

THE INTERNATIONAL OMBUDSMAN ASSOCIATION (IOA)
GUIDANCE FOR BEST PRACTICES AND
COMMENTARY ON THE AMERICAN BAR ASSOCIATION
STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS
OFFICES, REVISED FEBRUARY 2004

March 14, 2006

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The International Ombudsman Association (IOA) wishes to clarify its own guidance on best practices for organizational ombuds in light of the 2004 modifications to the American Bar Association (ABA) Standards for the Establishment and Operations of Ombuds Offices as revised in February 2004 (hereafter, the “ABA Standards”).

I. INTRODUCTION

Until recently, organizational ombuds standards have been asserted, without challenge, as a set of ideals for a role that was principally self-regulated. In the United States, there have been no laws or rules that define necessary credentials for declaring oneself an ombudsman, no training path required to be entitled to use the name, and no criteria for certifying any ombuds programs as legitimate. As the organizational role became more widely established, during the 1990s, the two United States organizational ombuds organizations, The Ombudsman Association (TOA) and The University and College Ombuds Association (UCOA), ratified their own Standards of Practice and criteria for professional association membership. These two organizations merged in July of 2005 to form The International Ombudsman Association, which developed its own IOA Standards of Practice and criteria for membership. Members of the ombuds profession hoped that the standards they defined for themselves would set the parameters for other efforts to define formal or legal terms of reference for the role. The ABA Standards for the Establishment and Operation of Ombuds Offices and accompanying Report, initially created in 2001, constituted the first time that another profession has fully examined the ombuds role in the light of its own perspectives and interests and offered its interpretation of the role. The ABA Standards were revised in February 2004. (In 1969 the ABA adopted a resolution “recommending that state and local governments consider establishing ombudsmen who would be authorized to inquire into administrative action and to make public criticism.” That Report was written in reference to classical ombudsmen and did not address the organizational ombudsman role which was, at that time, in its infancy.)

The 2004 ABA Standards modified the Standards passed by the ABA in 2001. The 2001 document represented a partially successful compromise document as the result of the joint efforts of the Administrative Law and Alternative Dispute Resolution (ADR)

sections of the ABA working with representatives of several ombuds organizations. They guided a group proposing Standards that attempted to reflect the central concerns of the ombuds community while working closely and intensely with the various sectors of the ABA. The United States Ombudsman Association (USOA), which largely represents classical ombudsmen, was unhappy with the results and withdrew its support and disavowed the proposed report and recommendations.

In addition, certain issues, such as notice and the relation of organizational ombuds to unions, were not fully addressed in the 2001 Standards because it was not possible to reach a formulation satisfactory to all parties. The 2004 Standards represent a second compromise – that between the key ABA drafters of the earlier report and representatives of additional ABA sections who had voiced a variety of new concerns that emerged as different sections reacted to the first report. Because of internal dynamics within the ABA, representatives of the different ombuds organizations were not able to play as active a role in the development of the 2004 Standards as they had in the first process, and a number of the objections and critical changes offered by ombuds organizations were ultimately not included in the second report.

In August of 2004, the Boards of Directors of TOA and UCOA approved the following Resolution in response to the ABA Standards of 2004:

RESOLVED: The Ombudsman Association and The University and College Ombuds Association note the Resolution adopted by the American Bar Association House of Delegates on February 9, 2004, on Standards for the Establishment and Operation of Ombuds Offices. The ABA Resolution significantly departs – in provisions including but not limited to confidentiality and notice – from the Standards of Practice adopted by The Ombudsman Association and The University and College Ombuds Association, which were derived from the best practices of organizational ombuds based on many years of collective experience. The Ombudsman Association and The University and College Ombuds Association therefore reaffirm their Standards of Practice.

The ABA Standards approved by the ABA Board of Delegates in February of 2004 include several changes that require the serious consideration of all practicing organizational ombuds and IOA members. Many of the principles stated in the ABA Standards are helpful to organizational ombuds, particularly the ABA's support for the essential ombuds characteristics of independence, impartiality, and confidentiality. Part II of this document (hereafter referred to as "IOA Guidance"), endorses the ABA's recommendation that the scope and authority of every organizational ombuds office be defined by a written charter.

Other areas of ombuds practice addressed in the 2004 ABA Standards raise serious concerns among the organizational ombuds community either because their implications are ambiguous or because they seem to constrain or undermine certain key aspects of the ombuds role. Key among these is Section D of the ABA Standards, entitled "Limitations on the Ombuds's Authority," which refers to the extent to which it is

appropriate for an organizational ombuds to address issues arising under a collective bargaining agreement or within the purview of federal, state, or local labor or employment laws. The third part of this IOA Guidance comments on Section D of the ABA Standards.

The language of Section F of the ABA Standards, entitled “Notice,” also raises concerns for ombuds practitioners. The fourth part of this IOA Guidance therefore comments on issues regarding notice. The first half of the fourth section deals with general principles for ombuds practice to clarify that a visitor’s communication to only the ombuds office does not constitute notice to the organization, but that under certain circumstances it is possible for the ombuds to put the entity on notice. The second half of the fourth section addresses how the ombuds should advise the visitor about the issues of confidentiality, notice to the organization and other aspects of the visitor’s rights.

Sections D and F of the ABA Standards are quoted in full at the beginning of Parts III and IV below. The complete text of the ABA Standards is available at www.abanet.org/adminlaw/ombuds/115.pdf.

This IOA Guidance document, originally drafted by TOA and UCOA, was presented online to the members of those organizations in February 2005, and distributed and discussed in sessions of the annual conferences April 9-13, 2005; the memberships’ open comment period extended from February through the end of April 2005. All comments received were carefully evaluated and many were incorporated into the document and/or will be integrated into ombuds training programs. The final revised version, presented to IOA members in March 2006 through the IOA Legal and Legislative Affairs Committee of IOA, is intended to provide:

1. Guidance for IOA members in interpreting the ABA Standards document, including recommendations for best practices in their offices and guidance when having discussions with their own organizations’ management, counsel and other relevant parties about charter or terms of reference, job descriptions and related matters;
2. Guidance for instructors in IOA training courses regarding the implications of the ABA document for how IOA defines and explains the ombuds role ;
3. Guidance for organizations considering the establishment of new ombuds programs or the review of existing programs;
4. Greater clarity regarding the key areas where the view expressed by ombuds professionals of their role and functions may vary somewhat from the view of the ABA.

It is important to emphasize that there are many elements of the ABA Standards that are supported by the ombuds community. In many ways the IOA Standards of Practice are consistent with the ABA Standards. In some of the commentary in this IOA

Guidance document, the perspective may be different from that of the ABA, but the ultimate definition of the ombuds function may be similar. Some of our recommendations may be compatible or even identical with the intentions of the ABA.

We recognize that both the ABA and the IOA are committed to creating greater uniformity in the formulation and practice of the ombuds role while simultaneously recognizing the value to society of informal, interest-based conflict resolution programs. It is to this end that we offer the following guidance and commentary.

II. OMBUDS OFFICE CHARTER

Most prominent among the helpful components of the ABA Standards is the stipulation that every organization with an ombuds should have a charter (also sometimes known as “terms of reference”) that specifies the functions, roles, limitations and protections of that ombuds office, especially the essential characteristics of independence, impartiality, and confidentiality. The charter will help each organization’s ombuds practice to maintain the highest standards and will help the organization and the individuals who use the office have a better understanding of its functions and confidence in the integrity of the process.

The ABA Standards includes a 12-page “Report” that includes a detailed description of the duties and authorities of the ombuds that should be defined in a written and publicly available charter. The recommendation for best practice below is a summary of the discussion of the ombuds office charter as found in the Report appended to the ABA Standards.

IOA Recommendation

- **Each entity that establishes an organizational ombuds office should ensure that the office has a charter that affirms the essential characteristics of the ombuds function – independence, impartiality, and confidentiality – that govern the role in which the ombuds receives complaints, works to resolve particular issues informally, and makes recommendations for the general improvement of the organization. The charter should also specify and define the ombuds’ scope of practice and limitations on the ombuds’ authority; qualifications to be an ombuds; office structure; procedures; confidentiality; and an understanding about the ombuds office not accepting notice on behalf of the entity.**

III. LIMITATIONS ON THE OMBUDS'S AUTHORITY

This part of the IOA Guidance for organizational ombuds responds to Section D (6) of the ABA Standards which presents limitations on the ombuds' authority to "address any issue arising under a collective bargaining agreement or which fall within the purview of any federal, state, or local labor or employment law, rule or regulation. . ."

We first quote from the relevant section of the ABA Standards:

a. Quotation

LIMITATIONS ON THE OMBUDS'S AUTHORITY

- D. An ombuds should not, nor should an entity expect or authorize an ombuds to:
- (1) make, change, or set aside a law, policy, or administrative decision
 - (2) make binding decisions or determine rights
 - (3) directly compel an entity or any person to implement the ombuds's recommendations
 - (4) conduct an investigation that substitutes for administrative or judicial proceedings
 - (5) accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding officer in that action explicitly consent
 - (6) address any issue arising under a collective bargaining agreement or which falls within the purview of any federal, state, or local labor or employment law, rule, or regulation, unless there is no collective bargaining representative and the employer specifically authorizes the ombuds to do so,⁴ or
 - (7) act in a manner inconsistent with the grant of and limitations on the jurisdiction of the office when discharging the duties of the office of ombuds.

⁴ Under these Standards, the employer may authorize an ombuds to address issues of labor or employment law only if the entity has expressly provided the ombuds with the confidentiality specified in Paragraph C(3). An ombuds program as envisioned by these Standards supplements and does not substitute for other procedures and remedies necessary to meet the duty of employers to protect the legal rights of both employers and employees.

(ABA Standards, Section D)

We believe this section of the ABA Standards generally reinforces an important and long-standing principle of ombuds practice, namely to provide an informal, impartial and confidential resource for resolution of various workplace issues. Items (1) – (5) and item (7) are compatible with IOA Standards of Practice. Only item (6) raises concerns, which are discussed below.

b. IOA Commentary and Recommendations

i. Issues arising under a Collective Bargaining Agreement (CBA)

Ombuds generally have great respect for the principles and goals of organized labor's advocacy for fair and just treatment of workers, and many ombuds are routinely called upon to provide informal assistance to union members. These requests for assistance, or referrals, which may come from union representatives, managers, or the union members involved, normally do not involve issues arising under a collective bargaining agreement (for example, union members may seek the assistance of an ombuds to address concerns about the entity or workplace in general, or conflict between members of the same union or with a non-union co-worker). Ombuds do not participate in formal grievances or substitute for existing grievance procedures. Thus, if an issue *does* fall under a CBA, the ombuds must first consider whether it would be appropriate to listen to the concern or accept the referral. If the union representatives, management, and union member(s) all agree to refer the problem for informal resolution, the referral may be appropriate for the ombuds. Typically, these kinds of referrals are made in the spirit of cooperation and with the goal of benefiting union and non-union employees, management, and the workplace and entity as a whole. Moreover, ombuds intervention under these kinds of circumstances is consistent with the spirit of many workplace policies and CBAs that recommend that, where possible, problems should be addressed through means of alternative dispute resolution.

When an ombuds assists a union employee, he or she should discuss generally known and applicable union options and resources with the union employee, and should defer to the union process any issue covered by the CBA contract unless otherwise agreed to by the visitor, the organization, and the union. An ombuds is not expected to be a substitute for a union representative in terms of providing advice about formal union processes or available union benefits or services.

This practice is consistent with the role of the ombuds to supplement existing resources available to their constituents, rather than to circumvent, duplicate, or create alternative grievance mechanisms. We agree with the statement in the ABA Report that an entity's policy of allowing an ombuds to address labor or employment-related matters should not be considered a suspect or disfavored practice.

IOA Recommendations

- **The ombuds charter, and, where possible, any relevant collective bargaining agreement, should define the involvement of an ombuds with union employees and with issues that arise under the collective bargaining agreement. For those ombuds whose scope of services includes union employees, the ombuds should defer to the union process any issue covered by the CBA unless otherwise agreed to by the union, the entity, and the persons involved.**

- **The ombuds should always inform covered employees about the union process when providing assistance on an issue that might be covered by the CBA.**
- ii. Issues that fall within the purview of federal, state, or local labor or employment laws

In addition to issues arising under a CBA, Section D(6) also raises questions about whether the involvement of an ombuds, in matters of labor and employment-related laws, could raise sensitive issues that may affect the rights and liabilities of the parties under those laws. Our longstanding position has been and continues to be that unless specifically excluded from involvement in labor or employment law issues, the organizational ombuds may address these issues. The IOA believes that the ABA's position in this area is inconsistent with the sound principles of alternative dispute resolution.

We recognize that visitors to the ombuds office may discuss a wide range of workplace concerns, some of which may relate to federal, state, or local law, and we respect the ABA's concern for preserving visitors' legal rights. As clearly stated above, our position is that an ombuds may address issues that fall within the purview of federal, state or local labor and employment laws. The ombuds should adopt important safeguards and considerations when dealing with cases concerning rights arising under a CBA or potentially relevant employment law. This recommended practice enhances the ability of an ombuds to effectively and appropriately address certain cases. We believe the safeguards and considerations recommended by the ABA Standards mirror existing ombuds ethics, values and best practices. For example, the ABA Standards suggest that an entity authorize its ombuds office to address matters related to labor and employment law only if the office meets the three essential characteristics of independence, impartiality and confidentiality (ABA Standards, Section D(6), Footnote 4). These characteristics are of equal importance to the ombuds profession and are the foundation of ombuds standards, values and ethics.

For most entities, it is the combination of informal services and formal grievance procedures, embodied in a conflict management system, that provides the appropriate range of options and that allow for early identification and resolution of potential legal issues or concerns. Central to ombuds practice is the principle that an ombuds program supplements, but does not replace or seek to duplicate existing formal grievance procedures, and that it is the role and obligation of the ombuds to refer visitors to the entity's formal procedures and remedies whenever appropriate. Nevertheless, visitors will often choose to explore informal options for a wide variety of reasons.

We believe the recommended safeguards reaffirm this important principle, and that they afford an opportunity for ombuds to demonstrate support for the provision of equitable and adequate formal grievance procedures as well as informal ombuds conflict resolution options. We note that the ABA positions stated in the ABA Standards and the ABA Report are internally inconsistent. We, therefore, want to draw special attention to,

and express our concurrence with, the statement in the ABA Report that an entity's policy of allowing an ombuds to address labor or employment-related matters should not be considered a suspect or disfavored practice.

IOA Recommendations

- **Ombuds should function in a way that addresses concern for preserving the legal rights of visitors. An ombuds should present and if appropriate discuss an appropriate range of options available to the visitor from the very informal to the most formal. Formal options may include ways to put management on notice of an issue, referrals to rights-based elements of the organization's conflict resolution system, or the provision of information about seeking external legal advice (for example, providing contact information to the local bar association's attorney referral service).**
- **When the ombuds works with the visitor to address issues that may involve other formal alternatives (under law, rules, or regulations), it should be made clear to the visitor that an informal approach does not automatically exclude the visitor's later participation in more formal options. The ombuds should remind the visitor to keep in mind possible time limits and their potential impact on the visitor's more formal options. The ombuds should not provide legal advice, but should suggest alternatives that make the visitor aware of the possible need to seek legal advice.**

IV. NOTICE

This part of the IOA Guidance discusses the concept of legal notice in general, and responds to the ABA Standards for notice as set forth in Section (F) of the 2004 revised Standards. We first quote the relevant section of the ABA Standards:

a. Quotation

NOTICE

- F. An ombuds is intended to supplement, not replace, formal procedures.⁵ Therefore:
- (1) An ombuds should provide the following information in a general and publicly available manner and inform people who contact the ombuds for help or advice that-
 - (a) the ombuds will not voluntarily disclose to anyone outside the ombuds office, including the

- entity in which the ombuds acts, any information the person provides in confidence or the person's identity unless necessary to address an imminent risk of serious harm or with the person's express consent
- (b) important rights may be affected by when formal action is initiated and by and when the entity is informed of the allegedly inappropriate or wrongful behavior or conduct
 - (c) communications to the ombuds may not constitute notice to the entity unless the ombuds communicates with representatives of the entity as described in Paragraph 2
 - (d) working with the ombuds may address the problem or concern effectively, but may not protect the rights of either the person contacting the office or the entity in which the ombuds operates⁶
 - (e) the ombuds is not, and is not a substitute for, anyone's lawyer, representative or counselor, and
 - (f) the person may wish to consult a lawyer or other appropriate resource with respect to those rights.
- (2) If the ombuds communicates⁷ with representatives of the entity concerning an allegation of a violation, then-
- (a) a communication that reveals the facts of
 - (i) a specific allegation and the identity of the complainant or
 - (ii) allegations by multiple complainants that may reflect related behavior or conduct that is either inappropriate or wrongful should be regarded as providing notice to the entity of the alleged violation and the complainants should be advised that the ombuds communicated their allegations to the entity; but otherwise,
 - (b) whether or not the communication constitutes notice to the entity is a question that should be determined by the facts of the communication.
- (3) If an ombuds functions in accordance with Paragraph C, "Independence, Impartiality, and Confidentiality," of these standards, then-
- (a) no one, including the entity in which the ombuds operates, should deem the ombuds to be an agent of any person or entity, other than the office of the ombuds, for purposes of receiving notice of alleged violations, and

- (b) communications made to the ombuds should not be imputed to anyone else, including the entity in which the ombuds acts unless the ombuds communicates with representatives of the entity in which case Paragraph 2 applies.

⁵An ombuds program as envisioned by these Standards supplements and does not substitute for the need of an entity to establish formal procedures that may be necessary *to protect legal rights and to address allegedly inappropriate or wrongful behavior or conduct*

⁶The notice requirements of Paragraph F do not supercede or change the advocacy responsibilities of an Advocate Ombuds.

⁷Under these standards, any such communication is subject to Paragraph C (3).

b. IOA Commentary and Recommendations on Sections F (2) and F (3)

Certain federal and state laws require an organization to take action when placed on “notice” of an alleged violation of the law. Therefore, there are situations where conversations within the workplace can place the organization “on notice,” thus requiring the organization to act, whether or not that is the wish of the person involved. Typically, the organization establishes official reporting channels designated as points of contact for reporting certain concerns such as sexual harassment (e.g., the human resources office, the sexual harassment prevention office, women’s resource center, or similar office) or fraud, waste and abuse of government/public/company resources (e.g., the ethics office, internal audit, or similar office). In addition, an organization may be placed on notice when information becomes known to certain organizational managers by virtue of the management level or seniority of their positions.

The ombuds office asserts that communications made to the ombuds are confidential, the office will assert a privilege to protect those communications, and therefore communications made to the ombuds are never notice to the organization.

The ombuds office's claim of confidentiality is based upon and supported by its founding tenets, in particular, by its establishment as an independent, neutral, informal and alternate channel for people to seek guidance on how to resolve workplace disputes or raise issues of concern. The ombuds’ confidentiality is based upon many values, including prompt, informal resolution of workplace disputes; organizational critical self-examination and continuous improvement; and enhanced risk management in providing a safe, off-the-record channel for people who otherwise would not come forward to seek guidance or learn how they can resolve workplace disputes or report concerns. The sense of safety created by the ombuds as a confidential channel enhances the communication and articulation of concerns and thus the organization’s ability to effectively respond to those concerns. The need to protect confidentiality of communications with the ombuds office is thus premised on “best practice” principles for organizational governance, including such important federal policies as those embodied in The Sarbanes-Oxley Act of 2002 and the U.S. Sentencing Guidelines for Organizations.

The ombuds office thus asserts a privilege, which is held by the office, that communications with the ombuds are confidential. This privilege is critical to making the ombuds office a place where people can raise any issue, including a violation of statute, regulation, or ethical standard. Only by offering the security of confidentiality can the ombuds facilitate organizational responsibility and accountability, which are at the heart of provisions contained in the U.S. Sentencing Guidelines and the Sarbanes-Oxley Act that call for mechanisms of confidential reporting and/or guidance. Where issues cannot be confidentially raised, they may not be raised at all, thereby depriving the organization of an opportunity to address issues and rectify misconduct that has not yet surfaced through other channels. The ability to have confidential communications that do not constitute "notice" to the organization is essential to the effective functioning of an ombuds office and distinguishes the ombuds from other reporting channels also generally available. It is the "off-the-record" aspects of the office that lead people who use the ombuds to do so before taking any official or formal action. The ombuds office enables people to come forward with an issue when they would otherwise be afraid to do so or when they fear retaliation from managers or peers.

Given the confidential nature of communications made to the ombuds office, and the privilege which should attach to those communications, IOA asserts, and the ABA agrees, that communications made to the ombuds do not constitute notice to the organization. Both the IOA and ABA assert as a part of their standards that no one, including the organization that employs the ombuds, should consider the ombuds office to be an agent of notice and no one, including the entity, should seek information about communications to the ombuds office. The IOA and ABA also agree that the nature and role of confidentiality should be explained to the visitor, who should understand that the ombuds claims the privilege for the office and that it is not the visitor's privilege to waive. Visitors should understand that as a condition for accepting and benefiting from the services, they have the obligation to support the ombuds claim of privilege and not to attempt to breach this claim.

While the IOA and ABA agree on many important principles for establishing and operating an ombuds program, the IOA believes that some of the provisions in the ABA Standards with respect to when an ombuds places an organization on notice are not well founded or legally supported. The ABA resolution suggests that circumstances may exist in which an Ombuds places an organization on notice other than by disclosing a specific allegation and the identity of the complainant or allegations by multiple complainants reflecting a pattern of "wrongful" conduct. In particular, the ABA addresses this possibility by noting that whether or not an ombuds communication constitutes notice to the entity is a question that should be determined by the "facts of the communication." We are concerned that this language does not capture accurately what may be a very limited number of peculiar situations, and instead offers an imprecise catch-all provision that could inadvertently invite courts to more closely examine communications to the ombuds as context for understanding communications by the ombuds to the entity. The ABA language, then, could jeopardize ombuds confidentiality and effectiveness.

The IOA takes the position that a communication to the ombuds *never constitutes notice to the organization*. As ombuds office administrative manager, the lead ombuds may be responsible for receiving notice about wrongful behavior of any ombuds office staff member whom the lead ombuds supervises. Except in this ombuds' administrative capacity as the manager of the ombuds office, the ombuds is never an agent of notice or a designated point of contact to accept formal claims or concerns. A communication between an ombuds and an organization's point of contact may serve as notice under some circumstances, as explained below, but the scope of that notice is limited strictly to the substance of the communication between the ombuds and the point of contact, and *never* includes any communications between the visitor and the ombuds. In most situations where notice to the organization may be appropriate, the ombuds helps direct the visitor to the proper point of contact. It is only in rare instances that the ombuds may choose to take action directly to place the organization on notice, such as in the unlikely event that the visitor to the ombuds office is not able or not willing to do so themselves.

Communications of a visitor to the ombuds are confidential, except in cases where the ombuds receives permission from the individual to share certain information or where the ombuds determines that there is an imminent risk of serious harm. An ombuds may place the organization on "notice" when the ombuds evaluates the circumstances and specifically elects to place the organization on notice by identifying an appropriate point of contact within the organization and communicating to that point of contact specific information which the ombuds expressly intends to share for the purpose of placing the organization on notice of a specific concern or specific situation. If an ombuds makes such an intentional notice communication, confidentiality is waived only with regard to the specific communication made with the point of contact for purposes of the notice communication. It is the conversation between the ombuds and the appropriate point of contact within the organization that constitutes notice and not the conversation between the ombuds and the visitor. Thus, under no circumstances, is the original communication to the ombuds part of the notice communication.

All ombuds offices should have a well-defined and generally available procedure detailing the limited circumstances and the processes under which the ombuds may provide notice. If the ombuds elects to place the organization on notice under the conditions above, the ombuds should follow the protocol of the particular ombuds office regarding this unusual action. The protocols should include specific steps so that is clear that the ombuds made an intentional decision to make a notice disclosure. The steps may include, for example:

- Identify the appropriate office of notice;
- Articulate the ombuds' intention of placing that agent of the organization on notice to take action;
- Give narrow and specific information (such as names and dates) regarding the allegations or concerns, sufficient to allow the organization to act on the notice;
- Provide the information in a way that preserves the maximum confidentiality possible, while providing information adequate for the organization's required response;

- Provide the recipient with narrow, carefully screened written information and instruct the recipient of the information to keep a record of the communication;
- Clarify that if called later to testify or to participate in a formal procedure that testimony is limited narrowly to questions pertaining directly to the ombuds' original notice communication to the organization and nothing more;
- Expressly state that limited disclosure of information necessary to provide notice does not act as a waiver to other information or conversations relevant to the matter.
- Remind the agent receiving the notice communication that he or she may not want to take specific adverse action based solely upon the notice of the communication, but instead may now be required to *investigate* the allegation, and then may want to consider whether any action is warranted based upon the results of his or her investigation.

In circumstances where the ombuds places the organization on notice, it may or may not be appropriate to seek permission from or to inform the original source(s) of the information. For example, in some circumstances the ombuds may determine that there is an imminent risk of serious harm to others besides the original source and seeking permission of the source could actually compromise otherwise protected information. In other situations the ombuds may determine that seeking permission of the visitor could actually cause the visitor harm. However, if it is appropriate and practical, the ombuds should advise complainants that the entity has been put on notice.

IOA Recommendations

- **Except in the administrative capacity as manager of the ombuds office, the ombuds is never an agent of notice, and communications to the ombuds office never constitute notice to the organization.**
- **The nature and role of confidentiality should be explained to the visitor, who should understand that the ombuds claims the privilege for the office and that it is not the visitor's privilege to waive.**
- **In most situations where notice to the organization may be appropriate, the ombuds helps direct the visitor to the proper point of contact. It is only in rare instances that the ombuds may take action, at his or her discretion, directly to place the organization on notice of an allegation of wrongdoing, such as in the rare event that the visitor to the ombuds office is not able or not willing to do so himself or herself.**
- **An ombuds may also place the organization on notice in the unusual situation in which the ombuds perceives there to be an imminent risk of serious harm. However, even in this instance, the original communication to the ombuds is not part of the notice communication.**
- **Every ombuds office should have a well-defined and generally available procedure detailing the limited circumstances and processes under which the ombuds may provide notice, and this protocol should be strictly followed when the ombuds takes the unusual action of placing the organization on notice.**

- **In circumstances where the ombuds places the organization on notice, it may or may not be appropriate to seek permission from or to inform the original source(s) of the information.**

**c. IOA Commentary and Recommendations on
Section F (1) (a) – (f)**

i. Communication of the Six Items in Section F (1) (a-f)

Section F (1) (a) - Section F (1) (f) of the ABA Standards discusses the issue of “notice,” and proposes six subjects the ABA believes an ombuds “should” communicate to persons who contact the ombuds. We will first comment on these six items in general, and then add specific comments on the voluntary disclosure of information in trend reporting and the “imminent risk of serious harm” language of Section F (1) (a).

We believe it is unnecessarily burdensome to ombuds practitioners, and potentially awkward and problematic for the building of rapport with those who contact the ombuds for assistance, to tell each and every person, whether by phone or in person, all six of the items recommended by the ABA. For example, part of the ombuds role is referral to appropriate resources. It may be immediately obvious to an ombuds that the caller seeks only an answer to a simple policy question or a referral to another office, such as an employee assistance program or human resources. As another example, the person may simply want coaching on communication skills, in which case telling the visitor about potentially contacting a lawyer regarding their rights could be unnecessarily alarming and irrelevant. It would not be appropriate to recite all six items to someone for whom some or all of these items are irrelevant.

IOA Recommendations

- **It is extremely important for the ombuds to demonstrate consistent practice when discussing with visitors the potential impact and limits of “notice” to the organization. The ombuds should ensure that all visitors, at the very least, have access to materials that explain the ombuds role and limits in relation to notice in detail. In addition, the ombuds should develop criteria (specific to the environment and needs of the ombuds’ own organization) for a consistent approach to providing information about notice, where and when relevant. Failure to demonstrate consistency of practice in this regard may expose the ombuds to the need to discuss ombuds conversations on a case-by-case basis relevant to determining whether the visitor adequately understood the options and the notice implications.**
- **The six items listed in the ABA Standards Section F (1) (a) – (f) as appropriate communications to persons who contact the ombuds office should be published on the ombuds office website, in the ombuds office brochures and other explanatory information, as**

well as in the entity’s charter for the ombuds office, so that this information is generally and publicly available.

- **The decision as to which, if any, of the six items should be communicated directly to the visitor should be left to the discretion of the ombuds, who will make the decision based on the overall circumstances and the criteria developed within the ombuds’ own organization (consistent with these guidelines).**
- **When necessary or appropriate, the ombuds should clarify how an ombuds program “fits” with other systems and services by explaining to visitors that:**
 - a. **The visitor may have important legal rights that may be involved with the visitor’s issue, and important time limits and other factors may be involved.**
 - b. **The ombuds program is not a substitute for a lawyer or other professional who might represent the visitor’s rights, and the visitor may wish to consult with these other services separately from their conversation with the ombuds.**
 - c. **The visitor may wish to consult with additional resources and services (e.g., an employee assistance program) which the ombuds may describe if they might be appropriate given the visitor’s presenting circumstances.**

ii. Voluntary Disclosure of Any Information – Section F (1) (a)

Section F (1) (a) recommends that ombuds inform users of services that “the ombuds will not voluntarily disclose to anyone outside the ombuds office, including the entity in which the ombuds acts, any information the person provides in confidence or the person’s identity unless necessary to address an imminent risk of serious harm or with the person’s express consent.” This recommendation raises two concerns: trend reporting and “imminent risk of serious harm.”

First, as part of trend reporting and advocacy for systemic change, both of which are appropriate ombuds roles, an ombuds may decide to disclose information to people outside the office even without a person’s consent -- but only when this can be accomplished in a way that protects the person’s confidentiality and/or identity. For example, if an ombuds is informed of a problem by many people, the ombuds may let someone higher up in the organization know that “several” people have communicated the problem.

We note that the ABA Standards are internally inconsistent on this topic. Other sections of the document encourage ombuds reporting: the ABA Standards identify ombuds roles as “making recommendations for the resolution of . . . a systemic problem to those persons who have the authority to act upon them,” “identifying complaint patterns and trends,” and “issuing periodic reports” [ABA Standards, Section A (7)]; the ABA Report states that the ombuds may “disclose confidential information so long as

doing so does not compromise the identity of the person who supplied it” (ABA Report, Section 3). Taken together, these statements seem inconsistent with the requirement in Section F (1) (a) that an ombuds not disclose “any” information provided in confidence without “the person’s express consent.”

Second, the reference to ombuds disclosure when there is “an imminent risk of serious harm” should include a proviso that the decision to make such a disclosure rests solely in the discretion of the ombuds.

IOA Recommendations

- **Ombuds materials (websites, brochures, etc.) should state that ombuds do report trends, and advocate for systemic change when appropriate, but that they do so in a manner that protects the identity of individuals.**
- **Ombuds materials that make reference to ombuds disclosure when there is “an imminent risk of serious harm” should always state that the decision to make such disclosure rests solely at the discretion of the ombuds.**

V. CONCLUSIONS AND FUTURE PLANNING

As stated in the introduction, the intent of this document is to provide guidance to IOA members in interpreting the ABA document and to make recommendations for best practices for organizational ombuds offices. IOA does not intend for this to be the end of the discussion about professional standards, but instead views this as a further step in understanding the application of our standards of practice to our daily professional activities. The road ahead should include consideration of the evolution of some of the legal and other issues raised here, as well as how to strengthen our legal standing in the future.

Specific next steps for our professional association include further clarification of our ethics, standards, and best practices, and enhancement of training programs to include these recommendations for best practices, with attention to giving practitioners greater awareness of the ABA Standards and other legal issues that may impact our practices.

The IOA looks forward to collaborations forging greater partnerships with the ABA and other organizations as we further define our profession and our professional standards.

-- Respectfully submitted by members of the task force that developed and revised this document, under the auspices of TOA, UCOA, and IOA: John Barkat, Judy Bruner, Howard Gadlin, Kevin Jessar, Bruce MacAllister, Martha McKee, Francine Montemurro, David Talbot, Marsha Wagner (chair), and Margo Wesley.

