

Is It Time for a Model Organizational Ombuds Act?

By Roy Baroff and John Lee

Let's start from the beginning—what is an organizational ombuds? The simple answer is to think about what many people do when they have a concern, issue, or conflict. They usually talk it over with someone—the adage “two heads are better than one” comes to mind! An ombuds can be that second person with whom to talk something over, be a sounding board, help develop options, and help navigate the situation through four unique features that set it apart from any other role in an organization.

An ombuds is independent (operates separately from ordinary line and employee structures), confidential (off-the-record communications with disclosure at the discretion of the ombuds with permission, or if there is imminent risk of serious harm), informal (does not directly participate in formal organization structures or processes), and impartial (does not take sides in a conflict nor advocate nor represent individuals, groups, or the organization). Together these standards of practice position an ombuds to provide a unique service to an organization.¹

The American Bar Association (ABA) has also supported the organizational ombuds role. As defined by the ABA:

Ombuds receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve. Ombuds protect: the legitimate interests and rights of individuals with respect to each other; individual rights against the excesses of public and private bureaucracies; and those who are affected by and those who work within these organizations. (2004 ABA Resolution, Preamble)²

One of the challenges for an organizational ombuds office lies in its formation that is generally by an office charter or terms of reference, which forms a contract between the office and the organization. While ombuds training is available, the International Ombudsman Association (IOA) provides an excellent course on the foundations of ombuds practice³, there are currently no required license or certification requirements to practice as an ombuds⁴ and no statutory requirements, guidelines, or protections. In particular, the issues of confidentiality (maintaining it), privilege (having it), and independence (ombuds contact does not constitute notice to an organization) can be challenging via contract and common law. These issues and challenges beg the query that forms the title of this article.

When considering a model act for organizational ombuds, the development of Model Standards for Mediators provides a useful point of reference. Model Standards for Mediators were initially developed in 1995 as a collaboration between the American Bar Association, the American Arbitration Association, and the Society for Professionals in Dispute Resolution (now the Association for Conflict Resolution) and then revised by the same organizations in 2005⁵.

More recently in “Regulating Mediator Practice: Highlights from Europe and the United States” from the Fall 2017 ABA Dispute Resolution Magazine, authors Alyson Carrel and Lin

Adrian highlighted mediation regulation efforts in the United States via the Uniform Mediation Act (UMA) and additional state statutes and rules.⁶ Additionally, the “On Professional Practice” discussion shared a conversation on the potential revision of the Model Standards of Conduct for Mediators.⁷

With respect to ombuds, in 1997 the United States Ombudsman Association’s Board of Directors (USOA) approved a Model Ombudsman Act directed toward state governments “in its effort to promote and encourage the establishment of [government] ombudsman offices.”⁸ The USOA and its model act addressed the needs and benefits of what are referred to as “classical ombuds”⁹ that differs in form and function from an organizational ombuds. However, the spirit of the USOA model act and the hope behind its design informs our current advocacy for an Organizational Ombuds Act.

Subsequently, the IOA developed organizational ombuds Standards of Practice in 2009¹⁰ to create uniformity among organizational ombuds programs. The core tenants of these standards, as previously discussed, are independence, confidentiality, informality, and neutrality/impartiality. While these standards provide guidance for an ombuds program and its establishing organization, they lack the authority and durability of a legislative statute.

Ombuds offer unique services to an organization including a place to discuss sensitive or unethical situations and explore potential options for resolution. The current climate of harassment claims coming forward and research about reporting sensitive issues illustrate that a large percentage of people do not come forward to report issues. People fear retaliation by accessing formal organizational processes; however, ombuds are unencumbered by traditional human resource and compliance department requirements where confidentiality and independence are limited. An ombuds can provide knowledgeable guidance on options when there is uncertainty about what to do or where to go and can explain formal reporting processes within organizations that can help demystify and normalize administrative functions. When formal processes are explained and people are given information on how to navigate an organization’s systems, people are more likely to participate in formal reporting processes when they might otherwise stay silent or seek remedy elsewhere. In essence, an ombuds office can “fill the gap” in organizations.¹¹

For an organizational ombuds to be effective, people must understand and have confidence with the ombuds role and its protections. Contracts and common law are limited when defining roles and providing protections while legislation can define, protect, educate, and support with clarity and strength. People can disclose issues with an ombuds with the assurance of confidentiality and privilege and develop an intentional, educated, self-determined plan on how they wish to move forward. If more people come forward, this can help an organization enhance its work place to be a safer and more productive environment.

Organizational ombuds also provide value to an organization through communication with leadership and key stakeholders regarding risks and trends. The ombuds is uniquely situated to offer insight, perspective, and feedback that may be useful when setting policy and dealing with issues such as morale, retention, productivity, and culture. The ombuds is capable of this level of service when it can simultaneously operate independently, confidentially, informally,

and impartially. The establishment of legislative protections for confidentiality and privilege would further ensure that consumers of ombuds services utilize the service with assurance and safety. Of significance, the safety that comes from confidentiality and privilege protection is what incentivizes use of an ombuds program and is a primary contributor to the unique utility of ombuds services.

Statutory support for the confidentiality of communications with an ombuds is particularly important. Chuck Howard, current co-chair of the ABA Dispute Resolution Section Ombuds Committee, has written extensively about organizational ombuds and the legal aspects of confidentiality and privilege. His review of legal cases, potential use of the UMA, and other supporting arguments demonstrate the lack of consistent protections.¹² A Model Organizational Ombuds Act would remedy the hodge podge of legal decisions and support consistency, fidelity, and efficacy of ombuds program development.

Congruently, the ABA recently adopted an updated resolution in support of ombuds programs that may signal that it is time for legislative consideration. Resolution 103 states:

RESOLVED that the American Bar Association encourages greater use and development of ombuds programs that comply with generally recognized standards of practice, as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.¹³

A Model Organizational Ombuds Act presents an opportunity to further define, professionalize, and support ombuds practices, services, benefits, and roles with the authority of legislative statute. It gives ombuds programs a template with which to educate and advocate for the role at the state level without having to work from scratch. It provides the legal community with clarity and understanding of the ombuds role and its scope. A model act could be the vehicle to help people and organizations understand what it means to be an ombuds, work with an ombuds, and have ombuds programs within an organization.

The answer is “yes.” It is time for an organizational ombuds act.

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¹ IOA Standards of Practice, International Ombudsman Association, available at http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf (last accessed December 14, 2017).

² *The Organizational Ombuds: Origins, Roles, and Operations - A Legal Guide*, Charles L. Howard (2010), Appendix 7 for the full text of the 2004 ABA Resolutions and Reports. See also Resolution 103 (2017 Resolution), ABA Resolutions with Reports to the House of Delegates, available at: <https://www.americanbar.org/content/dam/aba/administrative/>

house_of_delegates/2017_hod_annual_electronic_report_book.authcheckdam.pdf (last accessed December 14, 2017)

³ IOA Foundations of Organizational Ombudsman training, *available at*: <http://www.ombudsassociation.org/Conferences-Professional-Development/Professional-Development/Foundations-Course-Jan-2018.aspx> (last accessed January 9, 2018).

⁴ The IOA Board of Certification has established certification as a “Certified Organizational Ombudsman Practitioner,” however this is not universally required to serve as an ombuds.

⁵ ABA Model Standards of Conduct for Mediators, *available at*: https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf (last accessed January 9, 2018).

⁶ Regulating Mediator Practice: Highlights from Europe and the United States. Alyson Carrel and Lin Adrian. ABA Dispute Resolution Magazine Vol. 24, Number 1, Fall 2017.

⁷ On Professional Practice. Ty Holt, Judith Meyer, Susan Podziba, and Sharon Press. ABA Dispute Resolution Magazine Vol. 24, Number 1, Fall 2017.

⁸ USOA Model Ombudsman Act for State Governments *available at*: <http://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-MODEL-ACT.pdf> (last accessed December 14, 2017).

⁹ Essential Characteristics of a Classical Ombudsman, United States Ombudsman Association, *available at*: <http://www.usombudsman.org/essential-characteristics-of-a-classical-ombudsman/> (last accessed December 14, 2017).

¹⁰ IOA Standards of Practice, International Ombudsman Association, *available at*: http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf (last accessed December 14, 2017).

¹¹ Organizational Ombuds: Filling the Gap in Effective Dispute Resolution Systems. Randy Williams and Sara Thacker. *ABA Just Resolutions*, February 2015.

¹² See Howard, *supra* n. 2.

¹³ See ABA Resolution 103, *supra* n. 2.