

## On The Evolving Corporate Ombudsman

By Andrew Singer

The corporate ombuds office struggles against a perception. It is often viewed by senior management as a “non-revenue center,” and it is often depreciated for that reason. There is “constant pressure” on every non-revenue generating office or department (ethics and compliance officers are familiar with this) over time, particularly in an economic downturn, notes attorney Charles L. Howard.

Indeed, the last few years have been “tough times” for corporate ombuds offices, says Howard, author of the recently published *The Organizational Ombudsman: Origins, Roles, and Operations-A Legal Guide*<sup>1</sup>.

One large Wall Street firm with which he worked was acquired by another company. The cost-conscious acquirer jettisoned the ombuds office. “It didn’t make the cut,” recounts



Charles L. Howard

Howard, something that often happens when budgets are tight.

“It’s not a huge cost center,” says Howard of ombuds offices generally. “And it’s not in competition with compliance or human resources (HR). It’s complementary.” Moreover, there are a lot of issues that people won’t bring up with HR or compliance that they will sometimes bring to the ombuds office, he says.

### More confidentiality?

Some companies have ethics officers. Some have ombudsmen. Both are hedges against organizational wrongdoing. Both offer a place to go for employees to report corporate misconduct. Is there really any difference between the two jobs?

Yes, answered Howard in a recent interview. An ombudsman can simply *deliver more* in the way of confidentiality to employees than can an ethics or compliance officer—something that is important given that most employees still think they will suffer retaliation if they report wrongdoing. Many are happy to go to ethics and compliance offices—but not all. Is the wrongdoing being sanctioned from above? They aren’t always sure. “It takes an unusual person to go forward and just report,” Howard tells us.

People will go to the office and ask a question, but it’s not the *real* question. It’s more of a test question. The caller might ask about a company policy. But after some conversation it turns out that person is not interested in ethics and compliance policy in general, but rather in the company’s kickback policy specifically—because the person believes his or her boss may be taking kickbacks. Is there a career risk in reporting that person’s suspicions to the compliance officer?

*‘There will always be people who are reluctant to come forward,’ says Howard, and for them an ombuds office could make an important difference.*

<sup>1</sup> Published by the American Bar Association on January 21, 2010.

In his book, Howard quotes an article from the *Conference Board Review* written by Patrick J. Gnazzo and George R. Wratney, the former vice president of business practices and corporate ombudsman, respectively, at United Technologies Corporation:

“Here’s a simple truth: A certain number of your employees will not raise issues to management unless they are promised confidentiality through the process, including in any potential litigation. Under current law, your ethics program cannot guarantee that protection. Consequently, you will not hear some things that you should.”<sup>2</sup>

Compliance and human resources officers are “clearly agents of their employers,” writes Howard. “They cannot promise employees that communications with them are confidential, because agency law principles impute their knowledge of misconduct to the organization as a whole, placing the organization on notice of the misconduct, and, much like, ‘tag, you’re it,’ they are compelled by their job function to act on what they hear and learn.”

A partner in the law firm of Shipman & Goodwin LLP (Hartford, CT), Howard examines in his book the history of how the role of an organizational ombudsman has evolved from its original concept in Sweden more than 200 years ago, to its usage by American universities in the early 1960s, and then to its implementation by businesses and government in the 1980s.

He explains, among other things, why such a function is critical for organizations in light of the demographic, technological, and globalization changes that have occurred in the past half-century. One quarter of an organization’s employees may now be working off premises on a given day, for instance. Corporations are increasingly multinational. There are often ‘first world’ and ‘third world’ people within the same company, and employees are working both in first- and third-world locations.

### **An evolution**

There has been an evolution in what it means to be an ombudsperson over the past 20 years, Howard tells us. The classic ombuds was a prosecutor and an investigator who worked for the government. The organizational ombuds has always been marked by four key attributes: Independence, neutrality, informality, and confidentiality.

A good ombuds can listen to an employee with a jumble

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of ideas and thoughts that don’t seem coherent initially, but through discussion and probing can distill those notions and often uncover the underlying issues. Then, with some coaching, and perhaps even role playing, the individual can be prepared to do something about his or her situation.

At some companies, as many as 40 percent of the people coming to the ombuds office are technical/professional individuals, often managerial, but for various reasons they don’t want to go to human resources or compliance. They are not all clerical people; in many instances they are people with years of experience and training that an organization does not want to lose.

### **The *Carmen* case**

The issue of confidentiality is a complex one, however. Organizational ombudspersons and their organizations have long insisted that their conversations with employees are ‘protected,’ legally speaking, from compelled disclosure. One setback to this position, however, was a 1997 court case, *Carmen v. McDonnell Douglas Corporation*, in which the Eighth Circuit court rejected a claim of ombuds ‘privilege.’

“In some subsequent cases,” writes Howard, “courts have rejected a claim of ombuds privilege based on the fact that the *Carmen* court did not recognize an ombudsman privilege, even where the privilege claim at issue was adequately supported by the factual record.”

Doesn’t this vitiate, then, the claim that an ombuds offers greater confidentiality to an employee when it comes to reporting wrongdoing?

Even though the *Carmen* decision cast a cloud on the issue, and legal ‘privilege’ can no longer be *widely* asserted, it doesn’t mean that there aren’t ways to structure a program “so that other bases for confidentiality” can be asserted, writes Howard. Ombudspersons have also “relied on contract and other theories as an additional means to protect confidentiality”

Confidentiality has been protected on the basis of an “implied contract,” for instance, says Howard, an argument that has become more important in the years since *Carmen*. It’s understood by this implied contract that the ombuds will

<sup>2</sup> See “Are You Serious About Ethics?” *Conference Board Review*, July/August 2003.

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not be called to testify in court against the whistleblower and will not expose the whistleblower to management. It's like the mediator model used in arbitration, he says. When there's a settlement discussion, there's a well-established mediation 'privilege.'

An ombuds and an employee can still have off-the-record conversations with no duty on the part of the ombuds to report (except when there appears to be imminent risk of serious harm or danger), he says. At the same time, the ombuds makes clear to employees that the office "doesn't accept notices of claims against the company."

### **Defending UTC's ombuds office**

Howard has been working in this area for more than 20 years. He represented United Technologies in *Roy v. United Technologies Corporation* (1990), one of the seminal cases that established the confidentiality of ombuds' communications. Howard was appointed by the U.S. Sentencing Commission in 2002 to serve as one of 16 members to a national advisory group to review and recommend revisions to the federal Sentencing Guidelines for Organizations.

Writing "The Organizational Ombudsman" consumed every weekend for two winters, he recounts. Howard was working his "day job" throughout. He is former chair of Shipman & Goodwin's litigation department and current chair of its E-Discovery and Information Governance Group.

Accurately portraying recent changes in demographics, technology, and globalization was one large challenge in writing the book. "Finding the facts was tough." He was "fairly comfortable" with the legal part of the story.

"Ombudsman" is an elastic term, notes Howard. People often assume it is one thing—an office connected with government or public institutions. Many seem surprised than an ombuds with its implied promise of confidentiality is also appropriate for a private organization. Most of the S&P 500 companies now have compliance and/or ethics officers. A smaller percentage by far has an ombuds.

The ombuds (Howard's preferred term, but his publisher insisted on 'ombudsman,' the classic term) is a "real person,"

not a customer service representative. He typically knows well the people and the organization. Hotlines, especially if outsourced, are often run on something like a commodity basis, Howard says. "Hotlines are still built on the 'you report it, we investigate' model."

### **Must have 'no personal agenda'**

What is the best background for an ombuds? He or she must be able to speak credibly with and to a wide range of people—"with a senior manager as well as a janitor," says Howard. The ombuds must have "no personal agenda." A legal background is "terrific," but if the ombuds is a lawyer, he or she may "need some training in listening."

Personal integrity, too, is a must. The ombuds can't be perceived to have any racial or cultural biases. That said, almost every organization has a person of this description somewhere within its walls. The ombuds shouldn't be just another compliance officer or HR person, says Howard.

Howard had three basic questions in mind when he wrote the book: 1) What is it? (i.e., an ombuds office), 2) Why have it? 3) How do you do it?

The book isn't a quick read. It weighs in at 642 pages. The 14 appendixes alone encompass nearly 200 pages.

This isn't meant to deprecate these appendixes. They provide many useful examples of ombuds cases—actual cases, not composites—e.g., an ombuds helping an employee to use the hotline, an ombuds helping management to address a potentially destructive rumor, an ombuds coaching and developing trend reports to help both an individual and the organization, an ombuds encouraging a departing employee to finally disclose his or her 'concerns,' etc.

Not all these cases are monumental; not all depict situations in which an individual is "betting the company." Some are "petty little things," says Howard, but that's part of the ombuds' job, too.

"There will always be people who are reluctant to come forward," says Howard, and for them an ombuds office could be important. It doesn't take an enormous economic outlay on the part of the organization. Even large companies seldom have more than a half dozen ombudspersons.

When setting up an office, however, "You really have to document it and structure it" properly, says Howard. You have to put in the right language and document the key points so if the office's operations are challenged in court, they can be justified and defended.

You have to set up that "implied contract" right at the beginning, in other words. □

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