Stanford University, et. al.*, Mr. Gazzano moved to compel production of documents housed with university ombudsperson David Rasch.⁷⁷ Despite counsel for Stanford competently asserting that the records of Mr. Rasch and the communications between Mr. Gazzano and Mr. Rasch are protected under the ombudsperson privilege, the court (after assessing the impact of FRE 501 and Federal Rule of Civil Procedure (“FRCP”) 26 to the issue⁷⁸) ordered Stanford to produce the relevant communications between the employee and the ombudsperson.⁷⁹

This case reflects the need for clear legislation at both the state and federal level. In denying the ombudsperson privilege, Judge Grewal noted that because the case was removed from state to federal court, the

77. *Gazzano v. Stanford Univ.*, No. C 12-057742 PSG, 2013 WL 3158075, at *1 (N.D. Cal. June 20, 2013).

78. *Id.* at *1-3. The court noted that Federal Rule of Civil Procedure 26(b)(1) provides that the parties may obtain non-privileged documents that are relevant to any party’s claim or defense, and that FRE 501 indicates that state law governs privilege regarding a claim or defense for which state law supplies the rule of decision. *Id.* at 1-2. But FRE advisory committee’s notes and Ninth Circuit case law are clear that in federal question cases, the federal law of privilege applies. *Id.* at 2 n.4. Under this, courts are to define new privileges by interpreting common law principles in the light of reason and experience. *Id.* at 2.

79. *Id.* at *2-3.

question is not whether California law recognizes an ombudsperson privilege but whether a federal law privilege exists.⁸⁰ In his analysis, Judge Grewal correctly stated that ombudsmen and mediators are similar in that they are counselors acting outside of the traditional corporate hierarchy—attempting to settle disputes by less formal means.⁸¹ He then went on to assert that corporate ombudsmen promulgate codes of ethics within a company, prosecute and adjudicate violations, and that employees are not likely to deal with company ombudsmen with an expectation of confidentiality.⁸² These assertions, when looking not only at the Stanford model,⁸³ but also the International Ombudsmen Association's ("IOA") standards of practice and code of ethics,⁸⁴ reflect a much different reality.

Properly organized ombuds offices do not promulgate codes of ethics for the company, they merely serve as advisors to management and change agents in the sense that they inform management when changes to policies might be apropos.⁸⁵ Properly organized ombuds offices do not prosecute and/or adjudicate ethical violations, these tasks are left for the company offices charged with this, namely the legal, compliance, and/or human resources departments.⁸⁶ Ombudsmen once again advise these offices (only sharing what they can with an eye towards protecting confidentiality) but they traditionally do not assist them with prosecutions or adjudications.⁸⁷ Furthermore, properly organized ombuds offices make it clear to employees that communications with them are confidential and that they will resist any attempts to be subpoenaed later.⁸⁸ This is typically found not only on the ombuds webpages but also in brochures, flyers, and in training sessions with employees informing them of ombuds services.⁸⁹ To allow

80. *Id.* at *2.

81. *Id.* at *3.

82. *Id.*

83. See Office of the Ombuds, STANFORD.EDU, <http://www.stanford.edu/dept/ombuds> (last visited June 21, 2014) (where it clearly and unequivocally states that communications with the ombudsperson are confidential and that the office does not serve as an agent of notice for the company relative to potential legal violations).

84. See *Standards of Practice*, *supra* note 20; see also *Code of Ethics* *supra* note 23.

85. See *Frequently Asked Questions*, *supra* note 25; See Dawn Sullivan, *HR Connection: HR and the organizational ombudsperson*, THE DAILY RECORD (May 5, 2014), <http://nydailyrecord.com/blog/2014/05/05/hr-connection-hr-and-the-organizational-ombudsperson/>; Williams, *supra* note 15, at 7-8.

86. See *Standards of Practice*, *supra* note 20; see Sullivan, *supra* note 87; see Williams, *supra* note 15, at 4.

87. See *Standards of Practice*, *supra* note 20.

88. See *id.*

89. *Id.*; see, e.g., Dep't of Elder Affairs, State of Florida, *Florida's Long-Term Care*:

an employee to benefit from confidential communications on the front end and then to benefit from compelled production on the back end creates a sham of the ombuds confidentiality assertions and jeopardizes not only public/employee trust in the offices but also the very survival of the programs altogether.

If ombudsmen can be compelled to testify and conversations with them cannot be deemed confidential, the important distinction between an ombuds office and a compliance, legal or human resources office becomes blurred. The distinction between ombuds and human resources offices becomes almost nonexistent.

V. OMBUDS VS. HUMAN RESOURCES OFFICES

It is especially difficult for a person to differentiate ombuds from human resources offices. Both offices are charged with conflict management, organizational leadership development, reputation management, and top talent retention.⁹⁰ However, the levels of formality and control asserted by the offices create an important difference. Indeed, there is an “unmistakable value in having an organizational ombudsperson as an informal channel available to members of an organization.”⁹¹

“[H]uman resources professionals must focus on protecting the best interests of the organization.”⁹² Consequently, they cannot always guarantee the confidentiality, independence, or impartiality that is the benchmark of ombuds offices.⁹³ HR must report and attempt to resolve issues like ethics violations, discriminatory and harassing conduct rising to the level of legal violations, and other conduct that jeopardizes the financial viability of the organization.⁹⁴ Ombudsmen have no such obligation.⁹⁵ They are free to keep any and all of this information confidential, typically only feeling compelled to speak up when they realize there is an imminent threat of harm to others.⁹⁶ “An

Ombudsman Program, OMBUDSMAN.MYFLORIDA.COM, <http://ombudsman.myflorida.com/publications/brochures/LTCOPbrochureENGLISH.pdf> (last visited Oct 22, 2014).

90. See Sullivan, *supra* note 87; Williams, *supra* note 15, at 4, 5, 8.

91. Sullivan, *supra* note 87.

92. *Id.*

93. *Id.*

94. See *id.*

95. *Id.*

96. Howard, *supra* note 2, at 40.

ombudsman's job is to guide people to their own resolutions,"⁹⁷ whereas human resource professionals routinely impose resolutions on the parties that are in the best interests of the organization.⁹⁸ By clearly pointing out these role differences to the judiciary, decisions such as Judge Grewal's should be able to be greatly reduced.

VI. ORGANIZATIONAL OMBUDS VS. GOVERNMENTAL OMBUDS OFFICES

Similarly, and as articulated at the beginning of this article, there should be little reason to confuse the role of the organizational ombudsman with the governmental and advocate models.⁹⁹ However, it seems that people still easily confuse the various roles and responsibilities of ombuds offices. The key differentiation to remember is that properly organized organizational ombuds offices do not advocate, formally investigate, render binding decisions, or directly promulgate rules and regulations.¹⁰⁰ These roles, however, can be found in the governmental and advocate models.¹⁰¹

Judges need to be made aware of the distinctions, because it is much less likely that the governmental and advocate ombudsmen will deserve a confidentiality privilege.¹⁰² It should be clear why an organizational ombudsman deserves such a privilege.¹⁰³ Without a level of clarity, judges will be prone to merely follow precedent without closely scrutinizing ombuds office practices on a case-by-case basis.

Some might scoff at the notion of needing an ombuds privilege, instead feeling compelled to support the interests of the individual to get access to any and all evidence available to support (or refute) subsequent legal proceedings. It should be remembered that usage of the organizational ombuds office is purely voluntary,¹⁰⁴ just like usage of alternative dispute resolution mechanisms generally. And like these other ADR mechanisms, people enter into the program with a keen knowledge of its confidential nature.

97. Adcock, *supra* note 49, at 7.

98. *Frequently Asked Questions*, *supra* note 25.

99. See discussion *supra* pp. 1-3. Simply stated, an advocate ombuds model is charged with actually advocating the position of its client; thus, not being held to the generally recognized core principle of impartiality prevalent in ombuds offices.

100. *Frequently Asked Questions*, *supra* note 25.

101. *Id.*

102. *Id.*

103. See discussion *supra* pp. 3-7.

104. *Standards of Practice*, *supra* note 25.

VII. THE ABA RECOGNIZES THE NEED FOR CONFIDENTIALITY AND SEVERAL STATES HAVE IMPLEMENTED OMBUDS OFFICES AS WELL; WHAT'S NEXT?

The American Bar Association has recognized the importance that confidentiality plays in the ombudsman role. Following the before-mentioned 1969 Resolution that focused on the role of the governmental ombudsman,¹⁰⁵ the ABA issued Resolutions in both 2001 and 2004 detailing a more encompassing statement regarding ombuds offices.¹⁰⁶ While the 2001 Resolution was an initial discussion and recognition of organizational ombuds offices,¹⁰⁷ the 2004 Resolution provided added clarity (some not necessarily welcomed by the IOA community) on issues left unaddressed by the earlier resolution, such as when an ombuds office can be deemed an office of notice to an organization and the impact of collective bargaining agreements on ombuds office communications.¹⁰⁸ The ABA's Resolutions are not perfect, and where they are less-than-optimal the TOA and IOA Standards of Practice and Code of Ethics, coupled with their 2006 commentary on the ABA's 2004 Resolution¹⁰⁹ and the subsequent IOA 2009 Best Practices publication,¹¹⁰ underscore the strong assertions from the ABA and clarify where the ABA's Resolutions might be analytically deficient. The point is that the ABA and the IOA have collectively asserted an interest in protecting the confidentiality of communications with ombuds offices.

Several states have implemented ombuds offices by statute.¹¹¹

105. See *supra* p. 1 and note 5.

106. See STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES 1 n.1 (2004) [hereinafter STANDARDS], available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/115.authcheckdam.pdf>.

107. See Howard, *supra* note 2, at 39 ("[T]he 2001 ABA Resolution helpfully stated that confidentiality was an essential characteristic of ombuds, but unfortunately it left unaddressed the limits of that confidentiality and whether any communications with an ombuds could be privileged.").

108. *Id.* at 42-44; see also STANDARDS, *supra* note 106.

109. See Sara Thacker, *Good Intentions Gone Astray: How the ABA Standards Affect Ombudsman* 2 J. INT'L OMBUDSMAN ASS'N 65 (2009).

110. IOA Best Practices: A Supplement to IOA's Standard of Practice, INTERNATIONAL OMBUDS ASSOCIATION, http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Best_Practices_Version3_101309_0.pdf (last visited Oct. 23, 2014).

111. Christina Kuta, *Universities, Corporations, and States Use Them Now It's Time To Protect Them: An Analysis of the Public and Private Sector Ombudsman and the Continued Need for a Privileged Relationship*, 27 S. Ill. U. L.J. 389, 395 & n.40 (2003). See also Adcock *supra* note

While some of these states also have regulations in place enforcing the confidentiality privilege of ombudsmen, this cannot be said about all states.¹¹² This issue is of course complicated in public agencies by the existence and strength of the Freedom of Information Act ("FOIA"),¹¹³ allowing for access to investigatory records, which presumably includes records maintained by ombuds offices. There needs to be widespread state acceptance of the ombuds privilege to influence judicial discourse. This is most notable given the *Carman* case which points out, in denying an ombuds privilege, that states have not adopted the notion despite the supporting statements from the IOA and ABA.¹¹⁴

So what else needs to be done? There needs to be both a federal and a state statutory privilege. The privilege need not be without exceptions. For example, if there is an imminent risk of physical harm to others, ombudsmen should not be able to hide such knowledge behind the shield of confidentiality. It also could be a rebuttable presumption of privilege, meaning a party opposing the privilege will have ample opportunity to provide information to rebut the confidentiality privilege—such as the ombuds office not being set up according to IOA and/or ABA dictates. But exceptions aside, states in particular need to be more aggressive in protecting the confidentiality rights of ombudsmen, whether on an individual state basis or in a collective effort a la the UMA. If states have UMA-like statutes in place, these laws, coupled with the ABA and IOA statements relative to the need for such a privilege, will serve to encourage state and federal courts to honor what should have been honored decades ago. . . confidentiality.

49, at 23.

112. Kuta, *supra* note 111, at 397; *see also* Del. Code Ann. Tit. 16 § 1153 (1995); *See* ILL. COMP. STAT. 105/4.04 (2013) providing for some protection against disclosure of confidential records but allowing for such disclosure if compelled by a court order (leaving unstated when it is appropriate or inappropriate for a court to render such an order)).

113. 5 U.S.C. § 552 (2001).

114. *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997); *see also* Solorzano v. Shell Co., No. Civ.A.99-2831, 2000 WL 11445766, at *2 (E.D. La. 2000).

