

# A Broader View of Dispute Resolution

By Charles L. Howard

In English common law, which forms the foundation for much of the US legal system, tradition and precedent are paramount. Because common law was built on the principles of lawyers, lawsuits, and the adversarial process, it's no surprise that many people today assume that resolving a dispute means hiring an attorney and going to court. Even more modern approaches to resolving differences such as mediation, arbitration, and conciliation are seen through this traditional lens. They're all alternatives to having your day in court.

But the concept of the "ombudsman,"<sup>1</sup> a role that first appeared in Scandinavia about 300 years ago and has been implemented in the United States for only about half a century, springs from a very different idea. This broader view of dispute resolution comes from a separate tradition and premise: that organizations, including governments, should function effectively and that an independent, skilled agent within an organization can help make that happen. Resolving conflicts is part of that effective functioning, but it isn't the only part. Understanding this view — and how the ombuds' role has evolved to include ever more governmental functions and many other complex systems — helps us see why and how ombuds can provide crucial help both to individuals and organizations.

## A Brief History of Ombuds

The first ombuds in a role that would be recognized as such today was created in 1713 by a Swedish king. When King Charles XII fled to Turkey after being defeated by Russia, the king appointed an "ombudsman" to ensure that his governmental officials "followed the law and fulfilled their obligations."<sup>2</sup> A century later, in 1809, Sweden adopted a parliamentary form of government with a constitution that provided for an ombuds to guarantee that the government complied with the law.<sup>3</sup> As the concept

spread throughout Scandinavia in the twentieth century, an ombuds was a lawyer — an investigator and sometimes a prosecutor — whose mandate was to ensure that the government complied with the law.

Kenneth Culp Davis, a longtime professor at the University of San Diego and an authority on administrative law, helped popularize the ombuds concept in the United States through an article he wrote in 1961 for the *University of Pennsylvania Law Review*<sup>4</sup> in which he described his observations of the workings of the Scandinavian ombuds. He believed the ombuds function filled two important roles: a "check" on the activities of governmental officials and a means of helping ensure fundamental fairness to concerns that could be as petty as

[w]hen a bureaucrat irritates you, or delays too long, or requires too much red tape, or denies what you want. . . . If the bureaucrat is wrong, the Ombudsman may publically reprimand him. If the government system is out of gear, the Ombudsman may recommend that it be set right, and his view is likely to prevail.<sup>5</sup>

## The Work of the Ombuds

These types of disputes — in which disagreements can be against or within an organization — are quite different from those in which the other forms of ADR are often used. Disputes in the ombuds' area often are about process (in addition to or sometimes instead of substance), and they may not even be at a level that would typically prompt someone to take formal action. Perhaps, for example, a medical technician believes that she is being belittled or insulted by her coworkers, supervisors, or hospital physicians — but not necessarily subjected to the kind of sexual harassment that would merit lodging a formal complaint. Whom can she talk to about her concerns and her options? If the clinic or hospital has



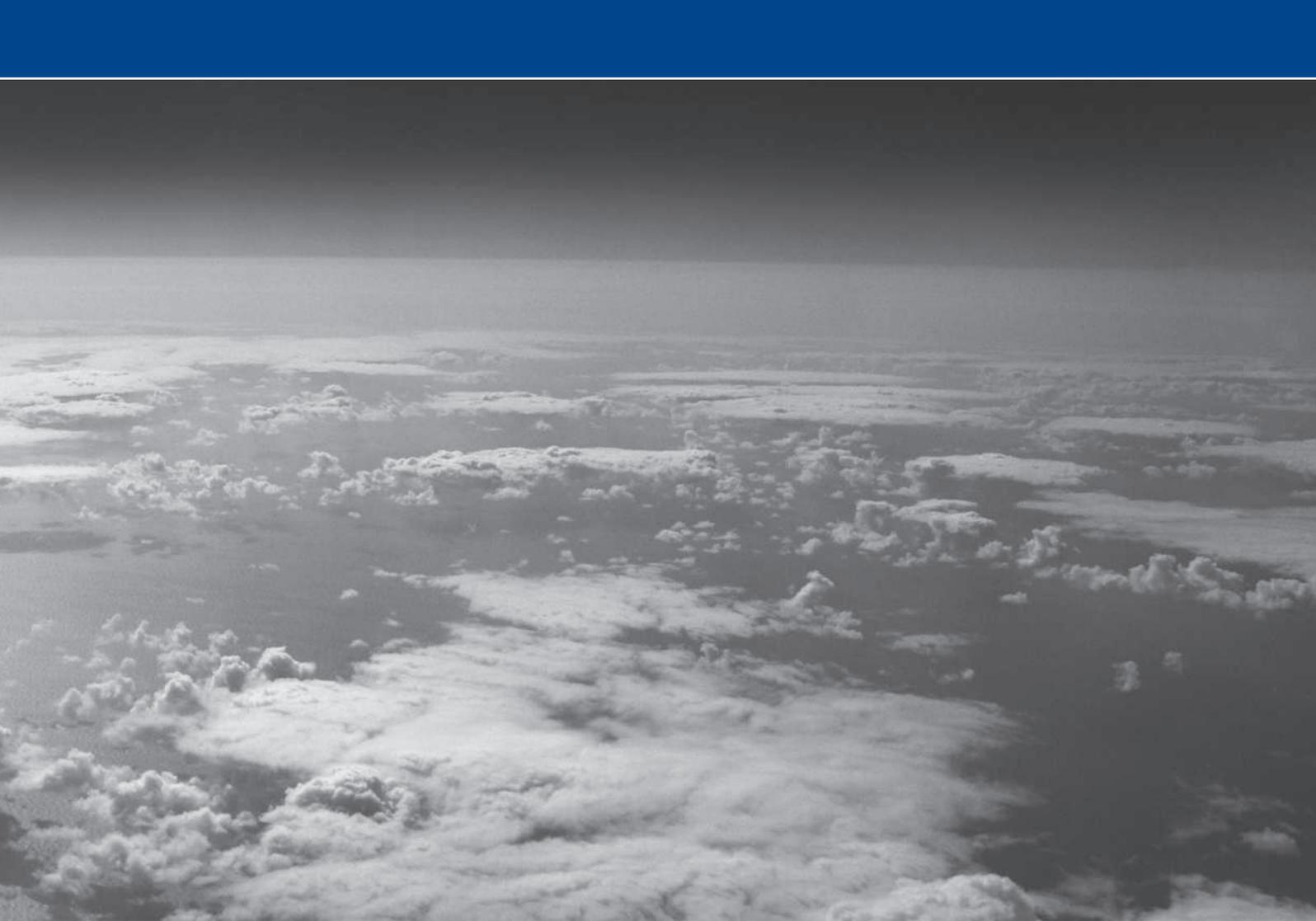
an ombuds, the technician can contact that office in complete confidence and set up a meeting, perhaps in an office located away from the workplace, to talk things over. Maybe that conversation steers her to other resources, helps her articulate her concerns, or assists her in understanding exactly how the organization defines harassment and what she could do to register a complaint. Perhaps the technician takes action; perhaps she doesn't. Regardless of how this particular issue is resolved, the ombuds often uses aggregate data on the types of issues presented to the office (without identifying the inquirers or disclosing confidential information about them) to alert the organization's management about systemic issues that may be of concern.

In all his or her work, the ombuds focuses not only on helping resolve a particular complaint but also on promoting the effective functioning of the organization or system to help set things right, in this case reporting aggregate information about employee complaints. This work pays big dividends, and over

the past 50 years, colleges, universities, private organizations, and even prisons and nursing homes have all appointed their own ombuds.

As the ombuds' role has moved beyond its original governmental moorings, which through statute, regulation, or governmental directive provided legal protection for its investigative function and the attendant need for confidentiality, it has been able to adapt to non-governmental contexts by developing and adhering to principles such as independence, impartiality, and confidentiality in the absence of any enabling legislation.

In this evolutionary process, various types of ombuds have emerged. As described in two resolutions adopted by the American Bar Association in 2001 and 2004, ombuds programs have evolved to include "organizational" and "advocate" ombuds in addition to the original "classical" or governmental (whether "executive" or "legislative") programs.<sup>6</sup> Despite such distinctions, the role's dual micro/macro focus endures: ombuds of all types seek to help



resolve particular concerns presented to them — and at the same time identify trends and systemic issues that their organizations should recognize.

In today's world, we all have to deal with government or other organizations every day, whether attending school, going to work, or dealing with a government agency or an insurance company. And whenever people are involved (i.e., always), mistakes, failures, or disregard of the law or proper process are sure to follow. Because most people have never been involved in a lawsuit, arbitration, or other formal conflict or adjudicatory process, they may not even know about traditional forms of ADR. And even if they have heard of mediation, arbitration, or case conciliation, they may not know how or where to find them. Or they may think these processes are intimidating, expensive, or ill-suited to their concern. And for those working inside an organization, even if a wrong seems indisputable, who wants to bring it to light and risk condemnation and perhaps retribution from bosses or coworkers or both?

Because ombuds are usually retained or employed by an organization or governmental agency and operate as an independent and impartial resource available to all the organization's constituents, the ombuds services are typically free for the individuals using them. Ombuds can help resolve conflicts, but because of their deep knowledge about the organizations they serve, they can also provide information and a safe, confidential space where people can discuss options for reporting and addressing their concerns. While the means for dealing with systemic issues may vary depending on the type of ombuds, virtually all ombuds consider identifying and addressing systemic problems within their organization to be among their main responsibilities.

The growth of ombuds programs bears witness to the increasing understanding of just how much this broader type of dispute resolution is needed. Forward-looking colleges and universities, as well as many large corporations and other organizations and institutions, have been surprised by both the variety

and cumulative significance of the issues brought to their ombuds, and each year numerous legislative proposals include calls for the appointment of new ombuds to address specific concerns. Ombuds themselves, their professional associations, and the Dispute Resolution Section's Ombuds Committee all agree: most large organizations and governmental programs would benefit greatly from having or using some kind of ombuds program.

## The Broader View in Public School Systems

To this end, the Section's Ombuds Committee aims to sponsor education and outreach about such programs by working with the major ombuds organizations, including the International Ombudsman Association (IOA), the United States Ombudsman Association (USOA), and the Coalition of Federal Ombudsmen (COFO), and encouraging articles and programs to promote better understanding and increased use of appropriately designed, supported, and implemented ombuds programs. One of the Ombuds Committee's big initiatives for the coming year will be spotlighting the potential for ombuds programs in public school systems.

Our public K-12 school systems are a great example of both the need for and the possible opportunities provided by an effective ombuds program. As most of us know all too well, conflicts between parents and school administrators abound, but the traditional means of resolving these disputes, whether through litigation or administrative complaint processes, can be expensive, time-consuming, adversarial, and inflexible for everyone involved. Many disputes take months, or even years, to resolve through formal channels.

But such systems may not always serve the larger good — or even the needs of the families and



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administrators involved. While almost all school disputes involve distinct facts, many also raise systemic issues that could be addressed through revisions to policy or practices. And some parents and officials really just need to sit down, talk, listen, and start to understand the other person's perspective.

By providing a cost-effective, efficient opportunity for parties to talk and for the larger system to learn and change, an ombuds program can serve as a check on systemic mistakes and promote public perception that educational decision-making is fundamentally fair.

School systems are just one arena where ombuds programs are a valuable resource, and in our increasingly complex and frequently global society, there are many more. Other articles in this issue of *Dispute Resolution Magazine* describe how ombuds help address those issues in certain organizations — an internal ombuds program at a consulting firm and an external-facing ombuds at a federal government agency. In all these contexts, what is needed is an appreciation of a dispute resolution method that goes beyond the common-law alternatives, one in which a trained, skilled ombuds works to help with an individual concern — and improve the system that gave rise to it. ■

## Endnotes

1 The term "ombudsman" derives from a Scandinavian word that is not gender-specific. In modern usage, different organizations have adopted variations of the word, including "ombuds" and "ombudsperson," to avoid any perceived gender association. In this issue of *Dispute Resolution Magazine*, we use "ombuds" unless the text refers to an office or organization that uses a different version of the word.

2 CHARLES L. HOWARD, *THE ORGANIZATIONAL OMBUDSMAN: ORIGINS, ROLES, AND OPERATIONS — A LEGAL GUIDE* 2-3 (2010) (quoting Gerald E. Caiden, *The Institution of Ombudsman*, in *INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND FUNCTION* 9-10 (Gerald E. Caiden ed., 1983)).

3 *Id.* at 45 n.6.

4 Kenneth Culp Davis, *Ombudsmen in America: Officers to Criticize Administrative Action*, 109 U. PENN. L. REV. 1057, 1057-58 (1961).

5 *Id.*

6 See generally HOWARD, *supra* note 2, at 468-524. For copies of the 2001 and 2004 Resolutions, see *id.* at 470, 494 (Appendices 6 and 7), <http://apps.americanbar.org/dch/committee.cfm?com=DR589600>.