RESPECT MY PRIVACY: AN ARGUMENT FOR LEGAL PROFESSIONAL PRIVILEGE IN OMBUDS COMMUNICATIONS

by

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THESIS ABSTRACT

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Since the latter part of the twentieth century there has been a push to promote the use of various forms of alternative dispute resolution to ease the pressure on America's overburdened and backlogged court system. Ombuds offices are often used as a tool to help resolve issues and disputes within organizations at an informal level. For these offices to be maximally effective they need to guarantee those who seek their assistance an extremely high degree of confidentiality. To that end, and to further the overall goal of settling disputes outside of the court system, a legally sanctioned professional privilege for ombuds communications should be implemented. The granting of this privilege would not only allow the ombudsperson to perform their duties free from concern of being forced to violate best practices, but it would also give those seeking services peace of mind that their concerns will not be made public.

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For me, but dedicated to the Potato.

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Chapter I

INTRODUCTION

Since the time of ancient Rome, it has been recognized that in certain professions and legal proceedings, there is a need for confidentiality of information. As early as 123 B.C., an advocate in a legal proceeding was disqualified from testifying against his client (American Bar Association [ABA], 1965). Information that is considered to be confidential and immune from discovery in legal proceedings is often referred to as privileged information.

Privilege has evolved since the days of the ancient Romans; however, the identifiable need for extending privilege to information exchanged in certain relationships has endured. Privilege, as we know it, was cemented into English law in the late sixteenth century. In 1576 a solicitor named Thomas Hawtry was subpoenaed to give testimony against his client. Hawtry presented to the court that he was a solicitor in the case in which he was ordered to testify and that he had received monies to represent his client. The Master of the Rolls, the second senior most judge in England, determined that based upon these facts Hawtry could not be compelled to be deposed in the case (Nollent, 2010). Privilege continued to morph and be utilized in various incarnations well into the eighteenth

and nineteenth centuries, ultimately becoming the rule of law we know today.

While information exchanged in certain professions such as between lawyers and their clients, between accountants and their clients, and between mental health counselors and their patients, has long been recognized as deserving of the protection of this privilege, there is still an extremely important profession to which this recognition has not been granted. I am speaking about the professional occupation of the ombudsperson[1]. Currently there is no law in the United States that extends privilege to the ombuds field. However, it is often argued that the work performed by an ombudsperson is equally deserving of privilege as the professions mentioned earlier. This lack of protection for the ombuds has the potential to be extremely problematic. If an ombuds is to sufficiently fulfil their role within an organization the information that is shared with them must be guaranteed legal privilege. It is not uncommon for issues that are brought before an ombuds to be of an extremely delicate nature, or be information that carries with it a certain degree of risk to the visitor. Sharing this information requires that

[1] It is not uncommon for this office to be called the office of the ombudsman, the ombudsperson, or simply, the ombuds. In this paper, I will use the terms ombudsperson or ombuds to refer to the office as well as the individuals holding the office. The term ombudsman will be used, but only when it comes from another source as such.

visitors[2] seeking an ombud's services feel secure in being completely honest and frank with the ombudsperson without fear of discovery or reprisal. The White House Task Force to Protect Students From Sexual Assault determined that confidential resources are essential to encourage individuals to speak about very sensitive matters. In their report they conclude, "If victims don't have a confidential place to go, or think an institution will launch a full-scale investigation against their wishes, many will stay silent" (International Ombudsman Association [IOA],2014). Without a legally recognized ombuds privilege, the ombudsperson can only protect the visitor's information through organizational charters and by denying requests for the divulgence of information. Ultimately, a court can compel an ombudsperson to surrender what information it has in a particular case. It is therefore imperative that a legally recognized professional privilege be granted to the ombuds field in an effort to ensure that visitors can freely supply the ombudsperson with all information necessary for them to effectively perform their duties.

In the following pages I will explore the functions of an ombuds office and the qualities that make the position deserving of a legally protected privilege. I will examine

[2] Individuals who utilize the services of the ombuds office are often referred to as visitors.

the similarities in function of the ombuds office to other positions that already enjoy the privilege and provide examples of endorsements from many powerful and respected entities that stand behind the idea of granting ombuds privilege. I will analyze existing laws and the manner in which an ombuds privilege already conforms to them, I will discuss some risks associated with not establishing ombuds organizations, and conclude with some arguments against granting an ombuds privilege.

You Need an Ombuds and You Need One Now

Since the 1980's the popularity of the ombuds profession has continued to grow. In more recent years, there has been an outpouring of support for the profession and many endorsements by corporations and government entities. These endorsements have been made in an effort to encourage the establishment of ombuds offices to better manage issues and conflicts within organizations and government entities.

In 2017 the rideshare company Uber was rocked with a series of scandals revealing everything from poor management to sexual harassment and discrimination. At the time of these problems for the company former US Attorney General Eric Holder led an investigation into the

allegations. In his subsequent report, wherein he issued his recommendations for the company, he stated that one thing Uber needed was to create an ombuds office to not only handle the problems as they arose, but to also monitor the company for problematic issues that otherwise may go unnoticed (New York Times [NYT], 2017).

More recently, in May of 2018 Seattle Mayor Jenny Durkin issued a statement in which she pledged to give serious concern to creating an ombuds office for city employees. The mayor was quoted as saying, “I can’t overnight put in an ombudsman, but I will give it deep thought. And I do have a sense of urgency” (Browning, 2018). In the months preceding this statement, Mayor Durkin was under tremendous pressure from city employees to take action against what they saw as sexual harassment and discrimination. After meeting with advocacy groups in the city the mayor determined that an ombuds office would be the most effective way to address these issues and concerns. Mayor Durkin’s faith in an ombuds office to effectively assist the city in handling delicate and complex issues demonstrates the growing understanding of the value an ombuds office can bring to an organization or government. It should be noted that this announcement by the mayor not only allowed her to show her commitment to

addressing these issues, but it also was a welcomed and accepted idea by the groups putting the most pressure on the mayor to act. This situation is unique in that it shows that not only do those in power value the services of an ombuds, but that the constituency the ombuds would serve also has faith in the ombuds ability to be effective and the necessity of the office.

In June of 2018 the former chair of the Equal Employment Opportunity Commission (EEOC), testified before a Senate Judiciary Committee. In her testimony, Jenny R. Chang stated that the current formal systems in place to address sexual misconduct within the federal court systems should be supplemented with an ombuds office. She further explained,

> In addition to robust informal complaint options through the human resources function, I recommend establishing an ombuds office as a separate mechanism for employees to raise concerns. Many federal agencies and some private companies and higher education institutions have successfully used an ombuds office to provide a safe and respectful case manager approach, offering credible options in a manner that builds trust within the organization. The ombuds office helps to brainstorm and identify potential

> solutions, yet the process does not constitute a formal complaint that puts the employer on notice or trigger an investigation that will likely notify the harasser of the nature of the allegations. This type of confidential process enables the employee to be the driver of the process in determining the approach she or he is most comfortable pursuing (Senate Committee on the Judiciary, 2018).

Even relatively new and still developing industries have expressed the need for establishing ombuds offices to foster fair and equitable workplace environments. In March of this year Andy Williams, a leader in the blossoming marijuana industry, wrote an article in which he expressed the need for the industry to proactively prevent harassment. Part of his suggestion in doing this is the creation of ombuds offices. In his article he states, "For some companies, this may even mean hiring an organizational ombudsman to ensure independent, impartial and confidential investigation and resolution of employee misconduct complaints — a move my chain of Medicine Man dispensaries is currently contemplating"(Williams, 2018). Mr. Williams' comments on this issue show a recognized need for establishing ombuds offices in a proactive manner, rather than waiting until there is a crisis that needs to be

managed. The statement also demonstrates a widespread understanding of the public and business leaders that an ombuds office is to be confidential. This awareness shows that there exists an attitude and opinion in parts of the business community that ombuds offices have a place in most every organization and that their services are to be confidential and they are worth the effort and expense associated with establishing and maintaining them.

CHAPTER II

WHAT IS AN OMBUDS?

As the congestion within the U.S. court system continues to grow, it is taking longer and longer for cases to move through the justice system. In response to this ever-increasing problem, many alternative dispute resolution (ADR) methods and techniques are being deployed to help alleviate some of the pressure on the courts. One such ADR tool is the office of the organizational ombuds[3]. An ombuds is a neutral party within an organization that works with the members of the organization, and sometimes third parties outside the organization, to resolve problems and conflicts in an informal and confidential manner. Statistics show that use of an ombuds within an organization may help to not only effectively solve the inevitable disputes that frequently arise, but also help to prevent unethical conduct within the organization (Spanheimer, 2012). In a study conducted in 2014, 263 cross-cultural employees were surveyed on their level of trust with dispute resolution processes. The results indicate that 37.8% of the employees would trust their internal dispute resolution process to address their

[3] There are generally three types of ombuds that all perform different functions. When ombuds is referenced in this paper it will be in reference to the office of the organizational ombuds.

problems, whereas 65% would feel comfortable with a neutral third party to help resolve their dispute (Isaac, 2014). This is a clear demonstration of the need and potential efficacy of the ombuds office.

In addition to the function the ombuds serves as a resolver of conflict and problem solver, the office has another role that is equally as important. Through the course of their work, the ombuds office also identifies trends within an organization. These trends are carefully tracked by the ombuds and if it is determined that there is a recurring issue, the ombuds office will report this trend to the highest possible authority within the organization. The reporting of these issues can result in formal investigations, policy changes, or personnel changes; all of which are aimed at solving the problem at hand and improving the conditions within the organization. It is through this tracking and reporting that an ombuds office can help detect, resolve, and discourage unethical or dangerous practices in an organization.

Why is an Ombuds so Special?

What makes an ombuds office unique and deserving of a legally sanctioned privilege is the importance that confidentiality plays in the execution of an ombud's

duties. The International Ombudsman Association (IOA) is the most widely recognized authority guiding the operational practices and standards of organizational ombuds offices around the globe. The IOA has identified four primary tenants of the ombuds field, confidentiality, neutrality, independence, and informality (IOA, 2009). An ombuds office is to remain neutral in all of its dealings, it is to operate independently from the organization that it serves, it is to be an informal office conducting no formal investigations and triggering no formal processes, and all communications with an ombuds must be guarded with the strictest of confidentialities.

As a place where individuals can come and freely discuss their issues, seeking sound advice on how to improve them, it is an absolute must that the communication with the ombuds office be confidential and protected. If an ombuds is to effectively help an individual, it is imperative that the visitor be comfortable divulging high-risk information. If a visitor is not guaranteed confidentiality, it is unlikely that they will share with the ombuds the most sensitive parts of their issue. This can render the ombuds office ineffectual in assisting the visitor, as the advice that will be given is distilled from

a partial representation of the problem not the problem in its entirety.

It is not only the IOA that has recognized and endorsed the importance and effectiveness of ombuds offices. The American Bar Association (ABA) has advocated for the use of ombuds offices in organizations to further the use of ADR. Since 1969 the ABA has repeatedly published resolutions intended to encourage the use of ombuds offices in both public and private sectors and to bolster the legitimacy and importance of these offices. The ABA not only endorses and encourages the use of ombuds offices, they have also taken steps to officially and clearly define who can be considered to be an ombudsperson and the rights and privileges that should be afforded the office and its holder. The ABA defines Ombudsman as, a person who is authorized to receive complaints or questions confidentially about alleged acts, omissions, improprieties, and broader, systemic problems within the ombudsman's defined jurisdiction to address, investigate, or otherwise examine these issues independently and impartially (Kuta, 2003).

The ABA goes on to further define twelve essential characteristics of the classical ombudsman which include: 1) Authority of the ombudsman to criticize all agencies,

officials, and public employees except courts and their personnel…; 2) Independence of the ombudsman from control by any other officer…; 3) Appointment by the legislative body or executive authority…; 4) Independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause…; 5) A high salary equivalent to that of a designated top officer; 6) Freedom of the ombudsman to employ his own assistants and to delegate to them, without restrictions of civil service and classifications acts; 7) Freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; 8) Access of the ombudsman to all public records he finds relevant to an investigation; 9) Authority to inquire into fairness, correctness, of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; 10) Discretionary power to determine what complaints to investigate and to determine what criticisms to make or publicize; 11) Opportunity for any public official criticized by the ombudsman to know of it in advance; 12) Immunity of the ombudsman and his staff from civil liability on account of official action (Kuta, 2003).

These definitions and the statement that the ombuds should be a confidential resource for individuals, puts the ABA and its recommendations squarely behind the support of a legal privilege for the communication between an ombuds and their visitors. It is clear from this endorsement that the preeminent organization that represents lawyers and the law, understands the seriousness of confidential communications between ombudspersons and their visitors. While the endorsement of ombuds guidelines by the ABA carries no real legal power to enforce its recommendations, what it does do is provide a framework and a working set of guidelines for organizations, jurisdictions, and states to establish offices according to the best practices endorsed by what is considered to be an organization that is known for its commitment to upholding sound judicial policy and fair legislative operations.

In addition to the IOA and the ABA, the Administrative Conference of the United States (ACUS) also very strongly endorses the use of ombuds offices with a focus on their utility in government agencies. ACUS is an independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure (Administrative Conference of the United States

[ACUS], 2016). In December of 2016 the agency adopted and published recommendation 2016-5. This report expanded and improved upon a recommendation from 1990 and roundly endorses the establishment of ombuds offices. On the topic of confidentiality as it pertains to ombuds offices, the new recommendation states,

> …requirements for confidentiality attach to communications that occur at intake and continue until the issue has been resolved or is otherwise no longer being handled by the ombuds, whether or not the constituent ever engages in mediation facilitated by the ombuds office. Restrictions on disclosure of such communications, however, should not cease with the issue resolution or other indicia of closure within the ombuds office (ACUS, 2016).

It is clear from these strong endorsements from such powerful entities, that the position of the ombuds office and its communications is deserving of a legally recognized privilege. These statements of support also speak to the uniqueness of the ombuds profession and help us to understand why the office is different from other offices within an organization. They help us understand why the ombuds should be distinguished and set apart from the rest

of the organization that does not require such stringent demands on confidentiality.

CHAPTER III

WE'RE NOT SO DIFFERENT YOU AND I

There is a strong argument to be made, in defense of creating a privilege for ombuds work, that the ombuds office performs functions that are similar to other professions that currently enjoy the protection of privilege. Perhaps the best suited example is that of the privilege of information in mediation proceedings.

The Uniform Mediation Act (UMA), which was approved by the National Conference of Commissioners on Uniform State Laws in 2001 and amended in 2003 defines mediation as, "…a process by which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." It further goes on to define a mediator as, "an individual who conducts mediation" (Howard, 2010, p. 348). A common argument for creating a legal professional privilege for ombuds communications is the fact that mediation is part of the job duties an ombudsperson must perform. Therefore, as Spanheimer (2012) states speaking on the similarity of some of the ombuds duties to that of a mediator, "…because an ombudsman privilege would be exceptionally similar to another currently recognized privilege and evidentiary exclusion, creating an ombudsman privilege is not "a wholly

new privilege" or even a "big step" (p. 12). Indeed, because mediation is so broadly defined, one could make the argument that while formal sit-down mediations do not generally happen on a daily basis in an ombuds office, through the loose definition of mediation, almost all of an ombuds duties could fall into this category.

It would be remiss to compare ombuds work too closely to the work done by what is considered a traditional mediator. There are at least two major differences between the work done by a mediator and the work done by an organizational ombuds and these distinctions can make the ombudsperson a more effective mediator. One distinction to be made is the position that the ombudsperson holds within the organization. By virtue of this association, the ombudsperson has more opportunities and avenues available to them to assist the parties in dispute to resolution. The ombudsperson will have access to organizational structures, policies, and personnel that a traditional mediator would not. While a mediator may help guide and even suggest possible avenues to resolution, the ombudsperson wields additional tools that can make for better resolutions for all parties involved within the organization.

The other major difference between traditional mediation and ombuds work is the ability of the

ombudsperson to affect change within an organization. While the ombuds office holds no power to dictate change or impose sanctions, it does have the power and the responsibility to report on issues and problems within the organization that it identifies as trends. In so doing, this gives the ombudsperson a unique ability to illuminate problems within the organization and make others who do have the power to mandate change aware of potential serious concerns. With this upward flow of information, the ombudsperson is also better able to follow-up on recommendations and commitments to confirm their adherence, whereas a traditional mediator would not be able to do so. These distinctions should not detract from the argument being made that the mediation privilege should be extended to ombuds work. The expansion in ombuds abilities only strengthens their effectiveness as mediators and agents of ADR and should be taken as evidence to strengthen the argument. The aforementioned differences between the professions are differences of form not of function.

With so many similarities in duties between a mediator and the office of the ombuds it becomes clear that the protection afforded communications in mediation should also cover the communications with an ombuds. If the resolution of differences and solving of conflicts through mediation

is so widely recognized as deserving of legal privilege, so too then should be the communications with the ombuds, as they are providing these same services as part of their daily duties.

This privilege of communication in mediation is so highly valued that 12 states have officially adopted the recommendations set forth in the UMA and two new states introduced legislation to adopt the UMA policies in 2018 (Uniform Law Commission, 2018). It has also been officially endorsed by a number of organizations, such as the American Bar Association, the American Arbitration Association, and the Judicial Arbitration and Mediation Service. The UMA holds that their statutes cover all mediations, with few exceptions, regardless of whether the parties have signed an agreement to mediate or have been referred by a court or agency (Howard, 2010, p. 348-9). This declaration by the UMA of the strength of the mediation privilege further demonstrates the necessity for an extension of this privilege to the ombuds profession. As both processes seek to achieve mutually agreeable resolution to disputes, the frankness and candor that is encouraged through a protected privilege is of paramount importance to both professions.

Further endorsing the value of mediation privilege is the decision of the court in Venture Investment Placement

v. Hall. The court granted an interlocutory injunction to prevent a party from disclosing to any other person any part of the discussions that took place in the course of the mediation process. The court emphasized that,

> Mediation proceedings do have to be guarded with great care. The whole point of mediation proceedings is that the parties can be frank and open with each other, and that what is revealed in the course of the mediation proceedings is not to be used for or against either party in the litigation if mediations fail (Bankin, 2011, p. 329).

The manner in which the court addresses the privilege in this decision highlights the similar requirements of confidentiality that are of chief concern in both professions. For an ombudsperson and its office to effectively serve its population, the frankness and openness referred to in the above judicial statement must sit at the core of the ombuds profession and it must be legally protected.

CHAPTER IV

AN OUNCE OF PREVENTION…

Corporations and government agencies have long been experiencing the backlash and public relations nightmares that are associated with internal abuses being exposed to the public. This is reflected in the recent #MeToo movement that has swept the nation. It seems that organizations in America take a damage control approach to internal abuses rather than proactively implementing offices and procedures that could prevent the damage from occurring in the first place. This is an aspect of running an organization in which an ombuds office could be extremely useful. Only an office that is completely confidential can provide employees with the outlet they need to expose highly sensitive and risky information that may reveal potential abuses within an organization.

There is a myriad of issues that an organization could face if they operate without the benefit of an ombudsperson. One such issue can be a lack of trust in the organization by those who work for it. If employees have no informal and confidential process by which to address grievances or problems, the organization can be seen to be uncaring toward its staff. There can also be a perception that one cannot trust an organization to do what is in the

employee's best interest if the organization is policing itself. While most entities have a human resources department that employees can utilize, these offices are general viewed as punitive departments and certainly are not perceived to be confidential. Jenny Yang further testified that in her study of the justice department, about 70% of individuals experiencing harassment in the workplace did not report it due to a lack of confidence that the responses to their complaints would be effective (Senate Committee on the Judiciary, 2018).

Another reason that human resources is not the best method of reporting harassment in the workplace is the fear, and sometimes reality, of retaliation. Again, in Yang's testimony she reports that 75% of individuals who spoke about workplace mistreatment also reported experiencing retaliation (Senate Committee on the Judiciary, 2018). Many individuals who report, also do not feel that they see effective action taken on their complaints. If no effective action is taken in response to harassment complaints then harassment is allowed to continue and perhaps even flourish. If there was a confidential ombuds office in place in this organization, staff would have a secure place to come and discuss the harassment they experience. Moreover, they would be

utilizing an office that would follow up on the complaints in the form of reaching out to those with the power to effect change, with the visitor's permission to do so, or through anonymous upward reporting of the patterns of abuse.

An additional argument for preemptively creating a confidential ombuds office is the informality of the ombuds profession. Most avenues available to employees for addressing concerns are formalized and often adversarial processes. What is desperately needed in most every organization is a place where people can go and discuss their issues without triggering any formal process. There is a tremendous need for these confidential resources that can assist an individual in assessing the situation, exploring possible options, gaining an understanding of what a formal process would look like, and an impartial ear to listen to their experiences. This is the ideal situation for an ombuds as this is their primary purpose. The ombuds office provides a safe and confidential space for one to unload all they are feeling, their concerns and fears, and to do so without bringing about processes or action that they may not be ready to face. It is worthwhile to note here that through the use of an ombuds services, many issues can be resolved without ever using the formal

grievance processes that may be in place. In many cases the ombuds can help to resolve an issue while it is at a lower level of conflict, thus preventing an issue from escalating to the level of formal action. This would benefit both the company and the employee.

Time and Money Not so Well Spent

In addition to the aforementioned problems that an ombuds office can help an entity avoid regarding confidence in the organization by its employees, the ombuds can be effective in avoiding other potential risks. No organization wants to get involved in litigation with a disgruntled employee. Likewise, no employee wants to spend years navigating the legal system to get the justice they feel they deserve. Through the mediation, facilitated discussions, and upward feedback the ombuds office conducts, it is possible to avoid litigation. Through the assistance of the ombuds a mutually agreeable solution can be reached between parties that can render litigation unnecessary. This saves all parties involved countless hours and financial resources. For this to be effective; however, all work performed by the ombuds must be completely confidential and free from discovery should a legal proceeding come to pass regardless. If a confidential

ombuds resource is available to all individuals within an organization, the public relations firestorms that we see all too often in the media also have a good chance of being avoided and resolved in house. Required again in this instance is the legal privilege that the ombuds profession deserves.

One final topic of discussion in advocating for creating ombuds offices as a preventative measure, is the financial costs that conflict can bring upon an organization. A 2014 study indicates that in punitive damages for racial discrimination cases alone, companies on average are being penalized to the tune of $6.4 million annually. There are also the costs of staff turnover to be considered. When an employee does not feel like their issues are heard, respected, and genuinely addressed they will often times change their place of employment. The estimated cost of this turnover with hiring and training new workers is estimated at 150% of the employee's salary. It is also estimated that the average employee spends approximately 2.8 hours per week dealing with conflict. For the fiscal year 2008, if these hours spent dealing with conflict are calculated at a rate of $17.95 per hour, that is approximately $359 billion paid for hours that are not spent producing work (Isaac, 2014). It must be reiterated

once again that the confidentiality aspect of the ombuds office is what makes most visitors comfortable enough to come to the office and utilize the service. Widespread utilization of ombuds services is crucial in helping to allay some of these costs.

While the above figures illustrate some of the costs associated with legal proceedings and turnover of employees, it can be difficult to precisely measure the cost savings that an ombuds office provides for an institution. However, many institutions report reduced instances of litigation and staff turnover which we have already seen can be quite costly. The difficulty in concretely identifying cost savings should not be used to assume that they do not exist. The difficulty in tracking is attributed to the policies on not preserving records or identifying information on cases the offices handle.

Fortunately, in a report written by Sue Theiss on the value her ombuds office provides for Oregon State University, she gives us a unique example of two very similar cases that were handled in completely different ways. While the cases are not from her office specifically, they illustrate the vast savings an ombuds office can provide. The illustrative cases are two employee relations cases where both employees were demoted in response to

retaliatory actions. One employee was offered an in-house investigation and handling of the issue while the other employee chose to pursue litigation. The case that was handled in-house and ended up costing the organization $17,500. In comparison, the case that went to litigation took much longer to resolve and the total cost to the organization was $1,040,000. While every case is different, these two similar cases can demonstrate the value of the informal services an ombuds office can provide. (Theiss, 2014)

CHAPTER V

EXISTING LAWS MAKE ROOM FOR AN OMBUDS PRIVILEGE

Creating an entirely new legal privilege is not a thing that should ever be taken lightly. There is a long-standing concept in the law that the public has the right to every man's evidence. It is through this concept that our system allows for the discovery of evidence which leads to the transparency that makes our legal system work. While this idea may be well engrained in the legal psyche of American law, there are instances wherein this sentiment simply should not, and by law in some jurisdictions, does not, apply. First, we will look at examples of states within the U.S. that have already granted some legal protections for ombuds communications.

Hawaii was the first state to establish a state-wide public ombudsman. Hawaii's statute stipulates, "the ombudsman and the ombudsman staff shall not testify in any court with respect to matters coming to their attention in the exercise or purported exercise of their official duties" (Kuta, 2003). Likewise, Alaska has created an ombuds office to investigate certain complaints about the state's administrative agencies and provides those ombuds with a privilege not to testify about matters within the scope of their duties. Oregon has also created an ombuds

office to deal with the department of corrections and more specifically, the complaints of incarcerated individuals (Howard & Gulluni, 2010). In this instance as well, the ombuds is protected from testifying in court and from being required to produce documents.

Iowa and Nebraska have both created public sector ombuds programs to monitor governmental agencies. In both of these states the statutes that establish the offices have also established a legal privilege for the office's communications. In both states the provisions for the privilege expressly command that neither the ombuds nor the ombuds staff will be compelled to testify or produce evidence in any judicial or administrative proceeding regarding matters relating to the ombuds official capacity (Kuta, 2003).

While these states have essentially created blanket protections for ombuds communications, other states have fallen short of this but have created limited protections in certain ombuds functions. Washington state has created an ombuds office to ensure equitable treatment within its department of family and children's services. In this case, the provision is the same as the Iowa and Nebraska statutes. The ombuds and its staff cannot be compelled to testify or present evidence in any judiciary hearing

providing the information is directly related to the ombuds duties. Indiana and Montana have created limited protections as well but they differ in their scope. Both offices were created to work within the public mental health sector of the government. While Indiana extends the same strictly enforced privilege of information as Iowa and Nebraska, Montana does not protect the privilege so completely. Montana prohibits the disclosure of ombuds records but only unless, "a court has determined that certain information is subject to compulsory legal process or discovery because the party seeking the information has demonstrated that there is a compelling state interest that outweighs the individual's privacy interest" (Kuta, 2003). While there remains no federally endorsed protection for the communications between an ombuds and their visitors, it is clear from the steps that these states have taken that there is a tremendous amount of benefit to be gained by protecting the ombuds doctrine of confidentiality.

How is This Protection Legally Justified?

Without doubt, the best way to establish a privilege that will be upheld by a court is to create the privilege through a statute. When that is not possible, or should an attempt to create such a statute fail, there are Federal

Rules of Evidence that can help guide a court through the decision-making process as to whether or not information in the case before them should be granted privilege. One such rule is Federal Rule of Evidence 501. The pertinent portion of rule 501 states,

> Except 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, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. (Kuta, 2003).

As it turns out, the phrase “in light of reason and experience” would prove to be the preferred manner in which courts decide on privilege in cases.

Prior to the adoption of Federal Rule of Evidence 501, both chambers of congress held hearings to discuss just

what the scope of federal privilege would be. The Supreme Court had previously handed down Article V regarding privileged information, and this article was heavily scrutinized by the Congressional committees and was also reviewed by a corresponding House committee. The findings of the committees and their recommendation to the House and the Senate was to officially recognize nine non-constitutional privileges that would be mandatorily upheld by federal courts. The privileges included required reports, those between a lawyer and a client, a psychotherapist and a patient, communications between a husband and wife, communications to clergymen, political vote, trade secrets, secrets of state, and other official information, and the identity of informants (Kuta, 2003).

When these recommendations were presented to the House for adoption they were flatly refused. The House was wisely contemplating the potential legal problems in the future if there were only nine federally recognized instances in which privilege could be guaranteed. The House determined instead to adopt the current version of Federal Rule of Evidence 501, relying heavily on the idea of “reason and experience”. The House felt that allowing privilege to only nine different instances was simply thinking too narrowly. They wanted the court system to have the flexibility and

the authority to grant privilege where reason and experience told them it was appropriate. This is a clear endorsement by the House that the law should continue to evolve and change with the times and that the federal government should continue to allow privilege to be granted where it seemed appropriate rather than being allowed to only uphold it in the aforementioned nine instances. The House's stance on this issue also allowed for states to have some freedom and authority over the granting of privilege in their own jurisdictions. If a state feels that it needs to protect certain types of information or communications, and there is no federal law prohibiting it, they can then create their own statute to grant that protection for the citizens of that state.

At the same time the House and Congressional committees were debating this issue, a Senate committee was doing so as well. This committee also recommended that the same nine non-constitutional privileges should be adopted. However, the Senate reflected the opinions and concerns of the House and rejected the proposal for much the same reasons. Once again, the governing bodies of the United States were choosing to rely on reason and experience rather than lock down privilege to a select few relationships. The Senate also made a point of stating that

simply because it was eliminating the named requested privileged relationships, that it did not imply or intend to communicate that those specific nine relationships did not deserve the protection of privilege, nor that they should now be afforded less protection (Kuta, 2003). These decisions are so important to the pursuit of a privilege for ombuds communications as they allow Federal Rule of Evidence 501 to be the guiding principle behind granting privilege. This gives the courts more discretion and makes it their purview to decide what reason and experience require with regard to ombuds privilege.

Upon examining how an ombuds office works and the efficacy of the offices, reason would tell us that an informal approach to conflict resolution, relying on the confidentiality of the information exchanged in said effort, is the preferable route to exploring settlement. Likewise, experience would tell us the same. Surveys of visitors who have used an ombuds services report an extremely high satisfaction rate and also indicate that using the ombuds office prevented them from having to take more formal approaches to resolving their issues. If reason and experience are the yard stick by which we gauge the appropriateness of privilege, then the ombuds office is the rule of measure.

Another argument that is often used to uphold privilege in the ombuds role is Federal Rule of Evidence 408. This rule is concerned with the exclusion of settlement negotiations in court proceedings. Rule 408 states the following, "…any evidence of conduct or statement[s] made in compromise negotiations regarding the claim, is not admissible at trial" (Spanheimer, 2012). Owing to the fact that a large part of what an ombuds does is attempt to reach negotiated agreements between parties, the ombuds work can easily fit into the definition as described in rule 408. It is quite common for an ombuds to handle various workplace disputes between employees and their peers as well as their supervisors and department heads. The ombuds role in these situations is often to negotiate an agreement between the parties that can allow the working relationship to continue and keep the matter out of litigation if it could escalate to such a height. This is what Federal Rule of Evidence 408 is all about. It is designed to encourage the settlement of disputes outside of the courtroom. It is impossible to deny that the US court system is absolutely choked with cases, some taking so long to be heard that settlement is often the preferred way of dealing with them. Rule 408 ensures that should parties attempt to negotiate an agreement rather than going

to court, they can do so, and pursue this option in frankness and confidence that the negotiations cannot later be used in court proceedings to damage their position.

The ombuds role as a settlement negotiator fits squarely within the scope of rule 408 and should therefore be protected from court proceedings as it is furthering the goal of the rule, to encourage out of court settlements. One could argue that the role of an ombuds actually furthers the spirit of the rule, works in direct support of the goals of the rule, and therefore should be protected by the rule.

It is clear from the rules of evidence that are currently in place, along with the examples of the many states that already protect ombuds communications, that there is a place for this privilege in our legal system as it currently exists. Creating a legal privilege for ombuds communications would alter no existing laws, it would simply expand the instances in which the law is applied.

CHAPTER VI

CONFIDENTIALITY DOES NOT MEAN SECRECY

There are many arguments made against granting ombuds the legally sanctioned privilege the offices require. Most of these objections are either born from a lack of understanding of the ombuds role within an organization, or they are politically motivated as transparency is often given very high regard in America. In this chapter I will discuss a few of the more common arguments against granting a legally recognized privilege.

There can be a general lack of understanding among the lay public regarding the limitations of legal privilege. For those who are not lawyers or familiar with the way privilege works, privilege may seem absolute and unbreakable. This simply is not the case. Any type of legally sanctioned confidentiality can, in fact, be breached. One way in which this is done is through the use of what is called an “in-camera” hearing. An in-camera hearing is a hearing that is held in private with a presiding judge. The judge is presented with the facts and circumstances of the case or issue at hand. There are no witnesses presented and no testimony given during these hearings. The judge is given the facts of the case and presented with the argument as to why one side feels that

the covenant of confidentiality should be broken. If the judge determines, through the evidence presented, that the greater good of the whole outweighs the benefits to the individual holding the privilege, then the judge can break the seal of confidentiality and allow the protected communications into the court and the official record.

There is little to no validity in the argument that once privilege is granted, all information will be secretive and remain buried. There is always the option of having an in-camera hearing with a judge and making a case to have the communications made public.

There are some who view the ombuds claim to confidentiality as problematic because of the lack of oversight and transparency in the day to day operations of the office. However, this independence from the organization that it serves is part of the IOA's standards of best practices. This argument also needs to be countered with the fact that the ombuds is responsible for making regular reports to the highest possible official within an organization. These reports are to present aggregate data that details the work the office has performed. Jenny Yang addressed this argument in her testimony to the Senate,

> A trusted confidential process can encourage more people to come forward to share workplace concerns. It

> does not mean forgoing transparency and an informal process need not become a mechanism to hide problems within an organization. To ensure accountability and transparency, the ombuds office should provide annual or other regular reporting of the nature and location of complaints without revealing the identity of the parties involved (Senate Committee on the Judiciary, 2018).

The argument that utilizing an ombuds as a confidential resource will only serve to shroud problems in secrecy is simply not valid. The ombuds offices are structured in such a way that oversight is built into their systems and reported on a regular basis.

Perhaps the most sensitive argument against such strict confidentiality in ombuds practices is related to sexual harassment and assault. This is of particular concern on college campuses around the country. Due to federal laws that are aimed at protecting students on college campuses from sexual assault, there are individuals who believe that no office on a college campus should keep sexual assault confidential and that everyone on campus should be mandated to report these incidents.

In 1972, new education amendments were passed. Part of these amendments is what is known as Title IX. Title IX is

a civil rights law that was amended in the 1990's to require schools to respond appropriately to reports of sexual harassment and abuse. As a result, colleges have enacted robust programs to adhere to the law, to keep their students safe, and to increase reporting and action on these accusations. With the increase in public awareness of sexual misconduct both on campuses and in the business world, these programs have become even more rigorous. Prohibiting ombuds offices from being exempt from reporting these incidents is not necessary for these programs to be effective. In 2014 the Office of the President released *Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault.* In that document, the White House Task Force emphasized the importance of providing victims of sexual violence with confidential resources for consultation, advise, and support. The report notes that victims of sexual assault want time and privacy to sort through their next steps and having a confidential place to go can mean the difference between getting help and staying silent (IOA, 2016). It is clear from the directions given in the white House report that the intent was never to require every office in an institution to mandatorily report these assaults. Quite the contrary, the report recommends that there be confidential avenues

available to students that will allow them to discuss, strategize, and decide for themselves if a formal process is right for them.

In rebutting this counter argument to the ombuds claim to confidentiality regarding Title IX, people must be made to understand that if an individual who has experienced sexual assault has nowhere to go other than an office that will trigger a formal process or investigation, the likelihood that they will do nothing and seek no help at all may drastically increase.

It is worth noting that the report also designates resources such as clergy and mental health counselors as designated confidential resources. However, the report also encourages campuses to appoint other resources as confidential as well (IOA, 2016). Not every victim of sexual assault will feel comfortable talking to a member of the clergy or even a psychologist. They may; however, feel comfortable talking to a trained professional who is independent from the institution and who is proficient in locating resources, brainstorming options, and one who can walk with them every step of the way through the formal process if they should choose to do so. That highly trained and compassionate professional is the organizational ombudsperson and their commitment to confidentiality is a

virtue that is dedicated to the constituency that they serve.

CHAPTER VII

CONCLUSION

As our modern world continues to spiral more and more out of control, as conflicts between people, nations, and organizational entities continually progress, fewer avenues of resolving conflict is the last thing we need. What is needed are more confidential resources that can assist people in exploring options, understanding processes, and resources that empower individuals to move forward on their own terms. The most effective, efficient, and preferable resource to provide these services is the office of the ombuds. By extending a legally recognized professional privilege to the ombuds profession we are empowering the office of the ombuds to fully serve its constituency, the organizations it serves and the visitors it assists. At the same time, we would be allowing those who use the office to take and maintain control of their own path through what may be very difficult times in their lives.

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