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1995 19

OMBUDSMAN OMBUDSMAN

News

WINTER 1995

Message From The President

*contributed by Tom Furtado
Ombudsman - United Technologies Corporation
President - The Ombudsman Association*

As we approach the holiday season and the end of the year, I would like to share some of the recent news and events in TOA. First of all we are about to launch our 1996 membership drive. Shortly, if you have not already, you will receive your 1996 membership application and a letter that speaks to how important it is for members to follow TOA's Code of Ethics and Standards of Practice. In this message I simply want to urge you to renew your membership or associate relationship with The Ombudsman Association — it is an investment in your profession.

~ The information you receive in TOA's newsletters, bulletins, booklets, and attendance at the Annual Conference is vital to you as a professional ombudsman in this rapidly growing field.

~ The advantages of ombudsman skill building and networking that is available in TOA's Ombudsman 101 and 202 are unparalleled in the profession.

Help us continue to work for you and your profession and expand these services by renewing your ties to your fellow ombuds.

By now many of you know that we had a very important "win" in the second appellate court in California. Privilege for Ombudsman Helen Hasenfeld of Cal Tech was upheld in the appeals process. This now gives us a stronger argument for ombudsman privilege in state courts elsewhere in the country. Larry Wood, of Alyeska PipeLines in Alaska also won a privilege case, noteworthy for us in that the judge cited the TOA Code of Ethics and Standards of Practice in his supportive opinion.

Legal issues continue in importance and it is safe to say that the assault on our confidentiality is not over. For this reason Sharan Levine, an attorney and associate of TOA, has agreed to write a regular column, SUA SPONTE, for the Ombudsman News, beginning with this issue, commenting on some of the important legal issues facing ombuds today.

Our cousins in Canada number among TOA's members and again, beginning with this issue, we welcome a new column, THE CANADIAN-SCENE, authored by TOA member Justine Sentenne, Ombudsman, Hydro-Quebec.

I hope that this newsletter finds you all in good health and spirits, that you have a wonderful holiday season, and that 1996 holds nothing but good things for you, both personally and professionally.

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The Ombudsman Association

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THE OMBUDSMAN NEWS

PUBLISHED QUARTERLY

Editor — Carole Trocchio

Co-Editor — Dottie Washington

THE CANADIAN SCENE

contributed by Justine Sentenne
Ombudsman - Hydro-Quebec



JUSTINE SENTENNE
Corporate Ombudsman
Hydro-Quebec Montreal, Canada

Since the TOA Annual Conference in New Orleans which some of us were privileged to attend, we have each been engaged in various activities that ombudspeople do. Trying to solve problems no one else has been able to resolve or lend a sympathetic ear to someone to whom no one else listens. The alternate dispute resolution (ADR) concept continues to make headway in Canada, in institutional organizations such as schools, hospitals, etc., as well as in governmental agen-

cies, banking institutions and the corporate sector.

My own experience with ADR was my participation in the University of Windsor Law School's Advanced ADR Certificate Workshop in Kitchener, Ontario in June. The session builds on developing negotiating skills and deals in more detail with large group process, mediation, and arbitration. In examining different theories and ideas about dispute resolution, the participants learn to develop skills which enable us to deal with conflict and disputes in our lives, and those of others. Since this is a skills development workshop, our group of 25 participants did much role-playing, supported by very good coaching and substantial theoretical material. We had opportunities to enact roles from the Clearinghouse at the Harvard Negotiation Project as well as others specifically tailored to the Canadian scene by the teaching staff at University of Windsor's Law School. A recent article in the Toronto Globe and Mail pointed out the usefulness of ADR in schoolyard disputes.

Interest in the profession of ombudsman is growing and requests for information come from all quarters and from every part of the country. Also, better communications among our small community both in Montreal and in Canada has helped keep a lifeline open to provide us with networking opportunities, discussion platforms and commiserating when the need arises. We are slowly discovering a broad range of practitioners. At present, it is interesting to note how the small network we've established in the last few years is attracting more and more interest from crime prevention officers to lawyers. Our soul-searching continues as the forum we use evolves and we continue to insist on two major criteria within our group meetings: confidentiality of our discussions and participants who are really practicing the function of ombudsman.

Carole Trocchio has been very attentive to requests for TOA material which is always very much appreciated by newcomers to the profession. Also, the Internet connection has been

invaluable in helping solve a few personal as well as professional situations. Through Mary Rowe's kind offices we have been informed of much of what is happening and isn't it strange how small the world is becoming and how similar the problems we all face.

The Protecteur du Citoyen du Quebec (Quebec's ombudsman), Me. Daniel Jacoby, met with a few of us this summer. We enjoyed sharing thoughts with him and learning more about his vision for the role of ombudsman which he has fashioned in this Province over the last decade.

Thanks to the suggestion of a colleague in the hospital sector, we have been able to ensure that James T. Zeigenfuss, Jr. Ph.D., will address a group of ombudspeople here in Montreal on April 12th, 1996. As Prof. Zeigenfuss is well known, not only here in Quebec but among all ombudspeople, already there is much enthusiasm and interest surrounding this forthcoming event. We intend to open this invitation to all "ombuddies" in Canada and are preparing a meaningful program for this venue.

In October, the Sun Youth Organization in Montreal played host to the International Crime Prevention Conference. This conference was well attended and had many interesting topics but two ninety minute sessions were of particular interest. The workshop of Violence in the Workplace, led by Dr. Gary P. Maddox, Director of the University of Missouri School of Laws, Law Enforcement Training Institute was most enlightening. During the course of his presentation, Dr. Maddox endeavored to counsel business and other leaders to be informed and plan what to do before situations deteriorate. This was followed by a workshop: "The Terrorist Threat - Has It Gone Away?", presented by Chief Inspector Peter Moore of the City of London and the London Metropolitan Police. Again, with the aid of a video presentation, CI Moore explained terrorism and the city's response to it as well as that of other police corps throughout the world. These two presentations had a very sobering influence on all present.

In conclusion, I feel the following topic is important enough to warrant some mention. October 30th marked an important event in each of our lives up here — this was the date of the Quebec Referendum on Sovereignty. Since that date, everyone has worked at getting back to business and carrying on with the business of living together. In my own opinion, without making use of this platform to "play politics", it cannot be ignored that since we ombudspeople are professionally looked upon for our impartial, neutral, and apolitical stance, it behooves us to play a role of reconciliation in this, the phase of the aftermath.

In spite of all the pitfalls we encounter, we do have something with which to generate dialogue and to do some bridge-building. After all, this is the International Year of TOLERANCE, as proposed by the United Nations. Perhaps this is where we as ombudspeople can make a real contribution towards restoring communications and interpersonal relations by taking every opportunity, no matter how small, to foster greater understanding between us all.

SUA SPONTE

(Lat. Of his or its own will or motion; voluntarily; without prompting or suggestion.)

by Sharan Levine, Attorney

Ombuds get accolades for a successful year pursuing a privilege of confidentiality. 1995 is significant because TOA adopted the Standards of Practice and because the first state appellate court opinion was issued granting ombuds privilege of confidentiality. Adopting the standards is important because they encourage consistency, enable visitors and managers to gain greater understanding of your function in the organization and will help you and your counsel educate courts and legislatures in the quest for approval of a privilege of confidentiality.

The year is also significant because a record number of cases granting a privilege of confidentiality was decided by administrative law judges, boards, and state and federal trial judges. Most of the cases rely on the common law analysis for privilege. This spring, a federal court judge protected Ombudsman Elizabeth Clark at the Upjohn Company in Mc Millan v Upjohn, Case No. 1:92-CV-826 (United States District Court, Western District of Michigan, Southern Division). In August, Clark defeated plaintiff's demand that she respond to discovery requests in Kozlowski v Upjohn, File No. 94-5431-NZ, in a Michigan state court.

Ombudsman Robert Portnoy at McDonnell Douglas Corporation successfully sought protection under Federal Rule of Evidence 501, in Jones v Mc Donnell Douglas, Case No 4:94-CV-355 (E.D. Mo., 1995). You will recall, up until now the only published opinion granting privilege to ombuds is Kientzy v McDonnell Douglas, 133 FRD 570 (E.D. Mo., 1991).

In July, the National Labor Relations Board found that Polaroid Company's ombuds program does not create a labor organization violative of the National Labor Relations Act. In October, the United States Department of Labor protected communications of Ombudsman Larry Wood at Alyeska Pipeline Co. in Richardo Acord v Alyeska Pipeline Service Co., Case No. 95-TSC-4. The administrative law judges determined that Alyeska's ombudsman office operated consistently with the ombudsman office described in Kientzy.

On October 23, 1995 the California Court of Appeals granted a qualified privilege of confidentiality to ombuds on the basis of California's constitutional right to privacy. In Garstang v California Technical Institute (Second Appellate District, Division Two, Case No: B088019), Plaintiff Garstang sued the private educational institution for slander and intentional infliction of emotional distress. Plaintiff claims she was treated unfairly when certain rumors circulated about her in the institution. Caltech's ombudsman, Helen Hasenfeld, conducted meetings to assist the parties to resolve the situation. However, the parties were unable to resolve the issue and Garstang filed suit. During discovery, plaintiff sought to compel Hasenfeld to testify about the substance of the meetings.

In deciding the case the court weighed competing public values "...there must be a careful balancing of the compelling public need for discovery against the fundamental right of privacy." The court also found that, "where the communications were tendered under a guaranty of confidentiality, they are thus manifestly within the Constitution's protected area of privacy."

California does not recognize a privilege unless codified by statute. The court could have applied the statutorily created mediation privilege and ruled just on the issue before it. Sandra Cooper, labor counsel for Caltech says, "California feels strongly about alternative dispute resolution; the court may have chosen to create a broad privilege because people are fed up with litigation."

After finding the right to privacy applicable, the Appellate Court also examined the facts in light of Kientzy, Garstang is the first appellate court in the country to recognize a privilege of confidentiality for organizational ombuds. Unless appealed and overturned, the case sets precedent in California.¹ Chuck Howard, a litigation partner at Shipman & Goodman in Connecticut who represents ombuds suggests caution. He says "granting a privilege to ombuds on the basis of a state constitutional right of privacy may produce a chilling affect on legislatures and other courts. They may perceive this as a decision to open Pandora's box and may not see where such a line of reasoning will end." Cooper agrees, "I have a long list of e-mail and phone calls from lawyers around the country and staff at Caltech asking about the scope of the privilege — there will probably be more cases to define the scope."

Adopting the standards is important because they encourage consistency, enable visitors and managers to gain greater understanding of your function in the organization and will help you and your counsel educate courts and legislatures in the quest for approval of a privilege of confidentiality.

Cooper admits she was initially reticent about the ombuds service. "Caltech is committed to providing informal dispute resolution service in this community." As labor counsel at the University she was concerned that she could not do her job, to supervise and control risk, "but," she says, "I realize it is a system that works only when the ombuds is permitted to go forward, bring people together and maintain confidentiality."

Sue Sponte is written quarterly. I welcome your comments and suggestions for topics. If you have specific questions you would like me to address in this column, write to me at Levine & Levine, 429 South Burdick Street, Kalamazoo, Michigan 49007. My e-mail address is SLEVINE555@AOL.COM. The comments and opinions contained in Sua Sponte are the opinions of the author and do not necessarily represent the opinion of TOA.

Sharan Lee Levine is a partner in the law firm, Levine and Levine, located in Kalamazoo, Michigan and currently provides counsel to several corporate ombuds. Mrs. Levine is an associate of TOA .

¹ A case becomes precedent when a principle of law is presented to a court of authority for consideration and determination, and after consideration, the court declares the principle to serve as a rule for future guidance in the same or analogous cases. A trial court makes decisions based on precedent. Trial courts do not have the authority of appellate courts. Judges in other states do not have to give deference to this decision, but the case, like other published decisions can be used as persuasive authority.

PROFILE OF AN OMBUDSMAN



Nancy G. Radcliff, Ombudsperson
Bronson Healthcare Group

"Healthcare is the current frontier that is changing as we speak and will never appear again as it has in the past" That is how Nancy Radcliff, Ombudsperson for Bronson Healthcare Group in Kalamazoo, Michigan summarized the healthcare issue.

As the Ombudsperson, Nancy is available to approximately 3,000 Bronson Healthcare Group employees, twenty-four hours a day with a staff of one... herself. She says, I have a lap top computer and access

to all the computer training I could possibly want through the hospital." She services an average of 10% of the total employee population each year.

Last year Radcliff found that "consistent administration of policies and practices" was the most frequently raised issue. This year, however, Radcliff has identified organizational transformation as the issue concerning most of her contacts. Radcliff explains, "That's because of the downsizing or rightsizing or any other euphemism that has bred insecurity and caution within the work area." Radcliff adds that she is seeing fewer grievance forms submitted and an increase in confidential matter.

Nancy, a registered nurse, has an extensive background in lecturing and instruction. She is a certified instructor-trainer in basic and advanced cardiac life support. Before reaching her present position as Ombudsperson, she was the quality education coordinator responsible for teaching and coordinating quality training education for all nursing and physician's staff. She was also an instructor at the Kalamazoo Valley College in Medical Terminology. In addition to nursing degrees, Nancy holds a Bachelor of Arts degree in Human Resources Management from Spring Arbor College, Michigan.

Some of Radcliff's many accomplishments include developing a Medication Resource Manual for Critical Care Nurses in 1983. She was a consultant to Turkish government officials on the establishment of a pre-hospital air ambulance service in 1990. Nancy is past Chairperson for the American Heart Association in Kalamazoo County. Currently a member of the board of The Ombudsman Association, Nancy presented at the New Orleans TOA Conference, and has served on the TOA Conference Committee for the past two years.

Bronson Healthcare Group is a holding company that owns a 500 bed Tertiary Hospital; three nursing-extended care facilities; a 200 apartment retirement village; one child-care facility, and nine managed physicians' offices in Michigan.

Radcliff says "Healthcare differs from the industrial world not by the fact that it provides a service, is constantly changing, or because this change is being forced — but by the fact

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TOA BOARD MEETING — ST. LOUIS

As the profession of ombudsman grows so does the activity of The Ombudsman Association and the responsibility of its Board to address the issue of how to better serve TOA's members and associates. During the year board members "meet" via three hour conference call each month to discuss current issues facing the Association. With the mounting focus on the profession it was felt that one face to face meeting (at the annual conference) was not sufficient to meet the Association's needs. Therefore, the TOA President invited board members to a full day and a half meeting in St. Louis (the site of the 1996 SuperConference). Board members Mary Rowe and Lou Garcia were in attendance via speaker phone.

The following is a brief summary of the board discussion:

Executive Office — Carole Trocchio distributed a Y-T-D financial status of the Association and noted that activity has increased throughout the year. A motion was made and accepted to establish a sub-committee to look into evaluating and reviewing E.O. responsibilities. **Incorporation** — TOA is in the process of changing the incorporation of the Association from the state of Michigan to the State of Virginia which is more favorable to TOA's goals. Vince Reily reported on the three steps remaining toward accomplishing this transfer. **SuperConference** — Linda Wilcox, member of the SuperConference Committee stated that initial information has been sent out. A pre-conference workshop will be offered by TOA with a 40 person maximum enrollment and a fee (over and above the conference registration fee) of \$75.00. If successful the pre-conference workshop will serve as a model for regional one-day workshops planned for 1996 in New York, California, and the Great Lakes area.

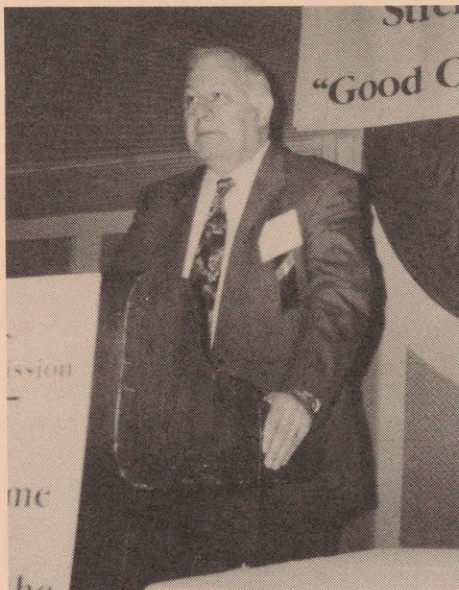
TOA 1997 Annual Conference - With the transfer of TOA's incorporation to the State of Virginia TOA may now consider

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TOA Board of Directors - St. Louis Meeting
1st row - left to right: Tom Furtado, Howard Gadlin, Brodrick Hill, Vincent Riley
2nd row - left to right: Ella Thurman, Kimberly Rupert, Elizabeth Clark, Eugene Herbert, Shirley Thomas, Linda Wilcox, Marsha Wagner

THE OMBUDS AND THE SENTENCING GUIDELINES



Tom Furtado, President TOA
Ombudsman - United Technologies Corporation

Tom Furtado, President of The Ombudsman Association, spoke at a symposium sponsored by the U. S. Sentencing Commission held recently in Washington, D.C. Furtado was part of a panel that discussed "Sharing "Best Practices" Information" with a group of 450 participants. The subject of this session was "Corporate Crime in America: Strengthening the "Good Citizen" Corporation." The panel included Alan R. Yuspeh of Howrey & Simon; Anne L. Gill of Sprint, and W. Michael Hoffman of the Ethics Officers Association and Tom Furtado representing TOA.

The U. S. Sentencing Commission was created by Congress in 1984. Its purpose is to establish sentencing policies and practices for the federal courts, including detailed guidelines prescribing the appropriate form and severity of punishment for offenders convicted of federal

crimes. Sentencing guidelines seek to increase honesty, certainty, and fairness by avoiding unwarranted sentencing disparity among offenders with similar characteristics convicted of similar criminal conduct. The guidelines were promulgated by the Commission and adopted by Congress have been implemented by the federal courts nation-wide since 1989. Sentencing guidelines for organizations convicted

Of particular interest to ombuds is the guideline that allows a sentence to be mitigated if an organization provides a place for people to voice their concerns in confidence and without fear of retribution.

of federal offenses became effective November 1, 1991 and provide guidance to sentencing courts in fashioning financial sanctions and probation sentences for convicted organization offenders.

Of particular interest to ombuds is the guideline that allows a sentence to be mitigated if an organization provides a place for people to voice their concerns in confidence and without fear of retribution.

The Commission conducts research on sentencing-related issues and serves as an information resource for Congress, judges, criminal justice practitioners, and the public. The Commission sponsored this symposium in furtherance of its statutory mandate to "reflect, to the extent practicable, advancement in the knowledge of human behavior as it related to the criminal justice process" and to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing."

Also attending the symposium were TOA members: Ann Bensinger and Gene Herbert, consulting ombuds of HB Associates; Jane Vicelich, Associate Ombudsman at Sony Electronics, Inc.

MARK YOUR 1995 CALENDAR

Ombudsman 101
February 12-14, 1996
Sheraton at Fisherman's Wharf
San Francisco, CA
Contact: TOA
(214) 553-0043

Ombudsman 202
February 14-16, 1996
Sheraton at Fisherman's Wharf
San Francisco, CA
Contact: TOA
(214) 553-0043

National Conference on Applied Ethics — CSLB University College Extension Service
March 7-9, 1996
Hilton Hotel
Long Beach, CA
Contact: Delona Davis
(310) 985-8222

First North American Conference
May 15-18, 1996
Mariott Pavilion in St. Louis, MO
Contact: Linda Wilcox
(617) 432-0586

Annual Business Ethics Conference — The Conference Board
May 22-23, 1996
Waldor-Astoria Hotel
New York, NY
Contact: Andrew Singer
(212) 759-0900

Ombudsman 101
June 18-21, 1996
Boston Back Bay Hilton
Boston, MA
Contact: TOA
(214) 553-0043

(Board Meeting continued from page 4)

holding it's 1997 Annual Conference in Canada and Vince Riley will explore appropriate locations sites. **Handbooks** — discussion of the need to update TOA Handbooks. **Communications Committee Report** — Brodrick Hill, Chair, led the discussion which centered on bulletins, newsletters, additional booklets on subjects of interest to ombudspeople ala "Options, Functions, and Skills... what every ombudsperson needs to know." It was decided that the E.O. explore the possibility and costs associated with TOA having a home page on the World Wide Web. **Membership Committee** — Kimberly Rupert, Chair, reported on the status of the 1996 TOA Application. **Research** - Mary Rowe, Chair, discussed the pros and cons of conducting another survey of Ombudspeople. **Curriculum Development** - Mary Wagner, Chair, reported on the success of Ombudsman 101 conducting three session in 1995 and recommended offering four Ombudsman 101 in 1996, in addition to Ombudsman 202 which will be offered twice in 1996. The board approved the recommendation to develop a one-year schedule for training programs. It was also decided that the registration fee for Ombudsman 101 would be increased to \$640 beginning with the June 1996 program.

The By-Laws were discussed by Tom Furtado, President and the need to modify to reflect changes in membership and the new incorporation. Furtado also reported on his testimony to the Federal Sentencing Guideline Commission regarding privilege and confidentiality. At the end of the focused day and one half it was agreed that the meeting proved extremely effective. All board members donate their time, energy and skills to the Association and appreciation was expressed to all for taking time from their own busy schedules as ombudspeople to attend this meeting.

(Profile continued from page 4)

that the main customer is someone who is helpless and in need of service to exist ... the patient.

The employees at Bronson are trained caregivers that give their all for the preservation of life. Frequently these employees are offended and appalled that quality has a monetary bottomline and is a necessary evil." The employees frequently ask, "How can we place a price on life?"

Nancy knows you cannot place a price on life, but you can demonstrate quality and place huge demands on excellence in customer service. And, as Bronson's ombudsperson she delivers just that — excellence and quality.



The
Ombudsman
ASSOCIATION

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