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Neutral, confidential corporate voice

Editor's note: Howard discusses his book on organizational ombudsmen, Writing the Official Guide to Off-the-Record Counsel, recently published by the American Bar Association.

Q. You're billed as "one of the few attorneys in the U.S. with extensive expertise in the legal issues of ombudsmen." What are ombudsmen and what are their roles in Corporate America?

A. Organizational ombudsmen are an independent, neutral, confidential and informal resource. They provide an off-the-record place for people to discuss how or where to report misconduct, ask questions, or seek guidance in finding ways to resolve workplace conflict. As such, they supplement - but do not replace - compliance officers and [human resources] personnel. They are especially effective for people who otherwise would not come forward out of fear of retaliation, uncertainty over where to go or what will be done, or because they are not sure that their suspicions are correct and do not want to start an investigation based solely on a report from them. Many people need this type of help before they are willing to make a report.

Q. The American Bar Association just published your 642-page book on ombudsmen. It seems as if this large of a book were needed, there would be more attorneys focusing on ombudsmen. Why isn't that the case?

A. The ombudsman concept was only introduced to the United States in the 1960s and has evolved in many ways since then, so that today there are different types of ombudsmen with different practices and it is often not clear what an ombudsman is or does. The purpose of the

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book was to explain the evolution of what is now known as the organizational ombudsman. The book was also intended to explain why this role is an important one for large organizations in a global economy. And finally, the book was written to address legal issues relating to organizational ombudsmen and their organizations. I believe that, over time, many more attorneys will both serve as organizational ombudsmen and represent them.

Q. The book, in part, is designed to help with alternative dispute resolution and mediation. Are both becoming more prevalent in corporations? Are both needed at companies that are non-union?

A. Absolutely. One of the central roles of an organizational ombudsman is to provide information to employees on how to resolve workplace conflict. With a diverse workforce and an increasing number of people working remotely, on part-time schedules, or only as consultants (rather than employees), an ombudsman who can help people discuss their problems and potential ways of addressing them improves the workplace environment and employee

retention as well as reduces the risk and cost of litigation.

Q. Why would a company want to start an ombudsman program, especially when companies are cutting back in a tight economy?

A. Best practices for compliance and corporate governance suggest that companies need confidential and anonymous places where employees can seek guidance on how to report misconduct and workplace conflict. Many of the tools that have been used to date - compliance officers, hotlines, and whistleblower policies - have limitations. The usefulness of the existing tools is especially limited where people are afraid of retaliation or is unsure of themselves and what they can or should do. An organizational ombudsman is a cost-effective way of filling that gap.

Q. How do "developments in criminal law, employment law, and corporate governance and regulation" affect the ombudsman position?

Legal developments in each of these areas have created pressures on organizations to implement codes of conduct, to require reporting of misconduct, and then to investigate and take action to punish or deal with any misconduct. Consequently, anyone who goes to a formal reporting channel (such as their boss, another manager, a compliance officer, or HR) cannot have an off-the-record conversation. As agents of the company, these reporting channels must act on what they hear. As a non-reporting channel, an organizational ombudsman can help address concerns or fears of someone off-the-record and help them understand what will happen when they come forward to a reporting channel with their issue. In many cases, an ombudsman can also help someone find a way to report the issue while still preserving their confidentiality. ■