

Understanding the Types of Ombudsman: A Starter Guide

By Julie C. Smith and Charles L. Howard

Whether you are building an ombuds program, talking with an ombudsman as his or her constituent, or standing outside an ombuds office during discovery stymied by the program's confidentiality, it helps to know what type of ombudsman you are dealing with. Arm yourself with a basic knowledge of the blueprints and architecture of an ombuds office.

BACKGROUND

Hard to pronounce, harder to pin down

Ombudsman. An internet search can identify how to pronounce ombudsman (om-buds-muhn), or at least the Americanized version of the word. That is pretty much the limit of how helpful a quick search can be – the general definitions offered fall short of capturing the variation in roles the title can play. The seemingly mercurial nature of the term muddles understanding for laymen and lawyers alike. Although an ombuds might offer insight or clarity as part of the job, the term ombudsman is not so helpful in illuminating its meaning, which can change significantly depending on the situation. (For this article, note that ombuds and ombudsman are used interchangeably, with a nod to interests in both terms ranging from historical value to practitioner preference to gender neutrality to brevity.)

A Swedish word that appeared in the 1700s,¹ ombudsman means agent or representative²; however, the idea of a complaint officer goes back even farther into history, reaching back to Ancient Egypt, the Roman Republic, and the Han Dynasty.³ According to the American Bar Association's (ABA) 2004 Resolution updating and setting standards for ombuds programs, ombudsman means "an independent, impartial, and confidential complaint handler" who "serves as an alternative means of dispute resolution – a means by which issues may be raised, considered, and resolved."⁴ Very roughly, an ombuds is a neutral party present to examine or help resolve issues that arise, generally in a context with a significant power imbalance or fear of retribution. A key issue, however, is that there are different types of ombudsmen. In fact, the ABA has also adopted three other Resolutions, beginning as far back as 1969, that help define the most common types of ombuds.⁵ Accurately identifying what type of ombudsman serves in a particular context is easier with an understanding of the specific ombuds program; these programs have evolved in the U.S. over the past fifty years.

History of U.S. ombuds in a nutshell

In the 1960s, a minor explosion of works extolled the virtues of using an ombudsman; literature included law review articles, books, and a *Time* magazine article, all illustrating as one professor termed it, "ombudsmania."⁶ An early U.S. reference to ombudsman comes from a scholarly world traveler searching for innovations to bring home to the U.S. He describes an ombudsman's duties as an independent complaint handler for the public with the access and mandate to raise issues; he added, "this is what happens in such places as Utopia and Scandinavia. The institution of the Ombudsman works exceedingly well, especially in Denmark... The idea, coupled with American ingenuity to adapt it to our institutions, may have considerable potentiality."⁷ Sure enough, the ombuds concept caught on and flourished: in 1969, Hawaii produced the first U.S. governmental ombudsman, just ten years after it joined the union;⁸ in 1996, the Administrative Dispute Resolution Act broadly authorized federal agencies' use of ombuds; and across the decades, Congress has specifically provided for ombuds in various capacities.⁹

Over the years, the ABA has adopted four resolutions supporting increased use and delineating the essential characteristics of ombudsman. The drafters consulted¹⁰ with many ombuds entities and the

resolutions have heavily influenced the field, but as the ABA's Section for Dispute Resolution's Ombuds Committee noted, it was "not without controversy, due to the divergent interests represented in the wide range of ombudsman types."¹¹ The ombuds community accepted and adopted these resolutions to varying degrees, while some rejected them altogether.¹² Ombuds have many and varied roles throughout the private and public sectors, but for those operating according to the blueprints of the ABA ombuds resolutions, there are a few unifying factors.

ESSENTIAL CHARACTERISTICS OF AN OMBUDSMAN

How to build an ombuds program

Nuances in the term ombuds developed over decades of varied uses, but as defined under the several ABA resolutions, there are three necessary commonalities. Only with independence, impartiality in conducting inquiries and investigations, and confidentiality can an ombuds work effectively.

Independence

"To be credible and effective, the office of the ombuds is independent in its structure, function, and appearance."¹³ Part of the rationale for establishing and supporting an ombudsman is to counter constituents' fears of retaliation for bringing forward issues; similarly, ombuds have to be able to carry out their duties without fear that as a result of their work, their office, position, or resources would suffer. Independence is the foundation for constructing an ombuds office.

Impartiality

Once an ombuds has that crucial independence, genuine impartiality is possible. If independence is the foundation of an ombuds office, impartiality is the architectural entrance that allows individuals to visit the ombudsman. In investigations or inquiries, the ombuds acts without initial bias or conflicts of interests; impartiality does not, however, mean that an ombuds cannot develop an interest in policy change or act in an advocacy role as appropriate.¹⁴

Confidentiality

With the independent foundation and impartial entryway in place, the final vital element is the ability to close the door on the rest of the world. Confidentiality is the door that shields sources' identities and communications with the ombudsman, a barrier that separates the ombudsman from other offices receiving complaints but maintaining closer ties with the policy or practice of the entity. Confidentiality "promotes disclosure from reluctant complainants, elicits candid discussions by all parties, and provides an increased level of protection against retaliation to or by any party."¹⁵ An ombuds does not disclose confidential information unless there is an imminent risk of serious harm; exceptions exist at the ombudsman's discretion for disclosing non-confidential information or confidential information that cannot trace back to and identify the source.¹⁶

When the principles of independence, impartiality, and confidentiality are set up, ombuds can operate effectively for their constituents. While some legislation exists that explicitly outlines these elements for certain legislatively-created programs, many ombuds offices do not have the luxury of regulations protecting their operational standards; these essential characteristics are the best insurance for such offices against intrusion. When the principles fail, it is as if someone is listening behind the door, directing traffic away from the entrance, or even shutting down the office of the ombudsman entirely.

TYPES OF OMBUDS DEFINED BY THE ABA RESOLUTIONS

Ombuds have adapted over the years to address a range of opportunities in alternative dispute resolution. They stretch from universities to corporations to the Federal Government; they extend across the public and private sectors, including prisons, nursing homes, and newspapers.¹⁷ Under the delineations of the 2001 and 2004 ABA Resolutions, five types of ombuds are categorized: Classical, Legislative, Executive, Organizational, and Advocate.

A **Classical/Traditional** ombuds works to address problems for the general public or within an entity, generally regarding “actions or policies of government entities or individuals.”¹⁸ In the 2004 Resolution, the more particularized legislative and executive ombuds replace the classical category,¹⁹ but the broader term is still widely used by ombuds groups, including the ABA Ombuds Committee, and used more often than the legislative/executive delineation.²⁰ The ombudsman is either appointed by the legislative body or by the executive with confirmation from the legislative body. Traditional ombuds can:

- Hold agencies accountable to the public and assist in legislative oversight of those agencies.
- Conduct investigations and use subpoena power.
- Issue public reports.
- Advocate for change within the entity and publicly.²¹

A **Legislative** ombuds works in the government’s legislative branch to address internal issues or problems brought by the public, generally regarding accountability to the public for “the actions or policies of government entities, individuals or contractors.”²² Legislative ombuds are appointed by the legislative body or the executive with confirmation by the legislative body and adhere to the twelve characteristics²³ outlined in the 1969 ABA Resolution. An example of this type of ombuds is the corrections ombudsman. Legislative ombuds can:

- Hold agencies accountable to the public and assist in legislative oversight of those agencies.
- Conduct investigations and use its subpoena power during investigations.
- Issue public reports.
- Advocate for change within the entity and publicly.²⁴

An **Executive** ombudsman can work in private or public sector entities and can hear “complaints concerning actions and failures to act of the entity, its officials, employees and contractors.”²⁵ Unlike the legislative ombudsman, the executive ombuds is not created by or with the confirmation of a legislative body, but rather are often appointed by the head of an entity. An example of this type of ombuds is the municipal government ombudsman. Executive ombuds can:

- Conduct investigations.
- Issue reports.
- Hold the entity accountable or collaborate with the entity to make programs better.
- Have jurisdiction over a subject matter that involves multiple agencies, but should not have general jurisdiction over more than one agency if located in government.²⁶

An **Organizational** ombuds can work in private or public sectors and usually addresses issues brought by an entity’s members, employees, or contractors of an entity regarding its practice or policy.²⁷ These ombuds often work to help resolve conflicts on an informal level for the organization, using a range of methods from conflict coaching to informal mediation. In addition to the three principles of confidentiality, impartiality, and independence, the leading organizational ombuds association recognizes informality as a vital component in the standards of an organizational ombuds practice, declaring in its code of ethics, “The Ombudsman, as an informal resource, does not participate in any formal adjudicative or administrative procedure related to concerns brought to his/her attention.”²⁸ With the program arising from the entity, even with structural independence it is especially important for the constituent to clearly differentiate the ombuds program from other agency mechanisms. An example of this type of ombuds is the university ombudsman. Organizational ombuds can:

- Make inquiries and operate according to informal processes as specified in an office charter.
- Conduct inquiries impartially and independently.
- Issue reports.

- Advocate for change within the entity.²⁹

An **Advocate** ombudsman can work in private or public sectors. While remaining objective, an advocate ombuds “is authorized or required to advocate on behalf of individuals or groups found to be aggrieved.”³⁰ This ombuds is thus not always a neutral party, but at the fact determination stage, even the advocate ombuds must be impartial. If there is a basis for a complaint, the ombuds advocates for change or relief. This ombuds must understand the nature and role of advocacy and provide constituents information, advice, and assistance. An example of this type of ombuds is long-term care ombudsman.³¹ Advocate ombuds can:

- **Represent** constituents’ interests regarding policies implemented by the establishing entity, government agencies, or other defined organizations.
- **Initiate** action when merited in an administrative, judicial, or legislative forum.³²

A handful of types, but the list goes on

In addition to these five types, all kinds of other entities use the term ombudsman, perhaps hoping to gain the status or name recognition associated with “ombudsman,” but some do so without actually adhering to the operating standards set forth by the ABA or the ombuds organizations. This ends up being confusing and problematic not only for their office but also – and perhaps even more so – for other ombuds programs that do adhere to the standards.

Several ombuds groups exist that are geared towards a particular type of ombudsman, including the [United States Ombudsman Association](#) (centered on traditional ombudsman), the [International Ombudsman Association](#) (focused on organizational ombudsman), and the [Coalition of Federal Ombudsman](#) (concentrated on federal sector ombuds). These groups emphasize standards and principles for their membership, and are a good source to consult to get a detailed understanding of the values of a specific type of ombuds.

Other specific kinds of ombudsman include media ombuds, whistleblower ombuds, analytic ombuds, and a hybrid of ABA types. There are variations even within the ABA-defined categories. For instance, the Coalition of Federal Ombudsman and the International Ombudsman Association categorize types of ombuds in their groups as internally-facing or externally-facing, with the potential for overlap. The internal ombuds focus on issues within their organization, while the external ombuds focus on issues outside stakeholders have with their entity.

Resolving: the future

A widely used term to refer to different types of offices, ombudsman can be a tricky term to nail down. The program blueprints and structures are in place, but given American ingenuity and the inherent creativity of the alternative dispute resolution field, “ombudsman” may yet take on new and complex meanings.

For more information, visit the Dispute Resolution Section Ombuds Committee’s website:
<http://apps.americanbar.org/dch/committee.cfm?com=DR589600>.

Charles L. Howard is a partner and the General Counsel of Shipman & Goodwin LLP. He has represented organizational ombuds programs for twenty-five years and is the author of *The Organizational Ombudsman: Origins, Roles, and Operations-A Legal Guide*, published by the American Bar Association in 2010. He is also the Chair of the Ombuds Committee of the Dispute Resolution Section. He can be reached at choward@goodwin.com. **Julie C. Smith** is a mediator and Attorney-Adviser at the U.S. Department of State. A member of the Maryland Bar, she earned her J.D. from William and Mary Law School. She can be reached at juliesmithADR@gmail.com.

-
- ¹ Charles L. Howard, *The Organizational Ombudsman: Origins, Roles, and Operations - A Legal Guide*, 1 (2010).
- ² American Bar Association, *Standards for the Establishment and Operation of Ombuds Offices*, 1 fn. 2 (2001) [hereinafter 2001 ABA Resolution] available at www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/attach.authcheckdam.pdf (last visited Dec. 21, 2014).
- ³ Gerald E. Caiden, *The Institution of Ombudsman*, in *International Handbook of the Ombudsman: Evolution and Function* 9 (1983).
- ⁴ American Bar Association, *Standards for the Establishment and Operation of Ombuds Offices*, 9 (revised Feb. 2004) [hereinafter 2004 ABA Resolution] available at www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/attach.authcheckdam.pdf (last visited Dec. 21, 2014).
- ⁵ Howard, *supra* note 1, at 7, 8 fn. 25, 24.
- ⁶ Donald C. Rowat, *Preface to the Second Edition of The Ombudsman – Citizen Defender*, xii (2d ed. 1968).
- ⁷ Kenneth Culp Davis, *Ombudsmen in America: Officers to Criticize Administrative Action*, 109 U. Penn. L. Rev. 1057-58 (1961).
- ⁸ Caiden, *supra* note 3, at 3, 9.
- ⁹ 2004 ABA Resolution, *supra* note 4, at 9.
- ¹⁰ *Id.* at 10.
- ¹¹ American Bar Association, Dispute Resolution Section's Ombuds Committee, *Who We Are, How We Got Here, and What We Will Do*, <http://apps.americanbar.org/dch/committee.cfm?com=DR589600> (last visited Dec. 21, 2014).
- ¹² *Id.*
- ¹³ 2004 ABA Resolution, *supra* note 4, at 13.
- ¹⁴ *Id.* at 14.
- ¹⁵ *Id.*
- ¹⁶ *Id.* at 4.
- ¹⁷ Howard, *supra* note 1, 9-10, 15, 21.
- ¹⁸ 2001 ABA Resolution, *supra* note 2 at 1.
- ¹⁹ American Bar Association, Dispute Resolution Section, Ombuds Committee, *Who We Are, How We Got Here, and What We Will Do*, <http://apps.americanbar.org/dch/committee.cfm?com=DR589600> (last visited Dec. 21, 2014).
- ²⁰ Howard, *supra* note 1, at 26.
- ²¹ 2001 ABA Resolution, *supra* note 2, at 5.
- ²² 2004 ABA Resolution, *supra* note 4, at 1.
- ²³ *Id.* at 19, fn. 12.
- ²⁴ *Id.* at 6 - 7.
- ²⁵ 2004 ABA Resolution, *supra* note 4, at 1.
- ²⁶ *Id.* at 7.
- ²⁷ *Id.* at 1.
- ²⁸ International Ombudsman Association, *IOA Code of Ethics*, <http://www.ombudsassociation.org/About-Us/IOA-Standards-of-Practice-IOA-Best-Practices/Code-of-Ethics.aspx>.
- ²⁹ 2004 ABA Resolution, *supra* note 4, at 7.
- ³⁰ *Id.* at 1.
- ³¹ For more information, visit www.ltombudsman.org.
- ³² 2004 ABA Resolution, *supra* note 4, at 8.