OMBUDSMAN DILEMMAS:
CONFIDENTIALITY, NEUTRALITY,
TESTIFYING, RECORD-KEEPING

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An intra-institutional ombudsman is a person designated as a neutral or impartial dispute resolution practitioner, whose major function in this capacity is to provide confidential and informal assistance as a counselor, shuttle diplomat, mediator, fact-finder, and agent for orderly systems change, and whose office is located outside ordinary line and staff structures.

THE ISSUES

The new breed of in-house ombudsmen in North America faces several dilemmas.¹ How neutral or impartial are they? How confidential are they? Should an ombudsman keep individual case records? If so, who may see them? Should an ombudsman agree to testify as a witness in an in-house, adversarial proceeding? Should an ombudsman agree to provide facts to an in-house investigator in a formal investigation? Should an ombudsman agree to testify outside in a court proceeding, a government hearing or the like? Should an ombudsman ever be a formal fact-finder? Should an ombudsman agree to accompany a disputant in a formal fact-finding or adversarial hearing or participate in any other way in a formal grievance process?

These issues are not just theoretical. Many ombudsmen are now facing them. For example, the 1989 Corporate Ombudsman Association Survey indicated that 30% of corporate ombudsmen have been involved in a legal proceeding or a formal hearing when questions
like the above arose. Moreover, there is increasing discussion of these points nationally. The Administrative Conference of the US, in its June 1990 recommendations, recognizes that ombuds practitioners in federal agencies should maintain confidentiality and the 1990 Administrative Dispute Resolution Act in Federal Government permits designated neutrals in federal agencies to resist breaking confidentiality under most circumstances. This article addresses several questions which illuminate the dilemmas of impartiality and confidentiality, testifying and record-keeping.

WHY THE DILEMMAS?

It has frequently been argued that the situation of an ombudsman is, with rare exceptions, not compatible with bearing witness in apparently adversarial proceedings. And the subject is of growing interest. About 60% of the corporate ombudsmen answering the 1989 Corporate Ombudsman Association Survey expressed interest in having an agreement with their employers that they would not be called by their employer in its own defense in a court case; nearly 70% expected that their employees would try to have subpoenas against them squashed; and virtually 100% asked for the Corporate Ombudsman Association to prepare position papers on this subject.

College and university ombudsmen, state ombudsmen, and ombudsmen in the United Kingdom have been discussing the question of testifying, as have other kinds of neutrals like mediators. Well-known ombuds practitioners such as Pete Small of Berkeley, Geoffrey Wallace of the University of California at Santa Barbara, Herman Doi of the State of Hawaii, and James Haswell of the Insurance Ombudsman Office in the United Kingdom have argued that ombudsmen, including classic, public ombudsmen, should stay out of court proceedings.

Arguments for this position center on issues of confidentiality and neutrality. If an ombudsman appears as a witness in an apparently adversarial hearing, the authors believe that the image of the confidentiality of this practitioner will be damaged. They believe that this is possible, even in those cases where the relevant complainant to the office has given permission for the ombudsman to speak in an internal or public hearing. In that situation many observers may not know that permission was given and may simply see that an ombudsman will, after all, break confidentiality. (One can imagine the public discomfort about seeing a doctor or priest testify about a
confidential discussion.) This point is absolutely vital where an
ombudsman customarily sees people who could be in danger from
speaking up, such as prisoners or whistleblowers.

Another confidentiality problem exists for ombudsmen who are
designated as neutral or impartial practitioners. An ombudsman is
not exactly like other confidential practitioners, for example, those in
Employee Assistance. The clients of an Employee Assistance practi-
tioner go for help to a given Employee Assistance office (although
most Employee Assistance people are of course careful to respect
the rights of all, many see themselves as advocates).

An ombudsman, by contrast, must endeavor equally to protect
the rights of everyone involved in a case. Therefore, before an
ombudsman were to speak in an apparently adversarial hearing
about a given case, at the very least, the ombudsman would have to
get permission from every person involved in the case, including all
disputants, the employer, etc.

There is also a vital neutrality problem associated with an
ombudsman's appearing in an apparently adversarial proceeding.
For example, if a workplace ombudsman testifies in a way that
seems to favor the employer against a worker, it will appear to many
observers that the ombudsman is just a tool of management. If an
ombudsman testifies against the employer, it will sharply reduce the
interest of employers to maintain this kind of in-house critic and
change agent. Most important of all, if faced with this potential
dilemma, practitioners themselves will lose the courage to be out-
spoken in raising problems to management and in support of those
who blow the whistle.

The experience of the authors as well as that of many other
ombudsmen affirms the reality of these issues. Both managers and
employees (let alone people in institutions such as prisoners and
patients) do need a confidential and neutral place to seek counsel.
Frequent and important examples include the people who come to
an ombudsman office with questions about ethics, harassment, safety,
etc., who commonly ask, "Is this discussion really off the record?"
and, if they do not know the office, some version of "Whose side are
you on?" Yet ombudsmen are sometimes asked if they will appear as
witnesses, be formal observers of a dispute, accompany a disputant
in a formal grievance process, and the like. And all ombudsmen
think about what kind of records to keep and why. It seems that the
price of a real neutrality is eternal vigilance ... and continued intro-
spection.
THE PURIST PRACTITIONER

As a way of examining these dilemmas, the authors have developed the concept of the "purist practitioner." This is an ombudsman who remains as purely neutral and confidential as possible. A purist practitioner would begin with a discussion with his or her employer or appointing body. The ombudsman would have a written agreement that the employer or appointing body would not call him or her to testify in an adversarial process and every attempt would be made by the employer to shield the ombudsman from being called to testify by any outside body or person.

The purist ombudsman would not keep any detailed individual case records. Notes written to an in-house manager about a problem would become solely the property of the recipient. The ombudsman would only keep aggregated records and records that followed a certain location or a type of problem (for example, safety in the XYZ plant) rather than records about visitors or people alleged to be a problem. The (minimal) case notes required to address any case would be destroyed regularly as a matter of customary practice.

The purist practitioner would have thought through with great care each of the functions of an ombudsman and how to deal in each mode with the dilemmas of confidentiality and neutrality. (An ombudsman may of course pursue more than one complaint-handling function in any one case so the conduct of the practitioner, with respect to these dilemmas, may be the same in more than one complaint-handling mode.)

As a counselor, the purist ombudsman would offer nearly complete confidentiality to anyone who contacted the office. The ombudsman would make clear that the office is informal and off the record and would advise individuals of all informal and formal options open to them. There would be almost no circumstance under which the practitioner would talk about a contact to the office without specific permission. To illustrate, if asked, "Have you talked with Archibald McNoodle?" the ombudsman would reply with some version of "I cannot answer that question."

The standard exception to blanket confidentiality concerns the "duty to protect." If an ombudsman hears information that reasonably indicates that someone's life may be in danger, plainly that information must surface from the original informant if possible but, if necessary, from the ombudsman him/herself. In addition to the duty to protect, the authors believe that, if an in-house ombudsman
hears of criminal activity or other serious, dangerous or unlawful conduct, then that practitioner must make extraordinary efforts to surface the information to the managers or other persons responsible for investigation and judgment in a manner consonant with the confidentiality of the office.

This is usually possible. Usually an ombudsman can offer several, different, responsible options to a concerned person with this kind of information. (Always offering options to a complainant is in any case good professional practice.) One can accompany the concerned person to report the problem or get permission to report for the concerned person (with or without that person’s name). One may invoke some standard monitoring process like an audit or safety inspection or provoke some standard problem prevention device like a training program against harassment or do an informal investigation that illuminates the problem without identifying the complainant. In the last resort in a duty to protect, if an ombudsman believes that he or she must break confidentiality, the authors would expect that, in most circumstances, the purist would consider informing the person who came to the office, if this can be done responsibly.

In more common cases, suppose the practitioner is asked about specific information received in the ombuds office or about what happened when a certain visitor came to the ombuds office. The purist will not give out individual information without permission. (The ombudsman might, however, take this opportunity to explore the issues of the person who has asked.) Suppose there is a formal in-house investigation, the concerned person gives permission for the ombudsman to relay his tale, and a relevant manager (the finder of fact) approaches the ombudsman for information. What would the purist do?

In such instances the writers believe that an ombudsman may offer aggregated statistics, may discuss his or her operating style ("This is how I would have dealt with this kind of concerned person"), and may discuss what he or she knows of this kind of problem generally in the given work location. In particular, the writers believe it is appropriate for the ombudsman to steer the investigator into a productive path for discovery of data, for example, alerting the investigator to an in-house memo that he or she might have read earlier or even written.

The authors also believe it is correct to help an investigator evaluate his or her draft findings on the basis of the ombudsman’s general experience or aggregated statistics. For example, it is proper
for the ombudsman to ask questions of any manager or investigator that will lead that person to follow a fair and balanced process. In particular, an ombudsman might deliberately and systematically ask questions on all sides of an issue, pointedly from the perspective of each interested party, in order to help a manager or investigator to remain fair.

The authors do not think that the purist ombudsman should be a formal witness as to what a specific visitor, client, or other interested person may have said in the ombuds office. First, in most circumstances, anything that an ombudsman knows will come more appropriately from the concerned person or be ascertainable by other investigations or from other witnesses. However, there are cases for example in sexual harassment or safety cases, when it is important to know that the concerned person came forward at a certain time and to know what he or she said at that time.

The purist ombudsman should try to conduct himself or herself in such a manner that he or she is not the only source of discoverable records. For example, one may encourage a concerned person to keep a log, to write to friends, to write memos to the file, to consult other relevant staff offices or see other people who will be able to testify if necessary. Second, presuming always that one has permission, the ombudsman may make it universal practice to report to management in writing certain kinds of concerns like safety so that whatever vital information the practitioner once had is retained in other offices not bound by confidentiality.

The authors do not mean to claim that ombudsmen necessarily have an absolute privilege not to testify. There might be rare cases that could not be anticipated where absolutely vital information could only be offered by the ombudsman. This could happen, for example, if a visitor to the office died after informing the ombudsman and only the ombudsman of essential information that was to be brought forward in a criminal proceeding. Sometimes, through a cascade of management mishaps or in a wide restructuring, all proper paths fail and only the ombudsman could possibly know information critical to justice in a very grave case. And an ombudsman who is a direct witness to a felony should report it like anyone else.

But cases where the ombudsman must come forward should be extremely rare if information is properly passed on and/or recorded by others. Obviously, all other avenues should be explored before an ombudsman is a formal witness. Moreover, if a case like this arises,
the purist practitioner will write a memo to file explaining the reasons for a serious departure from the norm.

What of circumstances where the ombudsman has been a shuttle diplomat, going back and forth between the concerned person and others? Here again the authors believe that the concerned person and the others are the proper persons to keep records if they are needed for administrative action. For example, suppose the purist has been trying to get a certain problem resolved and finally appeals informally to high authority to have recalcitrant managers act appropriately.

If the high authority is outraged about the failures of those lower down and wants both to remedy the situation and to reprimand those who failed, may these actions be taken on the basis of the ombudsman’s presentation? Unless the matter is quite straightforward and the unsatisfactory management easily demonstrated, the authors would hope that the high authority will not take adverse administrative action without appropriate factual records in the hands of that authority or in the hands of someone other than the ombudsman.

Suppose the ombudsman is acting as a formal mediator, helping in-house disputants to come to their own written settlement. Here again the authors believe that the purist ombudsman will be very clear to all parties that he or she will not testify in any subsequent adversarial process as to what may have happened in the course of mediation, whether a success or a failure. (Some states have shield laws for mediators; this, of course, should be explored.) The purist ombudsman would also ask each disputant to write a statement requestion mediation, acknowledging that the mediator and his notes may not be called in any adversarial proceeding.6

Suppose an ombudsman is asked to do a formal finding of fact in a formal grievance process (as distinguished from the informal investigation and recommendations for dispute resolution that constantly accompany shuttle diplomacy). How we look at this situation depends on the type of investigation. One can do an objective, spare investigation that simply iterates fact; this is what would have been captured on videotape and audiotape if all relevant events had been recorded. Where there are different stories, an iteration of fact may list all relevant points of view: A said this, B said that.

In this kind of investigation, the contribution of the fact-finding depends on the evidence itself which stands on its own. It can be important to have a neutral person collect such evidence, both for
fairness and to gain access to people who otherwise might not testify. Fortunately, this kind of finder of fact is not very likely thereafter to be required as a witness and any request to testify may be particularly reasonable to decline.

There are more elaborate findings of fact where the investigator reports not only evidence but the interpretation of evidence. "A said this, B said that; for these reasons I find that A is telling the truth." The investigator's role broadens yet again when he concludes a finding of fact with recommendations for management decision. In this circumstance, the fact-finding ombudsman makes judgments about substance as well as arguing for fair process.

These roles call more into question whether an ombudsman should be shielded from testifying about an investigation. However, even in cases like these, Herman Doi and James Haswell, working on the more public edge of the profession (as a state ombudsman and UK insurance ombudsman, respectively, each strongly pleaded not to be called as a witness.

In formal investigations which will form the basis for management decision, if the ombudsman makes recommendations about substance as well as arguing for fair process, there is a serious issue about "Who is the client?" As noted above, an ombudsman, working informally as an alternative dispute resolution specialist, has multiple clients: the disputants, the employer, perhaps other stakeholders. As noted above, one practitioner says, "My employer has a long run interest with anyone who has been wronged, and where two people each have wronged the other, my employer may have a partial interest on each side."

In this circumstance, ombudsmen work hard for integrative solutions. Where the dispute has become completely polarized, the employer—or the employer and society-- may be the only clients or it may appear that there is only one client. It is in these circumstances that an ombudsman would be most likely to be called to testify, as one or another disputant files suit, and it is in these cases that the most damage could be done to the image of neutrality if the practitioner were in fact to testify.

With respect to formal investigations, the purist practitioner has options. One purist option is to refuse to do formal investigations for a formal grievance procedure. Another choice is to make findings of fact, but not to express opinions of who is right and not to make recommendations.

Another possibility is to take on a formal investigation, when the
ombudsman is obviously the best and fairest choice for that role, but
to write a memo to file, acknowledging that, with respect to this
specific task, one may be called to testify.\textsuperscript{9} Alternatively, the purist
might follow the path of distinguished public ombudsmen, much of
whose work is composed of just such investigations, who believe that
ombudsmen ought never to testify (beyond offering the reports pre-
pared to fulfill the functions of the office).

Should an ombudsman agree to be \textit{an observer} in an adversarial
hearing? It could be argued that fair process is more likely when an
observer is present. The authors believe that the purist practitioner
could undertake this role if he or she is very clear about the role.
They think this role would properly be to observe and, if necessary,
comment on process and, if necessary, refuse to continue to observe
unfair process, but not to take notes and not to be a witness later on.
By the same token, the authors believe that it is proper for an
ombudsman to guide and chair a peer review or other grievance
process as a \textit{non-voting, neutral grievance coordinator}.\textsuperscript{10}

Should an ombudsman be formally an advocate or accompany
any party in a formal grievance process? The authors believe that the
purist practitioner will not perform these roles or would do so (with
a memo on file about making an exception) only in a most excep-
tional case.

As an \textit{agent for systems change} and as an upward feedback
mechanism, the purist ombudsman will be exceptionally careful
about questions of records. The authors believe that it is proper for
an ombudsman to keep aggregated statistics, where individual cases
cannot be identified, and to answer questions about how the statis-
tics are kept. In order to protect the privacy of the employer and
facilitate responsible systems change, it is appropriate for an om-
будсman to convey some statistics and some reports to senior
management only.

It is appropriate to use "generic" cases, clearly labeled, for
management training and other kinds of reports. The authors believe
that it is correct to work for systems change on the basis of unidenti-
fied witnesses, where the witnesses may feel in danger as in prisons
or in whistleblowing situations. It is correct to call for a fair investi-
gation on the basis of information supplied by unidentified witnesses.

\textbf{THE PURIST'S PATH TO REFUSING TO TESTIFY}

Obviously a purist who does not wish to testify should, if possible,
never testify in an adversarial proceeding, in-house or out of house. (Making a common practice of picking and choosing where one will testify will seem suspect to nearly everyone.) The purist ought to make his or her position clear at every relevant opportunity and should post a relevant Code of Ethics or a statement about the office. The purist may be working for appropriate shield laws. The purist in principle will not take sides in public or any issue outside ombudsman practice about which responsible people disagree, for example, state and local politics, union campaigns, abortion, disarmament.\[11\]

If called under court order, the purist ombudsman must decide whether or not to obey the law or risk and possibly accept a contempt citation and then, if necessary, decide whether to go to jail. A practitioner may try to negotiate a lesser compliance with a court order. This may seem reasonable if, for any reason, the ombudsman’s own work is in question.

For example, an ombudsman might offer to speak (solely) about customary office practice or, if under attack personally, might agree to testify (solely) about his or her own statements and actions in the case without speaking of anyone else. The practitioner under duress might also agree to speak but only in a closed discussion outside of a formal hearing or courtroom. Under court order, the practitioner might agree to speak but only about the positions and statements of those who have given permission. Obviously an ombudsman may, in fact, not remember much without records and may say so. An ombudsman whose customary practice is to limit formal findings of fact solely to objective fact might also decide to avoid opinions and personal judgments in formal testimony.

It is important to realize, if possible before the need arises, that if the ombudsman does not testify, he or she may sometimes feel that justice is not done. Moreover, the ombudsman himself or herself may be attacked and have no opportunity for self-defense. All of this will be extremely painful to every responsible practitioner. The dilemmas are not escapeable.

**RULES OF THUMB**

Here are some rules of thumb for the individual practitioner. An ombudsman should be clear about his or her role in each function of a complaint-handler and should be clear about that role with everyone. The ombudsman should establish customary modes of practice,
especially those which reduce the likelihood of being called into a formal grievance (for example, always or nearly always offering several options to every concerned person for the concerned person's choice). The purist will then stick to these modes with care. The ombudsman should think through his or her customary practice with regard to investigations. Record-keeping practices should be especially carefully scrutinized and adhered to. Information that will be needed by a complainant or management should, in general, be kept by someone other than the ombudsman. Exceptions to normal practice should be noticed, analyzed, and written up for the file if important.

WHAT SHOULD BE DONE?

The authors recommend that these questions be thought through clearly with the employer or appointing body and with professional colleagues. They recommend written agreements and relevant codes of ethics for professional associations of ombudsman. They also believe that there should be shield laws for ombudsman similar to those for neutrals functioning in federal agencies as established by the Administrative Dispute Resolution Act of 1990.

NOTES

1. The authors wish to thank James Ziegenfuss and Robert Munzenrider of Penn State University who, with Mary Rowe, conducted the Corporate Ombudsman Association Surveys cited in this article. They are also indebted to attorneys James Simon and Jerome Weinstein who have worked extensively with the Corporate Ombudsman Association and who have advised the authors on confidentiality issues since 1984 and 1973, respectively.

2. The authors use the term "bearing witness" to include use of ombuds office records as well as the practitioner's appearance as a witness. The question of whether and when an ombudsman may bear witness in formal, adversarial proceedings is not yet a settled matter among ombudsmen. The Ombudsman Association (TOA) and its Board are discussing this matter, as are college, university, state and other ombudsmen in the US, corporate ombudsmen in the UK, and probably others. There have been some important cases in the United States and England where requests to bear witness have been withdrawn. Codes of ethics for various neutral practitioners speak to these questions.

3. One hopes that this situation will not happen often. The purist practitioner should make clear to all sides in relevant cases and at relevant points in every discussion
that ombudsmen do not offer testimony in adversarial processes.

4. Interestingly enough, the problem arises where the testimony of the ombudsman would be damaging to the person who called the ombudsman as well as in cases where the ombudsman's testimony would be supportive.

5. Very occasionally the ombudsman himself/herself will be an injured party and may decide for compelling reasons that it is worth the loss of "neutral" image to pursue his or own case.

6. Such forms are being developed by the authors; however, practitioners can just use a simple statement.

7. It is very uncommon for an ombudsman to be an arbitrator, decision-maker or voting member of a grievance panel. The classic phrase about the profession is: "Ombudsmen may not make or change or set aside a law or management decision; theirs is the power of reason and persuasion." Ombudsmen typically have every function of a complaint-handler except that of judge.

8. At least 70% of corporate ombudsmen in the 1989 Survey reported themselves to be "fact-finding" in half or more of their cases. Most of the fact-finding is informal. However, since some companies do not have formal grievance procedures, the potential exists for informal investigation in such companies to be seen as formal, especially if the ombudsman submits findings in writing.

9. Two of the authors are not in favor of this option and the authors believe that other practitioners may not be.

10. This role in fact exists very successfully in a number of companies.

11. Some ombudsmen on principle do not socialize with colleagues from the workplace, except at ceremonial and public gatherings, in order to protect the image of scrupulous neutrality. Many ombudsmen do not accept gifts larger than a flower or a thank-you card.

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