are the central documents that comprise the last third of the volume and include the New York and Panama Conventions, the Federal Arbitration Act, the rules of the leading arbitration institutions, ethics rules for arbitrators and guidelines and protocols for discovery in arbitration.

The fine work that has been done in this book should be applauded and it must be hoped that the editors will, in the course of time, retain the enthusiasm that gave rise to it and cause their illustrious contributors to keep it up to date, whether online or otherwise. As the law evolves with the Supreme Court continuing to take an interest in arbitration issues, updates to the book would be of great interest. The book should get the wide attention that it deserves.

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The Organizational Ombudsman: Origins, Roles, and Operations—A Legal Guide by Charles L. Howard

Reviewed by Stefan B. Kalina

As author Charles Howard states, "A principal purpose of this book is to serve as a legal guide for ombuds and those with whom they work on three critical questions: What is an organizational ombuds program? Why is it important? How can its claim of confidentiality be protected?" A glance back at these questions reveals only one whose answer appears to be useful to busy lawyers, i.e., how to maintain the confidentiality of communications with an ombudsman in the course of litigation. The other two appear to pose historical and policy-based questions better suited for academics. Indeed, they might. However, Mr. Howard's well-guided journey into these background questions provides useful, if not necessary, context for counsel grappling with the current confidential aspects of an ombudsman's work. Therefore, this comprehensive, yet compact, single volume reference warrants consideration by lawyers representing "ombuds ***and*** those with whom they work" to resolve disputes.

This distinction bears repeating at the outset, as it highlights a prime characteristic of a modern American form of ombudsman most lawyers will likely encounter: the "organizational ombudsman." This type of ombudsman strives to be ***independent*** of his or her organization in order to provide informal, confidential, and mediative resources to surface and facilitate resolution of conflict. Such work requires the attention of lawyers representing three distinct groups to a dispute: individual claimants, institutional clients, and the ombudsmen themselves. This is especially true because when an ombudsman is or has been involved, counsel for all three groups may interact in an adversarial or coordinated basis over the course of an investigation, attempted resolution, and potential litigation.

Despite its prevalence, the term ombudsman remains unfamiliar in sound and meaning. Mr. Howard notes that the ombudsman is not yet fully understood by practitioners or the courts, despite first appearing in some of the largest American institutions over 50 years ago. For that reason, Mr. Howard devotes time detailing the historical forces that have shaped the ombudsman role generally, and in American organizations specifically, as well as the public policies advanced by ombuds practice and why such organizations have implemented this unique form of conflict prevention and resolution. It is only against this backdrop that the legal issues surrounding ombuds, mainly confidentiality, come into sharp relief.

The first ombudsman was appointed in the eighteenth century by an exiled Swedish monarch seeking to maintain authority over his kingdom. The term ombudsman referred to a form of agent. The King's highest ombudsman was granted prosecutorial power to ensure that his government officials discharged their duties according to law. The office gained constitutional status as Sweden evolved into a parliamentary democracy and the ombudsman evolved into a "citizen defender," with powers to receive, investigate, and recommend a response to the wrongdoing or abuse. The concept of an ombudsman was later exported to Scandinavia and beyond, reaching American shores in the 1960s.

The advent of the public ombudsman in America coincides with the expansion of bureaucracy and the growing concern over administrative problems. Reflecting the ombudsman's evolution into an agent of administrative change for the betterment of the citizenry, the American Bar Association adopted a resolution in 1969 asking governments at all levels to consider establishing an ombudsman authorized to "inquire into administrative action and make public criticism." Many governments appointed such public ombudsmen.

The role of the private ombudsman began to take new shapes as many non-governmental, yet still bureaucratic, organizations adopted the idea in response to societal pressures. The earliest adopters were public universities during the 1960s and 1970s when campus unrest high-

lighted the need for an independent voice to respond informally to faculty, student, and administrative concerns and mediate disputes between them. Corporations later began using an ombudsman to bridge communication gaps between management and employees and to work informally with, but not as part of, management, to resolve disputes. Subsequently, in the 1980s, firms such as defense contractors embraced the ombudsman, in the wake of reported alleged misconduct, to assist with monitoring compliance and to disclose violations that sought to increase their public accountability.

Mr. Howard further contends that what is past is also prologue, and that societal challenges will likely continue to stress and potentially compromise our public and private institutions. Accordingly, he argues that having ombudsmen in place will continue to help provide the needed checks and balances on these institutions and promote their ethical conduct. In so doing, an ombudsman fosters compliance with several civil and criminal statutory schemes in such arenas as workplace harassment or securities fraud that may otherwise be violated.

In this context, the organizational ombudsman continues to emerge as a neutral party. This role contrasts with the traditional Scandinavian or "classical" ombudsman who served as an independent government official with formal powers to investigate and report, as well as the "advocate" ombudsman who represented concerned constituencies within an entity.

As a neutral, the work of an organizational ombudsman includes: communication and outreach, issue resolution, issue identification, and issue prevention. To carry out these functions, an organizational ombudsman must be independent, impartial, confidential, and informal. Mr. Howard explains that most of an ombudsman's work centers on issue resolution by providing a confidential and off-the-record resource where "inquirers" can obtain information about potential or actual issues they may observe within the organization. Notably, the ombudsman in this setting is located outside the formal, organizational channels for reporting or identifying wrongdoing. The ombudsman instead serves as an alternative to the bureaucratic apparatus and is, in fact, a real person with whom persons can interact freely. This affords inquirers the ability to discuss issues without necessarily identifying themselves. In turn, an ombudsman can gather data and pass it on to the inquirer in their effort to deal with a particular issue. For this reason, an ombudsman should have full access to the organization's information and procedures. During an information exchange, an ombudsman neither advocates for the inquirer nor the organization. The work does not, however, necessarily end here.

An ombudsman may also assist the inquirer to identify pertinent issues out of several presented, coach the inquirer how to present the issue on her own to the organization, help the inquirer to gain the perspective of other parties to the issue, and educate the inquirer on the limits on how the organization may respond. This may end the inquiry. Alternatively, if it does not, either the inquirer or the ombudsman may ultimately choose to broach the issue with the organization. If the ombudsman does so, then the ombudsman need not disclose the identity of the inquirer.

Lastly, an ombudsman with independent access to all persons, procedures, and information of an organization is able to work on a broad scale, above individual inquiries, to identify grounds for systemic change that may prevent future conflict. Again, without disclosing the identity of any inquirer or group of inquirers, an ombudsman can provide trend reports to organizations on the nature and type of issues he or she is handling, thereby providing or encouraging an organizational response on how to address current or emerging problems.

For this reason, Mr. Howard explores why organizations, public or private, should create an ombudsman program to create confidential discussion and, hence, promote issue prevention and, where needed, resolution. He identifies that current statutory compliance programs and whistleblower protections aimed at similar goals are limited in scope or intended effect. Therefore, he suggests that an ombudsman program that provides an off-the-record resource can supplement the commonly found (if not required) reporting programs and possibly promote the prevention of issues before they become sanctionable.

This necessarily raises issues as to the scope of confidentiality an ombudsman can provide. There are three main impediments to maintaining confidentiality. First, and foremost, there are no federal or state statutory guarantees of confidentiality.[1] Moreover, when the subject matter of a reported incident involves fraud or criminal behavior, pertinent policy reasons or constitutional rights may require the ombudsman to make disclosure(s) in order to protect a victim from imminent harm or so that the accused may confront his accusers. Second, in the absence of any statutory protection, disclosure must be defended on a case-by-case basis, in accord with legal principles that favor the public disclosure of facts needed to resolve disputes. Third, and somewhat related, courts deciding these issues are often unfamiliar with ombudsman programs and the nature of their communications.

To address these challenges, Mr. Howard maintains that an ombudsman program should be properly structured to respond to demands for disclosure and possess adequate resources to assert its confidentiality. The ombudsman's neutral posture, predicated on independence, stands apart from the historical concept of agency that marked earlier forms of ombudsman, and plays a direct role in maintaining the confidentiality of their communications. Under concepts of agency, notice to an ombudsman can potentially be imputed to an organization. This

may occur if the ombudsman has an express duty to disclose his or her knowledge or if the ombudsman is held out as a formal reporting channel so that he or she may be deemed to have apparent authority to receive notice on behalf of the organization.

Mr. Howard provides a detailed discussion of how the ombudsman can structure and operate his or her office to counter the risk of imputed authority, maintain independence, and successfully assert confidentiality over communications. Additionally, Mr. Howard surveys the legal bases that the ombudsman's counsel may advance when dealing with confidentiality issues. Case law and factual hypotheticals, together with practice tips, usefully illustrate how suggested best practices and legal principles are applied in real world situations and have been construed by the courts. These features expand the text into an accessible reference work for counsel representing ombudsmen, their organizations, or the aggrieved person(s).

In the last section of the book, Mr. Howard turns his attention to the non-lawyer ombudsman, and presents several topics that may be encountered in the course of practice. Some of the topics are essentially primers on the legal aspects of litigation and ADR and are of potential use to corporate lawyers and in-house counsel who may be asked to counsel organizations on risk management in general or render advice in the throes of a dispute or litigation. Other bodies of law pertinent to an ombudsman's duties are also covered. They range from the general to the specific. College and university ombuds may be interested in the treatment of the Jeanne Cleary Act for reporting incidents of campus violence, while government ombuds may refer to the exposition on records retention and freedom of information laws. Ombuds for multinational corporations may likewise consult the treatment on European data protection. Last, as all ombuds are apt to face employment-related issues, the survey on federal employment law is particularly useful, especially given the case summaries that follow.

In sum, Mr. Howard's work provides an insightful introduction to the ombudsman and demystifies this less familiar aspect of dispute resolution practice. The breadth of his book is matched by its accessibility and practicality. It should therefore be consulted by practitioners on any side of an organizational dispute, as well as students of the legal limits and potential of the office of ombudsman.

Endnote

1. The text does point the reader to the federal Administrative Dispute Resolution Act which provides potential protection for communications that fall within the definition of "alternative means of dispute resolution."

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