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Justification for Creating an Ombudsman Privilege in Today's Society

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JUSTIFICATION FOR CREATING AN OMBUDSMAN PRIVILEGE IN TODAY'S SOCIETY

Due to ever-increasing court congestion and contemporary policy favoring the resolution of disputes outside the courtroom, now more than ever a privilege for communications with an ombudsman is needed. Although statistics demonstrate that an ombudsman can quickly and effectively resolve disputes, courts have been inconsistent in recognizing such a privilege. This failure to consistently recognize a privilege for communications with an ombudsman places practicing ombudsmen in a catch-22. Ombudsmen are left to decide between disregarding standards of practice they have sworn to follow, most notably that ombudsmen keep communications in confidence, on the one hand, or of violating a court order requiring disclosure of the communications made to the ombudsman, on the other. Recognizing an ombudsman privilege will eliminate this dilemma without unduly impeding access to evidence, as an ombudsman privilege is merely a different embodiment of privileges and rules of evidence already in effect.

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I. INTRODUCTION

Today court congestion continues to escalate, and as a result alternate methods for resolving disputes have become increasingly widespread.¹ One of these alternative dispute resolution techniques that has been implemented in organizations ranging from private businesses to governmental and education institutions is the use of ombudsmen.² An ombudsman is a neutral member of an organization who receives complaints from employees inside the organization, as well as third parties external to the organization, and attempts to resolve these complaints through various dispute resolution methods.³

Statistics show that use of an ombudsman within an organization may help to not only effectively solve the inevitable disputes that frequently arise, but also help to prevent unethical conduct within the organization.⁴ However, these significant benefits that an ombudsman may provide to an organization hinge on the guarantee to complainants that the communications with the ombudsman will be kept confidential.⁵ Without a guarantee of confidentiality an ombudsman cannot function effectively because complainants will be hesitant to come forward with issues regarding the organization for fear of retaliation.⁶

The centrality that confidentiality plays in the ombudsman process is embodied by the numerous standards of practice that have been promulgated to regulate practicing ombudsmen, which require ombudsmen keep nearly all communications with a complainant confidential.⁷ Despite the ombudsman's duty under these standards of

1. *See infra* Part II.

2. *See infra* Part II.C.

3. *See infra* Part II.A.

4. *See infra* Part II.C.

5. *See infra* Part III.

6. *See infra* Part III.A.

7. The International Ombudsman Association (IOA) standards require an ombudsman to "hold[] all communications with those seeking assistance in strict confidence and take[] all reasonable steps to safeguard confidentiality . . ." IOA STANDARDS OF PRACTICE § 3.1 (Int'l Ombudsman Ass'n 2009), available at http://www.ombudsassociation.org/sites/default/files/IOA_Standards_of_Practice_Oct09.pdf. Similarly, the United States Ombudsman Association places the discretion to disclose information with the ombudsman and requires an ombudsman "not [to] reveal information when confidentiality has been promised." GOVERNMENTAL OMBUDSMAN STANDARDS §§ I(C), II(A)(8)(d), II(C)(1)–(2) (U.S. Ombudsman Ass'n 2003), available at http://www.usombudsman.org/documents/PDF/References/USOA_STANDARDS.pdf. Importantly, both standards plainly state the ombudsman should not be compelled to testify. *Id.* § II(C)(3); IOA STANDARDS OF PRACTICE, *supra*, § 3.3.

practice to maintain the confidence of a complainant's communications, courts have recently held that these communications are not privileged; therefore, disclosure may be compelled.⁸ When a court allows discovery of communications with an ombudsman it leaves the ombudsman with the choice of either violating the court's order or violating the standards of practice the ombudsman has sworn to abide by.⁹

Therefore, it is essential that a privilege be granted for communications with an ombudsman as confidentiality is vital to the ombudsman process. Indeed, this process provides a critically important alternate route to litigation in contemporary times of increasingly congested court dockets, but yet courts have recently put practicing ombudsmen in the challenging position of choosing between violating a court order for disclosure or violating their standards of practice.¹⁰ Furthermore, granting an ombudsman privilege would both be exceptionally similar to the current recognized mediation privilege, and it would also further the increasingly important policy of settling disputes outside of court.¹¹

Prior writings discuss the importance of an ombudsman privilege. This comment will build upon several of these works,¹² beginning in Part II by discussing the benefits of using an ombudsman and provide statistics on general use of ombudsmen in various organizations.¹³ Next, Part III will explain the critical role confidentiality plays in the effective use of an ombudsman.¹⁴ Then, Part IV will consider the differing views courts have taken on an ombudsman privilege over the years, as well as where the law stands today and what a practicing ombudsman can do to increase the chances that complainant communications are kept confidential.¹⁵ Finally, Part V will explore the similarities between an

8. See *infra* Part IV.C.

9. See *infra* Part IV.C.

10. See *infra* Part IV.C.

11. See *infra* Part V.

12. See Christina M. Kuta, Comment, *Universities, Corporations, and States Use Them—Now It's Time to Protect Them: An Analysis of the Public and Private Sector Ombudsman and the Continued Need for a Privileged Relationship*, 27 S. ILL. U. L.J. 389 (2003); Scott C. Van Soye, *Illusory Ethics: Legal Barriers to an Ombudsman's Compliance with Accepted Ethical Standards*, 8 PEPP. DISP. RESOL. L.J. 117 (2007); Brenda V. Thompson, Comment, *Corporate Ombudsmen and Privileged Communications: Should Employee Communications to Corporate Ombudsmen Be Entitled to Privilege?*, 61 U. CIN. L. REV. 653 (1992).

13. See *infra* Part II.

14. See *infra* Part III.

15. See *infra* Part IV.

ombudsman privilege and the widely accepted mediation privilege as well as the similar policy shared by an ombudsman privilege that is behind Federal Rule of Evidence 408 to demonstrate that creating an ombudsman privilege is nothing more than the next logical step in today's society.¹⁶

II. USE OF AN OMBUDSMAN TO PREVENT MISCONDUCT AND EFFECTIVELY DEAL WITH COMPLAINTS

How does society detect and prevent misconduct, as well as settle disputes in educational, governmental, and private business institutions? The answer to this question for most of our nation's history was, and to a large degree continues to be, litigation through the courts.¹⁷ However, the use of the courts to quickly resolve disputes today is at best wishful thinking.¹⁸ Indeed, with the continued increase in case filings, it does not appear that litigation through the courts will be a route for quick dispute resolution anytime in the near future.¹⁹ Due to this lack of timely resolution of disputes through the courts, there has been a trend toward the use of alternative dispute resolution (ADR).²⁰ In fact, public policy and the Supreme Court favor "promoting non-judicial settlement of disputes."²¹

16. See *infra* Part V.

17. See STATISTICS DIV., OFFICE OF JUDGES PROGRAMS, FEDERAL JUDICIAL CASELOAD STATISTICS 40 tbl.C (2010) [hereinafter STATISTICS DIVISION], available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx> (showing that 258,535 civil actions were filed in the United States District Courts in the twelve-month period ending March 31, 2009, and that 282,307 civil actions were filed in the next twelve-month period).

18. See *id.* at 59 tbl.C-5 (showing median time to trial in federal court is almost twenty-four months).

19. See *id.* at 40 tbl.C (showing an increase in case filings of 9.2% between 2009 and 2010).

20. Thompson, *supra* note 12, at 672 (noting a "trend toward ADR").

21. See, e.g., H.R. REP. NO. 93-650, at 8 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7081 (providing the congressional view of public policy on the issue). In 1973, the United States Supreme Court submitted a proposal to the Committee on the Judiciary that eventually became the current Federal Rule of Evidence 408(a)(2). *Id.* Rule 408(a)(2) makes certain conduct and statements made in compromise negotiations inadmissible in subsequent litigation. FED. R. EVID. 408(a)(2). One of its goals, as indicated by the Congress, was precisely to promote non-judicial settlements of disputes. H.R. REP. NO. 93-650, at 8.

A. *Who is an Ombudsman?*

One area of ADR that detects and prevents misconduct, as well as quickly settles disputes in educational, governmental, and private business institutions is the use of an ombudsman.²² An ombudsman is a neutral member of a public or private association who receives complaints from sources both internal and external to the association and helps to resolve these complaints through mediation, counseling, and other innumerable dispute resolution techniques.²³ The use of an ombudsman can take various forms depending upon the organization in which an ombudsman is implemented; however, there are five generally accepted categories of ombudsmen: the classical, the executive, the educational, the corporate, and the newspaper.²⁴ Notwithstanding these various types of ombudsmen, the term “ombudsman” will be used throughout this comment in the general sense to refer to a neutral person within any public or private organization who detects, receives, and resolves disputes in lieu of the disputes going to court.

B. *Benefits of Using an Ombudsman*

It is apparent that Congress has known about the overall beneficial effects that the use of an ombudsman can have for some time. In 1990, consistent with the “trend toward ADR,”²⁵ Congress passed the Administrative Dispute Resolution Act.²⁶ Generally this Act requires that federal agencies adopt a policy that addresses the use of ADR.²⁷ Interestingly, the Act was soon thereafter reenacted in 1996 to include “use of ombuds” in the statutory definition of ADR.²⁸ However, this legislation simply incorporated what had already been the practice in

22. 1 JAY E. GRENIG, *ALTERNATIVE DISPUTE RESOLUTION* § 2:62, at 40–41 (3d ed. 2005).

23. *Id.*

24. Van Soye, *supra* note 12, at 119–25.

25. *See supra* note 21 and accompanying text.

26. Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (codified at 5 U.S.C. §§ 571–84 (2006)).

27. *Id.*

28. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 2, 110 Stat. 3870, 3870 (1996) (codified at 5 U.S.C. § 571); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-446, *HUMAN CAPITAL: THE ROLE OF OMBUDSMEN IN DISPUTE RESOLUTION* 7 (2001) [hereinafter *HUMAN CAPITAL*] (discussing federal agencies movement “towards greater use of ADR to deal with workplace disputes by legislation, policies of the adjudicatory agencies, and by the desire to avoid the time, cost, and frustration of the more formal dispute resolution processes”).

several federal agencies, including the IRS, EPA, and Commerce Department, that had been successfully using an ombudsman program since the 1980s.²⁹ Importantly, this successful implementation of an ombudsman is not limited solely to the public sector.

In addition to use in federal agencies, ombudsmen can be effective in large corporations to help alleviate the negative public perception of these corporations.³⁰ As the former Chairman and CEO of McDonnell Douglas Corporation once put it, “the average man in the streets right now thinks we’re all a bunch of crooks.”³¹ This general negative public perception of corporations can be traced to numerous corporate scandals that have been the center of media attention over the past fifteen years.³² This negative public image of the corporation, in addition to the lack of checks and balances within many corporate organizations of the past, warrants the use of an ombudsman.³³ Not only can the use of an ombudsman in a corporation improve the corporation’s public image, but it can also lead to an increase in the overall ethics of the corporation.³⁴ Increasing corporate ethical standards is important for many unquantifiable reasons, in addition to the fact that a majority of corporate executives “believe high ethical standards improve a company’s competitive position.”³⁵

Ombudsmen, whether used in a public or private organization, are unique because not only can they resolve disputes outside of court, but

29. Kuta, *supra* note 12, at 397.

30. Victor Futter, *An Answer to the Public Perception of Corporations: A Corporate Ombudsperson?*, 46 BUS. LAW. 29, 55 (1990) (“If the institution of the ombudsperson could be made to work successfully, it will be developed in a variety of ways by the country’s diverse corporations and it should help to improve the public perception of corporations and to restore public confidence in their behavior.”).

31. *Id.* at 30.

32. See, e.g., Cathy Booth Thomas, *Called to Account*, TIME, June 24, 2002, at 52 (discussing accounting firm Arthur Andersen’s role in Enron fraud, and finding that the firm, simply because it was associated with Enron, “had already been found guilty in the court of public opinion” before its trial for obstruction of justice began).

33. Kevin L. Wibbenmeyer, *Privileged Communication Extended to the Corporate Ombudsman-Employee Relationship Via Federal Rule of Evidence 501*, 1991 J. DISP. RESOL. 367, 370.

34. Futter, *supra* note 30, at 55 (concluding that the ombudsman can invigorate corporate integrity with the public as well as ensure corporate integrity for corporations themselves).

35. *Id.* at 49 & n.66 (citing Selwyn Feinstein, *Labor Letter*, WALL ST. J., Dec. 29, 1987, at 1) (“[T]wo-thirds of the corporate executives questioned ‘believe high ethical standards improve a company’s competitive position.’”).

they also can prevent disputes from occurring in the first place.³⁶ In fact, it has been shown that ombudsmen in corporations spend approximately 30% of their time reporting to corporate management on “new or potential problems in the organization.”³⁷ Furthermore, the use of an ombudsman allows organizations an opportunity to detect potential problems sooner, when the prospective negative impact is less severe.³⁸ Indeed, an ombudsman facilitates “[t]hings get[ting] surfaced that wouldn’t get surfaced any other way,”³⁹ and thus helps organizations using an ombudsman to avoid liability in countless areas of the law, including business practices, Sarbanes-Oxley concerns, and equal opportunity claims.⁴⁰

In addition to the valuable benefit a corporation receives from the early detection of problems, an ombudsman also provides numerous other advantages. First, as briefly mentioned earlier, an ombudsman allows an organization to avoid court.⁴¹ This route around litigation is a major reason why the use of ombudsmen has been found to be cost-effective.⁴² This is due to the time and cost litigation imposes upon litigants.⁴³ As compared to formal court proceedings, an ombudsman resolves disputes in significantly less time.⁴⁴ For example, in one ombudsman program 40% of resolved cases were closed in two weeks, and the other 60% within six weeks, of when the complaint was received.⁴⁵

36. HUMAN CAPITAL, *supra* note 28, at 3–4. “A key feature distinguishing ombuds from other dispute resolution practitioners is the ombuds’ focus on systemic issues and on developing conflict prevention strategies.” *Id.* at 8.

37. Thompson, *supra* note 12, at 666 (citing Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, 3 NEGOTIATION J. 127, 132 (1987)).

38. GRENIG, *supra* note 22, § 13:3, at 322.

39. *Ombuds Can Help Address Conflicts, Potential Lawsuits*, HR FOCUS, Oct. 2005, at 8–9 (quoting Wendy Fried, a corporate ombudsman).

40. *Id.* at 9.

41. See GRENIG, *supra* note 22, § 13:3, at 322; Thompson, *supra* note 12, at 653.

42. Mary Elizabeth McGarry, *The Ombudsman Privilege: Keeping Harassment Complaints Confidential*, N.Y. L.J., Nov. 30, 1995, at 1, 7 (citing Rowe, *supra* note 37, at 136); see MARY ROWE & MARY SIMON, EFFECTIVENESS OF ORGANIZATIONAL OMBUDSMEN 8 (2001), http://web.mit.edu/ombud/publications/effectiveness_final.pdf.

43. See STATISTICS DIVISION, *supra* note 17, at 59 tbl.C-5.

44. See, e.g., *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 572 (E.D. Mo. 1991) (“A successful ombudsman program resolved many problems informally and more quickly than other more formal procedures, including court actions.”).

45. HUMAN CAPITAL, *supra* note 28, at 21–22 (reporting on the success of the ombudsman program at the National Institute of Health).

Second, in addition to resolving disputes more quickly than litigation, an ombudsman conserves an organization's resources because an ombudsman is much less costly than hiring outside counsel to investigate a dispute within the organization.⁴⁶ Moreover, if an ombudsman prevents one key lawsuit from being filed against a large corporation or stops one controversial issue about the organization from being disseminated in the media, the ombudsman has more than justified the cost to that organization.⁴⁷ In addition to saving litigation costs, there are enormous productivity and efficiency costs a large organization can incur by letting problems go unnoticed.⁴⁸ For instance, ongoing sexual harassment in the workplace can cost a large employer millions in absenteeism, low productivity, and employee turnover.⁴⁹ Thus, to the extent an ombudsman is resolving these issues early, the ombudsman is facilitating enormous future cost savings to the employer.

A third benefit the use of an ombudsman brings to an organization is a result of the fact that the organization's potential problems and disputes are resolved solely by the ombudsman, therefore allowing the managers and executives of the organization to exclusively concentrate on their primary goals of earning profits, organizational growth, and competing in the market place.⁵⁰ Finally, the implementation of an ombudsman benefits the employees of the organization because it provides them a neutral person to whom they can fully voice concerns in confidence.⁵¹ This ability to voice concerns in confidence encourages

46. Futter, *supra* note 30, at 48.

47. *Id.*

48. *See id.* at 49 (finding that in addition to saving a company potential damages in litigation, having an ombudsman could "avoid a tremendous amount of damaging publicity as well as save an inestimable amount of management time, attention, distraction, worry, and expense").

49. McGarry, *supra* note 42, at 1. "Sexual harassment costs a typical Fortune 500 company with 23,750 employees \$6.7 million per year in absenteeism, low productivity and employee turnover." Ronni Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1988, at 69, 71.

50. *See* GRENIG, *supra* note 22, § 13:3, at 322 ("Other areas or departments of the organization may acquire additional time to work on more focused departmental goals."); Futter, *supra* note 30, at 36 (stating that an ombudsman can permit a CEO to focus attention on "earning profits, strategic planning, and meeting both domestic and foreign competition"); Wibbenmeyer, *supra* note 33, at 371 (noting that an ombudsman "frees top management to concentrate on activities necessary for the profitable growth of the corporation").

51. GRENIG, *supra* note 22, § 13:3, at 322 (noting that an ombuds program "provide[s] a safe mechanism for persons to raise concerns"); Futter, *supra* note 30, at 36 (stating that the creation of an ombudsman "assists employees who, for one reason or another, find it difficult

those employees who fear retaliation to come forward with their issues and leads to an overall increase in the morale of the organization.⁵² In addition, this outlet for confidential voicing of concerns will facilitate and encourage appropriate individual behavior throughout the organization.⁵³

C. Statistical Use of an Ombudsman

Considering all of the benefits that the use of an ombudsman can bring to an organization, it only follows that more organizations are starting to realize these benefits and the use of ombudsmen is on the rise.⁵⁴ In fact, the use of ombudsmen has now gained worldwide recognition.⁵⁵ Indeed, the United Nations employs an ombudsman department that handled 2,267 cases in 2011.⁵⁶ In the United States, a survey a few years ago found that about ten percent of the responding corporations employed an ombudsman and that in total over 1,000 corporations in the United States use ombudsmen.⁵⁷ The use of ombudsmen in United States corporations continues to grow, and currently ombudsmen are used in many iconic corporations including McDonald's, AT&T, American Express, and Federal Express.⁵⁸ In addition to the growing use of ombudsmen in corporations, higher educational institutions across North America continue to effectively use ombudsmen with currently over 200 colleges and universities employing an ombudsman department.⁵⁹ Across all of these various organizations where ombudsmen are routinely used, it has been estimated that the average ombudsman may receive 200–300 complaints

or impossible to go through normal reporting channels”).

52. GRENIG, *supra* note 22, § 13:3, at 322 (“Increased morale and relationships should be more harmonious.”).

53. Futter, *supra* note 30, at 36–37.

54. Corie Marty, Recent Development, *Carman v. McDonnell Douglas Corp.*, 13 OHIO ST. J. ON DISP. RESOL. 275, 275 (1997).

55. DOUGLAS H. YARN & GREGORY TODD JONES, ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PROCEDURE IN GEORGIA § 11:31, at 373 (3d ed. 2006).

56. *Ombudsman and Mediation Services: Frequently Asked Questions*, UNITED NATIONS, <http://www.un.org/en/ombudsman/faqs.shtml#4> (last visited Oct. 30, 2011) [hereinafter *Frequently Asked Questions*].

57. Van Soye, *supra* note 12, at 124 n.73 (citing Jeffrey S. Lubbers, *Ombudsman Offices in the Federal Government—An Emerging Trend?*, 22 ABA ADMIN. & REG. L. NEWS, Summer 1997, at 6).

58. YARN & JONES, *supra* note 55, § 11:31, at 373.

59. *Id.* at 374.

a year regarding a wide range of legal issues, including wrongful termination, compensation, harassment, and discrimination.⁶⁰

The use of ombudsmen in various organizations to successfully resolve disputes in lieu of expensive and time-consuming litigation continues to grow due to the numerous benefits the use of an ombudsman provides to an organization.⁶¹ In light of this trend, it follows that the law should also recognize the benefits and efficiency of the ombudsmen in organizations and aim to facilitate the effective use of ombudsmen by granting a privilege for communications with ombudsmen. After all, effective use of ombudsmen does the legal system a favor by keeping disputes from accumulating onto the already congested court dockets.⁶²

III. THE KEY TO THE EFFECTIVE USE OF AN OMBUDSMAN IS A GUARANTEE OF CONFIDENTIALITY

In light of the growing, effective use of ombudsmen to prevent and resolve disputes in various types of organizations,⁶³ the law needs to strive to facilitate their effective use for the benefit of society. Like many other dispute resolution techniques that the law has attempted to facilitate the effective use of,⁶⁴ successful use of the ombudsman process depends on the presence of certain principles, or ground rules.⁶⁵ Multiple ombudsman associations have promulgated standards of practice for an ombudsman to abide by which include principles that an ombudsman must be independent, neutral, and keep communications confidential.⁶⁶ For continued growth of successful ombudsman use by

60. Lee P. Robbins & William B. Deane, *The Corporate Ombuds: A New Approach to Conflict Management*, NEGOTIATION J., Apr. 1986, at 195, 201.

61. See GRENIG, *supra* note 22, § 13:3, at 322; Thompson, *supra* note 12, at 656 (discussing rise in use of ombudsmen by corporations).

62. See *supra* notes 17–19 and accompanying text.

63. Thompson, *supra* note 12, at 656 (discussing rise in use of ombudsmen by corporations); see also *supra* notes 28–29 and accompanying text (discussing rise in use of ombudsmen by the United States Government).

64. See, e.g., FED. R. EVID. §§ 408, 501; *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1179–80 (C.D. Cal. 1998), *aff'd*, 216 F.3d 1082 (9th Cir. 2000) (adopting a federal common law privilege for dispute resolution through mediation because confidentiality of communications during mediation is key to its success); see also discussion *infra* Part V (showing that creation of an ombudsman privilege would be similar to another privilege and evidentiary exclusion currently recognized by the law).

65. See *supra* note 7 and accompanying text.

66. See *supra* note 7 and accompanying text.

various organizations, these standards of practice and the particular principles that ombudsmen are ethically required to abide by must be respected by the courts if society is to continue to realize the benefits of dispute prevention and resolution through ombudsmen.

A. *The Essential Role of Confidentiality*

Among the principles promulgated by ombudsman associations that practicing ombudsmen are ethically required to abide by is confidentiality, or protection of complainant communications with an ombudsman.⁶⁷ This protection is essential to the ombudsman dispute resolution process.⁶⁸ In fact, courts have stated that “without confidentiality, the ombuds process would not work.”⁶⁹ If communications with an ombudsman in the course of attempting to resolve a dispute were not confidential and could be disclosed and used in subsequent litigation, the effective and timely dispute resolution afforded by an ombudsman would be destroyed.⁷⁰ Additionally, a failure to keep communications with an ombudsman confidential would devastate the ombudsman process beyond repair in the eyes of third parties.⁷¹ The utmost importance of this confidentiality principle was recognized by Congress when it enacted the Administrative Dispute Resolution Act of 1990,⁷² which was intended to encourage the use of

67. See *supra* note 7 and accompanying text.

68. GRENIG, *supra* note 22, § 13:1, at 319 (“The most important element of an ombuds program is confidentiality of program usage.”); Marty, *supra* note 54, at 285 (“[T]he effectiveness of corporate ombuds programs rests on an employee’s belief that information divulged will remain confidential, and destroyed the employee’s confidence in that confidentiality will destroy the corporate ombudsman program itself.”); Thompson, *supra* note 12, at 654 (“[T]he ombudsman relies on the confidential nature of his office to encourage employees to come forward”); Katherine A. Welch, Note, *No Notice Is Good News: Notice Under the New Ombuds Standards for the Establishment and Operation of Ombuds Offices*, 2005 J. DISP. RESOL. 193, 198 (“Key to the ombuds process is the protection afforded to communications that are made to an ombuds by a complainant.”).

69. Welch, *supra* note 68, at 198–99 (discussing *Garstang v. Superior Court*, 46 Cal. Rptr. 2d 84 (Ct. App. 1995); and *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991) (supporting the proposition that confidentiality is vital to the ombuds process)); see also *infra* notes 117–21 and accompanying text.

70. Wibbenmeyer, *supra* note 33, at 377 (“The quick and effective settlement processes offered by the ombudsman concept would be stifled if the statements made by the ombudsman or employee could be used in eventual legal proceedings.”).

71. GRENIG, *supra* note 22, § 13:3, at 323 (“If the necessity of confidentiality is breached, then the program will be irreparably destroyed in the eyes of other persons.”).

72. Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (codified at 5 U.S.C. §§ 571–84 (2006)).

ADR in federal agencies and specifically states that communications made to a neutral party in dispute resolution settings cannot be disclosed and must remain confidential, subject to listed exceptions.⁷³

In addition to Congress recognizing the significance of confidentiality, multiple ombudsman associations along with the American Bar Association (ABA) have endorsed the view that when an ombudsman has offered confidentiality to a complainant, the ombudsman must maintain that confidence.⁷⁴ The International Ombudsman Association's Standards of Practice, which practicing member ombudsmen are required to adhere by, states that ombudsmen must maintain all communications in strict confidence, such communications are privileged, and that any task the ombudsman performs during the scope of his work, including data and record keeping, must maintain this confidentiality as a top priority.⁷⁵ Another ombudsman association, the United States Ombudsman Association, has also promulgated standards requiring confidentiality and similarly stating that the ombudsman take strong efforts to keep all records confidential, while adding that the ombudsman cannot be compelled to testify in a formal proceeding.⁷⁶ In addition to these ombudsman associations, the ABA has also publicized the importance of confidentiality in a memorandum supporting a privilege for communications with an ombudsman and discussing the value to society of the ombudsman as well as the indispensability of confidence to the effectiveness of the process.⁷⁷ Clearly, confidentiality of ombudsman communications has the support of these associations.

As well as ombudsman associations, scholars, courts, and Congress

73. 5 U.S.C. § 574 (2006); Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 264 (2002) ("The Act prohibits ADR neutrals and parties from voluntarily disclosing communications or from being required to disclose communications through discovery or compulsory processes.").

74. See IOA STANDARDS OF PRACTICE, *supra* note 7, § 3.1; GOVERNMENTAL OMBUDSMAN STANDARDS, *supra* note 7, at 2, §§ I(C), II(A)(8)(d), II(C)(1)–(2); AMERICAN BAR ASSOCIATION, STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES 5 (2004) [hereinafter ABA STANDARDS], available at <http://www.abanet.org/leadership/2004/recommendations/115.pdf> ("An ombuds does not disclose and is not required to disclose any information provided in confidence, except to address an imminent risk of serious harm.").

75. IOA STANDARDS OF PRACTICE, *supra* note 7, § 3.1–8.

76. GOVERNMENTAL OMBUDSMAN STANDARDS, *supra* note 7, §§ I(C), II(A)(8)(d), II(C)(1)–(3).

77. ABA STANDARDS, *supra* note 74; Kuta, *supra* note 12, at 409–10 (discussing a memorandum produced by the ABA in support of an ombudsman privilege).

all recognizing the importance of confidentiality, those who directly deal with and use an ombudsman also recognize the necessity that these communications be kept confidential.⁷⁸ This belief in the significance of confidentiality of communications is illustrated by the first question almost all people who come to an ombudsman ask, “Is this discussion off the record?”⁷⁹ Anyone who comes to an ombudsman to voice his or her concerns finds security and confidence in the fact that reporting an issue to an ombudsman will be “off the record” and not later disclosed or used adversely because these patrons know the ombudsman has a duty under his or her standards of practice to keep the conversation confidential.⁸⁰ The ability to have off the record, or confidential, communications not only provides a sense of security by knowing the conversation cannot be disclosed later or subsequently used adversely in formal proceedings, but also provides a safe route to raise concerns without the worry of retaliation in the present.⁸¹ This feeling of security that a guarantee of confidentiality provides, explains why outlets for raising issues that guarantee confidentiality receive usage rates twice that of outlets that do not guarantee confidentiality of such communications.⁸²

B. The Argument Against Confidentiality

While the focal point of this piece centers on the need for confidentiality from the perspective of the complainant who discloses information through the ombudsman process, recognizing a privilege for communications with an ombudsman also necessitates that statements made to the ombudsman by the institution or organization with whom the complainant has an issue also remain confidential. Although the essential role confidentiality plays from the complainant’s perspective is well-documented,⁸³ not everyone agrees that confidentiality is always

78. McGarry, *supra* note 42, at 1, 7 (recognizing the need for “strictly confidential complaint channels” and noting that “[i]t is critical for an ombudsman office to . . . establish procedures to ensure that confidentiality is, in fact, provided.”).

79. *Id.* at 7.

80. See *supra* note 7 and accompanying text.

81. GRENIG, *supra* note 22, § 13:3, at 322 (“Anonymity, confidentiality and non-retaliation provide a safe mechanism for persons to raise concerns.”).

82. McGarry, *supra* note 42, at 7.

83. See, e.g., Deason, *supra* note 73, at 243 (noting that confidentiality “is regarded as so crucial for mediation that the importance of confidentiality itself is rarely at issue in mediation scholarship”); see also *supra* Part III.A (discussing the essential role of confidentiality in the ombudsman process).

100% beneficial, especially when invoked to keep actions of the institution or organization from the public eye.⁸⁴

Rather, some argue that confidentiality impedes the public's right to know.⁸⁵ Furthermore, in contrasting the transparency of courts with the opaqueness of ADR proceedings due to confidentiality, a court stated: "[P]ublic access to court proceedings helps society become aware of unfair business acts and practices, educating consumers and thereby discouraging such activities[.]" while confidential ADR proceedings, such as arbitration, "prevent the public from discovering such violative acts and practices."⁸⁶ For instance, confidentiality can endanger the public health by keeping critical information from those who need it most.⁸⁷ Additionally, as a result of keeping information out of the public's eye the problem of over-avoidance due to under-informed consumers leads to shifting to inferior alternatives in both the labor and goods markets.⁸⁸ Finally, in the context of ADR, which usually involves a third party neutral, confidentiality shields this third party neutral from public oversight and scrutiny, and thus, there is no analog to the public accountability judges have.⁸⁹

In the end, despite these criticisms of confidentiality, the benefits

84. Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in On Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 466, 518–19 (2006) (stating, among other things, that due to the secret, confidential environment ADR operates in, a "world of mischief" can be concealed behind ADR's closed doors).

85. Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 947 (2006) ("[T]he backbone of the argument against confidentiality [is] the right of the public to know.").

86. *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1181 (Ohio Ct. App. 2004).

87. *See, e.g., Rojas v. Superior Court*, 93 P.3d 260, 262 (Cal. 2004) (holding that confidentiality afforded to information obtained through prior mediation prevented current discovery of materials related to the mold-infested condition to which tenants were exposed); Gina Kolata, *Secrecy Orders in Lawsuits Prompt States' Efforts to Restrict Their Use*, N.Y. TIMES, Feb. 18, 1992, at D10 (discussing controversy regarding silicone breast implants where data related to dangers associated with the implants had been kept in confidence from the public for years).

88. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 907–09 (2007) (discussing the impact that news of public settlements would have in assisting consumers and workers in distinguishing dangerous products from good ones and dangerous jobs from safer ones); *see also* Kotkin, *supra* note 85, at 929 (arguing that the ability to keep settlements confidential leads to invisible workplace discrimination).

89. Doré, *supra* note 84, at 490 (noting that a third party neutral, such as an arbitrator, "who already possesses largely unchecked discretion," is free from public scrutiny due to the confidentiality of the proceeding).

confidentiality affords to the ombudsman process far outweigh any perceived adverse consequences. Indeed, confidentiality is essential to facilitate the quality of communication needed to effectively resolve disputes with an organization.⁹⁰

IV. THE ESSENTIAL ROLE OF CONFIDENTIALITY: COURTS DO NOT ALWAYS AGREE

A. Determination of Privilege Left to the Common Law

Despite the essential role confidentiality plays in the ombudsman process, courts over the years have taken diverging views on granting a privilege for communications with an ombudsman.⁹¹ Federal courts have been given the ability to determine what constitutes privileged communications as a matter of common law by the Federal Rules of Evidence.⁹² Specifically, the federal courts are to determine what constitutes privileged information “in the light of reason and experience.”⁹³ This decision in the Federal Rules of Evidence by the Senate and the House to allow the federal courts to determine whether a privilege exists on a case-by-case basis, rather than explicitly granting an arbitrary number of privileges in specific relationships,⁹⁴ shows the desire of the House and Senate to encourage federal courts to continue to develop privileges as necessary in specific beneficial circumstances.⁹⁵

90. See Deason, *supra* note 73, at 245–47 (discussing the benefits confidentiality affords in mediation proceedings).

91. See, e.g., *Kientzy v. McDonnell Corp.*, 133 F.R.D. 570, 573 (E.D. Mo. 1991) (recognizing privilege for communications with ombudsman in that instance because of the importance of confidentiality to the process); *Shabazz v. Scurr*, 662 F. Supp. 90, 90–91, 94 (S.D. Iowa 1987) (granting a privilege for ombudsman communications and stating that there are other means for obtaining the evidence). But see *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 794–95 (8th Cir. 1997) (declining to recognize a privilege for communications with an ombudsman without establishment of more facts regarding the benefit of the ombudsman program).

92. FED. R. EVID. 501 (“The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege.”).

93. *Id.*

94. See Kuta, *supra* note 12, at 399–400 (noting as originally proposed by the committee charged with writing the Federal Rules of Evidence, there was to be nine specific privileges the federal courts were required to recognize which were as follows: lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and the identity of informers).

95. *Id.*; *Jaffee v. Redmond*, 518 U.S. 1, 8–9 (1996) (“[Federal Rule of Evidence 501] did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to ‘continue the evolutionary development of

Putting this authority into practice, federal courts have recognized communications as privileged when the interests the privilege promotes sufficiently outweigh the normally predominate principle of using all available means of obtaining evidence to determine the truth.⁹⁶

The debate as to whether a privilege should apply generally contains the same arguments on both sides notwithstanding the particular subject matter sought to be protected through a privilege. Those against granting a privilege in a specific circumstance cite the old adage that “the public has a claim to every man’s evidence.”⁹⁷ Furthermore, those opposing the creation of a wholly new privilege argue that it is a big step and creating such a barrier to obtaining relevant evidence in the truth seeking process must not be undertaken lightly.⁹⁸ On the other hand, those proponents of a privilege contend that without the privilege most of the desirable evidence that a party seeks, such as admissions against interest, exists because of the privilege and is not likely to have come into being in the first place if there were no such privilege.⁹⁹ Additionally, these proponents point out that when a privilege is granted it is limited in the sense that it only bars disclosure of the communication itself, and it does not prevent a party seeking certain evidence from obtaining and using the underlying facts of that communication through other means.¹⁰⁰ Such arguments are taken into account by a court when determining whether a privilege will apply in

testimonial privileges.” (citation omitted)).

96. *Jaffee*, 518 U.S. at 9; *Trammel v. United States*, 445 U.S. 40, 53 (1980) (defining adverse spousal testimony privilege to apply only to the witness-spouse, and finding that such a privilege furthered the important public interest in marital communications without overly burdening evidentiary needs); *United States v. Bryan*, 339 U.S. 323, 331 (1950) (“every . . . exemption is grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth.”).

97. 12 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND 25 (London, T.C. Hansard 1812) [hereinafter COBBETT’S PARLIAMENTARY HISTORY].

98. *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 794 (8th Cir. 1997) (“To 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.”).

99. *Jaffee*, 518 U.S. at 12 (“Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being [and] [t]his unspoken ‘evidence’ will therefore serve no greater truth-seeking function than if it had been spoken and privileged.”).

100. *Shabazz v. Scurr*, 662 F. Supp. 90, 93 (S.D. Iowa 1987) (“The privileged nature of communications [the ombudsman] received as the ombudsman does not prevent the plaintiffs from using other means to prove the existence of facts communicated to him.”).

the particular case.¹⁰¹

The federal courts' process for determining whether a privilege exists on a case-by-case basis "in the light of reason and experience"¹⁰² is substantially the same as the state courts' process where determinations of privileges are also left to the common law.¹⁰³ The only difference, however, is that many states have explicitly adopted statutory provisions addressing privileges in certain specific circumstances.¹⁰⁴ Therefore, when such specific circumstances are at issue and the statutory provision is called into operation, there is no need to leave the determination of a privilege up to the court; the issue has already been determined as a matter of policy by the state's legislature.

101. *See id.* at 92–93.

102. FED. R. EVID. 501; *see, e.g., Jaffee*, 518 U.S. at 8–9; *United States v. Rakes*, 136 F.3d 1, 3–4 (1st Cir. 1998) (discussing some of the factors taken into consideration when the court determined the applicability of the spousal privilege: that the husband intended his conversations with this wife to be confidential; that there is no exception to spousal privilege in communications related to financial matters; that it did not matter whether the husband relayed to his wife the events already occurred in these conversations; and that it did not matter that the spousal communications took place at the same time as criminal act conduct with which the husband was charged in the present case).

103. Van Soye, *supra* note 12, at 130 ("Rule 501 allows federal courts to recognize new privileges based on common law principles, applying the court's 'reason and experience,' on a case-by-case basis.")

104. *See* Deason, *supra* note 73, at 259 ("Many of the states with general mediation statutes or evidentiary rules chose privilege as the most effective framework for protecting confidentiality in legal proceedings . . ."); *see, e.g., ALASKA STAT. § 24.55.160(b)* (2010) ("The ombudsman shall maintain confidentiality with respect to all matters and the identities of the complainants or witnesses coming before the ombudsman except insofar as disclosures may be necessary to enable the ombudsman to carry out duties and to support recommendations."); *HAW. REV. STAT. ANN. § 96-9(b)* (LexisNexis 2012) ("The ombudsman is required to maintain secrecy in respect to all matters and the identities of the complainants or witnesses coming before the ombudsman except so far as disclosures may be necessary to enable the ombudsman to carry out the ombudsman's duties and to support the ombudsman's recommendations."); *IOWA CODE ANN. § 2C.20* (West 2008) ("[N]or shall the citizens' aide or any member of the staff be compelled to testify in any court with respect to any matter involving the exercise of the citizens' aide's official duties . . ."); *NEB. REV. STAT. § 81-8,253* (2008) ("Neither the Public Counsel nor any member of his staff shall be required to testify or produce evidence in any judicial or administrative proceeding concerning matters within his official cognizance . . ."); *WASH. REV. CODE ANN. § 43.06A.060* (West 2009) ("Neither the ombudsman nor the ombudsman's staff may be compelled, in any judicial or administrative proceeding, to testify or to produce evidence regarding the exercise of the official duties of the ombudsman or of the ombudsman's staff.").

B. Early Common Law on Privilege for Communications with an Ombudsman

As a result of leaving the determination of whether privileges should exist up to the common law, much inconsistency regarding the recognition of a privilege for communications with an ombudsman has resulted among courts over time.¹⁰⁵ Early on, courts began to recognize a privilege for communications with an ombudsman in specific contexts on a case-by-case basis.¹⁰⁶

The first case to apply Federal Rule of Evidence 501 in the context of communications with an ombudsman, *Shabazz v. Scurr*,¹⁰⁷ ruled that such communications were privileged.¹⁰⁸ *Shabazz* held that communications made specifically to a prison ombudsman were privileged, reasoning that this confidentiality encouraged such complaints to be brought freely.¹⁰⁹ The next case brought to court concerning the recognition of a privilege for communications with an ombudsman occurred in *Monoranjana Roy v. United Technologies Corp.*¹¹⁰ In fact, *Roy* was the first court to recognize a privilege for communications with an ombudsman in a corporate setting by holding that in this specific case there was a privilege from discovery for the defendant company's ombudsman because the communications in the context presented there, between the corporate ombudsman and an employee of the corporation, were privileged.¹¹¹

Shortly after *Roy*, the court in *Kientzy v. McDonnell Douglas Corp.*¹¹² continued the trend of recognizing an ombudsman privilege under Federal Rule of Evidence 501.¹¹³ In *Kientzy*, the plaintiff, a former employee of the defendant corporation, brought suit claiming wrongful termination and as part of discovery sought to take a

105. See *supra* note 85 and accompanying text.

106. See Wibbenmeyer, *supra* note 33, at 373.

107. *Shabazz v. Scurr*, 662 F. Supp. 90 (S.D. Iowa 1987).

108. *Id.* at 90–91.

109. *Id.* at 92 (“[A]nything which chills a citizen’s willingness to come forward limits the [ombudsman] office’s effectiveness in the long run . . .”).

110. *Roy v. United Techs. Corp.*, No. H–89–680, at 23–24 (D. Conn. May 29, 1990).

111. *Id.*; Wibbenmeyer, *supra* note 33, at 373.

112. *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991).

113. *Id.* at 571; see also Van Soye, *supra* note 12, at 130 (discussing *Kientzy*); Wibbenmeyer, *supra* note 33, at 373 (noting that *Monoranjana Roy* expanded the *Kientzy* decision and found a privilege applicable to the communications of a corporate ombudsman and an employee).

deposition of the defendant's ombudsman concerning communications made to the ombudsman by defendant's management involved in the decision to terminate the plaintiff.¹¹⁴ However, the court held that such communications made to the ombudsman in the circumstances presented to the court, were privileged, and, therefore, the plaintiff could not compel the ombudsman nor the management to disclose the statements made between each other regarding the plaintiff's termination.¹¹⁵ The court found the communications with the ombudsman to be confidential because the following four facts were present in this case: 1) the statements were made with the belief that they would be kept confidential; 2) the need for confidential communication is essential to the effective functioning of the ombudsman; 3) the relationship between the ombudsman and the defendant's employees and management is worthy of societal protection; and 4) the benefit to plaintiff gained by disclosure is outweighed by the harm that would be caused by an interference in the confidential relationship between the ombudsman and others.¹¹⁶

C. Reversal of the Early Common Law on Privilege for Communications with an Ombudsman

Despite the early trend of courts to recognize a privilege for communications with an ombudsman under Federal Rule of Evidence 501, the Court of Appeals for the Eighth Circuit later rendered a decision that marked a polar shift in the court's view of an ombudsman privilege.¹¹⁷

The Eighth Circuit held in *Carman v. McDonnell Douglas Corp.*¹¹⁸ that an employee's confidential communications made to the corporation's ombudsman were not privileged.¹¹⁹ This holding was a complete departure from the previous decisions of *Shabazz*,¹²⁰ *Roy*,¹²¹

114. *Kientzy*, 133 F.R.D. at 571.

115. *Id.* at 573 (noting, as with all privileges, that plaintiffs cannot compel anyone to disclose their specific statements to the corporation's ombudsman but could compel disclosure of any facts known to them, even though these facts may have been contained in statements to the ombudsman).

116. *Id.* at 571-72.

117. *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 794-95 (8th Cir. 1997) (rejecting *Kientzy* holding and denying a privilege for communications with an ombudsman in the same program at issue in *Kientzy*).

118. *Id.* at 790.

119. *Id.* at 794-95.

120. *See Shabazz v. Scurr*, 662 F. Supp. 90, 90-91 (S.D. Iowa 1987) (recognizing a

and *Kientzy*.¹²² The *Carman* court reasoned that in the specific circumstances McDonnell Douglas had not provided any evidence that its ombudsman process was successful at resolving disputes involving the corporation prior to litigation. The court also noted that McDonnell Douglas failed to show that the advantages of the ombudsman program would be lost without a privilege because the ombudsman could still promise to keep the employee's communications confidential from corporate management.¹²³ Furthermore, the court stated that for McDonnell Douglas to justify the creation of an ombudsman privilege, it needed to first demonstrate that "society benefits in some significant way from the particular brand of confidentiality that the privilege affords."¹²⁴

Not only did the Eighth Circuit's decision in *Carman* mark a change in the court's view towards an ombudsman privilege,¹²⁵ it presents a troubling dilemma for all practicing ombudsmen. As discussed earlier,¹²⁶ ombudsmen are required to adhere to standards of practice promulgated by the ombudsman association to which they are members.¹²⁷ These standards of practice include the duty that all communications made to the ombudsman are privileged and must be maintained in confidence by the ombudsman as a top priority.¹²⁸ These mandates of the standards of practice for ombudsmen stand in direct conflict with the *Carman* court's holding that the communications made to the ombudsman in that case were not privileged and the ombudsman could be compelled to disclose the communications in litigation.¹²⁹ This now leaves practicing ombudsmen to choose between violating the

privilege under Federal Rule of Evidence 501 for communications with a prison ombudsman because it encourages complainants to come forward).

121. See *Roy v. United Techs. Corp.*, No. H-89-680 23-24 (D.Conn. May 29, 1990) (recognizing a privilege for communications with a corporate ombudsman under Federal Rule of Evidence 501).

122. See *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 573 (E.D. Mo. 1991) (holding that corporation's ombudsman could not be compelled to disclose communications made to her by corporation's management regarding the termination of the plaintiff).

123. *Carman*, 114 F.3d at 793-94.

124. *Id.* at 794.

125. *Id.* at 794-95.

126. See *supra* Part III.

127. See generally IOA STANDARDS OF PRACTICE, *supra* note 7; GOVERNMENTAL OMBUDSMAN STANDARDS, *supra* note 7.

128. See *supra* note 7 and accompanying text.

129. *Carman*, 114 F.3d at 794-95.

ombudsman standards of practice they have vowed to abide by or disregarding a court order to disclose communications that were thought to be made in confidence.¹³⁰

D. Persuading a Court to Grant an Ombudsman Privilege Today

The few subsequent cases since *Carman* dealing with the issue of an ombudsman privilege have done little to help clear up the troubling conflict¹³¹ ombudsmen are now confronted with between their standards of practice and courts denying a privilege for communications with an ombudsman.¹³² However, despite the decision in *Carman*,¹³³ because privileges are granted on a case-by-case basis¹³⁴ it is still entirely possible that a court would grant an ombudsman privilege when a strong enough factual showing has been made as to the importance and effectiveness of the ombudsman in the specific case.¹³⁵ Such a showing was not made in *Carman*.¹³⁶ In fact, by the time the suit was brought, the ombudsman office at issue had been abolished and no facts whatsoever were provided to the court regarding the ombudsman office in general, much less how the office operated or why the privilege was important.¹³⁷ As a result, because no facts were presented to the court to justify entitlement to an ombudsman privilege, the court had no choice but to deny such a privilege in the specific case.¹³⁸ Therefore, as the law concerning an ombudsman privilege currently stands, the best way for a practicing ombudsman to avoid conflict between his or her standards of

130. Compare IOA STANDARDS OF PRACTICE, *supra* note 7, § 3.1 (“The Ombudsman holds all communications with those seeking assistance in strict confidence . . .”), and GOVERNMENTAL OMBUDSMAN STANDARDS, *supra* note 7, § II(C)(1) (“The Ombudsman should not reveal information when confidentiality has been promised.”), with *Carman*, 114 F.3d at 794–95 (ordering an ombudsman to produce evidence of employee communications thought to have been made in confidence).

131. See, e.g., *Miller v. Regents of the Univ. of Colo.*, No. 98-1012, 1999 WL 506520, at *15 (10th Cir. July 19, 1999) (denying privilege for communications with an ombudsman).

132. See *supra* Part IV.C.

133. *Carman*, 114 F.3d at 794.

134. See *supra* notes 91–95 and accompanying text.

135. See *Carman*, 114 F.3d at 793–94; Van Soye, *supra* note 12, at 132; Charles L. Howard & George R. Wratney, *In Aftermath of the Carman Decision, Ombuds “Privilege” Still Has Validity*, ETHIKOS, May/June 1999, at 9–10.

136. *Carman*, 114 F.3d at 793 (stating that no evidence was presented, and was not even argued, showing the success of the ombudsman office or advantages provided by having the office).

137. *Id.*; Marty, *supra* note 54, at 281; Howard & Wratney, *supra* note 135, at 9–10.

138. See *Carman*, 114 F.3d at 793; Howard & Wratney, *supra* note 135, at 10.

practice mandating communications be kept confidential¹³⁹ and a court potentially denying a privilege and compelling disclosure of the confidential communications¹⁴⁰ is to prove entitlement to an ombudsman privilege in every case brought before a court.¹⁴¹

Proving entitlement to an ombudsman privilege can be done by demonstrating to the court why confidentiality is vital to the effective use of the ombudsman process¹⁴² and that the relationship between an ombudsman and a complainant benefits society.¹⁴³ Additionally, showing how the process works within the organization, presenting the ombudsman standards of practice promulgated by various respected organizations and followed by ombudsmen, and producing detailed statistics regarding the use of the ombudsman's office within the organization can all successfully persuade a court to understand why an ombudsman privilege is necessary and must be granted in the particular case before it.¹⁴⁴

E. Other Ways to Attempt to Keep Communications with an Ombudsman Confidential Without Having to Persuade a Court to Grant a Privilege

Persuading a court to grant a privilege for communications with an ombudsman each time the issue is brought before the court¹⁴⁵ can be unpredictable and require significant resources.¹⁴⁶ Therefore, alternate ways of keeping communications with an ombudsman confidential without the need for a court's agreement that such communications should be protected are desirable.

Perhaps the easiest way for an ombudsman to attempt to keep communications confidential, and thus remain in compliance with the ombudsman's standards of practice,¹⁴⁷ without the need to persuade a

139. See IOA STANDARDS OF PRACTICE, *supra* note 7, § 3.1.

140. See, e.g., *Carman*, 114 F.3d at 794–95.

141. Howard & Wratney, *supra* note 135, at 10.

142. Marty, *supra* note 54, at 286; Howard & Wratney, *supra* note 135, at 10, 13; see *supra* Part III.

143. Marty, *supra* note 54, at 286 (explaining that “[a]ny corporation that hopes to invoke the ombudsman privilege will have to convince the court . . . that this relationship is one that benefits society as a whole”).

144. Howard & Wratney, *supra* note 135, at 10, 13, 16.

145. See *supra* Part IV.D (detailing how to persuade a court in a particular case why a privilege for communications with an ombudsman should be granted).

146. See Howard & Wratney, *supra* note 135, at 10, 13, 16.

147. See *supra* Part III (noting that ombudsmen standards of practice require an

court to grant a privilege is to have each complainant who comes to the ombudsman sign a confidentiality agreement.¹⁴⁸ The use of confidentiality agreements not only reinforces to complainants that their communications will not be disclosed, but it also serves as evidence that complainants had a belief that their communications with an ombudsman would be kept confidential.¹⁴⁹ Such evidence of an individual's belief about the ombudsman program is important because the further it can be demonstrated that potential complainants were promised confidentiality in their communications with an ombudsman, the greater the likelihood a court will refuse to allow these communications to be disclosed at trial.¹⁵⁰ Therefore, a practicing ombudsman should routinely have all complainants sign confidentiality agreements in order to decrease the likelihood a court would require the communications be disclosed in future litigation.¹⁵¹

Another technique, which is similar to executing confidentiality agreements, used by organizations to attempt to protect communications with an ombudsman from compulsory disclosure in litigation is to include in the bylaws of the specific organization that all communications with the organization's ombudsman are confidential.¹⁵² For example, the United Nations Office of the Ombudsman has included in its bylaws that all communications with the Office of the Ombudsman are to be confidential and remain so unless one of three conditions is met: waiver by the complainant; explicit permission by a U.N. staff member; or imminent risk of serious harm without a reasonable alternative.¹⁵³ It stands to reason that if a court is willing to keep communications confidential because potential complainants were

ombudsman to keep all communications confidential).

148. See Van Soye, *supra* note 12, at 141–42; Deason, *supra* note 73, at 251.

149. See *Garstang v. Superior Court*, 46 Cal. Rptr. 2d 84, 88–90 (Cal. Ct. App. 1995). Evidence that complainants were led to believe their communications with an ombudsman would be kept in confidence has been used to keep communications with an ombudsman from being used as evidence at trial. See *id.* (emphasizing the complainants' belief that their communications would be kept confidential in refusing to allow the communications to the ombudsman to be disclosed for evidentiary use at trial).

150. *Id.* (holding that the privacy of the parties due to the private nature of the communications and the existence of a pledge of confidentiality required that the discovery of such communications with the corporate ombudsman be denied).

151. Van Soye, *supra* note 12, at 145–46.

152. See, e.g., *Frequently Asked Questions*, *supra* note 56, at 3 (noting that the United Nations bylaws state that communications by the Office of United Nations Ombudsman and Mediation Services are required to be kept confidential).

153. *Id.*

led to believe their communications would be kept in confidence,¹⁵⁴ a court should keep communications with an ombudsman confidential where the ombudsman is part of an organization whose bylaws require and make it known that the communications are to be confidential—essentially an implicit confidentiality agreement.

Finally, depending on the jurisdiction, there may be no need to persuade a court that communications with an ombudsman should be privileged in the specific case because of the particular jurisdiction's statutes.¹⁵⁵ Some states have recognized the important role confidentiality plays in the ombudsman process and have created statutes providing that communications with an ombudsman are to be privileged.¹⁵⁶ However, only a small minority of jurisdictions have statutes addressing whether communications with an ombudsman are privileged, and of those that do the statutes vary extensively.¹⁵⁷ Consequently, the best practice for an ombudsman is still to have all complainants sign confidentiality agreements¹⁵⁸ regardless of the jurisdiction because even where a state statute declares communications with an ombudsman to be privileged, the issue of the confidentiality of the communications could still later be addressed in another case under a different jurisdiction's law.

V. CREATION OF AN OMBUDSMAN PRIVILEGE WOULD BE SIMILAR TO ANOTHER PRIVILEGE AND EVIDENTIARY EXCLUSION CURRENTLY RECOGNIZED BY THE LAW

Despite the old saying that “the public has a claim to every man's evidence”¹⁵⁹ and the common understanding that the creation of a wholly new privilege is a big step that should not be undertaken lightly,¹⁶⁰ recognizing a privilege for communications with an ombudsman would be very analogous to another privilege as well as to an evidentiary exclusion acknowledged under the law today.¹⁶¹ Indeed,

154. See *Garstang*, 46 Cal. Rptr. 2d at 87.

155. See *supra* note 104 and accompanying text.

156. See *supra* note 104 and accompanying text.

157. See Kuta, *supra* note 12, at 395–97 (discussing the varying state statutes in the area of ombudsman communications).

158. Van Soye, *supra* note 12, at 141–42 (noting that confidentiality agreements are arguably “the key to maintaining the secrecy of proceedings”).

159. See COBBETT'S PARLIAMENTARY HISTORY, *supra* note 97.

160. See, e.g., *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 794 (8th Cir. 1997).

161. Sarbanes-Oxley Act of 2002, 15 U.S.C. § 78j-1(m)(4) (2006). These procedures

the particular privilege and the evidentiary exclusion recognized today are strikingly similar in their principles (in the case of the current privilege, it even encompasses a major function an ombudsman performs¹⁶²) to those a privilege for communications with an ombudsman would serve.¹⁶³ Therefore, because an ombudsman privilege would be exceptionally similar to another currently recognized privilege and evidentiary exclusion, creating an ombudsman privilege is not “a wholly new . . . privilege” or even a “big step.”¹⁶⁴

A. Similarity to the Mediation Privilege

The ombudsman process is exceedingly similar to, and rather frequently includes,¹⁶⁵ mediation. Mediation is a process whereby a neutral assists the parties to a dispute in reaching a settlement.¹⁶⁶ Mediation does not need to be formally labeled as such,¹⁶⁷ and in fact there are no special requirements (except that usually the parties desire someone who is neutral to the dispute) that need to be met for one to qualify as a mediator.¹⁶⁸ Communications made during mediation are protected as privileged under federal law¹⁶⁹ and a majority of states’ laws, although the extent and scope of the protection varies.¹⁷⁰

In performing his or her role, the ombudsman seeks to settle complaints brought concerning the organization the ombudsman is a

provide confidentiality for employees’ submissions concerning “questionable accounting” practices within their company. *Id.* In fact, many companies have elected to create an ombudsman office to receive these confidential complaints. Welch, *supra* note 68, at 206–07.

162. See *infra* Part V.A.

163. See *infra* Part V.A–B.

164. Carman, 114 F.3d at 794.

165. GOVERNMENTAL OMBUDSMAN STANDARDS, *supra* note 7, § II(D)(2)(b) (noting that mediation of disputes is part of an ombudsman’s role).

166. See, e.g., CAL. EVID. CODE § 1115(a) (West 2009) (defining mediation as “a process in which a neutral person . . . facilitate[s] communication between the disputants to assist them in reaching a mutually acceptable agreement”); GREINIG, *supra* note 22, § 4:3, at 63 (noting that a neutral assists parties in settling disputes).

167. Van Soye, *supra* note 12, at 142.

168. See GREINIG, *supra* note 22, § 4:40–:41, at 80–82 (discussing both the characteristics as well as roles and functions of a competent and effective mediator).

169. E.g., *In re RDM Sports Grp, Inc.*, 277 B.R. 415, 438 (Bankr. N.D. Ga. 2002); *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1171 (C.D. Cal. 1998), *aff’d*, 216 F.3d 1082 (9th Cir. 2000).

170. E.g., ARIZ. REV. STAT. ANN. § 12–2238 (2011); CAL. EVID. CODE § 1119 (West 2009); COLO. REV. STAT. ANN. § 13–22–307 (West 2011); ILL. COMP. STAT. ANN. 20/6 (West 2007); IOWA CODE ANN. § 679.12 (West 1998); WIS. STAT. § 904.085 (2009–2010); see also *Folb*, 16 F. Supp. 2d at 1178–80 (discussing mediation privilege status in some of the states).

part of through direct resolution, investigation, advocacy, or mediation.¹⁷¹ As a result of mediation being broadly defined as a neutral assisting two parties in resolving their dispute and there being no requirement that a formal title be given to the interactions, a significant portion of what an ombudsman does on a daily basis when handling complaints is mediation.¹⁷² When an employee of the organization brings a complaint to the ombudsman, the ombudsman acts as the mediator between the complainant employee and the organization to assist these two parties in resolving the dispute.¹⁷³ Therefore, it stands to reason that those communications made to the ombudsman in the context of settling a dispute should almost certainly meet the definition of mediation and be protected under the mediation privilege.¹⁷⁴

There are two major differences between a traditional mediator and an ombudsman mediating a dispute between his or her organization and a complainant that can make mediation through an ombudsman more effective. One main difference between a traditional mediator and an ombudsman is that when an ombudsman is doing the mediating the ombudsman has additional capabilities, which a traditional mediator would not have, to generate detailed information and investigate aspects of the dispute from within the organization.¹⁷⁵ This ability of an ombudsman can lead to a resolution of the dispute that is more specifically fitted to, and therefore more satisfactory to, the parties at hand.¹⁷⁶ The other main difference between a traditional mediator and an ombudsman again results from the ombudsman's position within the organization and the power given to many ombudsmen to help initiate changes within the organization.¹⁷⁷ Whereas a traditional mediator only

171. GRENIG, *supra* note 22, § 13:26, at 334 (“The common duties of ombuds include: listening to and taking in contacts from targeted stakeholders, investigating the concerns or questions, making recommendations to the organization, and reporting on ombuds’ activities.”); YARN & JONES, *supra* note 56, § 11:31, at 372–73; Thompson, *supra* note 12, at 672.

172. Van Soye, *supra* note 12, at 142 (stating that because “[m]ediation need not be formally designated as such,” the ombudsman can be considered a mediator).

173. See Kuta, *supra* note 12, at 391.

174. See Van Soye, *supra* note 12, at 142–43 (stating that because “[m]ediation need not be formally designated as such,” the ombudsman can be considered a mediator and “[t]he mediation privilege [can] belong[] to the neutral ombudsman”).

175. See Kuta, *supra* note 12, at 390–92 (discussing an ombudsman’s extensive investigation powers).

176. See *id.* at 390–91.

177. See GRENIG, *supra* note 22, § 13:1, at 318 (mentioning ombudsmen have superior access to upper management).

has the power to recommend rather general settlements to the dispute,¹⁷⁸ an ombudsman in many organizations has the power to not only recommend a wider range of remedies for settlement, such as internal procedural changes in the organization, but also to try and ensure that the final resolution to the dispute is followed through.¹⁷⁹

Consequently, because the mediation privilege that is recognized today encompasses a chief portion of what an ombudsman does on a daily basis,¹⁸⁰ creating a privilege for communications with an ombudsman is the logical next step. After all, in many ways an ombudsman can resolve disputes through mediation more effectively than even the most well-respected mediators could in the circumstances because the ombudsman has the ability to use his or her position inside the organization to ensure a more tailored and pleasing resolution for the disputing parties.¹⁸¹

B. Similarity to Exclusion of Settlement Negotiations

The creation of a privilege for communications with an ombudsman would not constitute a big step because the privilege would be based on—and further—the same policy that is currently embodied by an evidence rule excluding conduct or statements made in compromise negotiations.¹⁸² Specifically, Federal Rule of Evidence 408 states that any evidence of “conduct or statement[s] made in compromise negotiations regarding the claim” is not admissible at trial.¹⁸³ The purpose and policy furthered by this rule is society’s interest in encouraging settlement of disputes outside of court.¹⁸⁴ In fact, this policy

178. See *id.* § 4:2, at 62 (noting disadvantage of traditional mediation is that “[t]he results are not binding on the parties”).

179. See *id.* § 13:2–:3, :25, at 321–22, 334 (noting respectively that one result of an ombudsman program is to “correct patterns of undesirable practices and procedures,” that ombudsman can connect a complainant to a “decision-maker in the company that will be [sic] to settle the dispute,” and that “[o]ften organizations insist that the ombuds[man] report to the highest level of management in the organization”).

180. See Kuta, *supra* note 12, at 391 (“[A]n [o]mbudsman provides assistance to individuals with problems or concerns in a neutral, non-biased manner.”).

181. See GRENI, *supra* note 22, § 4:41, at 82 (“An effective mediator suggests creative ways to resolve the dispute”); *id.* 13:1, at 318–19 (stating that an ombudsman “serves as a contact person for all conflicts in the organization”).

182. FED. R. EVID. 408.

183. *Id.* at 408(a)(2).

184. *Id.* at 408 (advisory committee’s note declaring that the rule is intended for the “promotion of the public policy favoring the compromise and settlement of disputes”).

of encouraging the settlement of disputes outside of court has become increasingly prevalent in legislation more recently¹⁸⁵ due in large part to today's crowded court dockets.¹⁸⁶

In light of Rule 408 keeping any "conduct or statement[s] made in compromise negotiations" from being disclosed at trial,¹⁸⁷ it stands to reason that much of what an ombudsman does on a daily basis could fit under this exclusion.¹⁸⁸ Regularly, an ombudsman deals with claims centering on discrimination, retaliation, safety, and other employment related disputes that the ombudsman may attempt to conduct compromise negotiations between the complainant and the organization.¹⁸⁹ Not only does an ombudsman's routine function of conducting compromise negotiations in regard to what could otherwise be numerous lawsuits sensibly fit within the exclusion of Rule 408, in so performing his or her role an ombudsman is directly furthering the policy behind Rule 408 of encouraging settlement of disputes outside of court.¹⁹⁰ Therefore, because the ombudsman is regularly advancing the policy that justifies the exclusion of conduct or statements from trial under Rule 408, it seems logical to exclude the conduct or statements of an ombudsman from trial by granting an ombudsman privilege.

Opponents to granting an ombudsman privilege, or in fact any privilege, justify their argument on the old principle that "the public has a right to every man's evidence."¹⁹¹ While it is true that in the past in many cases it may have been more vital to ascertain the truth of what happened than further a policy or protect a confidentiality interest, today's times are different. As a result of today's increasing court congestion,¹⁹² Rule 408 as well as other relatively recent pieces of

185. See, e.g., Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–84 (2006) (requiring federal agencies, under section 571, to adopt policies addressing the use of alternative dispute resolution to settle disputes as an alternative to court).

186. See *supra* notes 17–19 and accompanying text.

187. FED. R. EVID. 408.

188. See *id.* at 408(a). This is true if, as Rule 408 requires, there is "a disputed claim." *Id.* This means that an ombudsman's statements or conduct when assisting in compromise negotiations will be excluded (Rule 408 excludes statements from anyone in compromise negotiations, not just the parties to the dispute) from trial as long as one of the parties has a "claim," and that claim is "disputed." *Id.*

189. GRENIG, *supra* note 22, § 13:2, at 320.

190. See *supra* note 185 and accompanying text.

191. See COBBETT'S PARLIAMENTARY HISTORY, *supra* note 97.

192. See *supra* notes 17–19 and accompanying text.

legislation, such as the Administrative Dispute Resolution Act,¹⁹³ display society's view that encouraging the settlement of disputes outside of the courtroom in many instances is more important than making every piece of evidence accessible when attempting to ascertain the truth.¹⁹⁴ Thus, because the role of an ombudsman serves this policy of resolving disputes outside of court a privilege should be granted for communications with an ombudsman in order to permit ombudsmen to effectively resolve disputes in lieu of court.¹⁹⁵

VI. CONCLUSION

In today's society new ways to resolve disputes in lieu of litigation are becoming increasingly important. One effective way to resolve disagreements outside court is the implementation of an ombudsman in various organizations. However, for an ombudsman to effectively resolve disputes the complainants need to be guaranteed that their communications with the ombudsman will remain confidential. Although courts have recently denied a privilege for communications with an ombudsman, the creation of such a privilege is merely the next logical step in furthering society's current policy of encouraging settlement of conflicts outside of court. Statistics show that an ombudsman can effectively resolve disputes quickly and provide creative settlements that would not otherwise be possible through litigation, but before these benefits can be fully realized, a privilege for communications with an ombudsman must be granted to facilitate the effectiveness of the ombudsman process.

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193. 5 U.S.C. §§ 571–84 (2006) (requiring federal agencies, under section 571, to adopt policies addressing the use of alternative dispute resolution to settle disputes as an alternative to court).

194. Wibbenmeyer, *supra* note 33, at 378 (“Despite the obvious need to uncover the truth and present relevant evidence in the search of truth, the Federal Rules of Evidence favor limiting the accessibility to evidence in order to encourage settlement of disputes prior to trial.”).

195. See *supra* Part III (discussing the essential role confidentiality—which results from the granting of a privilege—plays in the effective functioning of an ombudsman).

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