

## DOCUMENTS--

### **Suggestions on The Creation, Maintenance, and Destruction of Documents**

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When I describe to clients or witnesses how lawyers prosecute or defend a case, I often use a construction analogy. I say that lawyers build cases with documents and testimony. Documents are the basic building blocks, with their often contemporaneous reflection of events; and testimony from witnesses, like mortar, is what connects the documents to each other and helps them form a structure--a successful claim or defense. Documents are thus an important part of any lawsuit because they are frequently the foundation upon which a case is built. When an ombuds office becomes implicated in a lawsuit, however, documents assume an even greater role. Lawyers for at least the plaintiff will closely examine all nonconfidential documents concerning the ombuds office and will often seek to obtain all confidential documents. Meanwhile, ombuds generally try not to create many documents, and they assert a privilege for any remaining confidential documents that might exist.<sup>1</sup>

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<sup>1</sup> See TOA Standards of Practice §§2.3, 2.4, 3, 3.1, 3.2, 3.3, 3.4

2.3 Any data that we prepare should be scrutinized carefully to safeguard the identity of each individual whose concerns are represented.

2.4 Publicity about our office conveys the confidential nature of our work.

3. We assert that there is a privilege with respect to communications with the ombudsman and we resist testifying in any formal process inside or outside the organization.

3.1 Communications between an ombudsman and others (made while the ombudsman is serving in that capacity) are considered privileged. Others cannot waive this privilege.

3.2 We do not serve in any additional function in the organization which would undermine the privileged nature of our work (such as compliance officer, arbitrator, etc.)

3.3 An ombudsman keeps no case records on behalf of the organization. If an ombudsman finds case notes necessary to manage the work, the ombudsman should establish and follow a consistent and standard practice for the destruction of any such written notes.

Because of the inevitable conflict between the plaintiff's lawyer who wants disclosure of all information and the ombuds who wants to prevent disclosure of confidential information, ombuds should thoroughly review of all documents that relate to their office, including (1) documents that create or establish the program; (2) documents that describe it to the various constituencies of the office; (3) documents that are kept by the office; and (4) documents created or kept by others outside the ombuds office that relate to the ombuds' role or confidential communications. Ideally, this review should take place *before* the office becomes involved in a lawsuit. Not only may an ombuds office avoid the negative impact any such documents may have, an ombuds may create documents that have a positive impact in proving entitlement to the ombuds privilege.

By offering these suggestions, I am only trying to highlight areas for further evaluation. Specific legal advice, of course, always depends on an analysis of the specific facts of a matter and the relevant law. I am, however, indebted to Randy Williams, Ombudsperson of American Express Company, for giving me permission to share in this forum some of the principles that the American Express Ombudspersons and I developed a couple of years ago for their practice. And, finally, I want to point out that these comments are prepared from the perspective of a corporate ombuds program, with which I have experience, and may or may not apply to governmental or other ombuds programs.

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3.4 When necessary, the ombudsman's office will seek judicial protection for staff and records of the office. It may be necessary to seek representation by separate legal counsel to protect the privilege of the office.

(1) Documents creating an ombuds program

One might at first blush assume that if an ombuds program is already established, it is too late to do anything about the documents in this category. But it is never too late.

Documents creating an ombuds program can often be amended or revised or additional documents created. For example, even if the original job description or employment agreement did not emphasize confidentiality, neutrality or independence, a new one with provisions on these topics can be prepared. Since these documents are often the "charter" for the ombuds program, they are especially important. These documents, therefore, should emphasize the following:

- Why the program was created and why this is important to the organization;
- What the scope of the ombuds office is and how it is expected to operate;
- To whom an ombuds reports and how this enables an ombuds to have access to senior management without compromising independence;
- That the program is independent, neutral, confidential, and not an official channel for placing the organization on notice;
- What the specific program features are that promote independence, confidentiality, and neutrality;
- Whether there are additional bases for a claim of confidentiality, such as a contractual basis or applicable statutes relating to the confidentiality of alternate dispute resolution or mediation proceedings;
- If there are exceptions to absolute confidentiality, what the exceptions are and who decides when they are applicable; and

- That the ombuds program helps employees report matters without fear of retaliation and thus helps the organization have a reporting system that complies with the U. S. Sentencing Commission Guidelines.

If all the documents establishing the ombuds office are reviewed and are found not to address any of the topics or issues noted above, an ombuds should consider creating additional documentation to make sure that all of these points are addressed.

(2) Publicity concerning an ombuds program

Publicity about an ombuds program, especially in large, multi-site corporations is critically important. This publicity may include posters, letters, speeches, newsletter items, brochures, videotapes, intranet bulletin boards, business cards or many other ways to communicate to employees. If an ombuds office does not communicate its existence and role in all of these ways, it should consider doing so. Moreover, each these media must present a consistent message--as if it were a mantra--on the core elements of the ombuds role: that it is neutral, confidential, independent, informal and not a channel for placing the organization on notice or for the organization to take disciplinary or remedial action. While some forms of publicity (such as a speech or a newsletter item) may present the opportunity to expand on these concepts, virtually every publicity document should address these core elements. If it does not do so now, it should be replaced with ones that do.

A couple of recent experiences illustrate these points. In one instance, an ombuds was deposed about a brochure which referred to the ombuds office, among other things, but neglected to mention confidentiality. This was the only brochure identified by the plaintiff, and the fact that the organization had emphasized the office's confidentiality in a multitude of

other places and in other documents appeared irrelevant. After all, an employee may only read one document; we cannot assume that he or she will read them all. In another instance, a brochure described the types of matters that could be brought to the ombuds attention and specifically referred to discrimination and harassment claims. While other brochures clearly indicated that the ombuds office was not an official reporting channel, this brochure did not make that distinction, thus arguably creating the impression that the ombuds was an official reporting channel.

A similar concern relates to how ombuds offices are referred to in an organization's code of ethics or business code. The ones that make no references to an ombuds program are missing a valuable opportunity to emphasize the value of the office. However, the ones that say that violations of the code may be reported to an ombuds--without also mentioning that the ombuds office is not a channel of official notice to the organization--are running the risk that a court might consider a communication with an ombuds to be notice to the organization.

With these considerations in mind, a good exercise for ombuds is to gather all of the documents about the office and to review them, one by one, to make sure that each publicity piece--assuming that is all a particular individual may have had--adequately describes the core function of the office.

### (3) Ombuds documents

Let's now turn to what goes on inside the ombuds office. Most ombuds accept it as an article of faith that they should create as few records as possible and then routinely destroy all records that might reveal individual confidential communications. Yet, this approach still leaves many unanswered questions on when documents or correspondence should be kept,

returned or destroyed. While the "charter" of a particular ombuds office may suggest or require a different approach, here are some guiding principles to help answer these questions:

- Correspondence from a lawyer or source that clearly reveals a matter being raised outside the jurisdiction of the office should be returned to the sender. This can be done with a simple form enclosure or a telephone call stating that the matter is not within the jurisdiction of the office. A similar approach should be taken with correspondence or documents asserting claims against the organization by someone who misperceives the function of the office.
- Correspondence or documents sent to others but which indicate that a copy is sent to the ombuds office (or vice versa) should be destroyed routinely since such communications may not be privileged. An ombuds may wish to contact the writer to indicate that the office is unable to deal with inquiries when copies of written documents are sent elsewhere or copied to the ombuds.
- Ombuds should avoid, if possible, being the conduit for giving notice to the organization of harassment, discrimination or similar claims. Accordingly, great care should be exercised in what is said to a manager on these issues and documents from an inquirer should not be forwarded to these channels by the ombuds.
- E-mails containing substantive information from an ombuds should be avoided. Efforts should be made to discourage inquirers from using e-mails to convey substantive information to an ombuds. Often, it may be appropriate to send a form reply e-mail advising the inquirer not to use this means of communication.

- Documents created by the ombuds (case notes, for instance) should be labeled "CONFIDENTIAL AND PRIVILEGED." A preprinted form is often useful for this purpose. Presumably these documents are routinely destroyed soon after a matter is closed.
- Ombuds should not accept original documents from inquirers (personnel evaluations, correspondence with others, etc.). An ombuds should accept only a copy (and preferably not even that).
- Anonymous information sent to an ombuds presents additional considerations. Documents or correspondence outside the ombuds' jurisdiction or that are clearly inappropriate should be destroyed. If the documents or correspondence raise issues appropriately addressed by other offices of the company, they may be reformatted to remove references to the ombuds office and anonymously forwarded to the appropriate office.
- Anything in writing leaving an ombuds office must be assumed to have a life of its own and cannot be considered confidential, since courts have not articulated how far the confidentiality privilege extends. While the best practice is to avoid putting anything in writing on a confidential topic that leaves the ombuds office, any such documents should be labeled, where appropriate, "PRIVILEGED AND CONFIDENTIAL."

Where an ombuds is aware of litigation that involves the ombuds office or that refers to contact with the ombuds, the ombuds should also be alert to the possibility that routine practices may need to be altered or specific legal advice sought. For example, what should an

ombuds do with information--perhaps even anonymous information--relating to a lawsuit against the organization? If someone is seeking to obtain information from the ombuds office and a court has not yet ruled on a motion for a protective order, should the routine document destruction in the office be suspended until the court rules? The answers to these questions are not simple and depend on the specific facts involved, but an ombuds should think to raise these issues if they do not otherwise present themselves.

(4) Documents created or kept outside the ombuds office that relate to the ombuds office or confidential communication.

My greatest area of concern with documents is not with the documents created by ombuds. Ombuds generally have a keen appreciation of the confidentiality issues involved and are trained in how they should handle documents. But, because ombuds frequently communicate with others in an organization--with the permission of an inquirer--there is always the possibility that the people outside the ombuds office with whom the ombuds speak are creating documents that relate to their confidential communications with the ombuds. This is my nightmare. To illustrate the point, consider what happens when someone with whom an ombuds talks (the inquirer or an authorized follow-up source) makes notes of all of the communications. While there may be little one can do if that person is an inquirer (other than the general admonition that this not be done), documents such as telephone notes of a conversation with the ombuds by someone working for the organization outside the ombuds office can be a disaster. They may be collected by the organization's lawyers and produced in discovery in administrative proceedings (such as EEOC responses) or in a lawsuit before anyone in the ombuds office even knows there is a dispute or a lawsuit. Since the notes in my

example look like any other notes, there is very little to alert an organization's counsel that these documents should be confidential and privileged. Further, inadvertent disclosure even to the organization's counsel creates a risk of a waiver of the confidentiality privilege or establishing a bad precedent for placing an organization on notice. Accordingly, ombuds should carefully consider to how to avoid having records of confidential communications created outside of their office. Some suggestions include:

- Consistently advising those individuals with whom an ombuds is authorized by an inquirer to speak that the conversation is confidential and privileged and that it is best if no notes are made. If it becomes necessary to make notes, an ombuds may request that they be labeled "CONFIDENTIAL AND PRIVILEGED" and later forwarded to the ombuds. Even if the documents are not sent to the ombuds, marking them as confidential may warn the organization's counsel to contact the ombuds office if these notes or records become relevant to a suit or claim.
- Working with the lawyers for the organization to advise them of this concern so that the ombuds office can be informed as early as possible if it appears that confidential documents from outside the ombuds office become an issue. At the very least, this may help avoid the inadvertent disclosure of documents relating to confidential communications.
- Assuming that anything outside the ombuds office risks being disclosed and operating with this assumption always in mind.

## CONCLUSION

Although the concept of an ombuds has existed for over a century, the role of an ombuds in a corporation in the United States is still in its infancy. And, this is even more true in other countries. Courts have not uniformly recognized the principle of a confidentiality privilege on which so much of the work of an ombuds depends, and even those that have recognized the privilege have not articulated how far the privilege extends. As a result, an ombuds must use documents affirmatively to show that the office is entitled to the privilege. This means that the documents must present a clear and consistent message of the core elements of what an ombuds office is and how it operates. Ombuds must also avoid having documents used against them to destroy the privilege. Confidential communications should be handled with appropriate safeguards within the ombuds office. And both the ombuds and the organization should guard against documents that may be created or exist outside the ombuds office that compromise or destroy the office's confidentiality.

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