PRACTICAL TIPS

ASSERTING THE OMBUDS TESTIMONIAL PRIVILEGE, AND SAFEGUARDING YOUR OMBUDS PROGRAM'S CONFIDENTIALITY

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Recently, I had the mixed good fortune to be called to testify in a legal action involving an employee of my organization. I say "mixed good fortune" because even though the situation involved some stressful interactions, in the end our Ombuds Program came away with valuable lessons-learned. Naturally, many of us might list being called to testify in court in our role as Ombudsman among our worst nightmares. Of course, testimony in any legal action is stressful, and spending time professionally with lawyers is rarely something any of us look forward to. In our role as an ombudsman, compelled testimony is perhaps our worst fear. I came away from my recent experience with some interesting lessons about managing our own information practices and visitor protocols to better ensure our claim of confidentiality.

The situation that I was involved in as the Ombudsman concerned a protected class individual who had sought help from the Ombuds Office in resolving problems stemming from being passed over for a leadership role after reorganization. Our office assisted the visitor in securing a new position in another unit of the organization. Because of the specialized background of this professional-level individual, finding another relevant and challenging job fit took significant time and effort. Ultimately, the visitor initiated litigation against our organization, stemming from unresolved issues surrounding the original job selection process.

Litigation rarely sneaks up on anyone. There is typically an extensive discovery phase, pre-trial motions, and invariably protracted negotiations. Our Office has a policy that we do not serve as a negotiation venue for people represented by legal counsel. These negotiations occur attorney-to-attorney. But it's never so simple. An employee may have one issue in the legal area, but wish to resolve on-going workplace issues, such as job assignments, informally and with the assistance of the Ombuds Program. This was the case in our case study. We knew there was litigation pending. We drew scrupulous boundaries between our role and the issues we could help with, and those that were to be left resolved through litigation. We did not wish to avoid assisting the person on issues unrelated to the litigation because it could create the appearance that because of the litigation, this employee was denied access to the Ombuds Office on other issues.

With the knowledge that our visitor had issues that were pending legal review, we devoted extensive effort to ensuring that the visitor knew and fully understood our confidentiality policy and our practice to refuse to become involved in formal reviews. The visitor also echoed our office's desire that we never become entangled in the litigation. We agreed that our work would be limited to providing ombuds services relevant to issues not under legal review. We gave the visitor hard copies and had several express discussions about our confidentiality, and we secured from the visitor verbal agreement and express understanding about our confidentiality and privilege. Thus, we approached the impending litigation with confidence that there was little potential that we would be involved. This is where the lesson began.

Several days into our visitor's trial, our office received a frantic phone call from one of my organization's contract trial attorneys seeking information about conversations that I may have had with this visitor. Consistent with our standards of practice and code of ethics, we refused to confirm or deny that we had seen this person. The attorneys were convinced that we had in fact seen the person, because they indicated that the visitor had made assertions that they had spoken with the Ombudsman and the Ombudsman had said that "the reason it took so long to find the person a job was because ... [the visitor ...] was involved in litigation with our employer." The trial attorneys stated that they were convinced that no one in the Ombuds Office would ever say such a thing, and that it was important that we testify as to what was said. Our office naturally refused, and negotiations ensued around what the ombudsman could or could not testify to. Even in the press of the trial, I found that our in-house counsel and trial counsel were reasonable, and wanted to accommodate our limitations. However, the attorneys also felt strongly that it was irresponsible to leave a misconception hanging

before a jury. In the final analysis, I learned a number of important lessons. Some of the most significant follow:

1. Attorneys can misunderstand the concept of ombuds privilege. Attorneys are familiar with the attorney-client privilege, which is owned by and can be waived by the client. This is true of most of the established and recognized testimonial privileges. Thus, in this situation, the good news was that the court readily accepted the concept of ombuds confidentiality, but once the visitor asserted that he was disclosing the contents of confidential conversations, the court, misunderstanding the concept of who owns the privilege, deemed that the visitor had "waived" confidentiality. The court determined to "allow" rebuttal testimony regarding the visitor's assertions.

LESSON LEARNED: Visitors should be counseled that it is extremely important that they treat conversations with the Ombudsman as confidential, and that they do not share them outside of the Ombuds context. Otherwise, they run the risk that a court may decide that they have waived confidentiality.

2. While Attorneys may accept the ombud's confidentiality, they may have a difficult time accepting the absolute nature of this confidentiality, and may be very skeptical about asserting a testimonial privilege. Attorneys typically approach information management on two levels: confidentiality and testimonial privilege. Basically, information is accepted as confidential if there is an established, recognized basis, such proprietary business information, public employee personnel records, and the like. On the other hand, courts and attorneys recognize very few testimonial privileges. These are generally created by statute or high level judicial decisions. The ombuds testimonial privilege has been accepted and recognized officially in relatively few jurisdictions. Confidential information is typically readily accessible to courts and attorneys involved in litigation through the discovery process, whereas privileged information is generally accessible only if the privilege is somehow waived or expressly limited by law.

LESSON LEARNED: Be prepared to approach the court with the understanding that the court may be unlikely to accept a testimonial privilege, and that even though the court may accept the Ombuds perogative to hold information as confidential, it may nonetheless expect disclosure. Manage your records accordingly, and do not maintain long-term case records that might be ordered released. Remember that there are very few laws that mandate records!

3. Be wary. Attorneys may accept the ombudsman's assertion of confidentiality and request that you merely provide general information. While this is perfectly acceptable and can be a civic service, the attorneys may have another end in mind. There is little difference between testimony that specifically discloses a conversation between the ombudsman and a visitor, and testimony that responds to a question which, in fact, essentially discloses information about a conversation with a visitor. Generic questions such as "would you ever tell any visitor something along the lines of..." are often thinly-veiled efforts to seek disclosure.

LESSON LEARNED: Negotiate exactly what questions are acceptable to you before you take the stand.

4. Have your house in order. Most attorneys love documentation and are comfortable in the world that documents and records create. The Ombuds approach to scant case documentation represents a very different paradigm than many attorneys are used to. A powerful way to help you sway attorneys that you may be working with to accept the ombuds confidentiality and privilege is to have a widely and consistently publicized set of statements, informational brochures, policies, memos from officials, web sites, etc., that all consistently state the confidentiality policies of the office. Links to the TOA standards of practice and code of ethics can be very useful as well.

LESSON LEARNED: We found our practice of consistently delivering our brochures and a detailed page about our confidentiality policies and practices was extremely useful in approaching our trial and in-house attorneys, who were much more willing to accept the ombuds practice because it was linked to national standards, and because the confidentiality practices had been so widely and consistently publicized.

As a parting note, I often reflect on the sage advice of many of our most experienced ombuds, who have consistently offered support, reassurance, and understanding to those confronted with the challenge of a threatened compelled disclosure. In the final analysis, we must remember that we do not work in isolation. We work within a social and civic web where all processes and approaches have valid application. Attorneys are tasked with the job of zealous representation. Ombudsmen hold dear their role as a neutral, independent, and confidential resource. Sometimes these roles appear to be in conflict, but my experience as both an attorney and an ombudsman tells me that there is room for mutual success. ●