The Ombuds Confidentiality Privilege

Theory and Mechanics

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Confidentiality[1] is the bedrock on which virtually all ombuds[2] programs are built. In order to serve as the "conscience" of an organization -- someone to whom its members may turn with problems of a sensitive or ethical nature[3] -- an ombuds frequently needs to be able to discuss matters in confidence. An ombuds' failure to make or uphold a promise of confidentiality not only hampers the discussion of delicate issues and undermines the effectiveness of the ombuds individually, it also defeats the very purpose of an ombuds program, which is to encourage the airing and resolution of issues and disputes.

An ombuds' promise to maintain confidentiality, however, is only as good as the legal recognition given to such a promise. Without legal protection, an ombuds' commitment to confidentiality would be irrelevant, because he or she could be compelled to reveal confidences. Fortunately, courts have begun in recent years to protect the confidentiality of ombuds' communications,[4] despite historic reluctance to sanction the nondisclosure of communications which may be relevant -- or which may lead to the discovery of information that is relevant -- to a particular dispute.

The means employed by courts to protect the confidentiality of ombuds' communications are varied. They include the recognition of a new form of testimonial privilege, a bar to disclosure based on an implied contract theory, and even the recognition of a constitutional right of privacy. In each instance in which the confidentiality of ombuds' communications has been recognized by a court, however, the facts presented to the court demonstrated that, by virtue of the way in which the ombuds program was established and operated, the program warranted legal recognition of the confidentiality of its communications. Accordingly, the purpose of this article is to set forth the legal foundations used by courts to protect the confidentiality of ombuds' communications and then to summarize the elements of ombuds programs that have been critical to achieving this recognition. We also note that a related legislative movement has been underway whereby laws are gradually being enacted to codify privileges and immunities which are beneficial to ombuds. As a final matter, we comment briefly from a litigation perspective on the preparations ombuds should make in order to enable them to assert the claim of confidentiality when the need arises.

I. Legal Bases For Protecting Confidentiality

Although there are statutes that recognize the confidentiality of certain communications,[5] much of the present development in this area of the law has been on a case-by-case basis in the courts. As outlined below, the development of the case law in this area began with the initial recognition by a federal court of a state statutory scheme that included a testimonial immunity. Since then, the case law has grown to include both the recognition of a federal common law[6] privilege and an implied contractual basis for barring disclosure. One court in California has even recognized a state constitutional right of privacy barring disclosure.

A. The Federal Common Law Privilege

Shabazz v. Scurr[7] was the first reported case in which a federal court recognized a common law bar to disclosure by an ombuds. In Shabazz, the office of an Iowa prison

ombuds sought to prevent a former employee of that office from testifying about events he witnessed during a prison riot. Iowa state law authorized the office to keep the identities of the complainants and witnesses secret and specifically provided that members of that office could not be compelled to testify about matters within the scope of their official duties. Although this state law scheme was not binding on the federal court, the federal court nevertheless was persuaded that confidentiality was critically important to the effectiveness of that ombuds office. Therefore, the court exercised its authority to recognize the state law privilege in federal court. Moreover, the court expressly found that the privilege belonged to the office itself, rather than to any particular individual who had occupied the office.

While the federal court in Shabazz was merely asked to apply a state statutory scheme in federal court, the court in Roy v. United Technologies Corporation ("UTC") had to go much further to protect the confidentiality of ombuds' communications.[8] Indeed, although it was not officially reported, Roy has been cited as the seminal case recognizing both the federal common law privilege and the implied contract basis for barring the disclosure of ombuds' communications.

In Roy, District Judge Cabranes granted the ombuds' motion for a protective order to limit inquiries about confidential communications at the ombuds' deposition.[9] Roy had sued UTC for discrimination on the basis of his age, race and national origin. While employed at UTC, he had consulted with the ombuds office. When he later sought to depose the person with whom he had dealt in order to obtain information about confidential communications, the ombuds moved for a protective order to preclude the parties from deposing her.

The Office of the Ombudsman at UTC asserted two grounds for its motion for a protective order, one of which was that the federal court should recognize, under federal common law, a testimonial privilege which would bar disclosure of the confidential communications.[10] The ombuds argued that Federal Rule of Evidence 501 allowed the court to recognize such a privilege.[11] That rule provides, "[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[12] Pursuant to Rule 501, then, federal courts are allowed to develop privileges on a case-by-case basis.

Although the Roy court had only Shabazz to cite as precedent for the recognition of a common law privilege, the court looked at the underlying factors supporting testimonial privileges and held that those factors were present in the case before it. In particular, Judge Cabranes relied on the test articulated by the Second Circuit Court of Appeals in In re Doe. That test identified the following four factors as necessary to support the existence of a common law privilege:

- The communication must be made in the belief that it will not be disclosed;

- Confidentiality must be essential to the maintenance of the relationship between the parties;
- The relationship is one that society considers worthy of being fostered; and
- The injury to the relationship incurred by the disclosure must be greater than the benefit gained in the correct disposal of the litigation.[13]

As to the first factor, the court in Roy recognized that UTC's Office of the Ombudsman had taken "extensive precautions," including the use of an 800 number, to ensure confidentiality.[14] The ombuds presented those precautions to the court in an affidavit with extensive exhibits. The ombuds proved the second element, that confidentiality was essential to the relationship, by showing that confidentiality was the very purpose for establishing the office and "is generally understood to be a defining characteristic of an ombudsman."[15] The third element, the societal worth of the relationship, was satisfied by the presentation of facts to show that UTC, as a defense contractor, had adopted its ombuds program in response to a general recognition that such programs are necessary to encourage the reporting of waste and fraud and the informal resolution of disputes.[16] Finally, the ombuds demonstrated that its interest in confidentiality outweighed the plaintiff's interest in discovery on the facts of the case.[17]

The Roy court concluded that, "[g]iven the ombudsman's procedures to ensure confidentiality and its announcements of these safeguards, plaintiff must have been aware that his own communications with it would be confidential."[18] The court also emphasized that, since the ombuds had not revealed its information to any party, including UTC, the plaintiff was not placed under any greater burden than the defendant.[19]

Other courts have built on Roy. Less than a year after the judge's order in Roy, the United States District Court for the Eastern District of Missouri relied on it to hold that confidential communications made to an ombuds were protected from disclosure.[20] In that case, styled Kientzy v. McDonnell Douglas Corporation, the plaintiff had consulted the ombuds office at McDonnell Douglas before she was terminated.[21] She then sued the company, alleging that she was terminated on account of her gender, and sought to depose the ombuds with whom she had consulted.[22] The ombuds moved for a protective order.[23] As the Roy court did, the court in Kientzy held that the In re Doe factors were satisfied and determined that Federal Rule of Evidence 501 protected the ombuds' communications from disclosure.[24] Since Kientzy was decided, other courts, both state and federal, have also found a common law privilege for the ombuds.[25]

Federal administrative case law has also recognized this common law privilege. An administrative law judge for the Department of Labor recently recognized a privilege for ombuds in Acord v. Alyeska Pipeline Service Co.[26] After citing Rule 501, Roy, Shabazz and Kientzy, the judge laid out the four In re Doe factors for consideration.[27] Regarding the third factor, that there is a societal interest in maintaining the confidentiality of the ombuds program, the judge stated,

> Complainant argues that the Kientzy rationale does not apply here because Alyeska is not similarly situated to McDonnell Douglas in as much as Alyeska does not produce military products for the United States, or contract with the government for the purposes of producing a product, but rather "is simply a consortium of oil companies for the purpose of maintaining and operating the Trans Alaska Pipeline." However, an ombudsman program which improves work conditions by facilitating the resolution of disputes with management, and encouraging the reporting of safety and environmental concerns, thus promoting the safe and efficient transportation of an American-produced oil supply, is also important to society. Moreover, effective ombudsman programs that address concerns of employees, protect whistle blowers and minimize their need, are also important to society. Accordingly, it is determined that Alyeska's ombudsman program as depicted by Alyeska has a definite societal benefit that is worth protecting.[28]

The judge concluded that the existence of an ombuds privilege warranted the issuance of an order protecting Alyeska's ombuds from discovery.[29]

B. Implied Contract

In addition to her claim that the ombuds privilege was supported by Federal Rule of Evidence 501, the ombuds in Roy argued that UTC's establishment of an ombuds program constituted a promise of confidentiality for communications made by or with that office.[30] The ombuds argued that the parties to the process enjoyed an implied-in-fact contract on the issue of confidentiality, since all UTC employees were informed that communications with the Office of the Ombudsman generally would be confidential. Accordingly, the UTC ombuds asserted that, when an employee availed himself or herself of the ombuds program, he or she implicitly agreed to recognize the confidentiality of the program. Similarly, those employees with whom the ombuds spoke while investigating the employee's inquiry were on notice that communications were confidential. Although the Roy court held that Rule 501 encompassed an ombuds privilege, the court also accepted this contract theory. The court stated, "[a] separate and independent basis for the Court's ruling here in favor of the movant is provided by the theory of implied contract."[31]

A few years later, in Criado v. ITT Corporation, the United States District Court for the Southern District of New York also recognized this implied contract argument.[32] In that case, the plaintiff was terminated after he reported his suspicions of possible unethical and illegal conduct in ITT's flight department to ITT's head of personnel.[33] The plaintiff sued ITT, alleging that ITT had breached an express limitation to his otherwise at-will employment agreement by firing him.[34] He claimed that ITT had expressly limited its right to dismiss him in its Corporate Code of Conduct and in other communications in which ITT asserted that the reporting of illegal or unethical conduct would be confidential and would not be penalized.[35] Although the plaintiff did not report his suspicions through the reporting channels specified in the Corporate Code, the court held that it was reasonable for the jury to conclude that ITT had modified the plaintiff's at-will employment.[36]

The use of an implied contract theory to support the confidentiality of communications with an ombuds has been met with some reluctance on the part of corporate labor relations counsel, who are wary that the use of such a concept may, in other contexts, come back to haunt the company. Accordingly, reliance on this theory may be considered a fall-back position in those situations. On the other hand, many states already recognize implied contracts in the employment setting, and, therefore, use of this theory does not create new law -- it only uses it to the ombuds' advantage. Moreover, such a theory may be the only or the best hope of preserving confidentiality in jurisdictions hostile to or unlikely to recognize an ombuds privilege.

C. State Constitutional Grounds

In the most sweeping opinion to date on the confidentiality of ombuds' communications, a California Court of Appeals in Garstang v. The Superior Court of Los Angeles County held in 1995 that communications made during mediation sessions conducted by an ombuds are protected by a state constitutional qualified privilege.[37] The plaintiff had worked for the California Institute of Technology ("Caltech"), where she was beset by rumors about the means by which she had secured promotions.[38] Caltech's ombuds conducted a number of meetings in connection with the rumors.[39] These meetings were unsuccessful in resolving the dispute, and the plaintiff sued Caltech and three of her co-workers for slander and intentional infliction of emotional distress.[40] When the plaintiff attempted to depose her co-workers about the meetings with the ombuds, her co-workers refused to answer on the basis that their statements were privileged because they were made before an ombuds.[41]

The plaintiff's motion to compel responses to these questions reached the state appellate court, which held that the state's statutory mediation privilege did not apply because the parties failed to execute a required writing. The court did hold, however, that there is a qualified privilege which bars the disclosure of communications made before an ombuds who is mediating an employee dispute.[42] The court based this qualified privilege on Article I, section 1 of the California constitution, which reads, "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy."[43] In finding that the ombuds' communications were protected by this state constitutional right to privacy, the court emphasized that the ombuds had made a commitment to confidentiality, and cited Kientzy and the four In re Doe factors.[44]

D. Statutory Protection and Related Privileges

Many states have statutes -- often in the mediation or alternative dispute resolution context -- that protect the confidentiality of certain communications and may be applicable to ombuds' communications. Although a detailed discussion of these laws, which vary from state to state, is beyond the scope of this article, they deserve mention because they represent yet another way in which the confidentiality of ombuds' communications can be given legal protection. Indeed, enacting laws may be the only way to preserve confidentiality in jurisdictions where the courts are averse to an expansion of the common law of privileges.[45]

One example of a state law that may be applicable is a statute that creates a testimonial privilege for mediators, such as the California statute cited in Garstang.[46] At the time of the mediation involved in Garstang, California's sweeping statute provided that, when persons agree to participate in mediation for the purpose of resolving a dispute (which agreement must be obtained in writing in advance), evidence of anything that was said in the course of the mediation is not admissible in evidence and is not subject to discovery. This statute has since been substantially revised, but it still provides that the testimony of the mediator cannot be compelled.[47] While not every state has a statute as sweeping as that of California, by some estimates more than half the states now recognize a mediation privilege in some fashion.[48]

Other states have created public sector ombuds programs by statute and have legislatively granted those ombuds privileges or immunities that protect their communications. For example, Alaska has created an ombuds office to investigate certain complaints about the state's administrative agencies and provided those ombuds with a privilege not to testify about matters within the scope of their duties.[49] Likewise, Oregon has created a Corrections ombuds and protected that official from being compelled to testify or produce evidence.[50] Indeed, the existence of a similar statute in Iowa was the starting point for the court's analysis in Shabazz.

Although we are not aware of any state that has enacted one of these "shield laws" which specifically refers to private sector ombuds, The Ombudsman Association, in conjunction with other ombuds associations, has formed a Shield Law Committee that has drafted a Model Shield Law for ombuds. The model law states,

> [t]he ombudsman and his/her staff shall not be compelled to testify or produce evidence in any judicial or administrative proceeding with respect to any matter involving the exercise of their official duties. All related memoranda, work product, notes or case files of an ombudsman are confidential and not subject to disclosure in any judicial or administrative proceeding.[51]

In drafting this model law, the Committee opted for the "immunity" approach, rather than the "privilege" approach. In other words, the model law precludes an ombuds from being compelled to testify or produce documents, rather than creating a privilege that the ombuds could assert when the need arose. By proceeding in this way, the Shield Law Committee has recognized the practical advantages of preserving confidentiality without

going to court to assert a privilege or having the existence of the privilege hinge on the specific facts before the court. Nevertheless, a shield law with these provisions should satisfy all four In re Doe criteria if subjected to judicial review.

Since ombuds programs are a form of alternative dispute resolution, privileges which preclude the disclosure of communications made in an alternative dispute resolution process or settlement discussion, whether created by case law or statute, provide another basis on which to protect the confidentiality of ombuds communications. Such privileges for alternative dispute resolution and settlement discussions have already influenced those courts which have found a privilege for ombuds' communications. For example, the Kientzy court recognized that a successful ombuds program resolves problems informally and more quickly than court actions, and that the utility of the program is founded on the confidentiality of its communications.[52] Similarly, a Michigan state court noted that ombuds serve a dispute resolution function, which is preferable to the utilization of judicial processes.[53]

Federal statutes also have created privileges or immunities for communications similar to ombuds' communications. The federal Administrative Dispute Resolution Act of 1990 (the "ADRA"),[54] for example, contained a provision which attempted to protect the confidentiality of "dispute resolution communications" in the context of federal administrative agency disputes.[55] Subsection (j) of 5 U.S.C. § 574, however, specifically provided that this provision could not be considered a statute exempting disclosure under the federal Freedom of Information Act ("FOIA").[56] As a result, confidentiality protection under the ADRA was criticized.[57] However, the legislative authorization for the ADRA expired on October 1, 1995, and the proposals to reauthorize the ADRA which are pending in Congress protect the confidentiality of communications from disclosure under FOIA.[58] Moreover, these proposals specifically include federal ombuds as "neutrals" under the ADRA.[59]

The protection of confidentiality in dispute resolution has also drawn support from other quarters. In the federal courts, Federal Rule of Evidence 408 has long been seen as necessary to promote the settlement of disputes. Rule 408 provides that evidence of conduct or statements made in settlement or compromise negotiations is inadmissible. The Kientzy court specifically noted the parallel between Rule 408 and the ombuds privilege it recognized.[60] Likewise, the Shabazz court cited Rule 408, noting that the rule recognizes the important public policy favoring informal dispute resolution.[61] Coming from yet another direction, a federal court in Maine recognized a testimonial privilege to promote alternative dispute resolution. In Maine Central Railroad Co. v. Brotherhood of Maintenance of Way Employees, the court held that an arbitrator could not be deposed because the public interest in maintaining the impartiality of federal mediations outweighed the benefits which would be gleaned from the arbitrator's testimony.[62]

II. Prerequisites to the Protection of Confidentiality

While nearly all the courts that recognize the confidentiality of ombuds' communications have done so by applying the In re Doe test to the case before them, those factors do not suggest how an ombuds program should be designed and operated in order to satisfy the test. Nevertheless, the guiding principles for the design and operation of an ombuds program can be distilled from the case law. These principles include:

- widely publicizing the promise of confidentiality when creating an ombuds program;
- maintaining the ombuds office as an independent, neutral and alternative means of dispute resolution;
- establishing an appropriate record-making and keeping policy; and
- consistently honoring these principles in the operation of the ombuds office.

These principles are echoed in The Ombudsman Association's Standards of Practice.[63]

A. Confidentiality

It should go without saying that, in order to protect the confidentiality of ombuds' communications, everyone dealing with the ombuds should be on notice that communications will be considered confidential. This process begins with references to confidentiality in the board resolution that creates the ombuds program and continues with widespread and frequent references to confidentiality in brochures, newsletters, posters, and other intra-organizational materials referring to the ombuds office. Whether communications are ultimately protected on a privilege theory or on the basis of an implied contract, it is critical that the promise and expectation of privacy be beyond challenge. Likewise, it should be understood by all individuals within the organization that, unlike an attorney-client privilege which may be waived by the client, individuals cannot waive the ombuds privilege. Publicity about the ombuds office should, therefore, reflect that it is the obligation of the office -- not of any particular individual -- to assert the privilege barring the disclosure of confidential communications.

Where an ombuds does not make promises of confidentiality, it is unlikely that a court will grant a protective order preventing the disclosure of ombuds' communications. For example, in Hansen v. Allen Memorial Hospital, the District Court for the Southern District of Iowa determined that there was no privilege pursuant to Federal Rule of Evidence 501 because the Iowa Civil Rights Commission ("ICRC"), which sought to quash a subpoena of its tape-recorded interviews, had not promised its witnesses confidentiality.[64] The Hansen court contrasted the case before it with Shabazz, and noted that the basis for the Shabazz decision was that court's belief that the flow of information to the ombuds office would be threatened if disclosures were not protected by the court.[65] The Hansen court stated, "[u]nlike the statute at issue in Shabazz, here there is not a general promise of confidentiality to individuals providing information to the ICRC.

Therefore, Shabazz is not only clearly distinguishable but is consistent with the court's holding here."[66]

There are, however, circumstances in which even the ombuds should not keep communications confidential. The Ombudsman Association has promulgated a Code of Ethics which recognizes this fact. The Code provides that an exception to the ombuds' responsibility to maintain confidentiality occurs when "there appears to be an imminent threat of serious harm."[67] In its Handbook, The Ombudsman Association explains that "serious harm" refers to physical harm, and that, in considering whether to breach confidentiality, an ombuds should weigh the threatened danger to others against the damage done by the breach of confidence.[68] Thus, the publicity in connection with the establishment of the ombuds office should emphasize that the ombuds will abide by the Code of Ethics and that there may be instances in which the ombuds may not maintain confidentiality.

B. Independent, Neutral and Alternative

When the ombuds office is maintained as an independent, neutral and alternative means of dispute resolution, and this status is clearly communicated, both the ombuds and the organization benefit. For example, an understanding of the ombuds' status ensures that reports to the ombuds of sexual harassment or discrimination do not constitute "notice" to the organization and do not trigger the organization's duty to investigate.[69] Additionally, management's clear understanding of the ombuds' role ensures that the ombuds will not be pressured to violate his or her promise of confidentiality. Finally, when the ombuds office acts as an alternative, neutral and independent means of dispute resolution, it garners two significant benefits: it meets the societal benefit prong of the In re Doe test;[70] and it satisfies the federal sentencing guidelines' requirements for compliance programs.[71]

In order to be independent, the ombuds office must exist outside the organization's management hierarchy and should have access to the chief executive officer or the board of directors.[72] In order for an ombuds office to act as an alternative channel, the ombuds program must be an addition to (not a substitute for) existing non-confidential reporting channels like human resources. Moreover, the ombuds must ensure that it is not part of his or her charge to make policy or to report to management. On this point, The Ombudsman Association's Standards of Practice emphasize that, in order to protect the neutrality and confidentiality promised by the ombuds office, an ombuds must "exercise discretion" before entering into any additional roles or positions in the organization, and must not serve in any function (e.g., compliance officer) which would undermine the privilege.[73] Finally, these ideas -- that the ombuds is independent of the management hierarchy and is a confidential alternative to existing reporting channels -- must be communicated to individuals within the organization.

C. Record-Keeping

The ombuds must ensure that its record-keeping practices do not cause it to breach its promise of confidentiality. The ombuds office should create policies regarding record-making and keeping, publish these policies internally, and adhere to them. Generally, the

guiding principle of these policies should be that files contain as little identifying information as possible and be retained for as short a period as possible. Obviously, files must be safeguarded and should not be shared with anyone outside the ombuds office. When reporting is required, statistical summaries should be used.[74] Moreover, even in the reporting of statistics, care must be taken to refrain from identifying the individuals involved or the specific facts involved in a claim.[75]

D. Consistency

No matter how well designed, an ombuds program is only as good as its operation. Even if an ombuds office makes and publicizes a promise of confidentiality, all it takes is one breach of that promise in practice to cost an ombuds program its privilege against disclosure. Therefore, a priority should be placed on training and on consistency in practice. All members of the office of the ombuds should know how to deal with certain kinds of situations, and should be made familiar with the The Ombudsman Association's Code of Ethics and Standards of Practice, the promises of neutrality and confidentiality, and internal policies like the one on record-keeping.

III. Motions for Protective Orders

Attempts to obtain disclosure of confidential information typically arise when an individual within the organization is involved in a lawsuit, and that individual believes that the ombuds office has information that is relevant or helpful to his or her case. The means used to obtain that information often involve a request to produce documents, interrogatories, or a subpoena for a deposition.

Court rules typically impose time requirements for objecting to discovery motions or seeking a protective order in connection with a subpoena. For example, under the Federal Rules of Civil Procedure, a party must object to interrogatories or requests for production of documents within thirty days of their service.[76] An objection to a federal court subpoena to produce or permit inspection or copying of documents must be made within fourteen days after service, or before the time specified for compliance if that time is less than fourteen days.[77] Since the time frames in which to respond can be quite short, it is clearly advantageous for the ombuds office to do as much of the work as possible in advance so that the appropriate motions can be filed in a timely fashion. Accordingly, as a preparatory step, the ombuds may wish to obtain advance authorization to retain independent counsel to represent the ombuds office. Using independent counsel, as opposed to the organization's counsel, serves various purposes, including the prevention of a conflict of interest between the organization and the ombuds, the maintenance of confidentiality, and a statement to the court of the seriousness of the ombuds' commitment to neutrality and independence.

In addition, the ombuds can pull together exhibits for use in court, including the board resolutions and underlying organizational documents. These will be required to provide factual support for the legal positions taken by the ombuds in a motion to quash or a motion for a protective order. For example, in Roy, the ombuds presented the court with numerous exhibits, including the ombuds' job description, correspondence from

management to company employees outlining the ombuds' role, UTC publications advertising the ombuds office, the Defense Industry Initiatives, The Ombudsman Association's Code of Ethics, and posters. Copies of routine notices, bulletins, posters, and newsletters should also be kept in a litigation file so that counsel can quickly review them for purposes of preparing an affidavit in support of the ombuds' motion.

Finally, the ombuds can undertake a preliminary review of state statutes or constitutional provisions which could form the basis for a motion for a protective order. Such a review might prevent the occurrence of a situation like that in Garstang, where the ombuds was precluded from relying on a state statute specifically granting an immunity to mediators because the required writing was not obtained in a timely fashion.[78] If a state has statutes that may protect the confidentiality of an ombuds' communications, it may be worthwhile to revise the ombuds' operating procedures to take advantage of them.

IV. Conclusion

Courts have begun to recognize the confidentiality of ombuds' communications by utilizing federal common law and implied contract theories. As Garstang reflects, courts have even displayed a willingness to use innovative theories to protect the confidentiality of these communications. Regardless of the legal basis used by the court, it is clear that those programs which have successfully asserted a privilege are those which have consistently abided by the following principles: confidentiality; maintenance of the ombuds office as an independent, neutral and alternative means of dispute resolution; and the development of record-making and keeping policies that are consistent with confidentiality. Likewise, those same considerations are the driving force behind legislative provisions that help protect the confidentiality of communications, whether expressed as a mediator's privilege or as a means of promoting alternate dispute resolution. Since there are still many issues relating to the confidentiality of ombuds' communications that have not been fully litigated, adherence to these principles will be essential in order for ombuds offices to withstand the challenges that are sure to come in the future.

REFERENCES

[1] The authors are grateful to Tom Furtado, Ann Bensinger, Kimberly Rupert, Mary Simon, Carole Trocchio, Vincent Riley and Mary Rowe for their comments and careful review of this article.

[2] We will use the term "ombuds" throughout this article except when citing to a case or program that uses a different appellation.

[3] See The Ombudsman Association, The Ombudsman Handbook, § 1.1 (1994).

[4] "Ombuds' communications" include written or oral statements made to or by an ombuds.

[5] See Section I.D.

[6] "Common law," as the authors use it, means "as distinguished from statutory law created by the enactment of legislatures." See, e.g., Black's Law Dictionary 276 (6th ed. 1990). The authors do not use the term in its other sense, i.e., to refer to the statutory and case law background of England and the American colonies before the American revolution.

[7] 662 F. Supp. 90 (S.D. Iowa 1987).

[8] Civil H-89-680 (JAC), transcript of May 29, 1990 proceedings at 22 (D. Conn.).

[9] Judge Cabranes now sits on the Second Circuit Court of Appeals.

[10] The Office of the Ombudsman also asserted that disclosure was barred by the existence of an implied contract. See Section I.B.

[11] Id. at 10.

[12] Fed. R. Evid. 501.

[13] Id. at 24-25 (citing In re Doe, 711 F.2d 1187, 1193 (2d Cir. 1983)).

[14] Id. at 25.

[15] Id.

[16] Id. at 26.

[17] Id.

[18] Id.

[19] Id. at 26-27.

[20] Kientzy v. McDonnell Douglas Corporation, 133 F.R.D. 570 (E.D. Mo. 1991).

[21] Id. at 571.

[22] Id.

[23] Id.

[24] Id. at 572-73.

[25] See McMillan v. The Upjohn Co., Case No. 1:92:CV:826 (W.D. Mich. March 8, 1995) (court granted the ombuds' petition for a protective order to prevent the parties from deposing the ombuds about communications made to the ombuds by Upjohn employees other than the plaintiff, on the grounds that Federal Rule of Evidence 501 and policy interests favor the creation of a privilege); Kozlowski v. The Upjohn Co., File No. 94-5431-NZ (Mich. Cir. Ct. August 16, 1995) (court granted ombuds' motion for a protective order and found that a common law privilege for ombuds exists and belongs to the ombuds, as opposed to the employees who seek the ombuds' help).

[26] U.S. Department of Labor Case No. 95-TSC-4 (October 4, 1995).

[27] Id. at 3. The judge did not recite the facts of the case.

[28] Id. at 4.

[29] Id. at 7.

[30] Roy, transcript at 10-11.

[31] Id. at 27.

[32] 61 Fair Empl. Prac. Cases (BNA) 321 (S.D.N.Y. 1993).

[33] Id.

[34] Id.

[35] Id.

[36] Id. (the Corporate Code directed employees to report suspicious conduct to the ombuds or the Director of Corporate Policy Compliance).

[37] 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84 (1995).

[38] Id. at 529-30, 46 Cal. Rptr. 2d at 86.

[39] Id.

[40] Id.

[41] Id.

[42] Id. at 531-32, 46 Cal. Rptr. 2d at 87.

[43] Id. at 532, 46 Cal. Rptr. 2d at 87.

[44] Id. at 534-35, 46 Cal. Rptr. 2d at 88-89 (although the court's inquiry tracked In re Doe, the court did not cite to that case).

[45] See, e.g., United States v. Burtrum, 17 F.3d 1299 (10th Cir.) (federal courts should not create any new privileges under Federal Rule of Evidence 501), cert. denied, 115 S.Ct. 176 (1994); In re Grand Jury Proceedings, 867 F.2d 562 (9th Cir.) (the creation of new privileges should be limited), cert. denied, 493 U.S. 906 (1989). These cases obviously conflict with cases like In re Doe. For a thorough review of the conflict, see Edward J. Imwinkelried, An Hegelian Approach to Privileges Under the Federal Rules of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis, 73 Neb. L. Rev. 511 (1994). Commentators hope that the United States Supreme Court will resolve this conflict in Jaffee v. Redmond, No. 95-266, a case about the psychotherapist-patient privilege which the Court currently has under consideration. See Marcia Coyle, Keeping Secrets: Psychotherapist Privilege Claim to High Court, National Law Journal (February 26, 1996).

[46] Cal. Evid. Code § 1152.5, as considered by the court in Garstang, provided:

(a) Subject to the conditions and exceptions provided in this section, when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute:

(1) Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(2) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible

in evidence, and disclosure of any such document shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(b) Subdivision (a) does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

(c) This section does not apply unless, before the mediation begins, the persons who agree to conduct and participate in the mediation execute an agreement in writing that sets out the text of subdivisions (a) and (b) and states that the persons agree that this section shall apply to the mediation.

[47] Cal. Evid. Code §1152.5, as amended in 1994, provides:

(a) When persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part:

(1) Except as otherwise provided in this section, evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence or subject to discovery, and disclosure of this evidence shall not be compelled, in any civil action or proceeding in which, pursuant to law, testimony can be compelled to be given.

(2) Except as otherwise provided in this section, unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence or subject to discovery, and disclosure of such a document shall not be compelled, in any civil action or proceeding in which, pursuant to law, testimony can be compelled to be given.

(3) When persons agree to conduct or participate in mediation for the sole purpose of compromising, settling, or resolving a dispute, in whole or in part, all communications, negotiations, or settlement discussions by and between participants or mediators in the mediation shall remain confidential.

(4) All or part of a communication or document which may be otherwise privileged or confidential may be disclosed if all parties who conduct or otherwise participate in a mediation so consent.

(5) A written settlement agreement, or part thereof, is admissible to show fraud, duress, or illegality if relevant to an issue in dispute.

(6) Evidence otherwise admissible or subject to discovery outside of mediation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation.

(b) This section does not apply where the admissibility of the evidence is governed by Section 1818 or 3177 of the Family Code.

(c) Nothing in this section makes admissible evidence that is inadmissible under Section 1152 or any other statutory provision, including, but not limited to, the sections listed in subdivision (d). Nothing in this section limits the confidentiality provided pursuant to Section 65 of the Labor Code.

(d) If the testimony of a mediator is sought to be compelled in any action or proceeding as to anything said or any admission made in the course of the mediation that is inadmissible and not subject to disclosure under this section, the court shall award reasonable attorney's fees and costs to the mediator against the person or persons seeking that testimony.

(e) Paragraph (2) of subdivision (a) does not limit the effect of an agreement not to take a default in a pending civil action.

[48] Joshua P. Rosenberg, Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws, Ohio State Journal on Dispute Resolution 157, 158 (1994).

[49] Alaska Stat. § 24.55.260.

[50] Or. Rev. Stat. § 423.440.

[51] Model Shield Law (Shield Law Committee, 1996).

[52] 133 F.R.D. at 572.

[53] Wagner v. The Upjohn Co., File No. A91-2156CL (Mich. Cir. Ct. April 22, 1992).

[54] 5 U.S.C. §§ 571 et seq.

[55] 5 U.S.C. § 575.

[56] 5 U.S.C. §§ 552 et seq.

[57] Mark H. Grunewald, The Freedom of Information Act and Confidentiality Under the Administrative Dispute Resolution Act, Administrative Conference of the United States, April 1995.

[58] See, e.g., H.R. 2977, 104th Cong., 2d Sess. § 2 (1996). As the authors were finalizing this article in April, 1996, the House and the Senate had reported bills to reauthorize the ADRA out of committee.

[59] Id.

[60] 133 F.R.D. at 572.

[61] 662 F. Supp. at 92.

[62] 117 F.R.D. 485, 486 (D.Me. 1987).

[63] The Ombudsman Association, Standards of Practice (1995), in The Ombudsman Handbook at 3.7 - 3.8.

[64] 141 F.R.D. 115, 123 (S.D. Iowa 1992) ("[a]ny claim by the ICRC that confidentiality is necessary to ensure the integrity of the investigative process is wholly illusory. Neither at the outset nor during the course of an investigation is a witness ever promised confidentiality as an inducement to provide information to the ICRC.")

[65] Id. at 124.

[66] Id. See also Flynn v. Goldman, Sachs & Co., No. 91 Civ. 0035 (KMW) 1993 WL 662380, at *2 (S.D.N.Y. September 16, 1993) (court finds self-critical evaluation privilege exists because communications with interviewed employees were made with the understanding that comments would be kept confidential and because "such confidentiality is critically important to eliciting candid responses from employees").

[67] The Ombudsman Association, The Ombudsman Handbook, § 2.4.

[68] Id. at § 3.5.

[69] See, e.g., West v. Philadelphia Electric Co., 45 F.3d 744, 756 (3d Cir. 1995) (evidence of employer's notice of a hostile work environment is always relevant); see also Mary Elizabeth McGarry, The Ombudsman Privilege: Keeping Harassment Complaints Confidential, New York Law Journal (November 30, 1995).

[70] See Section I.A., above.

[71] Numerous employers have instituted ombuds programs in order to provide employees with an office where they can report suspicious corporate behavior without fear of retaliation. Creating such a program mitigates potential fines imposed by the federal sentencing guidelines. See, e.g., Jeffrey M. Kaplan, J.D., et al., Compliance Programs and the Corporate Sentencing Guidelines (1995).

[72] The Ombudsman Association's Standards of Practice state, "[w]e are designated neutrals and remain independent of ordinary line and staff structures."

[73] The Ombudsman Association, Standards of Practice §§ 3.2, 5.5.

[74] See The Ombudsman Association, Ombudsman Handbook, §§ 1.5 - 1.7.

[75] See The Ombudsman Association, Standards of Practice § 2.3.

[76] Fed. R. Civ. P. 33 and 34, respectively.

[77] Fed. R. Civ. P. 45(c)(1)(B).

[78] See text accompanying footnote 42.

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