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No Notice Is Good News: Notice Under the New Ombuds Standards for the Establishment and Operation of Ombuds Offices

I. INTRODUCTION

The American Bar Association (ABA) recently announced its decision to endorse the revised Standards for the Establishment and Operation of Ombuds Offices, dated February 2004.¹ A modification to the 2001 Standards for the Establishment and Operation of Ombuds Offices,² the new Standards are responsible for certain clarifications of the role of an ombuds. One such clarification is that of notice in the employment context. Under the new Standards, communications made to an ombuds regarding complaints of violations or unlawful practices within the workplace do not constitute notice to the employer, provided that the ombud's practices are consistent with the core qualities an ombud's office must possess under the Standards. As the 2001 Standards did not address the issue of notice, the new notice provision is particularly important. Because numerous employment dispute proceedings throughout the past few decades have resulted in a judicial finding that an employer received constructive notice of some discriminatory action or other violation within the workplace, the new notice provision is a significant development in the area of employment disputes. The benefits of the new provision will likely extend to both ombuds in the workplace and the entities for which such ombuds work. This Comment explores the backdrop against which notice in the employment context has traditionally been considered, and examines both the rationale employed in forming the new notice provision and the future implications of the provision in the employment context.

1. American Bar Association, Section of Administrative Law & Regulatory Practice, Section of Business Law, Section of Dispute Resolution, Section of Individual Rights & Responsibilities, *Standards for the Establishment and Operation of Ombuds Offices (2004)*, at <http://www.abanet.org/leadership/2004/recommendations/115.pdf> [hereinafter ABA, *Revised Standards 2004*]. The establishment of the new Standards is preceded by years of ABA support for increasing the use of ombuds in a broader range of entities. 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. [The ABA adopted a second resolution in 1971], recommending that the [f]ederal government experiment with the establishment of ombudsmen for certain geographical areas, specific agencies, or for limited phases of [f]ederal activities. In 2001, [the ABA] adopted [another] resolution supporting the greater use of "ombuds" [in handling claims] involving [both] public and private entities.

ABA, *Report on Standards for the Establishment and Operation of Ombuds Offices 1 (2004)* [hereinafter ABA, *Report 2004*]. The 2001 Resolution also endorsed Standards for the Establishment and Operations of Ombuds Offices and, together, the 2001 Resolution and Standards broadened the ABA's existing policy at that time to address the growing role of ombuds in both the private and public sectors. *Id.*

2. ABA, *Standards for the Establishment and Operation of Ombuds Offices (2001)*, at <http://www.abanet.org/poladv/letters/107th/adminlaw072602/attach.pdf> [hereinafter ABA, *Standards 2001*].

II. LEGAL BACKGROUND

A. *The New Ombuds Standards*

The new Standards are a modification of the 2001 Standards for the Establishment and Operations of Ombuds Offices,³ and were developed in response to the proliferation of divergent processes utilized by various ombuds offices, and the resulting inconsistent expectations of individuals seeking assistance from those offices.⁴ Propelled by the concern that, as a result of this inconsistency, ombuds offices may be established in ways that would compromise their effectiveness, the Standards were developed to provide advice and guidance on the structure and operation of ombuds offices, so that ombuds may better fulfill their functions and so that “individuals [may] avail themselves of [an ombuds’] aid . . . with greater confidence in the integrity of the process.”⁵

B. *Ombuds Generally*

An ombuds is an individual who “receive[s] complaints and questions from individuals concerning people within an entity or the functioning of an entity.”⁶ The role of ombuds was originated in Scandinavian countries and now has worldwide recognition for its dispute resolution efficiency.⁷ The first United States government ombuds office was established in New York in 1966, and the first state to establish an ombuds office was Hawaii in 1967.⁸ Today, such ombuds offices are found throughout the country.⁹

“The first ombuds offices operated within a governmental framework in what is now known as the classical ombudsman model.”¹⁰ Classical ombuds offices were “legally established by one or more branches of government, but maintained independence from all branches of government” in its dispute resolution processes.¹¹ Today, ombuds continue to “work for the resolution of particular issues

3. *Id.*

4. *Id.* at 1.

5. ABA, *Standards 2001*, *supra* note 2, at 1. To ensure that ombuds can protect individual rights against the excesses of public and private bureaucracies, the Administrative Law & Regulatory Practice, Business Law, Dispute Resolution, and Individual Rights & Responsibilities sections have worked together with the ombuds community and with other ABA entities to develop a resolution to support amendments to the Standards. See ABA, *Report 2004*, *supra* note 1, at 2.

6. ABA, *Revised Standards 2004*, *supra* note 1, at 2. As stated in both the *Standards* and the *Report*, the term “ombuds,” as it is used in this summary, is intended to encompass all other forms of the work such as ombudsperson, ombuds officers, and ombudsman, a Swedish word meaning “agent” or “representative.” See ABA, *Report 2004*, *supra* note 1, at 1 n.1. The use of “ombuds” in both the *Standards* and the *Report* “is not intended to discourage others from using other terms.” *Id.*

7. DOUGLAS H. YARN, *ALTERNATIVE DISPUTE RESOLUTION: PRACTICE & PROCEDURE IN GEORGIA* § 10-31 (2d ed. 1997).

8. *Id.* The ombuds office was called a “public protector.” *Id.*

9. *Id.* While many ombuds “retain all of the characteristics of the classical ombudsmen model . . . many have adapted the role to changing circumstances.” *Id.*

10. *Id.*

11. *Id.*

and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve.”¹²

The ombuds capacity in the employment context is found in the form of an “organizational ombuds.”¹³ An “organizational ombuds” may be found in the public or private sector and “ordinarily addresses problems presented by members, employees, or contractors of an entity concerning its actions or policies.”¹⁴ This person “facilitates fair and equitable resolutions of concerns” arising within the establishing entity.¹⁵ An organizational ombuds should be “authorized to undertake inquiries and function by informal processes as specified by [the organization’s] charter.”¹⁶ This person should also be “authorized to conduct independent and impartial inquiries” within her designated jurisdiction and to further have the authority to issue reports and advocate for change.¹⁷ To fulfill the numerous duties included in the role of an organizational ombuds, the ombuds must have frequent communication with the entity in which it acts, as well as with the employees who make complaints to the ombuds office.¹⁸ As such, the issue of what level of protection should be afforded such communications has been the subject of much recent deliberation within the alternative dispute resolution community.

C. Notice in the Employment Context

The issue of notice has pervaded labor and employment cases for decades. Notice questions arise frequently in cases in which an employee is the alleged victim of some violation or unfair practice performed by either the employer or by another employee or supervisor. Many such employment actions involve harassment claims brought under Title VII of the Civil Rights Act of 1964, as implemented by the Equal Employment Opportunity Commission (EEOC).¹⁹ The relevant section, 42 U.S.C. § 2000(e), sets forth unlawful employment practices, delineates various types of discrimination, and provides for the statute’s enforcement.²⁰

Many actions involving employee allegations of harassment do not involve the issue of notice at all. For instance, in the influential United States Supreme

12. ABA, *Revised Standards 2004*, *supra* note 1, at 2. The ABA has categorized the interests protected by ombuds: “(1) the legitimate interests and rights of individuals with respect to each other; (2) individual rights against the excesses of public and private bureaucracies; and (3) those who are affected by and those who work within these organizations.” *Id.*

13. *Id.* ¶ I. Other types of ombuds include legislative ombuds, organizational ombuds, and advocate ombuds. ABA, *Report 2004*, *supra* note 1, at 2.

14. ABA, *Revised Standards 2004*, *supra* note 1, at 1.

15. *Id.* ¶ I.

16. *Id.* ¶ I.

17. *Id.* ¶ I.

18. The executive ombuds: “(1) should be authorized to conduct investigations and inquiries; (2) should be authorized to issue reports on the results of such investigations and inquiries; and, (3) if located in government, should not have general jurisdiction over more than one agency, but may have jurisdiction over [a] subject matter that involves multiple agencies.” *Id.* ¶ H.

19. 42 U.S.C. § 2000(e) (2004). See also Jason B. Binimow, Annotation, *When is Supervisor’s Hostile Environment Sexual Harassment Under Title VII of Civil Rights Act of 1964 Imputable to Employer*, 157 A.L.R. FED. 1 (2004).

20. Binimow, *supra* note 19, at 1. See also 42 U.S.C. § 2000(e) (2004).

Court case *Burlington Industries v. Ellerth*,²¹ the plaintiff sued her employer under 42 U.S.C. § 2000(e), alleging sexual harassment by her supervisor.²² In its discussion, the Supreme Court considered the class of cases in which a supervisor takes a “tangible employment action against a subordinate,” such as a discharge, demotion, or undesirable reassignment.²³ The Court stated that “[e]very [federal circuit] to have considered the question has found vicarious liability when a discriminatory act results in a tangible employment action.”²⁴ Courts have also held that if a plaintiff can show that she suffered an economic injury from her supervisor’s actions, her employer becomes strictly liable without any further showing.²⁵ Under these circumstances, an employer is strictly liable, and notice is of no relevance to a court’s determination of liability.

The cases in which the issue of notice does arise, however, are those cases not involving strict liability. The courts deciding these actions place great importance on an employer’s knowledge, either actual or constructive, of the alleged discriminatory practice or violation in determining whether the employer is liable for such alleged discrimination. The EEOC provides that “[w]ith respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer, [its agents, or supervisory employees] knows or should have known of the conduct, unless [the employer] can show that it took immediate and appropriate corrective action.”²⁶ The *Ellerth* court, for instance, in applying this rule to the plaintiff’s sexual harassment claim, stated that “[a]n employer is negligent with respect to sexual harassment if it knew or should have known about the alleged conduct and failed to stop it.”²⁷ *Ellerth*, and many cases succeeding it, have applied this rule in finding that an employer is subject to liability with respect to a harassment claim even if it had no actual knowledge of the alleged conduct, so long as the employer should have known about the alleged conduct.²⁸

The issue with which courts struggle in employment actions is the determination of what actions or circumstances are sufficient to show that an employer should have known about discriminatory conduct. In other words, courts must determine what actions constitute “constructive notice” and, in turn, when notice should be imputed to an employer. Many courts have recognized that “the type

21. 524 U.S. 742 (1998).

22. *See id.*

23. *Id.* at 760-61.

24. *Id.* at 760. *See also* Meritor Savs. Bank v. Vinson, 477 U.S. 57, 70-71 (1986) (stating “courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew or should have known, or approved of the supervisor’s actions”).

25. *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993) (citing *Kotcher v. Rosa & Sullivan Appliance Cr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992)).

26. 29 C.F.R. § 1604.11(d) (2004). *See also* 29 C.F.R. § 1606.8 (2004); *Jacob-Mua v. Veneman*, 289 F.3d 517, 522-23 (8th Cir. 2002) (holding that “to establish a prima facie case of hostile work environment harassment by non-supervisory co-workers, [plaintiff] must establish, [among other elements, that] the employer knew or should have known of harassment and failed to take prompt remedial action”).

27. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 759 (1998). According to the Restatement, under these circumstances, the employer is subject to liability for its negligence or recklessness. RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

28. *Deters v. Equifax Credit Info. Servs.*, 202 F.3d 1262 (10th Cir. 2000); *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289 (3d Cir. 1999).

and extent of notice necessary to impose liability on an employer under Title VII is the subject of some uncertainty.²⁹ Determinations of employer notice frequently must be made in cases in which the plaintiff presents evidence that she reported incidents of harassment or other discriminatory acts to a supervisor also working for the employer. In these cases, many courts look to whether the employer had any policy in place that obligated the supervisor to relay such information to the employer.³⁰

In *Williamson v. City of Houston*, the Fifth Circuit stated that because a police department policy gave a supervisor the authority to accept harassment complaints, the supervisor's knowledge of the plaintiff's complaints of sexual harassment could be imputed to the police department for purposes of liability, even though the police officer had not chosen to exercise that authority by relaying the information.³¹ In addition, the Seventh Circuit has held that an employer may be "notified" of a sexual harassment claim if the information regarding the alleged conduct meets particular criteria:

[The claim] must either (1) come to the attention of someone who (a) has under the terms of his employment, or (b) is reasonably believed to have, or (c) is reasonably charged by law with having, a duty to pass on the information to someone within the company who has the power to do something about it; or, (2) come to the attention of such a someone.³²

Many courts take into consideration an employer's organizational structure and/or size in determining whether a complaint made by an employee to someone other than the employer suffices as notice to the employer. In *Miller v. Kenworth of Dothan, Inc.*,³³ the plaintiff presented evidence showing that one of only two managers permanently assigned to the plaintiff's employer had received notice of harassment directed against the plaintiff.³⁴ After pointing out that only one other employee separated the manager from the employer's president, the Eleventh Circuit held that this organizational structure, combined with the fact that the manager was one of only two managers on-site at the employment site, would allow a reasonable jury to conclude that the manager was of a sufficiently high

29. *Williamson v. City of Houston*, 148 F.3d 462, 465 (5th Cir. 1998) (citing *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 807 (5th Cir. 1996)).

30. *See id.* at 466 (focusing on whether the supervisor was authorized to accept complaints of harassment).

31. *Id.* *But see* *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269 (11th Cir. 2002) (holding that "when an employer has promulgated an effective and comprehensive anti-harassment policy that is aggressively and thoroughly disseminated to its employees, an employee's failure to utilize the policy's grievance process will prevent constructive knowledge of such harassment from adhering to the employer").

32. *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997) (citing *Torres v. Pisano*, 116 F.3d 625, 638 (2d Cir. 1997)) (holding that an employer had notice where complainant notified her department head, one of four options for reporting complaints described in company's harassment policy).

33. 277 F.3d 1269 (11th Cir. 2002).

34. *Id.* at 1279.

level in the company that notice to him of the hostile work environment would serve as notice to the employer.³⁵

D. Ombuds and Notice

Key to the ombuds process is the protection afforded to communications that are made to an ombuds by a complainant.³⁶ Many courts have asserted that without confidentiality, the ombuds process would not work. Numerous courts have differed, however, on the extent to which confidentiality protects communications. Actions that involve analysis of ombuds confidentiality often turn on the issue of whether communications to an ombuds are entitled to a qualified privilege for discovery purposes.

The California Court of Appeal's case *Garstang v. Superior Court of Los Angeles*,³⁷ is commonly cited for the proposition that communications disclosed during a mediation session before an ombuds are protected by a qualified privilege.³⁸ In *Garstang*, the plaintiff filed a claim for slander against her employer,³⁹ the California Institute of Technology, and three of her co-employees, alleging that the co-employees had made false statements to third persons that the plaintiff had "traded sexual favors for job advancement."⁴⁰ Before trial, the plaintiff moved to compel further responses from the defendants, regarding statements made by the defendants during a pre-trial mediation over which an ombuds had presided.⁴¹ The defendants opposed the motion, arguing that because the communications made during the mediation were made before an ombuds, they were privileged pursuant to the California constitutional right to privacy.⁴² In its analysis of the qualified privileged claim, the California Court of Appeal conceded that denying the plaintiff the opportunity to depose the defendants as to what was said during the meetings with the ombudsman would impair her ability to ascertain the truth in connection with her lawsuit.⁴³

Its analysis notwithstanding, the *Garstang* court determined that a proper balancing of competing values weighed in favor of the right to privacy of those individuals participating in the ombuds sessions, because the communications made during the session related to the private affairs of various company employees and were maintained in confidence by the institution.⁴⁴ In its analysis, the court

35. *Id.* But see *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1323 (11th Cir. 1999) (holding that "actual notice of racial discrimination to two Wal-Mart store managers could not serve as notice to the corporation because [the managers] were not sufficiently high up the corporate ladder").

36. ABA, *Report 2004*, *supra* note 1, § C(3) (calling confidentiality an "essential characteristic").

37. 39 Cal. App. 4th 526 (Cal. Ct. App. 1995) (basing the privilege on the state constitutional right to privacy).

38. *Id.* at 532. But see *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997) (holding that record is not sufficient for court to create wholly new evidentiary privilege).

39. *Garstang*, 39 Cal. App. 4th at 529-30. The plaintiff's complaint also included a claim of intentional infliction of emotional distress. *Id.*

40. *Id.* at 530.

41. *Id.*

42. *Id.*

43. *Id.* at 533.

44. *Id.* at 533-34.

looked to the 1991 federal case, *Kientzy v. McDonnell Douglas Corp.*,⁴⁵ which held that:

[C]ommunications received during an informal mediation before an ombudsman were privileged because the communication was made in the belief that it would not be disclosed, [because] confidentiality was essential to the maintenance of the relationship between the parties, [because] the relationship was one that society considers worthy of being fostered, and [because] the injury to the relationship incurred by disclosure would be greater than the benefit gained in the correct disposal of litigation.⁴⁶

In its discussion, the court stated, “There is no question that confidentiality is essential to the maintenance of the relationship between [the institute’s] employees and management.”⁴⁷ The court continued:

The function of an [ombuds] office is to receive communications and to remedy workplace problems, in a strictly confidential atmosphere. Without this confidentiality, the office would be just one more non-confidential opportunity for employees to air disputes. The [ombuds] office provides an opportunity for complete disclosure, without the specter of retaliation, that does not exist in the other available, non-confidential grievance and complaint procedures.⁴⁸

The *Garstang* court noted that it was “readily apparent” that the relationship between the ombuds office and the company’s employees and management was worthy of societal support.⁴⁹ Specifically, it was important that the institute’s students and employees had “an opportunity to make confidential statements and to receive confidential guidance, information, and aid to remedy workplace problems’ to benefit themselves and their community.”⁵⁰ Further, it was apparent to the court that the “harm caused by the disruption of the confidential relationship between the ombuds office and others in [the plaintiff’s] case would be greater than the benefit to [the plaintiff] by disclosure.”⁵¹ “A successful ombudsman program resolves many problems informally and more quickly than other more formal procedures, including court actions.”⁵² The court noted that the utility of

45. *Kientzy*, 133 F.R.D. 570 (D. Mo. 1991), *overruled by* *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997).

46. *Garstang v. Super. Ct. of L.A.*, 39 Cal. App. 4th 526, 534 (Cal. Ct. App. 1995). The *Garstang* court noted that *Kientzy* was decided in the federal system which, “unlike California, permits the judicial creation of privileges.” *Id.* The Court explained that it found the reasoning useful, however, in considering whether, and under what circumstances, a qualified privilege should be extended to communications made before an ombudsman. *Id.* See also *Shabazz v. Scurr*, 662 F. Supp. 90, 92 (D. Iowa 1987) (asserting that if state officials become less candid when contacted by an ombudsman out of fear that any admission might be used against them in a subsequent legal action, the power of the ombuds office to solve problems will diminish).

47. *Garstang*, 39 Cal. App. 4th at 535.

48. *Id.* (quoting *Kientzy*, 133 F.R.D. at 572).

49. *Id.*

50. *Id.* (quoting *Kientzy*, 133 F.R.D. at 572).

51. *Id.*

52. *Id.* (quoting *Kientzy*, 133 F.R.D. at 572).

an ombuds program and office “in resolving disputes in the workplace and thus diminishing the need for more formal resolution procedures, is founded on the confidentiality of its communications to and from company officials and employees.”⁵³ Accordingly, the court determined, an order that those participating in the sessions held by an ombuds must disclose information communicated in confidence, would “destroy the reputation and principle of confidentiality” that the institute’s ombuds program needs to perform its function.⁵⁴ The court went on to advocate that the privacy interests of individuals participating in an ombuds program such as the institute’s should be afforded constitutional protection.⁵⁵

Although the holdings of many state court cases are consistent with that of *Garstang*, many federal courts that have dealt with the issue of an ombuds privilege have reached conflicting conclusions. Some federal courts have found that that no such privilege should necessarily be afforded communications to an ombuds.⁵⁶ The Eighth Circuit case, *Carman v. McDonnell Douglas Corp.*,⁵⁷ for instance, overruled *Kientzy*, holding that in order “[t]o justify the creation of a privilege, [the defendant] must first establish that society benefits in some significant way from the particular brand of confidentiality that the privilege affords.”⁵⁸ Because the *Carman* court found that the record of the case at hand did not meet this standard, it held that confidential communications made by an employee to a company ombuds who investigated and mediated workplace disputes were not privileged from disclosure.⁵⁹ In another case, *Solorzano v. Shell Chemical Co.*,⁶⁰ the Louisiana Eastern District Court found that the issue of whether the public interests would be served by an ombuds’ privilege in federal cases required a “weighing of interests more appropriate for the Congress than the courts.”

E. The Standards on Notice

One important aspect of the new Standards is its clarification that communications made by an individual to an ombuds do not necessarily constitute notice to the ombuds establishing entity.⁶¹ In the employer-employee context, the issue of

53. *Id.* (quoting *Kientzy*, 133 F.R.D. at 572).

54. *Id.*

55. *Id.* at 535.

56. See *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997). See also *Solorzano v. Shell Chem. Co.*, 2000 U.S. Dist. LEXIS 12072, at *15 (E.D. La. 2000). Title VII and the Age Discrimination in Employment Act contain no privilege for ombudsmen’s records.

57. 114 F.3d 790 (8th Cir. 1997).

58. *Id.* at 794.

59. *Id.* In reaching its decision on whether to create a new evidentiary privilege, the *Carman* court assessed “the importance of the relationship that the privilege [would] foster.” *Id.* at 793. The court found that the defendant had failed to present evidence that the ombuds method was more successful at resolving workplace disputes than other forms of alternative dispute resolution. *Id.* The court also pointed out that, “Even without a privilege, corporate ombudsmen still have much to offer employees in the way of confidentiality [because] they are still able to promise to keep employee communications confidential from management.” *Id.* at 793-94. See also *Solorzano v. Shell Chem. Co.*, 2000 U.S. Dist. LEXIS 12072, at *17-18 (E.D. La. Aug. 14, 2000) (holding that defendant in age discrimination case was not entitled to a protective order for the ombudsman program records because the records were not privileged under federal common law or state statute and the court declined to find a new privilege).

60. *Solorzano*, 2000 U.S. Dist. LEXIS 12072, at *15.

61. ABA, *Revised Standards 2004*, *supra* note 1, ¶ F.

notice arises when an employee makes a work-related complaint to an ombuds acting for her employer. The Standards recognize that when meeting with an ombuds, employees “discuss allegations of unfairness, poor administration, abuse of power, and other sensitive subjects.”⁶² As a result, an employee “may fear personal, professional, or economic retaliation, [as well as] loss of privacy and loss of relationships.”⁶³ The 2004 Report states, “Many employees faced with sexual or racial harassment, for example, may quit, become ill, or suffer in silence.”⁶⁴ For these reasons, the writers of the new Standards have determined that such communications must be protected if employees “are to be willing to visit and speak candidly with [an] ombuds.”⁶⁵ As a modification to the 2001 Standards, the issue of notice under the new Standards will likely have a strong impact on the entire ombuds process in the workplace.

Under the Standards, employers that establish an ombuds should authorize the ombuds to operate with confidentiality and independence.⁶⁶ In order to maintain confidentiality under the Standards’ definition, the ombuds must not disclose and must not be required to disclose the identity of a complainant without the complainant’s express consent.⁶⁷ However, there is an exception for disclosures necessary to address imminent risk of serious harm.⁶⁸ Specifically, the ombuds must not reveal the identity of a complainant without that person’s express consent.⁶⁹ In order to be independent, the ombuds must be free from interference in the performance of her duties and must be independent from control, limitation, or penalty imposed for retaliatory purposes by the ombuds’ employer or by a person who may be the subject of a complaint or inquiry.⁷⁰ Accordingly, the ombuds should inform anyone who contacts the ombuds office that she will not voluntarily disclose to anyone outside the office any information the employee provided in confidence, nor the identity of the employee, unless the employee consents to such disclosure.⁷¹

The new Standards, confronting the issue of notice, are based on the principle that “an ombuds is intended to supplement, and not replace, formal procedures.”⁷² Thus, a “person contacting an ombuds for assistance needs to understand the difference between working with an ombuds and seeking formal redress.”⁷³ The new

62. ABA, *Report 2004*, *supra* note 1, § F.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* § C(3). Confidentiality extends to all communications with the ombuds and to all notes and records maintained by the ombuds in the performance of assigned duties. *Id.*

69. *Id.* § C.

70. *Id.* § C(1).

71. *Id.* § C(3). The exception to the general rule of non-disclosure is that disclosure may be made if necessary to address the imminent risk of serious harm. *Id.* The new Standards also recognize that in some limited circumstances an ombuds may be compelled by a court to divulge confidential information. *Id.* §§ C, F.

72. *Id.* § F.

73. *Id.* § F. The ombuds should inform an individual contacting him or her that 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 operates. *Id.* The Standards allow the ombuds to inform people coming to the ombuds office of the issues identified in the Standards via “a brochure or [website].” The brochure or website must explain the function of the office, or the om-

notice Standards are designed to ensure that an employee who goes to her employer's ombuds office will be aware that she may need to take further action by talking to a lawyer or to another appropriate resource about the protection of any legal rights that might be at stake.⁷⁴ The Standards acknowledge that when formal action is initiated against an employer, the plaintiff-employee's rights may be affected by whether and when the employer was notified of its allegedly inappropriate or wrongful conduct.⁷⁵ In the event that an employee wishes to bring an action against her employer regarding a work-related problem or violation, the fact that the employee has talked to an ombuds does not change the notice requirement or the specific time by which the employee's action must be commenced.⁷⁶ Thus, an ombuds must inform the complaining employee that her communications to the ombuds may not constitute notice to the employer.⁷⁷

Obviously, an ombuds may often need to work with an employer or representatives of the employer in addressing a work-related complaint.⁷⁸ If, in this case, the ombuds communicates with representatives of the employer⁷⁹ concerning an alleged violation, and reveals both the identity of the complainant and the specific allegation, then the communication should be regarded as providing notice of the alleged violation to the employer, and the ombuds should inform the complainant that the employer was notified.⁸⁰ Likewise, "if the ombuds communicates [identical or very similar] allegations of multiple complainants that may reflect related behavior . . . that is either inappropriate or wrongful" the employer should also be regarded as having notice of the alleged violation.⁸¹ It is also possible for the ombuds to provide enough information that the employer is in fact put on notice, even if confidentiality is maintained.⁸² The new Standards provide that whether the complainant's communication to the ombuds constitutes notice to the entity is a fact question that should be determined by analyzing the communications.⁸³

The notice provisions under the new Standards result from the idea that the Standards do not contemplate an ombuds providing any sort of legal advice as to what an individual's legal rights are, but rather, as providing information on

buds' establishing entity may include similar information in a manual, other information provided to affected people, or as part of the charter for the ombuds office. *Id.* § F.

74. *Id.* § F.

75. ABA, *Revised Standards 2004*, *supra* note 1, at 5.

76. ABA, *Report 2004*, *supra* note 1, § F(1).

77. *Id.*

78. *Id.* § F. Any such communications are subject to the confidentiality provisions in § C of the new Standards. *Id.*

79. ABA, *Revised Standards 2004*, *supra* note 1, ¶ F. Under these standards, any such communication is subject to the Standards discussion of limitations on ombuds' authority. *Id.* at 5 n.7.

80. *Id.* at 5-6.

81. *Id.* In the instance of multiple complainants, the fact that there are multiple complainants makes up for the lack of a specific identity. *Id.* "In both instances, the information provided would need to be sufficiently detailed that the entity could conduct its own investigation with respect to the allegations." ABA, *Report 2004*, *supra* note 1, § F.

82. ABA, *Report 2004*, *supra* note 1, § F.

83. *Id.* The ombuds must also make clear that working with him or her may address an individual's problem effectively, but may not protect the rights of either the individual or the entity in which the ombuds operates. *Id.* An ombuds must inform an individual seeking her help that the ombuds is not, and is not a substitute for, anyone's lawyer, representative, or counselor. *Id.* Thus, the individual may wish to consult a lawyer or other appropriate resource with respect to her legal rights. *Id.*

whether those rights exist.⁸⁴ If an ombuds functions in accordance with the core qualities of independence, impartiality, and confidentiality,⁸⁵ then 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 the establishing entity's alleged violations or unlawful practices.⁸⁶ Moreover, communications made to the ombuds should not be imputed to anyone else, including the entity, unless the ombuds communicates with entity representatives as previously discussed.⁸⁷ Because the ombuds is independent of the employer in this respect, it would be inappropriate for the ombuds to accept notice on its behalf with respect to any alleged grievance.⁸⁸

F. Modification of the 2001 Standards Provision

The 2001 Standards did not address the issue of whether such communications constitute notice, stating only that "important legal rights and liabilities may be affected by the notice issue."⁸⁹ The ABA Report that accompanied the 2001 Standards, however, discussed the issue at length.⁹⁰ The 2001 Report pointed out that, if an ombuds functioned in accordance with the Standards by operating with confidentiality and independence, it could be strongly argued that the establishing entity's management lacked the control over day to day operations that are essential for someone to be deemed an agent.⁹¹ Thus, there was strong support for the idea that any communication to the ombuds should not be imputed to any other person, including the entity.⁹² Accordingly, "it would not be appropriate for the ombuds to accept notice on the entity's behalf with respect to an alleged grievance."⁹³ The 2001 Report also stated that some ombuds offices already instituted outside the framework of the 2001 Standards did not operate with confidentiality or independence.⁹⁴ In some cases, management's control over an ombuds may be so extensive as to substantially weaken the argument that the office could not be deemed to be an agent of management.⁹⁵ Following this reasoning, a strong argument could also be made that knowledge of a communication to the ombuds should be imputed to management.⁹⁶ The 2001 Report concluded by stating that because the law in this area was continuing to evolve, it was unclear what a court might decide with regard to notice in the wide range of circumstances that may

84. ABA, *Report 2004*, *supra* note 1, § F.

85. ABA, *Revised Standards 2004*, *supra* note 1, at 6.

86. *Id.* Rather, the ombuds would be deemed independent of the entity itself for these purposes. ABA, *Report 2004*, *supra* note 1, § F.

87. ABA, *Revised Standards 2004*, *supra* note 1, at 6.

88. ABA, *Report 2004*, *supra* note 1, § F.

89. ABA, *Standards 2001*, *supra* note 2, § F.

90. ABA, Report on Standards for the Establishment and Operation of Ombuds Offices (2001) [hereinafter ABA, *Report 2001*].

91. *Id.* § F.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

arise.⁹⁷ Based upon these conflicting rationales and uncertainty regarding the notice issue, the 2001 Standards did not address the issue.⁹⁸

III. COMMENT

A. *The New Standards as Compared to the 2001 Standards*

Since the 2001 Standards did not address the issue of notice, the notice provision contained in the 2004 Standards is a great modification to the 2001 Standards. And although a notice provision was not provided in the 2001 Standards, the 2001 Report's discussion of the notice issue is clearly reflected in the new Standards. By acknowledging that an establishing entity should authorize an ombuds to operate with confidentiality and independence,⁹⁹ and by recognizing that by operating with such qualities a strong argument can be made for the proposition that management lacks the control that is essential for an ombuds to be deemed an agent,¹⁰⁰ the analysis contained in the 2001 Report was undoubtedly fundamental in the development of the new notice provision.

On the other hand, the 2001 Report also presents an argument that communications to an ombuds should be imputed to management. As the 2001 Standards point out, there are some cases in which management's control over an ombuds may be so extensive that it substantially weakens the argument that the ombuds office cannot be deemed to be an agent of management.¹⁰¹ Indeed, the 2004 Standards and Report provide for instances in which the ombuds's entity should be regarded as having notice.¹⁰² Where the ombuds' communication to the entity "reveals the facts of a specific allegation and the identity of the complainant," for instance, the entity is deemed to have notice.¹⁰³ Still, the extent of management's everyday control over an ombuds is of little relevance when examined in light of the 2004 Standards because the purpose of the new notice provision is to set an unambiguous standard by which a complainant's communication to an ombuds may be considered. Under the new Standards, an ombuds must inform a complainant that, unless the ombuds contacts the entity as specifically described in the Standards, the communications will not constitute notice to the entity.¹⁰⁴

Also key to the 2004 notice provision is the emphasis on the concept that an ombuds is intended to supplement, and not replace, formal procedures.¹⁰⁵ This is supported by the language of the 2004 Standards, which provides that an ombuds should explain to her complainants that "working with the ombuds is an informal

97. *Id.*

98. *Id.* The 2001 Report stated, however, that important legal rights and liabilities may be affected by the resolution of the notice issue and that an ombuds should, in appropriate circumstances, advise an individual that, unless the individual authorizes the ombuds to inform an entity's management about a matter, the entity may not be deemed to have notice of the matter and the failure to give such notice might impair the individual's legal rights. *Id.*

99. ABA, *Revised Standards 2004*, *supra* note 1, ¶ C.

100. ABA, *Standards 2001*, *supra* note 2, § F.

101. *Id.*

102. ABA, *Revised Standards 2004*, *supra* note 1, ¶ F; ABA, *Report 2004*, *supra* note 1, § F.

103. ABA, *Revised Standards 2004*, *supra* note 1, ¶ F(2)(a)(i); ABA, *Report 2004*, *supra* note 1, § F.

104. ABA, *Revised Standards 2004*, *supra* note 1, ¶ F(1)(c) (emphasis added).

105. ABA, *Report 2004*, *supra* note 1, § F.

process that may well address the person's concern effectively, but [that] doing so may not protect that person's legal right" or the rights of the entity for which the ombuds functions.¹⁰⁶ The 2001 Standards acknowledges that because "important legal rights and liabilities" may be affected by the resolution of the notice issue, an ombuds should, in appropriate circumstances, advise an individual that her communication may not constitute notice to the entity.¹⁰⁷ The new Standards provide the same instruction to ombuds, although rather than limiting its use to "appropriate circumstances," the new Standards obligate the ombuds to provide this information in a "general and publicly available manner" to all individuals who contact the ombuds.¹⁰⁸ It is apparent from the reasoning provided in the 2004 Report that the new Standards recognize and place value on the idea that confidentiality in the ombuds process is best protected by not imputing notice to the ombuds of the establishing entity.¹⁰⁹ By focusing on the necessity of independence and confidentiality in the ombuds process, the writers of the new Standards set forth a necessary modification of the 2001 Standards, which clearly defines the scope of confidentiality to be utilized in the ombuds process, and sets the outer limits to which that confidentiality may be extended.¹¹⁰

B. Future Implications of the New Notice Provision in the Employment Context

Although the new notice provision clarifies the boundaries to which confidentiality is extended, it may also raise certain issues in the employment context. The employment setting by its very nature often brings about situations in which an employee suffers adverse consequences as a result of making complaints about her employer within the workplace. Thus, the outer boundaries to which confidentiality may be stretched are of great significance. In a society that continues to place importance on the rights of employees to make complaints in a way that ensures those complaints will be addressed, it is likely that conflicts in the employment context may arise.

The Sarbanes-Oxley Act of 2002¹¹¹ was signed into law by President George W. Bush on July 30, 2002.¹¹² The Sarbanes-Oxley Act establishes guidelines that public companies possessing specific criteria¹¹³ must follow in their corporate operations.¹¹⁴ Created in response to actions of corporate authorities that have

106. *Id.* The ombuds role is set out explicitly in the negative, specifying that "the ombuds is not the person's lawyer or labor representative nor a human resources or social work counselor" for either the complainant or the entity. *Id.*

107. ABA, *Standards 2001*, *supra* note 2, § F.

108. *Id.*

109. *See* ABA, *Report 2004*, *supra* note 1.

110. *See id.*

111. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

112. *Id.*

113. Sarbanes-Oxley applies to companies with a class of securities under section 12 of the Securities Exchange Act of 1934, and to companies that are required to file reports under section 15(d) of the same act, or any officer, employee, contractor, subcontractor, or agent of such company. *See* 15 U.S.C. §§ 780(d), 781 (2004).

114. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

“shaken confidence in our markets,”¹¹⁵ Sarbanes-Oxley provides rules that companies must follow within their scheme of corporate governance “to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.”¹¹⁶

Included within the Sarbanes-Oxley Act are provisions enabling employees of publicly traded companies to report to their employer information regarding unlawful acts or violations occurring in the workplace.¹¹⁷ For example, Title VII of Sarbanes-Oxley—named “Corporate and Criminal Fraud Accountability”¹¹⁸—provides “whistle blower protection” to employees of publicly traded companies who lawfully provide information or otherwise participate in any proceeding regarding the employer’s alleged violation.¹¹⁹ Title VII states that the employer, as well as any individual working for the employer, may not discriminate in any way against an employee who lawfully provides such information.¹²⁰ Also, section 301 states that each “audit committee”¹²¹ in order to be in compliance must establish procedures for the confidential, anonymous submission by company employees of concerns “regarding questionable accounting or auditing matters.”¹²²

Although companies may choose from a wide range of alternatives, many choose the establishment of an ombuds position as its established reporting procedure.¹²³ As was predicted (and still is), the choice of many companies to establish an ombuds office has prompted the growth of ombuds in the corporate world.¹²⁴ In effect, the ombudsman is established to serve as a “safe haven”¹²⁵ to which employees may report company violations without fear of suffering adverse employment consequences. The confidentiality aspect of the ombuds encourages employees to file complaints internally, giving companies an opportunity to cor-

115. President George W. Bush, Statements at Signing of Sarbanes-Oxley Act of 2002 (July 30, 2002). The president’s statements are published at <http://www.whitehouse.gov/news/releases/2002/07/20020730.html> (last visited Jan. 12, 2005).

116. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). See also President George W. Bush, Statements at Signing of Sarbanes-Oxley Act of 2002 (July 30, 2002). The president stated, “This law gives my administration new tools for enforcement. We will use them to the fullest. We will continue to investigate arrest and prosecute corporate officials who break the law.” *Id.*

117. See 18 U.S.C. §§ 1514A, 1348. This includes alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). See *Summary of Sarbanes-Oxley*, TRIANGLE BUS. J., Dec. 6, 2002, at <http://www.bizjournals.com/triangle/stories/2002/12/09/focus1.html>.

118. Sarbanes-Oxley Act of 2002, tit. 7, 116 Stat. 745.

119. 18 U.S.C. § 1514A (2004).

120. *Id.* This includes “any officer, employee, contractor, subcontractor, or agent of such company.” *Id.* The employer or individual may not “discharge, demote, suspend, threaten, harass,” or in any other way discriminate against the employee. *Id.*

121. Sarbanes-Oxley Act of 2002, tit. 3, § 301.

122. American Institute of Certified Public Accountants, *Sarbanes-Oxley Opens Doors*, AICPA ONLINE, Jan. 12, 2005, at <http://www.aicpa.org/pubs/tcpa/oct2003/sarbanes.htm>.

123. *Id.* Such reporting systems range from providing a telephone hot line to establishing the position of an ombudsman. *Id.*

124. Carolyn Hirschman, *Someone To Listen: Ombuds Can Offer Employees a Confidential, Discreet Way To Handle Problems—But Setup and Communication are Crucial To Making This Role Work Properly—Employee Relations*, Society for Human Resource Management & Gale Group (2003), at http://www.findarticles.com/p/articles/mi_m3495/is_1_48/ai_96453596/print.

125. Email from Richard Reuben, Professor of Alternative Dispute Resolution, University of Missouri School of Law, to Katherine Welch, Student Author, University of Missouri-Columbia, School of Law (Oct. 7, 2004, 10:35 PM CST) (on file with author).

rect problems before they become “public relations nightmares.”¹²⁶ This is an important feature of the Sarbanes-Oxley Act because it does not require employees to file a complaint in-house before contacting an outside enforcement agency.¹²⁷

Although a seemingly good solution, it is also possible that the establishment of an ombuds may conflict with the purpose of the Sarbanes-Oxley Act because, if operated under the new Standards, the establishing company’s ombuds would have no obligation to pass along reported information.¹²⁸ Because one aim of the Sarbanes-Oxley Act is to take action upon hearing information regarding fraudulent actions within the public company, this policy would seem to frustrate the reporting requirement.¹²⁹ One possible solution might be to create an exception for reports made to an ombuds pursuant to the Sarbanes-Oxley Act.¹³⁰ However, creating any sort of exception would likely undermine the qualities of independence and confidentiality upon which the ombuds process must be based.¹³¹

When viewed in this way, the new notice provision somewhat conflicts with the Sarbanes-Oxley Act’s overall purpose and presents the potential for notice issues to arise in future employment disputes brought in accordance with Sarbanes-Oxley. On the other hand, drafters of the new Standards argue that an ombuds should not be used to fill the mandatory reporting requirement of the Sarbanes-Oxley Act in the first place.¹³² The reasons given are that “[w]hen presented with a serious issue that appears to have merit, an ombuds will more than likely exercise the inherent discretion of the office by reporting or helping others report the substance of the matter to management while maintaining confidentiality.”¹³³ However, the ombuds office, through the use of its discretion, “might decide for one reason or another that the matter should not be brought forward.”¹³⁴ Uncertainty as to whether the “ombuds will be a conduit from a whistleblower to senior manager” is the result.¹³⁵ Because this uncertain result is intolerable, “the ombuds should therefore be established to supplement, but not replace, a [Sarbanes-Oxley] reporting mechanism.”¹³⁶

Minor exceptions aside, the new notice provision is likely to be very effective in the employment dispute resolution context. Further, the benefits of the provision will likely extend to both sides of the dispute. By establishing an ombuds office, an employer may help to facilitate the resolution of employee complaints more quickly and effectively and may also reduce the potential for future disputes. Absent the protection of such communications to an ombuds, many employers might be hesitant to establish an ombuds office for fear that doing so will create a heightened risk of liability for any employer inaction in responding to employee

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. See Sharan Levine & Paula Aylward, *Integrity Meets Integrity: Using Ombuds To Comply With the Sarbanes-Oxley Act*, 11 DISP. RESOL. MAG. 13, 13-14 (2005).

133. *Id.* at 14.

134. *Id.*

135. *Id.*

136. *Id.*

claims. As previously discussed, employer-employee disputes have resulted in a judicial finding that the employer had constructive notice of the harassment or other discriminatory act alleged by the employee. By eliminating the possibility that notice provided to the employer's ombuds may be imputed to the employer, the new notice provision will encourage employers to establish an ombuds office, which will in turn afford employers the benefits of a more efficient dispute resolution system, without the fears of adverse consequences.

The new notice provision will also be extremely beneficial to employees. Key to the effectiveness of the notice provision is the recognition of the role of confidentiality in the ombuds process. Without assuring that employee complaints will be kept confidential, the ombuds process would be less attractive to employees who would otherwise seek its aid. Furthermore, if employees become less candid when speaking with an ombuds out of fear that any admission might be used against them in a subsequent legal action, the power of the office to solve problems will diminish.¹³⁷ Courts have a special interest in protecting an ombuds office's problem-solving function. There are also strong public policy arguments in favor of facilitating the compromise and settlement of disputes outside of court so as to avoid wasting time in litigation when a problem can be solved through other, more efficient or more effective means.¹³⁸

IV. CONCLUSION

The notice provision contained in the 2004 Standards is key to protecting the role of confidentiality in the ombuds process. By establishing that a complainant's communications will be kept confidential, employees will be more likely to seek the aid of an ombuds before resorting to judicial resolution of their issues. This is important because the use of an ombuds to resolve employment problems is often a more effective and efficient dispute resolution process than a judicial proceeding brought to address the same issue. Further, the benefits of the notice provision will extend to both employers and employees as companies continue to establish ombuds offices. Because employees will be more likely to report grievances to an ombuds when they are assured of the ombuds' confidentiality, and because employers will be more willing to establish ombuds offices without fear of adverse consequences resulting from employer inaction, the entire dispute resolution process within the workplace will likely become more efficient through the use of ombuds. Although the possibility exists for conflicting interests between ombuds offices and various reporting schemes intended to provide the maximum disclosure possible, the new notice provision will absolutely provide more help than harm to achieving the Standards' objective of a more efficient and effective resolution of disputes within the workplace.

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137. See *Shabazz v. Scurr*, 662 F. Supp. 90 (D. Iowa 1987) (expressing concern about state officials "becom[ing] less candid when contacted by an ombudsman out of fear that any admission might be used against them in a subsequent legal action" and that this will adversely affect the power of the ombuds office to act as a problem solver).

138. *Id.*