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By Jeffrey S. Lubbers

The ombudsman is decidedly not a new concept. It is a Swedish word meaning "agent" or "representative," and its Scandinavian origins have been traced to 1274. The first national Ombudsman was established in Sweden in 1809, and the concept began spreading to the rest of Scandinavia and New Zealand and Australia in the twentieth century. But its growth in American soil has been halting until about twenty years ago—when ombudsman offices began to spread to states and local governments, prisons, universities, newspapers, and corporations.

Will there soon be a "seeing eye dog" ombudsman in every agency to help resolve various types of disputes much like there is now an internal "watch dog" inspector general to guard against waste, fraud, and abuse?

Now federal agencies are jumping on the bandwagon by creating such offices—in some cases with congressional blessing or mandates. For example, the recent Small Business Regulatory Enforcement Fairness Act of 1996 created the Small Business and Agricultural Regulatory Enforcement Ombudsman (15 U.S.C. 657). Other interesting statutorily mandated ombudsmen include the "Asbestos Ombudsman" (15 U.S.C. 2652), the "Construction Metrication Ombudsman" (15 U.S.C. 2051), and the "Aircraft Noise Ombudsman" (49 U.S.C. 106). A computer search of LEXIS's U.S. Code Service reveals fifty-three documents containing the word "ombudsman." Does this development portend a trend? Will there soon be a "seeing eye dog" ombudsman in every agency to help resolve various types of disputes much like there is now an internal "watch dog" inspector general to guard against waste, fraud, and abuse?

In conjunction with the United States Ombudsman Association and The Ombudsman Association, the Section of Administrative Law and Regulatory Practice recently sponsored a program in Washington. The program featured agency ombudsmen from four major federal agencies (Customs Service, FDA, IRS, and EPA), an agency inspector general (IG), a former state ombudsman, and a leading academic expert. Each of these agency ombudsmen dealt with problems encountered by agency customers or regulatees and were seen as "external" or "regulatory" ombudsmen as opposed to those who functioned as "internal" or "workplace" ombudsmen.

A general consensus emerged that federal agencies could benefit from establishing ombudsman offices. However, questions were raised about the need for standards in establishing, operating, and protecting such offices; the arguable need for different standards for "external" and "internal" ombudsman offices; and their relationship with other federal offices such as IGs and agency dispute resolution specialists. It was agreed that the ABA and this Section could play an important role in addressing some of these questions.

The Title. The term "ombudsman" is controversial in several senses. First, some people are put off by its "foreign-ness," arguing that it lacks a ready meaning to most citizens. Despite the fact that four states, twenty federal agencies, and over 1,000 corporations have established ombudsman offices, alternative names have been used such as "advocate," "citizen's representative," and "mediator." For example, legislation recently renamed the "taxpayer ombudsman" to "taxpayer advocate." Participants at the conference seemed to agree that the alternatives themselves were somewhat misleading, and that the word is becoming sufficiently well known. Second, the word, even though a foreign word, appears to lack a gender neutrality. Thus, variations such as "ombudsperson," "ombuds," and even "ombuddy," have attained respectability. More substantively, there was a definite concern on the part of the "classical" ombudsman community that the term has lost some of its distinctiveness by being used (officially or unofficially) to apply to officials who serve other functions or who lack some of the required independence, powers, or access to top management that characterized the original Swedish model and its

"classical" descendants.

Standards. The fear on the part of some that the coin of the realm was being devalued by over- or misuse is clearly related to the concern that appropriate standards for the establishment and operations of the office be created and followed. Some important work has already been done in this regard. In 1969, an ABA House of Delegates resolution enumerated twelve essentials for a statute creating an ombudsman office. These guidelines were then incorporated into the Model Ombudsman Statute for State Governments. In 1990, the Administrative Conference of the U.S. (ACUS) adopted Recommendation 90-2, "The Ombudsman in Federal Agencies," which urged agencies with significant interaction with the public to consider establishing an agencywide or program-specific ombudsman and set forth guidelines concerning powers, duties, qualifications, term, confidentiality, limitations on liability and judicial review, access to agency officials and records, and outreach.

Relationship with IGs. Under the Inspector General Act of 1978, major federal departments and agencies have IGs who are appointed either by the president or the agency head, possess great independence, and have broad investigative powers to uncover and report waste, fraud, and abuse of agency programs. It is apparent that agency IGs and ombudsmen might potentially clash on certain matters or at least overlap in their jurisdiction. The IG on the Section program acknowledged the possibility of some friction, but gave her personal view that she would welcome the creation of ombudsman offices to handle problem resolution to free IG offices to concentrate on their investigatory and audit work. It is not clear that this view is shared throughout the IG community, however, and some interesting questions were posed by audience members about the potential for IGs subpoenaing ombudsman records and vice versa.

Confidentiality. The subpoena question is one facet of the general concern expressed among ombudsmen that the confidentiality of their documents and communications is crucial to their effectiveness. To some extent, this concern has been ameliorated with regard to federal agency ombudsmen by a surgical amendment to the Administrative Dispute Resolution Act in that Act's 1996 reauthorization. That Act, enacted in 1990, protects the confidentiality of documents possessed and communications engaged in by "neutrals" involved in resolving government disputes. The 1996 amendment added "use of ombuds" to the definition of "alternative means of dispute resolutions" covered by the Act and its protections.

The Future of the Agency Ombudsman. Since the 1990 ACUS study and recommendation concerning agency ombudsmen, the popularity of the idea has grown significantly. In 1993, the president's National Performance Review (NPR) recognized the potential usefulness of the concept in increasing public participation in agency proceedings and in improving customer service. A "coalition of federal ombudsmen" was created by federal ombudsmen themselves to provide information-sharing and some measure of coordination among the various ombudsmen offices. Its effectiveness was saluted recently by NPR, which awarded a "Hammer Award" to the coalition.

Conclusion. The ombudsman role in federal agencies is clearly becoming better known. And there seems to be a fair amount of bipartisan support for the concept in Congress. With staff reductions in many agencies, the need for problem resolution between regulators and the regulated (or affected third parties) is becoming more acute. Similarly, as workplace tensions increase due to the dislocations caused by downsizing, the need for internal problem-solving is growing equally fast. Whether external and internal ombudsmen are sufficiently similar to appropriately share the same title and attributes is an open question, but it is clear that whatever the resolution of that question, ombudsmen will have an increasingly important role to play in and for agencies in the years to come.

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-This article is an abridged and edited version of one that originally appeared on page 6 in *Administrative and Regulatory Law News,* Summer 1997 (22:4).

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