



## What is an Ombuds Charter and Why it Matters

*By Chuck Doran and Chuck Howard*

An ombuds charter is an agreement between the organization and its ombuds resource describing the terms, conditions, and principles on which the resource was established and on which it will operate. It establishes a shared understanding of how the resource will function within the organization that the organization, its visitors (employees, staff, faculty, students, etc.), and the ombuds team can all rely on.

A charter clarifies the scope of the ombuds resource, what it is and is not, and protects the organization. This protection derives from leadership's demonstrated support of the ombuds' commitment to keeping the organization's sensitive information confidential which in turn provides reassurance to visitors who assess whether to bring serious concerns to the ombuds (vs turning to other outlets such as private counsel or the press). The protection is established by the leader of the organization signing and distributing the charter, along with a message of support of the ombuds resource from leadership, throughout the organization. The charter is then posted publicly on the ombuds website where visitors can read it and understand the terms of engaging with the ombuds.

Leadership's understanding of how a charter both protects and serves the organization is crucial to the success and utilization of an ombuds resource.

- A charter helps preserve confidentiality (for the ombuds and the organization) by providing a basis to assert that members of the ombuds team cannot be called to testify or produce records in any formal, administrative, or legal proceeding. This is because the charter provides that the use of the ombuds resource is purely voluntary and that no one is required—or can be required—to use it but that those who do so will be bound by the terms, conditions, and principles on which the resource was established. Among those “terms, conditions, and principles” are explicit provisions that people who use the ombuds resource (“visitors”) will be understood to have agreed not to call the ombuds to testify or produce records in any formal, administrative, or legal proceedings. Pairing this restriction on visitors who use the resource with a representation that the organization will also honor the terms and conditions on which the program was established by not calling on the ombuds to testify or produce records for the organization in these situations creates a balance that makes it easier for a court to enforce the prohibition against ombuds' involvement in adversarial proceedings. We have also found that by being so explicit on these issues, there is a significant preventative benefit (i.e., the language is so explicit that some plaintiff's counsel does not even try to call the ombuds to testify or will retreat when this language is pointed out to them).
- Although confidentiality can also be asserted on other grounds such as privilege (in federal courts, for example, under Federal Rule of Evidence 501) and mediation and other ADR statutes and rules, these claims may be both harder to establish and not always available in a particular jurisdiction because of variations in state statutory law and legal restrictions on a court's ability to recognize new common law privileges in many jurisdictions. In contrast, a contractual “terms and conditions” claim of confidentiality is easier to establish and can be used in virtually any jurisdiction. As someone who has defended more ombuds than any other attorney in the world, MWI Advisor Chuck Howard has been successful in establishing both a privilege claim and a

contractual claim of confidentiality in various cases, once he developed explicit language to make the contractual claim more explicit and less “implied,” the frequency of challenges to ombuds’ confidentiality has dropped to almost zero.

- A charter both protects the organization and helps the organization and the ombuds preserve ombuds confidentiality. A charter protects the organization from claims that communications with the ombuds put the organization on notice.. This is because the issue of “imputed notice” is generally legally analyzed on the “agency” principles of actual and apparent authority. The charter addresses the “actual authority” of the ombuds by specifically providing that they have no authority to accept notice of claims against the organization, that they have no authority to make business or policy decisions, and that they have no authority to conduct formal investigations. By publicizing the terms of the charter and having it widely accessible to visitors, the organization has taken steps to make it unreasonable for someone to assert that they thought or believed that the ombuds had authority to do something (like receive notice of claims) even though there was no actual authority to do so, thus effectively providing the evidence to rebut any claim of ombuds’ apparent authority. Think of a charter as a type of insurance that no organization with an ombuds resource should be without.

Finally, by incorporating the [Standards of Practice \(SOP\) and Code of Ethics \(COE\) of the International Ombuds Association \(IOA\)](#), a charter enshrines the ethical principles on which the organization’s ombuds resource operates. This is especially important because not every point included in the SOP and COE can be repeated in the charter. For example, the SOP and COE provide more explanation of each of the fundamental principles (independence, informality, impartiality, and confidentiality), including recordkeeping expectations and the exceptions to confidentiality.

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