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Scott C. Van Soye

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Illusory Ethics: Legal Barriers to an Ombudsman's Compliance with Accepted Ethical Standards

By Scott C. Van Soye‡

Americans don't trust their governments. A 1997 survey of urban Philadelphia residents by the Pew Research Center for the People and the Press showed that ninety percent of respondents didn't trust government at any level.[1] This is disturbing because citizens with low trust in government are generally less law-abiding than their trusting counterparts.[2] Furthermore, they feel less able to affect events in their community, and are less likely to engage in civic affairs.[3]

Such feelings are not confined to a particular political party, community, or administration. The Philadelphia study's authors indicate that their results mirror those across the nation.[4] Similar attitudes of distrust and skepticism toward government have persisted since the Vietnam War, with the exception of a brief period of strong support for the Bush administration after the attack on the World Trade Center.[5] While some scholars argue that

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‡ Scott C. Van Soye is a 1988 graduate of the UCLA School of Law. He is also a member of the Class of 2007 at Pepperdine's Straus Institute for Dispute Resolution. He actively litigated in California courts from 1988-1998, and served as Judicial Staff Counsel to the judges of the San Bernardino Superior Court from 1998-2006, advising them on literally thousands of civil cases. He now uses this broad experience as a principal in Pacific Coast Dispute Resolution, which provides mediation, arbitration, and reference services to those involved in civil disputes at the trial and appellate level.

1. PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, TRUST AND CITIZEN ENGAGEMENT IN METROPOLITAN PHILADELPHIA: A CASE STUDY (1997), http://people-press.org/reports/display.php3?ReportID=110, (last visited Oct. 18, 2007).

2. Timothy E. Cook & Paul Gronke, *The Skeptical American: Revisiting the Meanings of Trust in Government and Confidence in Institutions*, 67 J. POL. 784, 785 n.1 (2005).

3. Cook & Gronke, *supra* note 2, at 786 n.1.

4. PEW RESEARCH CENTER, *supra* note 1.

5. PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, PUBLIC OPINION SIX MONTHS LATER: NATIONHOOD, INTERNATIONALISM LIFTED (2002), http://people-press.org/commentary//display.php3?AnalysisID=44 (last visited Oct. 19, 2007).

this data shows merely skepticism and not active distrust,[6] the net result is the same – dissatisfaction with the government, and a belief that it must be monitored.[7] The situation in the private sector is similar. An ABC News poll found that in the face of repeated corporate scandals, only 11% of Americans trust corporate executives,[8] and only 18% trust even published corporate financial statements.[9]

One method of combating such beliefs is the introduction of an ombudsman,[10] or "citizen's defender,"[11] into the governmental[12] or corporate[13] system. An "ombudsman" is a person who receives complaints about improprieties and systemic problems within his defined jurisdiction and investigates or otherwise addresses these issues independently and impartially.[14]

There are five general types of ombudsmen: classical, executive, corporate, educational, and newspaper.[15] The first two types are appointed by governmental entities,[16] while the last three are associated with private organizations.[17]

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6. Cook & Gronke, *supra* note 2, at 800-01.

7. *Id.* at 784.

8. Stephen Ruckman, *A Matter of Expression: How Trusted Communication Leads to Trusted Boards*, CORP. GOVERNANCE, Oct. 2004, at 25, 33 n.1.

9. Ruckman, *supra* note 8, at n.3.

10. The term *ombudsman* is used here in a gender-neutral sense. The author recognizes the valuable contributions of women to this field. In using the male form neutrally, the author follows the lead of other writers in this area. *See e.g.* SAM ZAGORIA, THE OMBUDSMAN: HOW GOOD GOVERNMENTS HANDLE CITIZENS' COMPLAINTS 3 (1988). This is also the practice followed by the International Ombudsman Association (IOA) on its website. International Ombudsman Association, http://www.ombudsassociation.org/ (last visited Oct. 18, 2007). It is also expressly adopted by the United States Ombudsman Association (USOA) in its standards. UNITED STATES OMBUDSMAN ASSOCIATION, GOVERNMENT OMBUDSMAN STANDARDS 1 n.1 (2003), http://www.usombudsman.org/documents/PDF/References/USOA_STANDARDS.pdf.

11. Alfred Bexelius, *The Origin, Nature, and Functions of the Civil and Military Ombudsmen in Sweden*, 377 ANNALS AM. ACAD. POL. & SOC. SCI. 10 (1968).

12. *Id.*

13. *See* Ruckman, *supra* note 8, at n.3.

14. *See* Christine M. Kuta, Comment, *Universities, Corporations, And States Use Them—Now it's Time to Protect Them: An Analysis of the Public and Private Sector Ombudsman and the Continued Need For a Privileged Relationship*, 27 S. ILL. U. L. J. 389, 393 (2003).

15. *See infra* notes 23-83 and accompanying text.

16. ZAGORIA, *supra* note 10, at 37-38. Zagoria also refers to a "citizen" ombudsman on pp. 38-40, appointed by a commission but funded by the government. *Id.* at 38-40. However, he does not discuss to whom the citizen ombudsman reports, what authority he or she has, or under what circumstances he or she can be dismissed. *Id.* Therefore, it is unclear whether this type is functionally distinguishable from those already named.

17. *See infra* notes 62 (educational ombudsmen), 71-72 (organizational ombudsman), and 79 (newspaper ombudsmen).

The American Bar Association has identified a sixth type of ombudsman, the advocate, whose responsibility it is to protect a vulnerable population, such as children or residents of long-term care facilities.[18] But because the advocate ombudsman is appointed by the government, he or she is either a legislative or an executive ombudsman, and there is no reason to create a separate category.[19]

As the ombudsman concept has spread, professional organizations have formed to support practitioners.[20]Ethics and standards of practice have been accepted by those in the field. [21] Unfortunately, these ethical standards will not withstand the realities of litigation in California. Even in jurisdictions where a general legislative ombudsman has been adopted, legal pitfalls inherent in the accepted ethical standards are so serious that strict compliance would land an ombudsman in serious trouble.[22]

So, what's an ethical ombudsman to do? After reviewing the characteristics of each type of ombudsman and identifying the legal and practical barriers to ethical compliance, this article will consider what claims of privilege or methods of practice will allow maximum ethical practice with minimum exposure to legal penalties, and will offer tips for moving forward.

I. THE FIVE TYPES OF OMBUDSMEN

A. The Classical Ombudsman

A "classical," or "legislative," ombudsman exists to ensure that the government follows the law, rendering fair and impartial administrative decisions. He or she is appointed by the legislature to investigate citizen reports of governmental abuse.[23] They may also initiate investigations on

18. *See* AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (2004), http://meetings.abanet.org/webupload/commupload/AL322500/newsletterpubs/115.pdf (last visited Oct. 18, 2007).

19. The ABA Standards do not discuss newspaper ombudsmen. *See* AMERICAN BAR ASSOCIATION, *supra* note 18.

20. *See supra* notes 15-16.

21. *See generally* International Ombudsman Association and United States Ombudsman Association, *supra* note 10 (the Standards of the IOA and the USOA); *see also* AMERICAN BAR ASSOCIATION, *supra* note 18 (the ABA Standards).

22. See *infra* notes 170-196 and accompanying text.

23. ZAGORIA, *supra* note 8, at 37-38.

their own.[24] Generally, the ombudsman is appointed for a defined term, reports directly to the legislature, and is neutral.[25]

The classical ombudsman has broad access to governmental employees and agency records, and is given subpoena powers.[26] They may resolve investigations informally (by persuading the appropriate official to change course) or formally (by publishing reports to the legislature[27]). Rowe and Gottehrer[28] assert that the identity of one who complains to a classical ombudsman is statutorily confidential,[29] but as we shall see this is not always true.

The modern use of the classical ombudsman began in Sweden in 1809,[30] in response to abuses by King Gustaf III.[31] The office still exists today, and is part of the Swedish Constitution, or *Regerinsformen*.[32] Unlike American ombudsmen, the Swedish official may act as a public prosecutor in cases of corruption or malfeasance.[33] Five American states (Alaska,[34] Arizona,[35] Hawaii,[36] Iowa[37] and Nebraska[38]) have general legislative ombudsmen on the Swedish model, as do the Territories of Guam[39] and Puerto Rico.[40]

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24. Dean M. Gottehrer & Mary P. Rowe, Similarities and Differences between Public and Private Sector Ombudsmen (1997) (unpublished manuscript, on file with ABA, Section of Administrative Law and Regulatory Practice), http://www.abanet.org/adminlaw/ombuds/g&rsimilar.html (last visited Oct. 18, 2007).

25. Dean M. Gottehrer & Michael Hostina, *Essential Characteristics of a Classical Ombudsman* 2-3 (1998), http://www.usombudsman.org/documents/PDF/References/Essential.PDF (last visited Oct. 18, 2007).

26. *Id.* at 7.

27. *Id.* at 5.

28. *See* Gottehrer & Rowe, *supra* note 24.

29. *See id.*

30. Bexelius, *supra* note 11, at 11.

31. *See* THE PARLIAMENTARY OMBUDSMAN, *The Parliamentary Ombudsman – JO*, Oct. 30, 2006, http://www.jo.se/Page.aspx?MenuId=12&ObjectClass=DynamX_Documents&Language=en (last visited Oct. 18, 2007).

32. *See* THE PARLIAMENTARY OMBUDSMAN, *The Instrument of Government (Regeringsformen)*, Oct. 12, 2004, http://www.jo.se/Page.aspx?MenuId=37&MainMenuId=2&Language=en&ObjectClass=DynamXDocument&Id=571 (last visited Oct. 18, 2007).

33. *See id.*

34. *See* ALASKA STAT. §§ 24.55.010-.340 (2006).

35. *See* ARIZ. REV. STAT. §§ 41-1371 to -1383 (2007).

36. *See* HAW. REV. STAT. §§ 96-2 to -19 (LexisNexis 2006).

37. *See* IOWA CODE §§ 2c.1-19 (2007).

38. *See* NEB. REV. STAT. §§ 81-8,240 to -8,254 (2006).

39. *See* GUAM CODE ANN. tit. 2 §§ 5101-5120 (2006).

40. *See* P.R. LAWS ANN. tit. 2 §§ 710-727 (2004).

B. The Executive Ombudsman

An "executive" ombudsman serves the same function as a legislative one, but is appointed by a government head, such as a mayor or governor, and serves at his or her pleasure.[41] At least thirteen states have general executive ombudsmen serving as part of the Governor's office.[42]

The federal government has created executive ombudsmen regarding a number of agencies and topics.[43] While these offices are established by statute, they are executive because the ombudsmen generally are appointed by and report to agency heads, rather than to Congress.[44]

Similarly, many states have statutorily-created executive ombudsmen concerning specialized topics, especially children,[45] small business, corrections, and injured workers. California has executive ombudsmen covering mobile homes,[46] small business,[47] teachers' retirement,[48] long-term

41. EXECUTIVE OMBUDSMEN IN THE UNITED STATES 10 (Alan J. Wyner, ed., 1973).

42. These states are Colorado, Indiana, Maryland, Massachusetts, Michigan, Montana, New Jersey, Oregon, Pennsylvania, South Carolina, Texas, Washington, and Wisconsin, according to the author's informal survey of gubernatorial websites.

43. *See* 5 U.S.C.A. § 1211 (2007) (Merit Systems Protection Board); 6 U.S.C.A. § 232 (2007) (immigration); 10 U.S.C.A. §§ 2304b, 2350h (2007) (military procurement); 11 U.S.C.A. §§ 332, 333 (2007) (bankruptcy); 12 U.S.C.A. § 4806(d) (2007) (banking); 15 U.S.C.A. § 657 (2007) (construction contracts); 15 U.S.C.A. §§ 657(b), 657b (b)(2), 2652 (2007) (SBA); 20 U.S.C.A. § 1018(f) (2007) (student loans); 22 U.S.C.A. § 290m-2(c) (2007) (community investment); 22 U.S.C.A. §2664a(c) (2007) (civil service); 22 U.S.C.A. § 5506(c) (2007) (international aviation disasters); 24 U.S.C.A. § 417(g) (2007) (military hospital); 26 U.S.C.A. §7802 (2007) (IRS); 36 U.S.C.A. §220509(b) (2007) (Olympic athletes); 41 U.S.C.A. § 253j (2007) (civil procurement); 42 U.S.C.A. § 1395b-9(c)(2) (2007) (Medicare); 42 U.S.C.A. § 3058g (2007) (long-term care); 42 U.S.C.A. §§ 6908, 6917 (2007) (solid waste disposal); 42 U.S.C.A. § 7261c (2007) (technology partnerships); 42 U.S.C.A. § 7385s-15 (2007) (energy employees occupational illnesses); 49 U.S.C.A. § 106(q) (2007) (aircraft noise); and 49 U.S.C.A. § 60133 (2007) (pipeline repairs).

44. The one possible exception is the special counsel to the Merit Systems Protection Board, who is appointed by the President for a five year term *with the advice and consent of the Senate*, and who reports to both the President and Congress. 5 U.S.C.A. § 1211(b) (2007); 5 U.S.C.A. §§ 1217-1218 (2007). Further, the special counsel may subpoena witnesses and begin litigation – powers of legislative ombudsmen. 5 U.S.C.A. § 1212 (2007). Finally, while the President may remove the special counsel, the grounds for removal are limited to "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C.A. § 1211(b) (2007). The special counsel is therefore a hybrid ombudsman, sharing characteristics of both executive and legislative types.

45. See Office of Children's Ombudsman, https://www.michigan.gov/oco/0,1607,7-133—11755—,00.html (last visited Oct. 18, 2007), for a listing of American children's ombudsmen.

46. CAL. HEALTH & SAFETY CODE §18151 (West 2007).

47. CAL. GOV'T CODE § 11148 (West 2007).

48. CAL. EDUC. CODE § 22302 (West 2007).

care,[49] child care,[50] prison sexual abuse,[51] foster care,[52] and workers' compensation insurance.[53] Like the federal ombudsmen discussed above, these ombudsmen are responsible to agency heads rather than the legislature. Executive ombudsmen's offices also exist in cities and counties across the country.[54]

Some theorists argue that executive ombudsmen are generally less effective than classical ones, because they serve at the pleasure of the executive, and because their term of office usually ends with the appointing executive's departure.[55] Also, such ombudsmen usually lack subpoena powers, though the appointing official may have them.[56]

A critical part of any ombudsman's value is his or her independence from the appointing authority.[57] The executive ombudsman's claim of independence may lack credibility, given his susceptibility to pressure from above.[58] Indeed, such ombudsmen are sometimes accused of whitewashing governmental corruption,[59] or of existing mainly to do political "casework" for the appointing executive.[60]

But this weakness – the executive ombudsman's perceived close ties to the appointing official – is also his greatest strength. In the absence of lower-level managerial cooperation, the ombudsman can go straight to the top to complain, and be heard. In practice, the executive ombudsman's

49. CAL. WELFARE. & INST. CODE § 9710 (West 2007).

50. CAL. HEALTH & SAFETY CODE § 1596.872(a) (West 2007).

51. CAL. PENAL CODE § 2641 (West 2007).

52. CAL. WELFARE. & INST. CODE § 16160 (West 2007).

53. CAL. INS. CODE § 11752.6(g) (West 2007).

54. *See* ZAGORIA, *supra* note 10, at 73-74.

55. *See id.* at 39-40.

56. *See* Stanley V. Anderson, *Comparing Classical and Executive Ombudsmen, in* EXECUTIVE OMBUDSMAN IN THE UNITED STATES, *supra* note 41, at 311-12; *see also* Michael Mills, *Municipal Government Ombudsman,* UNITED STATES OMBUDSMAN ASSOCIATION, Sept. 23, 1994, http://www.usombudsman.org/en/references/more_references/municipal_government_ombudsman.cfm (last visited Oct. 18, 2007).

57. See AMERICAN BAR ASSOCIATION, *supra* note 18.

58. *See* ZAGORIA, *supra* note 10, at 38-41; *see also* Anderson, *supra* note 56, at 311; *see also* Larry B. Hill, Letter to American Bar Association President Martha W. Barnett, UNITED STATES OMBUDSMAN ASSOCIATION, July 20, 2001, http://www.usombudsman.org/documents/MSWord/References/ABA/Hill.doc (last visited Oct. 19, 2007) (dissenting from the Committee's Report to the House of Delegates of the Standards for the Establishment and Operation of Ombudsman Offices).

59. Phillip J. Hannon, *The Nassau County Ombudsman, in* EXECUTIVE OMBUDSMEN IN THE UNITED STATES, *supra* note 41, at 111, 121-23.

60. *See* Hill, *supra* note 58.

independence is generally fostered and respected by those who appoint him.[61]

C. The Educational Ombudsman

Universities and colleges and have made extensive use of ombudsmen since 1966, when Michigan State University and Eastern Montana College both established ombudsmen to hear student and faculty complaints occurring in the face of student unrest.[62] The concept spread rapidly after the Kent State massacre of 1970,[63] as a way to provide students with a way to express their frustrations, a "safety valve" that would prevent more violent confrontations.[64]

Today, there are more than 300 college and university ombudsmen in the United States.[65] They address problems affecting students, faculty and staff, including grading and discipline issues, personnel problems, and tenure decisions.[66] Professor Larry Hill notes that most educational ombudsmen function as mediators, rather than conducting investigations to ensure that university or college standards have been followed,[67] as a classical ombudsman would do. Robert Shelton[68] confirms this observation, noting that he began a campus mediation service while serving as an ombudsman at the University of Kansas. However, Shubert & Folger[69] note

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61. *See* Anderson, *supra* note 56; *see also* Mills, *supra* note 56. The United Sates Ombudsman Association also recognizes these weaknesses at sections II(A)(1)(c) and II(A)(2)(c) of its standards; *see* Cook & Gronke, *supra* note 2.

62. Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model,* 12 OHIO ST. J. ON DISPUTE RESOL. 95, 113 (1996).

63. Wiegand, *supra* note 62, at 113-14.

64. Paul Hobson-Panico et al., *Can Ombudsmen Influence Organization Effectiveness Through the Practice of Campus Ecology?* CAMPUS ECOLOGIST (IND. STATE UNIV., TERRE HAUTE, IND.), 1985, http://www.campusecologist.org/cen/v3n4.htm (last visited Oct. 19, 2007).

65. Luigi Cominelli, *Dawn of a New Profession: The Evolving Practice of the Organizational Ombudsman* 3, http://www.lawandsocietysummerinstitutes.org/workshop05/paper4/Cominelli.rtf (last visited Oct. 19, 2007).

66. *See* Office of the Ombudsman, Michigan State University, What is an Ombudsman?, http://www.msu.edu/unit/
ombud/what.html (last visited Oct. 19, 2007).

67. Hill, *supra* note 58.

68. Robert L. Shelton, *The Institutional Ombudsman: a University Case Study*, 16 NEGOTIATION J. 81, 92 (2000).

69. J. Janelle Shubert & Joseph P. Folger, *Learning from Higher Education*, 2 NEGOTIATION J. 395, 397 (1986).

that many universities also incorporate an adjudicative component into the process, in hopes of minimizing intervention by the courts.

Shelton identifies the ideal characteristics of an educational ombudsman as "community experience" (that is, time spent in both teaching and administration), tenure (which carries with it independence), confidentiality, and experience with dispute resolution.[70]

D. The Corporate Ombudsman

A fourth use of the concept is the corporate ombudsman. His function is to resolve problems with customers and employees, and to spot trends that may indicate failures of policy.[71] One study found that approximately ten percent of responding corporations surveyed had ombudsmen on staff,[72] and the American Bar Association states that over 1,000 U.S. corporations employ ombudsmen.[73]

Corporate ombudsmen are generally outside the organizational hierarchy; they serve at the pleasure of the board, president or chairman of the corporation.[74] They therefore suffer from the same weaknesses as an appointed executive ombudsman – susceptibility to executive pressure or changes in leadership, and a resulting lack of credibility among the corporate rank and file.[75]

For example, although Rowe and Hicks emphasize that the corporate ombudsman must be perceived as independent to be useful ,[76] Fox and Stallworth found that only a third of employees who complained of workplace bullying supported the use of an ombudsman.[77] They suggest

70. Shelton, *supra* note 68, at 83, 92.

71. JAMES T. ZIEGENFUSS, JR., ORGANIZATIONAL TROUBLESHOOTERS 94-96 (1988). *See also* Mary P. Rowe & Wilbur Hicks, *The Organizational Ombuds, in* RESOURCE BOOK FOR MANAGING EMPLOYMENT DISPUTES 8 (2004), *available at* http://www.cpradr.org/pdfs/Rowe_Hicks_Ombuds.pdf (last visited Oct. 19, 2007). Rowe and Hicks state that as much as a third of the corporate ombudsman's time is spent in this policy-changing function. *Id.* at 7.

72. Jessica Oser, Note, *The Unguided Use of Internal ADR Programs to Resolve Sexual Harassment Controversies in the Workplace*, 6 CARDOZO J. CONFLICT RESOL. 283, 295 n.80 (2005).

73. Jeffrey S. Lubbers, *Ombudsman Offices in the Federal Government—An Emerging Trend?*, 22 ABA ADMIN. & REG. L. NEWS (1997), *available at* http://www.abanet.org/adminlaw/news/vol22no4/ombudsmn.html (last visited Oct. 19, 2007).

74. Rowe & Hicks, *supra* note 71, at 3.

75. *See infra* note 77 and accompanying text.

76. Rowe & Hicks, *supra* note 71, at 4-5.

77. Suzy Fox & Lamont E. Stallworth, *Employee Perceptions of Internal Conflict Management Programs and ADR Processes for Preventing and Resolving Incidents of Workplace Bullying: Ethical Challenges for Decision-Makers in Organizations*, 8 EMP. RTS. & EMP. POL'Y J. 375, 400 (2004).

that employees distrust corporate ombudsmen because of their perceived ties to upper management.[78]

These ties are emphasized by the practice of giving the ombudsman an elevated place in the corporate hierarchy,[79] though in theory he or she is supposed to exist outside of it.

E. The Newspaper Ombudsman

A special type of corporate ombudsman, or "public editor," is seen in some newspapers. Rather than addressing problems with employees or customers, however, the newspaper ombudsman addresses issues of "accuracy, fairness, balance and good taste in news coverage."[80]

The idea began in Japan in 1922, and spread to the United States in 1967.[81] But by 2003, less than forty of the United States' 1,500 daily newspapers had ombudsmen.[82] Critics like Matt Welch argue that the ombudsman can do nothing to improve accuracy that a responsive newspaper staff would not do on its own.[83] However, others argue that news ombudsmen increase accuracy, fairness and accountability, save time, and reduce lawsuits.[84]

II. THE ETHICAL STANDARDS

College and university ombudsmen formed their own professional association, the University and College Ombudsmen Association (UCOA),

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78. *Id.*

79. Professor Victor Futter defines a corporate ombudsman as a "senior official" in his article. Victor Futter, *It's Time for a Corporate Ombudsperson*, 10 ALTERNATIVES TO THE HIGH COST OF LITIGATION 76, 76-77 (1992). As an example, McDonald's' national ombudsman is a vice-president. *See Ron Hawkins: Vice President and National Ombudsman*, EBONY, Dec. 2004, *available at* http://findarticles.com/p/articles/mi_m1077/is_2_60/ai_n7577915/pg_1 (last visited Oct. 19, 2007).

80. Organization of News Ombudsmen, What is ONO?, http://www.newsombudsmen.org/what.htm (last visited October 19, 2007).

81. *Id.*

82. Matt Welch, *Anything but the Ombudsman! Why Newspapers Should Avoid In-House Watchdogs*, REASON, Aug. 2003, *available at* http://www.reason.com/news/show/28860.html.

83. *Id.* As Welch puts it: "[h]iring a public editor is like advertising your monopolist indifference and staffing bloat . . . ." *Id.*

84. George Claassen, *Why Ethics Matter*, *in* CHANGING THE FOURTH ESTATE: ESSAYS IN SOUTH AFRICAN JOURNALISM 135-37 (Adrian Hadland ed., 2006).

in the late 1990s[85] and published their own ethical standards shortly thereafter.[86] Likewise, a group of corporate ombudsmen formed The Ombudsman Association (TOA) in 1992.[87] TOA also promulgated its own code of ethics.[88]

Although the Organization of News Ombudsmen was formed in 1980,[89] its members have not propounded a separate code of ethics. Presumably, they adhere to reporter's ethics, which (as relevant here) provide that the identity of confidential informants shall be kept confidential, and that newsmen will not testify to those identities.[90]

In 2005, the UCOA merged with TOA to form the International Ombudsman Association ("IOA").[91] The IOA professes the following ethical principles: (1) IOA members shall be independent to the greatest extent possible; (2) IOA members are neutral, and do not engage in conflicts of interest; (3) IOA members keep all communications confidential, except where there is consent to disclosure or an imminent risk of harm; (4) IOA members will not participate in formal adjudicative or administrative proceedings.[92]

IOA's Standards of Practice[93] flesh out these principles, providing in part:

- That communications with the ombudsman are kept confidential and that confidentiality may be maintained even in the face of a waiver.[94]

85. *See* International Ombudsman Association, http://www.ombudsassociation.org/ (last visited Oct. 19, 2007).

86. University and College Ombuds Association, *Standards of Practice,* http://www.colorado.edu/Ombuds/UCOA/
SOP.html (last visited Oct. 19, 2007) (for a copy of the UCOA's ethical standards, later superseded by those of the IOA).

87. Diversity Best Practices, *Additional Ethics-Related Resources*, at 789, http://www.diversitybestpractices.com/pdf/r_ethics04/add.pdf (last visited Aug. 1, 2007).

88. The Ombudsman Association, *Code of Ethics* (1995), http://web.mit.edu/negotiation/toa/TOAcoe.html (last visited Mar. 31, 2007) (for a copy of TOA's ethical standards, later superseded by those of the IOA).

89. *See* What is ONO?, *supra* note 80.

90. *See* Claassen, *supra* note 84, at 138; *see also* Branzburg v. Hayes, 408 U.S. 665, 732, n.10 (1972) (Stewart, J. dissenting).

91. *See* International Ombudsman Association, IOA Code of Ethics, http://www.ombudsassociation.org/standards/Code_Ethics_1-07.pdf (last visited Oct. 19, 2007).

92. *See id.*

93. *See* International Ombudsman Association, IOA Standards of Practice, http://www.ombudsassociation.org/standards/Stds_Practice_1-07.pdf (last visited Feb. 27, 2007).

94. *See id.* at § 3.1.

- That communications with the ombudsman are subject to a privilege, which is held by the ombudsman.[95]
- That the ombudsman does not testify in internal proceedings, and will resist testifying in external proceedings such as litigation, even if given permission or requested to do so.[96]
- That no records containing identifying information are kept by the ombudsman on behalf of the organization.[97]
- That any records will be kept secure, and will be subject to a document destruction policy.[98]
- That notice to the ombudsman is not notice to the organization.[99]

Like the IOA, the United States Ombudsman Association (USOA), which represents governmental ombudsmen, has published standards promoting independence, impartiality, confidentiality, and the credibility of the review process.[100] These standards emphasize that the ombudsman is neutral, and represents neither complainant nor agency.[101] They assert that the ombudsman should not be subject to testimonial compulsion,[102] should have discretion to offer confidentiality to participants,[103] and that records of the proceedings should also be confidential.[104]

Unlike the IOA Standards,[105] however, the USOA Standards recognize that their confidentiality principles may be subject to legal limits.[106] They

95. *See id.* at § 3.2.
96. *See id.* at § 3.3.
97. *See id.* at § 3.5.
98. *See id.* at § 3.6.
99. *See id.* at § 3.8.
100. *See* United States Ombudsman Association, Government Ombudsman Standards, http://www.usombudsman.org/documents/PDF/References/USOA_STANDARDS.pdf (last visited Oct. 19, 2007).
101. *See id.* at § II(B)(5)(a).
102. *See id.* at § II(C)(3)(a).
103. *See id.* at § II(C). The USOA refers to confidentiality as a "tool," to be offered or withheld at the ombudsman's discretion. *Id.*
104. *See id.* at §§ (A)(8)(d)-(e).
105. *See* IOA Standards of Practice, *supra* note 93.

do not insist that confidentiality be maintained at all costs, and do not call for the systematic destruction of records.[107]

III. LEGAL BARRIERS TO ETHICAL PRACTICE.

A. The States and the "Ombudsman Privilege"

Both the IOA and the USOA argue that communications with the ombudsman are privileged, although the USOA's standards make the privilege discretionary with the ombudsman, rather than absolute.[108]

California case law[109] specifically rejects an ombudsman privilege, based on California Evidence Code section 911, which provides that all privileges against testimony or disclosure of information are statutory.[110] California has no general privilege statute relating to ombudsmen.[111] Where there is no statutory or constitutional basis for a privilege, California courts have rejected its creation.[112]

In fact, no American state or territory – including those where a general legislative ombudsman exists[113] – embraces the ombudsman privilege as envisioned by either the IOA or by the USOA.[114]

B. Differing State and Territorial Approaches to Privilege

Those jurisdictions with some statutory reference to an ombudsman's privilege use widely divergent approaches. Alaska[115] and Hawaii[116] require the ombudsman to keep all matters and witness identities confidential.

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106. *See* Government Ombudsman Standards, *supra* note 100, at § II(C)(1)(b).

107. *See id.*

108. *See id.* at § II(C); *see also* IOA Standards of Practice, *supra* note 93, at §§ 3.1-3.8.

109. Saeta v. Superior Court, 117 Cal. App. 4th 261, 273 (Cal. Ct. App. 2004); *see also* Ombudsman Serv. of N. Cal. v. Superior Court, 154 Cal. App. 4th 1233, 1243 (Cal. Ct. App. 2007).

110. CAL. EVID. CODE §911 (2006).

> Except as otherwise provided by statute: (a) No person has a privilege to refuse to be a witness; (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing; (c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing.

Id.

111. *See generally id.* at §§ 911-1128 (2006) (concerning privileges).

112. Am. Airlines v. Superior Court, 114 Cal. App. 4th 881, 887 (Cal. Ct. App. 2003).

113. *See supra* notes 17-21 (Alaska, Arizona, Hawaii, Iowa and Nebraska).

114. *See infra* notes 115-25.

115. ALASKA STAT. § 24.55.160(b) (2006).

116. HAW. REV. STAT. § 96-9(b) (LexisNexis 2006).

Iowa[117] and Guam[118] permit, but apparently do not require, confidentiality. Iowa Code Section 2C.8 provides that "[t]he citizens' aide *may* maintain secrecy in respect to all matters including the identities of the complainants or witnesses coming before the citizens' aide. . ."[119] Title 2 of the Guam Code Annotated contains almost identical language, granting the ombudsman (known as the *suruhanu*) the power – but apparently not the duty – to maintain secrecy.[120]

Arizona requires the ombudsman to keep witnesses' identities confidential if they so request.[121] The Nebraska Code lacks a confidentiality provision.[122]

Four states (Alaska, Arizona, Hawaii, and Nebraska) grant the ombudsman an express privilege not to testify.[123] It is unclear whether the Iowa or Guam statutes that grant those legislative ombudsmen the power to "maintain secrecy" would be interpreted as a testimonial privilege.[124] No case from either jurisdiction addresses the issue. Puerto Rico's ombudsman statutes neither grant any privilege nor address the confidentiality issue.[125]

Despite their differing approaches, these statutes have one thing in common: Across the United States and its territories, any existing testimonial privileges apply to the ombudsman alone, not to claimants or witnesses.[126] Assuming that witnesses' identities were somehow disclosed in litigation, they would have to testify in court.[127]

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117. IOWA CODE § 2C.8 (2007) (Emphasis added).

118. GUAM CODE ANN. tit. 2 § 5111(h) (2006).

119. IOWA CODE, *supra* note 117. However, the remainder of ICA §2C.8 gives the Governor and the General Assembly complete access to the ombudsman's files. *Id.*

120. GUAM CODE ANN., *supra* note 118. "The *suruhanu* shall have the following powers . . . (h) to maintain secrecy in respect to all matters and the identities of the complainants or witnesses coming before him." *Id.*

121. ARIZ. REV. STAT. § 41-1378(F) (2007).

122. *See generally* NEB. REV. STAT. §§ 81-8,420 to 81-8,253 (concerning the duties of the Public Counsel (i.e., the ombudsman)).

123. *See* ALASKA STAT. § 24.55.260 (2006); ARIZ. REV. STAT. § 41-1380(C) (2007); HAW. REV. STAT. §96-9(b) (LexisNexis 2006); NEB. REV. STAT. § 81-8,253 (2006).

124. *See supra* notes 116, 119 and accompanying text.

125. *See* P.R. LAWS ANN. tit. 2, §§ 701-725 (2004).

126. *See supra* notes 115-125 and accompanying text.

127. *See* IOWA CODE § 2C.8 (2007); *see also* GUAM CODE ANN. tit. 2 § 5111(h) (2006). It is possible to interpret the vague language of the Iowa and Guam statutes, which grants the ombudsman the power to "maintain secrecy," as including a privilege to prevent other participants from testifying. *Id.* There is no authority on point, however. *Id.*

Even Sweden, the birthplace of the modern ombudsman, imposes secrecy on ombudsmen's proceedings only where "considerable harm" to the state or private citizens would otherwise result.[128]

C. The Federal Courts and the Ombudsman Privilege

Federal courts have rarely recognized a common-law privilege for employee communications with a corporate ombudsman. The first to do so was the District Court of Connecticut, in the unpublished case of *Monoranjan Roy v. United Technologies.*[129] The only *published* federal case supporting the privilege is *Kientzy v. McDonnell Douglas Corp,*[130] which follows *Roy.*[131]

Kientzy relies on section 501 of the Federal Rules of Evidence in recognizing an ombudsman's privilege.[132] Rule 501 allows federal courts to recognize new privileges based on common law principles, applying the court's "reason and experience," on a case-by-case basis.[133]

In deciding whether to find a privilege, the courts generally consider three factors: "(1) whether important private and public interests would be served by recognition of the privilege; (2) whether the evidentiary cost of recognizing the privilege is likely to be modest; and (3) whether similar protections are afforded by the states, either through legislation or the common law."[134]

While the first two factors must be evaluated on an individualized basis, the previous discussion shows that the third criterion will weigh against the recognition of the privilege, since the states do not embrace a similar protection.[135]

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128. *See* 11 ch. 4 § Sekretesslagen (1980:100), *available at* http://www.jo.se/Page.aspx?MenuId=37&MainMenuId=12&Language=en&ObjectClass=DynamX_Document&Id=576.

129. Monoranjan Roy v. United Technologies, (D.CT H-89-680) (May 29, 1990). Although *Roy* is unpublished, it has been cited and discussed by succeeding cases and articles on the subject of the ombudsman privilege. *See, e.g.,* Kientzy v. McDonnell Douglas Corp., 133 F.R.D. 570, 572-73 (E.D. Mo. 1991); Carman v. McDonnell Douglas Corp., 114 F.3d 790, 794 n.3 (8th Cir., 1997).

130. *Kientzy*, 133 F.R.D at 571-73.

131. *Kientzy* also relied on Shabazz v. Scurr, 662 F.Supp. 90 (S.D. Iowa 1987) to support the creation of an ombudsman's privilege. But the court's reliance on *Shabazz* was misplaced. That opinion established a limited *governmental* privilege, held by the state. *Id.* at 92-93. The privilege was based on an expert witness' former employment as a state prison ombudsman, not on participants' rights to confidentiality. *See id.* at 90-91.

132. *Kientzy*, 133 F.R.D. at 571-73.

133. Fed. Evid. R. 501 (2007).

134. *In re* Grand Jury Subpoenas, 438 F. Supp. 2d 1111, 1118 (N.D. Cal. 2006) (citing Jaffee v. Redmond, 518 U.S. 1, 10-15 (1996)).

135. *See supra* notes 115-127 and accompanying text.

The District Court in *Kientzy* reasoned that the ombudsman privilege should be upheld on the facts before it, because: (1) the participants believed their communications would be confidential; (2) confidentiality is essential to the ombudsman's function; (3) the relationship between the ombudsman and process participants is worthy of societal support given McDonnell Douglas' status as an important federal contractor; and (4) the potential damage to McDonnell Douglas' ombudsman program outweighed the possible benefit that discovery might confer on the litigants.[136]

The Court of Appeals for the Eighth Circuit[137] rejected *Kientzy*'s rationale and denied the privilege in *Carman v. McDonnell Douglas Corp*, a case involving the same corporate program.[138] *Carman* asserted that the program's proficiency at resolving workplace disputes had not been shown, that even without a privilege, the ombudsman could offer to keep employee communications confidential from management, and that employees would fear disclosure despite promises of confidentiality and regardless of any privilege.[139]

Only two post-*Carman* federal cases discuss the ombudsman privilege.[140] Both flatly state that there is no such privilege under federal law.[141] Though neither is binding, both indicate that a future claim of privilege stands a poor chance of success in the federal courts.

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136. *Kientzy*, 133 F.R.D at 570-72.

137. The Court of Appeals for the Eighth Circuit encompasses the District Courts that decided both *Kientzy* and *Shabazz*. *See supra* notes 127-29.

138. *Carman*, 114 F.3d at 793-94.

139. *See* Fox and Stallworth, *supra* note 77 (discussion of the existence of such fears).

140. *See* Miller v. Regents of the Univ. of Colo., 188 F.3d. 518 (10th Cir.1999), 1999 WL 506520; *see also* Solorzano v. Shell Oil Co., 2000 WL 1145766 (Aug. 14, 2000).

141. The unpublished decision in *Miller* expressly states: "we affirm the district court's ruling regarding the ombudsman privilege. It is clear that neither Colorado law nor federal law, including the decisions of this circuit, recognize an ombudsman privilege." *See id.* at 15. The District Court in *Solorzano* relied on the Eighth Circuit's decision in *Carman* in refusing to recognize a federal ombudsman privilege, saying at page 6 of its decision:

The Eighth Circuit in *Carman* appears to be the only appellate court to have considered whether to create a federal ombudsman's privilege. The Court's reasons for rejecting the proposed privilege are persuasive. . . I am particularly reluctant to recognize such a privilege as a matter of federal common law when a narrowly drawn protective order of the type included later herein, short of recognition of a broad-ranging privilege, will suffice to accommodate any need for confidentiality of the records that might be responsive to plaintiff's discovery request.

Id. at 6.

Because such claims are evaluated on a case-by-case basis, however, it is possible that the privilege may yet be granted on a strong enough factual showing, though practitioners should prepare for its denial.

D. Confidentiality

In addition to the IOA's (erroneous) claim that communications with the ombudsman are privileged,[142] both the IOA[143] and the USOA[144] claim that the process is confidential. IOA Standards also provide that confidentiality may, at the ombudsman's discretion, be maintained even in the face of a waiver.[145]

The term "confidential" generally refers to information that is the subject of efforts to keep it secret from others.[146] As the court in *Hofmann Corp. v. Superior Court* has said, "[o]rdinarily information which is relevant to the subject matter of a lawsuit and not privileged is discoverable."[147] *Hofmann* notes that protection is given to banking and other sensitive financial information,[148] and to trade secrets.[149]

In contrast to privileged information, confidential information is subject to discovery, although the California courts may impose a higher standard for discovery, and deny discovery of information that is only marginally relevant.[150] However, such an approach is confined to "protecting

142. *See* IOA Standards of Practice, *supra* note 93, at § 3.2.

143. *See id.* at § 3.1.

144. *See* Government Ombudsman Standards, *supra* note 100, at § (A)(8)(d)-(c).

145. IOA Standard 3.1 provides, in part:

The Ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality, including the following: The Ombudsman does not disclose confidential communications unless given permission to do so in the course of informal discussions with the Ombudsman, *and even then at the sole discretion of the Ombudsman*; the Ombudsman does not reveal, and must not be required to reveal, the identity of any individual contacting the Ombudsman Office, nor does the Ombudsman reveal information provided in confidence that could lead to the identification of any individual contacting the Ombudsman Office, without that individual's express permission. . . (emphasis added).

IOA Standards of Practice, *supra* note 93, at § 3.1.

146. *See* BLACK'S LAW DICTIONARY 318 (8th ed. 2004).

147. Hofmann Corp. v. Superior Court, 172 Cal. App. 3d 357, 362 (Ct. App. 1985).

148. Burkle v. Burkle, 135 Cal. App. 4th 1045, 1064 (Ct. App. 2006) (citing Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 656 (1975)).

149. In calling trade secrets "confidential," *Hofmann* confuses that concept with privilege, which refers to a right not to disclose information. *See generally* Fred C. Zacharias, *Harmonizing Privilege and Confidentiality,* 41 S. TEX. L. REV. 69, 71-75 (1999). A qualified privilege is conferred on trade secrets by CAL. EVID. CODE § 1060 (West 2006).

150. Volkswagen of America, Inc. v. Superior Court, 139 Cal. App. 4th 1481, 1492 (2006).

particularly sensitive matters, such as sexual or psychiatric histories, or the privacy interests of third parties."[151]

There is little California authority regarding the confidentiality of the ombudsman process. California Welfare and Institutions Code section 9725 provides that complainants' communications to a long-term care ombudsman are confidential.[152] But the complainant may waive this protection, disclosure may be made to law enforcement agencies, and the courts may order discovery. This conditional, complainant-held confidentiality is not the near-absolute, ombudsman-controlled protection that IOA Standard 3.1 envisions.[153]

The only other California statute mentioning the confidentiality of ombudsman communications is Penal Code section 2641, which simply provides without explanation that prison officials shall allow inmates to write confidential letters to the Sexual Abuse in Detention Elimination Ombudsperson.[154] No case discusses section 2641.

In fact, no California or Ninth Circuit case has held that communication with an ombudsman is *per se* confidential.[155] Even *Garstang v. Superior Court*, which denied discovery of statements made to a corporate ombudsman, did not extend confidentiality in this way.[156] *Garstang's* holding rested on the existence of a confidentiality agreement, on the revelation of private information to the ombudsman by university

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151. *Id.* at 1492.

152. California Welfare and Institutions Code section 9725 provides:

> All records and files of the office relating to any complaint or investigation made pursuant to this chapter and the identities of complainants, witnesses, patients, or residents shall remain confidential, unless disclosure is authorized by the patient or resident or his or her conservator of the person or legal representative, required by court order, or release of the information is to a law enforcement agency, public protective service agency, licensing or certification agency in a manner consistent with federal laws and regulations.

CAL. WELF. & INST. CODE § 9725 (West 2007). For a 2007 case analyzing this section and limiting consent-based disclosure to the consenting patient's records and court-ordered disclosure to cases in which such disclosure is "necessary to enforce the provisions of the State Ombudsman law . . . or when a party's compelling need for discovery outweighs the fundamental interest in maintaining the confidentiality of the ombudsman's records," see *Ombudsman Serv. of N. Cal.*, 154 Cal. App. 4th at 1248.

153. *See* HAW. REV. STAT. § 96-9 (LexisNexis 2006).

154. CAL. PENAL CODE § 2641(b) (West 2007).

155. One Ninth Circuit case has described a meeting with a university ombudsman regarding sexual harassment as 'confidential', but the opinion does not discuss the issue, and cites no authority in support of this *dictum*. *See* Holly D. v. Cal. Inst. of Tech, 339 F.3d 1158, 1165 (9th Cir, 2003).

156. Garstang v. Superior Court, 39 Cal. App. 4th 526 (1995).

employees,[157] and on promises of confidentiality by university officials.[158] It did not rest on the confidentiality *per se* of communications with the ombudsman. Had there been no disclosure of private information and no confidentiality agreement, *Garstang* would have been decided differently.

This conclusion is bolstered by the opinion in *Saeta v. Superior Court.*[159] In *Saeta*, the court refused to follow *Garstang* where there were no demonstrated privacy concerns.[160] Because not every case will encompass privacy issues, the blanket claims of confidentiality made by the IOA are insupportable, notwithstanding *Garstang*.

Furthermore, the IOA's assertion that confidentiality will be maintained even where there is a waiver has no legal basis. Where confidentiality has

157. The Court in *Ombudsman Service of Northern California* takes a similar approach. There, the Third District of the California Court of Appeal relied on *Garstang*'s privacy analysis to strike down a court's discovery order, which had allowed broad discovery of a long-term healthcare ombudsman's statutorily-privileged records. The Court did so without a showing that some compelling need justified disregarding both the statutory privilege and the patients' very strong privacy interests. *See Ombudsman Serv. of N. Cal.*, 154 Cal. App. 4th at 466-69.

158. *See Garstang*, 39 Cal. App. 4th at 533-35.

159. *See* Saeta v. Superior Court, 117 Cal. App. 4th 273 (Ct. App. 2004).

160. The *Saeta* court said:

> Relying on *Garstang*, petitioner argues he is protected by the California Constitution's qualified privilege. He acknowledges California does not recognize an ombudsperson privilege, but argues the state recognizes the importance of alternative dispute resolution and deems communications made in mediation to be protected. We conclude, under the facts of this case, petitioner does not enjoy the qualified privilege set forth in article 1, section one of the California Constitution. Evidence provided by [real party in interest] Dent reveals that the information she sought from petitioner does not relate to the private affairs of any other employees... Moreover, there is no showing the parties here anticipated the sessions before the review board would be confidential. Unlike *Garstang*, the parties here did not sign a confidentiality agreement. [The employer] made no representations that the review board hearing would be held in confidence. Moreover, others who had been present at Dent's review board hearing have already testified in depositions without invoking a privilege or a right to privacy. As petitioner observed, the Legislature has clearly and unequivocally expressed its espousal of alternative dispute resolution, underscoring its support by insisting on confidentiality that applies to the parties to mediation as well as to the mediator. However, the record shows that the parties proceeded without the expectation that what was said or occurred during the review board hearing was confidential. The parties' right to privacy in this case is outweighed by Dent's need for discovery to facilitate the effort to ascertain the truth. Accordingly, the privilege embodied in the right to privacy is inapplicable here.
>
> We hold the trial court did not err in granting Dent's motion to compel petitioner's deposition testimony because the testimony being sought is not protected by either the privileges of Evidence Code sections 703.5 and 1119, or by the right to privacy contained in article 1, section 1 of the California Constitution.

Saeta, 117 Cal. App. 4th at 273-74.

been waived, both testimony[161] and discovery[162] regarding the previously confidential topic may be compelled.

E. The Refusal to Testify

IOA Standard 3.3 expressly provides that members shall refuse to testify in internal organizational hearings, and shall "resist" testifying in court, even if other participants request his or her testimony.[163] The first part of this standard need not concern us. While it may cause the ombudsman trouble at work, there are no legal barriers to complying with it.

For purposes of this discussion, I will assume that at least some ombudsmen would interpret the instruction to "resist" testifying in court to require an outright refusal. Such an assumption makes sense if one accepts the other premises of the IOA Standards – that the ombudsman holds a privilege, and that proceedings before him shall remain confidential even in the event of a waiver.[164]

This assumption is also supported by the IOA's Code of Ethics, which states unequivocally that the ombudsman "does not participate in any formal or informal adjudicative or administrative procedure related to concerns brought to his/her attention."[165]

This ethical standard is in direct conflict with the principle that "the public has a right. . .to every man's evidence."[166] Only a privilege not to testify will overcome this principle.[167] As we have seen, California does not recognize such a privilege for ombudsmen,[168] and its viability in the federal courts is extremely questionable.[169] Therefore, an ombudsman who refuses to testify in these forums faces contempt penalties.[170]

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161. Agnew v. Superior Court, 156 Cal. App. 2d 838, 841(Ct. App. 1958); Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1134-35 (N.D. Cal 1999).

162. Wilson v. Superior Court, 63 Cal. App. 3d 825, 830 (Ct. App. 1976); Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 47 (N.D. Cal 1971).

163. *See supra* notes 93, 96.

164. *See generally* IOA Standards of Practice, *supra* note 93.

165. *See* IOA Code of Ethics, *supra* note 91.

166. Roman Catholic Archbishop of L.A. v. Superior Court, 131 Cal. App. 4th 417, 438 (Ct. App. 2005); *Branzburg*, 408 U.S. at 674.

167. 131 Cal. App. at 438; 408 U.S. at 674.

168. *Saeta*, 117 Cal. App. 4th 261.

169. *See supra* notes 128-39 and accompanying text.

170. *See infra*, notes 171-83 and accompanying text (discussing these penalties).

The case of *Branzburg v. Hayes* is instructive regarding the obligation to testify.[171] Paul Branzburg, a reporter, was held in contempt for refusing to disclose confidential informant identities to a grand jury.[172] His refusal was based in part on the published ethical standards of the American Newspaper Guild, which forbade such revelations.[173]

The United States Supreme Court upheld the conviction, saying:

> Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence. . .No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice.[174]

F. Penalties for Contempt

The parallel between an ombudsman who adheres strictly to IOA ethical standards and the unfortunate Mr. Branzburg is exact. An ombudsman who felt ethically compelled not to recognize a waiver, or otherwise refused to testify or provide discovery about communications from participants, would likely suffer a contempt citation from either a California[175] or a Federal[176] court.

Of course, an ombudsman might choose to suffer punishment for contempt in defense of his or her beliefs, just as reporters sometimes choose incarceration to protect their sources.[177] But such a choice should be made only with full awareness of the potential adverse consequences.

The consequences may be severe. In California, one guilty of contempt may be fined up to $1,000 or incarcerated for up to five days, or both.[178] He may also be required to pay attorneys' fees related to the contempt

171. *See generally Branzburg*, 408 U.S. 665.

172. *Id.* at 709.

173. *Id.* at 732 n.10 (Stewart, J., dissenting).

174. *Id.* at 683.

175. *See* People v. Cloyd, 54 Cal. App. 4th 1402, 1408 (1997) (refusal to testify as contempt); *see In re* de la Parra 184 Cal. App. 3d 139, 143 (Ct. App. 1986) (refusal to obey discovery order as contempt).

176. *See* Aradia Women's Health Ctr. v. Operation Rescue, 929 F.2d 530, 533 (9th Cir. 1991) (refusal to testify as contempt); *see* Danning v. Lavine, 572 F.2d 1386, 1389-90 (9th Cir. 1978) (refusal to obey discovery order as contempt).

177. Recently, Judith Miller of the *New York Times* was held in contempt for refusing to disclose the content of her conversations with then-vice-presidential chief-of-staff I. Lewis "Scooter" Libby, Jr. about the "outing" of former CIA agent Valerie Plame. *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006).

178. CAL. CIV. P. CODE § 1218(a) (West 2006).

proceeding.[179] Finally, he may be imprisoned until he complies with the order, or the court determines that he will not do so.[180]

Under federal law, the punishment for contempt may likewise include both fines and imprisonment.[181] As in California,[182] fines for a criminal contempt may not exceed $1,000.[183] However, a conviction for federal criminal contempt may result in imprisonment for up to six months.[184]

If the contempt is civil, a federal court may assess fines in whatever amount it deems necessary to compensate for actual losses sustained,[185] including the cost to federal taxpayers of the contempt prosecution.[186] The federal civil contemnor may be imprisoned until he complies, or the court determines he cannot do so.[187]

G. Recordkeeping and Document Destruction

IOA Standards provide that the ombudsman shall keep no records identifying complainants "on behalf of the organization,"[188] and shall keep all records secure, even from management.[189] Further, such records are to be subject to a consistent document destruction policy.[190]

Keeping no identifying records may not be practical, as some records must be maintained during the process, if only to refresh the ombudsman's recollection. Further, as Ziegenfuss notes, corporate ombudsmen are sometimes required to generate reports regarding the facts of a case, which may include the names of witnesses or potential witnesses.[191] For someone

179. *Id.*

180. *In re* Farr, 36 Cal. App. 3d 577, 583-84 (Ct. App. 1974).

181. 18 U.S.C.A. § 402 (2006).

182. *See* CAL. CIV. P. CODE § 1218(a) (West 2006); *see generally Roman Catholic Archbishop of L.A.*, 131 Cal. App. 417; *see also Branzburg*, 408 U.S. at 665.

183. *See* 18 U.S.C.A. § 402 (2006); *supra* notes 128-39 and accompanying text.

184. *See id.*

185. *In re* Maurice, 73 F.3d 124, 127-28 (7th Cir. 1995).

186. *In re* Jaques, 761 F.2d 302, 306 (6th Cir. 1985).

187. Chadwick v. Janecka, 302 F.3d 107, 117 (3d Cir. 2002) (holding that state court's denial of habeas corpus petition to contemnor confined indefinitely for period then totaling, seven years was not unreasonable application of federal law).

188. *See* IOA Standards of Practice, *supra* note 93 at § 3.5. As previously noted, the governmental ombudsmen of the USOA do not have similar standards. *See generally* Cook & Gronke, *supra* note 2.

189. *See* IOA Standards of Practice, *supra* note 93 at § 3.6.

190. *See id.*

191. *See* ZIEGENFUSS, *supra* note 71, at 116.

with enough knowledge of the corporation, it would not be hard to track down the complainant's identity, even if his or her name is not mentioned in the report or has been redacted.

Finally, Oser points out that keeping information from management may create conflicts of interest between the internal corporate ombudsman and the corporation.[192] One litigation-related conflict is described by Ziegenfuss, who recounts that his company's lawyers wanted to rebut a charge that the corporation had no complaint process by describing the plaintiff's visit to the ombudsman.[193] An ombudsman's records might also establish when a statute of limitations began to run, or reveal prior inconsistent statements made to the ombudsman.

Despite these tensions and conflicts, there is normally no legal requirement that records of a corporate ombudsman's activities be created. But the situation might well be different for certain regulated businesses. For example, California physicians are required to keep "adequate and accurate records relating to the provision of services to their patients."[194] While there is no authority on the subject, if a physician or medical group hired an ombudsman to resolve complaints, his or her files could constitute "records relating to the provision of services," which must therefore be maintained.

Similarly, insurance companies must maintain claim files containing all documents that "reasonably pertain to each claim."[195] Further, the destruction of documents – or a policy of not creating them in the first place in order to avoid their introduction in litigation – has been held to justify a finding of bad faith.[196] So if an ombudsman were used in the claims context, the failure to keep records, or the decision to destroy documents, in accordance with IOA Standards 3.5 and 3.6, could be unlawful.[197]

The issue of document destruction is a sensitive one. Federal obstruction-of-justice statutes criminalize the destruction of evidence known to be relevant to a pending or likely federal judicial proceeding.[198] A pre-existing document destruction policy will not necessarily immunize such conduct.[199]

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192. *See* Oser, *supra* note 72, at 296-97.

193. *See* ZIEGENFUSS, *supra* note 71, at 116.

194. CAL. BUS. & PROF'L CODE § 2266 (West 2007).

195. *See* CAL. CODE REGS. tit. 10 § 2695.3 (2003).

196. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 435 (2003).

197. *See* IOA Standards of Practice, *supra* note 93 at §§ 3.5, 3.6.

198. 18 U.S.C.A. §§ 1503, 1519 (West 2007).

199. Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L. 721, at 729-35 (2003).

Ombudsman records could be "relevant" under sections 1503 and 1519 if the complainant was dissatisfied with the informal resolution process and filed litigation over the same issues.[200]

California law is less expansive; it prohibits the knowing destruction of evidence that is "about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law."[201] There are also civil penalties for such destruction (or "spoliation") of evidence in litigation. They include the possibility that the court will draw a negative inference from the destruction of the ombudsman's records, or impose discovery sanctions on the corporation.[202] Under Federal law, spoliation of evidence may be grounds for a similar negative inference, or even a new trial on the ground of fraud.[203]

Clearly, if the court does not find the corporation's document destruction policy to be valid, the IOA's Standards on this topic can lead to serious consequences for both the ombudsman and the corporation.[204]

H. Notice to the Ombudsman as Notice to the Corporation

IOA Standard 4.8 provides that the ombudsman shall not serve as the organization's agent.[205] What this standard fails to recognize is that agency is not always the choice of the agent. For example, some corporations give their ombudsmen exalted titles, perhaps to ease their relations with other managers.[206] But this practice may mean that service of process on the ombudsman *is* service on the corporation, despite any statements to the contrary.

California law provides that service on the corporation is effective if it is made on an agent for service *or* on "the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to

200. 18 U.S.C.A. §§ 1503, 1519 (West 2007).

201. CAL. PENAL CODE § 135 (West 2007).

202. Cedars-Sinai Med. Ctr. v. Superior Court, 18 Cal. 4th 1, 12-13 (1998); CAL. EVID. CODE §413 (West 2007); CAL. CIV. P. CODE § 2023.030 (West 2007).

203. Chase, *supra* note 199, at 722 n.7 and accompanying text (citing FED. R. CIV P. 60(b)(3)).

204. *See supra* notes 188-203 and accompanying text.

205. *See* IOA Standards of Practice, *supra* note 93, at § 4.8.

206. *See* Futter, *supra* note 79, at 76-77.

receive service of process."[207] That is, giving the ombudsman any of these positions automatically authorizes his receipt of the summons.

IOA Standard 4.8 also asserts "notice to the ombudsman is not notice to the organization."[208] The ABA Standards also provide that notice to the ombudsman should not be imputed to the organization.[209]

The notice-to-the-organization issue raised by Standard 4.8 is likely to arise where a report of sexual harassment is made to the ombudsman.[210] Under Title VII, a corporation is liable for sexual harassment by plaintiff's coworkers or by non-employees where "its agents or supervisory employees knows or should have known" of the harassment, and fails to take "immediate and appropriate corrective action."[211]

Notice to management-level employees constitutes notice to the corporation in both the Ninth Circuit[212] and California.[213] Giving the ombudsman an officer's title[214] is therefore likely to result in imputed notice to the corporation where a complainant discloses sexual harassment.[215]

The American Bar Association's revised 2004 Standards for the Establishment and Operations of Ombuds Offices do not address the effect of a practitioner's position within the organization on the notice issue. They do, however, point out that the ombudsman's communications with management can result in notice to the organization, especially where the information is specific, or indicates a pattern of widespread wrongdoing.[216]

To minimize the possibility that notice to the ombudsman will be treated as notice to his or her employer, the ombudsman should be given power

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207. CAL CIV. P. CODE. § 416.10(b) (West 2007).

208. *See* IOA Standards of Practice, *supra* note 93, at § 4.8.

209. *See* AMERICAN BAR ASSOCIATION, *supra* note 18 at Standard F(3).

210. 29 C.F.R § 1604.11 (d)-(e) (2007).

211. *Id.*

212. Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991).

213. Birschtien v. New United Motor Mfg., Inc., 92 Cal. App. 4th 994, 1007 (Ct. App. 2001).

214. *See* Futter, *supra* note 79, at 76-77.

215. *See* Bonnie Belson Edwards & John H. Mason, *Sexual Harassment Investigation: How Far Can You Go? in* Mass. Cont. Legal Educ., Inc., 2 DISCRIMINATION AND SEXUAL HARASSMENT 2007, §14.12.2 (a). Even if the ombudsmen is not part of management, one commentary has argued:

> [T]he notion that a complaint to a designated "ombudsman" does not constitute "notice" to the employer for purposes of responding to claims of sexual harassment—even if it means disclosing the identity of the complaining individual—is of uncertain legal standing. Obviously, this would hinge upon a court (or better yet, a legislature) recognizing ombudsman "privilege."

Id.

216. Judy Kaleta & John Barkett, *The ABA Ombuds Standards: Advancing an Important Profession*, 11 DISPUTE RESOL. MAG. 9 (WINTER 2005); *see also* AMERICAN BAR ASSOCIATION, *supra* note 18 at Standard F(2).

within the organization, and access to senior management, without making him or her an officer or member of senior management.

An ombudsman may also unwillingly become an agent through other conduct. If the organization, through its lack of ordinary care, leads a third party to a reasonable belief that the ombudsman is its agent, and that party relies on her belief, the ombudsman will be treated as an agent.[217] This is known as "ostensible agency," and could make the ombudsman an agent of the corporation despite Standard 4.8.[218] A finding of ostensible agency requires "reasonable reliance" on facts leading one to believe in the ombudsman's agency.[219] Express representations that the ombudsman is not an agent could render such reliance unreasonable, though there is no case on point.

I. Other Paths to Ethical Practice – Applicable Privileges and Useful Practices

Although strict compliance with the published ethical standards may result in penalties once litigation begins, there are other doctrines and modes of practice that could allow an ombudsman to preserve the confidentiality of communications and the neutrality of his office. These strategies are discussed below.[220]

1. Confidentiality agreements

Garstang[221] and *Saeta,*[222] *supra,* indicate that confidentiality agreements may be the key to maintaining the secrecy of proceedings where the information to be disclosed to the ombudsman is not otherwise private. Breach of such an agreement gives rise to an action for damages. Its existence will also lead the court to apply a higher standard to discovery requests.[223]

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217. Mejia v. Cmty. Hosp. of San Bernardino, 99 Cal. App. 4th 1448, 1453 (Ct. App. 2002); *see also* CAL. CIV. CODE §2317 (West 2007).

218. *Id.* at 1453.

219. Hobart v. Hobart Estate Co., 26 Cal. 2d 412, 451-52 (1945).

220. *See infra* notes 220-50 and accompanying text.

221. *See supra* notes 156-60 and accompanying text.

222. *See id.*

223. Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J. L. & POL'Y 67, 76-77 (2000).

This higher standard arises from the fact that "communications made under a guarantee of confidentiality are "manifestly within the Constitution's protected area of privacy."[224] The privacy privilege thus applies; but it is a conditional privilege. It will be disregarded when (1) the information sought is directly relevant to the action, and (2) there is a "compelling public need" for the discovery that outweighs the privacy interest advanced.[225]

If this difficult test is not met, discovery will be denied.[226] So by ensuring that all participants enter into a confidentiality agreement, ombudsmen can help secure the integrity of their process despite the existence of related litigation.

The Mediation Privilege

The USOA recognizes that mediating disputes is a valid part of an ombudsman's function.[227] And while the IOA Standards do not address the issue, organizational ombudsmen, like their educational brethren,[228] often mediate disputes.[229] Because both California law[230] and federal authority recognize a mediation privilege, the ombudsman and process participants may each maintain the confidentiality of mediation efforts and the communications leading up to them.[231] For example, California's statute provides that no statement or document "made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" is admissible or discoverable.[232]

Mediation need not be formally designated as such. It is defined as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement."[233]

Because a mediator is simply "a neutral person who conducts a mediation," or an assistant to such a person, the ombudsman need not have any special qualifications in order for his conflict resolution efforts to

224. Bd. of Trs. v. Superior Court, 119 Cal. App. 3d. 516, 527 (1981).

225. *Garstang*, 39 Cal. App. 4th at 533-34; *Bd. of Trustees*, 119 Cal. App. 3d at 527-28.

226. *Garstang*, 39 Cal. App. 4th at 533-34; *Bd. of Trustees*, 119 Cal. App. 3d at 527-28.

227. *See* Government Ombudsman Standards, *supra* note 100, at § II (D)(2)(b); *see also* Mills, *supra* note 56 (a description of the City of Portland, Oregon's mediation program, which was designed to resolve complaints concerning the police department).

228. See *supra* notes 62-70 and accompanying text.

229. *See* ZIEGENFUSS, *supra* note 71, at 25, 38-39; *see also* Hill, *supra* note 58. Hill refers to corporate ombudsmen (somewhat disparagingly) as "mediator ombudsmen." *Id.*

230. CAL. EVID. CODE § 1119 (West 2007); *In re* Marriage of Kieturakis, 138 Cal. App. 4th 56, 85-86 (2006).

231. *See* FED. R. EVID. §§ 408, 501; *see also* Folb v. Motion Picture Indust. Pension & Health Plans, 16 F. Supp. 2d. 1164, 1171-72 (C.D. Cal 1998).

232. CAL. EVID. CODE § 1119 (West 2007).

233. CAL. EVID. CODE § 1115(a) (West 2007).

qualify as privileged.[234] The mediation privilege belongs to the neutral ombudsman as well as to the disputants, so it can be maintained by him or her even if one of the parties waives it.[235]

Although the *Garstang* court denied application of the mediation privilege to an ombudsman's efforts, it did so only because the then-required written mediation agreement had not been signed.[236] *Garstang* therefore does not bar application of the mediation privilege to an ombudsman's dispute resolution efforts.[237]

The ombudsman also has a limited privilege not to testify about his acts as a mediator. The privilege does not apply to related contempt, criminal, disqualification or disciplinary proceedings.[238]

Although California defines mediation broadly enough to encompass many types of dispute resolution facilitation, including a process in which the parties never meet face to face,[239] the courts would seem to be most likely to apply the privilege when a traditional mediation session has taken place. There are, however, no cases on point.

2. The Self-critical Analysis Privilege

Another doctrine that has the potential to shield aspects of the ombudsman's work is the self-critical analysis privilege, which protects voluntary self-evaluative reports aimed at determining an entity's

234. CAL. EVID. CODE § 1115(b) (West 2007).

235. *See* Olam v. Cong. Mortgage Co., 68 F. Supp. 2d at 1130-31 (applying California law).

236. *See Garstang*, 39 Cal. App. 4th at 531; *see also* CAL. EVID. CODE § 1152.5(c) (repealed 1997). The statute that required a written agreement was repealed in 1997. *Id.*

237. *See Garstang*, 39 Cal. App. 4th at 531.

238. CAL. EVID. CODE § 703.5 (West 2007). The statute provides:

> No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. . .

Id.

239. *See supra* note 234 and accompanying text.

compliance with legal or regulatory requirements.[240] Ombudsmen are frequently involved in such analyses.[241]

In order for the privilege to apply, three criteria must be met:

[F]irst, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed.[242]

For example, a corporate ombudsman's report to directors regarding ongoing complaints of unsafe practices could be covered by the privilege. There is a public interest in such reports, because they increase awareness of problems, and allow the corporation to take corrective steps. [243] Further, a corporation might well be reluctant to allow such analyses if they could be used in court.California does not recognize the critical self-analysis privilege, for which there is no statutory basis.[244] Further, it has not yet been recognized by the Ninth Circuit.[245] Although the current usefulness of the self-critical analysis privilege is therefore doubtful, its recognition is still possible, given the case-by-case approach taken under Rule 501, and practitioners may wish to claim it in appropriate circumstances.[246]

3. The Deliberative Process Privilege

In California, the deliberative process privilege protects "not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated."[247]

The privilege has also been accepted by the federal courts, so an ombudsman whose recommendations and discussions lead to changes in policy may rely on the deliberative process to protect communications with other participants.[248]

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240. Reichhold Chem., Inc. v. Textron, Inc., 157 F.R.D. 522, 524 (N.D.Fla. 1994).

241. Brenda v. Thompson, Note, *Corporate Ombudsmen and Privileged Communications: Should Employee Communications to Corporate Ombudsman Be Entitled to Privilege?* 61 U. CIN. L. REV. 653, 668-69 (1992).

242. Note, *The Privilege of Self-Critical Analysis,* 96 HARV. L. REV. 1083, at p. 1086 (1983).

243. *See* Wylie v. Mills, 195 N.J. Super. 332, 337-40 (1984).

244. Cloud v. Superior Court, 50 Cal. App. 4th 1552, 1557-58 (Ct. App. 1996).

245. Dowling v. Am. Haw. Cruises, Inc., 971 F.2d 473, 476 (9th Cir. 1992).

246. *See Kientzy*, 133 F.R.D at 571-73.

247. Regents of Univ. of Cal. v. Superior Court, 20 Cal. 4th 509, 540 (1999).

248. Carter v. U.S. Dep't of Commerce, 307 F.3d 1084, 1090 (9th Cir. 2002).

4. Lowering the Risk of Sanctions for Document Destruction

As noted above, document destruction policies carry with them a risk of liability for obstruction of justice and spoliation of evidence.[249] Nevertheless, the United States Supreme Court has recognized the validity of such policies, which are widely used in business.[250] But to be valid, the policy must be communicated to all employees, be routine, and be consistently applied.[251] It cannot be selective in its scope or enforcement. Therefore, compliance should be monitored on an ongoing basis.[252]

And the retention periods in the policy must be reasonable. One Nevada decision held that destruction of incident reports before the relevant statute of limitations has run justifies an adverse inference that the reports would have been unfavorable.[253]

Once it becomes apparent that litigation may be filed, a litigation "hold" must be placed on related document destruction, including any automatic deletion protocols related to electronic data. The failure to do so may well result in liability for obstruction of justice, even though the otherwise-neutral document-retention policy calls for destruction at the same time litigation becomes likely.[254]

IV. TIPS FOR MOVING FORWARD

The IOA's published ethical standards are surely a trap for the unwary. They could result in serious legal consequences for an ethical ombudsman.[255] But by keeping the following tips in mind, the ethical ombudsman can maximize the integrity of the process, while minimizing unacceptable legal risks:

Neither California nor the Ninth Circuit currently recognizes an ombudsman privilege.[256] But the routine execution of confidentiality

249. *See supra* notes 188-204 and accompanying text.

250. Arthur Andersen v. United States, 544 U.S. 696, 704 (2005).

251. Peter Brown, *Discovery and Use of Electronic Evidence, in* 797 PRACTISING L. INST. 447 (June 2004).

252. *See id.*

253. Reingold v. Wet 'N Wild Nev., Inc., 113 Nev. 967 (1997) (overruled in part by Bass-Davis v. Davis, 122 Nev. 422 (2006)).

254. *See* United States v. Quattrone, 441 F.3d. 153 (2nd Cir. 2006).

255. *See generally* IOA Standards of Practice, *supra* note 93.

256. *See supra* notes 141-63 and accompanying text.

agreements will decrease the likelihood of disclosure, especially if the information revealed to the ombudsman is generally regarded as personal.

The ombudsman should avoid being assigned other management responsibilities, or being designated as an officer of the corporation. Otherwise, notice to him or her will likely be treated as notice to the organization.[257] Further, the ombudsman should expressly notify process participants that he or she is not the agent of the corporation. Such notification could well defeat a claim of ostensible agency, by drastically weakening the element of reasonable reliance, which is necessary to a finding of agency on this theory.[258]

When the ombudsman attempts to resolve disputes, he or she should model those efforts on a traditional mediation session, rather than accomplishing the same results by phone or letter. While no doubt mediation will be more time consuming than other methods, it will maximize the chance that the mediation privilege will be applied, along with the related testimonial privilege conferred by California Evidence Code section 703.5.[259]

A legislative or executive ombudsman's contributions to policy change are probably protected by the deliberative process privilege, which should be claimed.[260] But the law is unlikely to shield a corporate practitioner's analogous efforts, because the self-critical analysis privilege has not been recognized by California or the Ninth Circuit. Nevertheless, because of the case by case approach taken by the federal courts, a claim that an ombudsman's work is a privileged self-critical analysis could succeed in federal litigation.

While generally an ombudsman has no duty to maintain records, this may not be true in heavily-regulated industries, or where a government entity is involved.[261] A wise ombudsman will become thoroughly familiar with the organization's recordkeeping obligations. If records are kept, they should be retained for a reasonable time, subject to a routine, universally-applied document destruction policy. This policy must be put on hold when litigation becomes likely.

Adopting these few changes will maximize the necessary confidentiality of the process while minimizing the adverse consequences to the ethical ombudsman.

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257. *See supra* notes 205-19 and accompanying text.

258. *See supra* notes 205-19 and accompanying text.

259. *See* CAL. EVID. CODE § 703.5, *supra* note 237.

260. *See supra* notes 247-48 and accompanying text.

261. *See* State *ex rel.* Strothers v. Wertheim, 80 Ohio St. 3d 155, 157-58 (1997) (reports to county ombudsman are subject to disclosure under the Ohio Public Records Act).