

# In Aftermath of the Carman Decision, Ombuds 'Privilege' Still Has Validity

by Charles L. Howard and George R. Wratney

A shudder raced through the organizational ombuds community in the summer of 1997 following the Eighth Circuit Court of Appeals' decision in *Carman v. McDonnell Douglas* (114 F.3d 790 [8th Circuit 1997]). After years of favorable decisions by federal district courts recognizing a confidentiality privilege for organizational ombuds, *Carman* presented the first federal appellate review of the privilege, and the court flatly refused to recognize the privilege.

Because the confidentiality privilege plays such an important role for organizational ombuds, the central question in the aftermath of *Carman* has been whether the privilege has any continuing validity. Based on our experiences over the last two years, we believe the answer is yes: While *Carman* was correctly decided on its facts, an ombuds confidentiality privilege can still be recognized under Federal Rule of Evidence 501 if the lessons of *Carman* are heeded.

## The Carman case

*Carman* was an age discrimination employment case. In the course of discovery, the plaintiff sought disclosure of information from the ombuds, which the company resisted on grounds of an ombuds privilege under Federal Rule of Evidence 501. The district court precluded the plaintiff from obtaining the ombuds' records, but when this issue was raised on appeal, the appellate court reversed the decision of the trial court, finding that the record did not support such a claim. This decision came as a surprise, since one of the first reported cases involving an ombuds confidentiality privilege was *Kientzy v. McDonnell Douglas Corporation*, 133 FRD 570 (E.D. Mo. 1991), also involving the ombuds program at McDonnell Douglas. There are, however, two critical points to a proper understanding of *Carman*.

First, by the time suit was filed in *Carman*, McDonnell Douglas had abolished its ombuds program (see *ethikos* September/October 1997). Thus, the ombuds program no longer had a separate voice inside the company, much less separate counsel. Moreover, counsel for McDonnell Douglas was not fully versed on the history and nuances of the ombuds privilege.

Second, the way in which the privilege was asserted by McDonnell Douglas is important. While not fully apparent from the decision, the appellate record reveals that in response to the plaintiff's request to produce documents, McDonnell Douglas objected to the production of documents from the ombuds on the grounds that they were "immune from discovery" because the ombuds' activities were considered confidential. This objection was overruled. In a subsequent motion for reconsideration filed by McDonnell Douglas, the company cited two unreported orders from the same federal district court involving the McDonnell Douglas ombuds program in which the privilege had been recognized. The district court reconsidered its prior ruling and, without any analysis on the issue, ordered that McDonnell Douglas did not have to produce the ombuds' documents.

Thus, the record before the appeals court in *Carman* reveals no facts (by testimony, affidavit, or otherwise) concerning the ombuds office, how it operated, or why confidentiality was important. Likewise, the record contained no analysis by the district court. Yet it is a fundamental principle of law that full disclosure of relevant evidence is required, and that any person claiming an exception to this rule, as in the ombuds privilege, bears the burden of proving why he is entitled to an exception. Since McDonnell Douglas had not presented any factual basis to the trial court to prove its entitlement to the privilege, the appeals court had virtually no choice but to deny the privilege.

## Aftermath of Carman

In contrast to the approach taken by McDonnell Douglas in *Carman*, United Technologies Corporation and its operating units (including Pratt & Whitney and Sikorsky Aircraft) have consistently taken an aggressive

approach to providing the trial court with the facts necessary to demonstrate entitlement to a confidentiality privilege.

This began with the evidentiary record presented to the court in *Roy v. United Technologies*, Civil No. H-89-680 (JAC) (D. Corm., May 29, 1990), the first case in which an organizational ombuds privilege was recognized under Federal Rule of Evidence 501. The decision in *Carman* has not changed this approach; rather, it has confirmed our belief that this approach can prevail despite the ruling in *Carman*. Moreover, this approach was vindicated by the recent favorable ruling in *Leslie v. United Technologies Corporation d/b/a Pratt & Whitney*, Case No. 97-8212-CIV (RYSKAMP), Southern District of Florida, West Palm Beach Division. Thus, the essential lesson of *Carman* is that, in every case, facts need to be presented to the court to prove entitlement to the privilege.

### **Practice Pointers**

To meet this burden, we offer the following suggestions:

1. *Know what the standard is.* While different federal circuits may have slightly different tests, the legal analysis of whether a communication privilege exists generally involves the four Wigmore factors (8 John Henry Wigmore, Evidence § 2285 [McNaughton rev. 1961 ]):

- a) the communication must be one made in the belief that it will not be disclosed;
- b) confidentiality must be essential to the relationship between the parties;
- c) the relationship should be one that society considers worthy of being fostered;
- d) the injury to the relationship incurred by the disclosure must be greater than the benefit gained in the correct disposal of the litigation.

2. *The ombuds must present facts to the trial court.* This can be done through affidavits, testimony, and documents in order to give the court the facts necessary to determine that each element in the Wigmore test is satisfied. Since the issue usually arises as a result of a plaintiff's attempt to depose an ombuds or to obtain the ombuds' documents, the privilege typically is asserted in a motion for protective order. In addition to a brief analyzing the facts and legal issues, we usually file an extensive affidavit from the ombuds, together with documents, in which we establish the following:

- *How the company came to create the ombuds program.* For defense industry companies such as United Technologies Corp., we begin with references to the Packard Commission, appointed by President Reagan, and the Defense Industry Initiative, both of which emphasized greater corporate self-governance and reporting. Creation of an ombuds program was one suggestion that arose from these major national policy initiatives.

- *How the program was established at the company.* The court needs to know how and why a company decided to create an ombuds office and how it differs from other communication channels in the company. We also describe or attach the ombuds' job description.

- *Why confidentiality is critical to the ombuds from the company's perspective.* Frequently this involves citations to corporate compliance or other policies and references to the Sentencing Guidelines for Organizations of the United States Sentencing Commission.

- *How the program operates within the company.* Included here are the facts describing how the program actually operates, the physical security measures used to protect confidentiality, and operating and record-keeping procedures used to preserve the confidentiality of communications. It is also important to present examples of publicity within the company in which confidentiality was emphasized.

- *Qualifications, experience, and standards adhered to by the ombuds.* Invariably, this involves reference to The Ombudsman Association's Code of Ethics and Standards of Practice, as well as other relevant experience and qualifications of the ombuds.
  - *Specific facts concerning the use of the ombuds program.* We try to inform the court how extensively the ombuds program is used (often by reference to the number of inquiries) and any aggregate statistics by which the effectiveness of the program is measured. Not to be forgotten is the point that the ombuds has never been compelled to break confidence.
3. *In support of each of the factual allegations in an affidavit, we attach as many documents as we can find.* Among the types of documents are board resolutions, company policies, publications from outside the company, internal memoranda, informational brochures, other publicity (including posters), and statistical reporting summaries.
  4. *Prepare in advance.* Since the preparation of these affidavits and the collection of the documents can be time consuming, we suggest that some effort be made to pull together this information in advance so that an effective motion for protective order can be prepared on short notice. Likewise, we suggest that the ombuds retain separate counsel to represent the ombuds in such a motion, since joint representation of the company and the office of the ombuds under these circumstances undermines the principles of confidentiality and independence on which the ombuds programs are established.

### **Conclusion**

The ombuds confidentiality privilege, like any privilege, can be established on the basis of a proper showing of facts supporting it. These facts must be presented to the trial court at the time a motion for protective order is filed, and the trial court must be provided with an analysis of these facts and the established legal principles. While the assertion of a confidentiality privilege is still very much a case-by-case analysis, we believe with a properly designed program, the facts will justify recognition of such a privilege. The challenge for the ombuds and the lawyer is to marshal those facts in an effective manner.

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