

O
Shield
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Keyword:

O Privilege

Shield law

Confidentiality

RATIONALE FOR STATUTORY IMMUNITY FOR OMBUDSPERSONS

- o An ombudsperson (or ombudsman or ombuds) serves as a designated neutral or impartial source of assistance in a variety of institutional settings: colleges and universities, corporations, federal agencies, hospitals, newspapers, nursing homes, prisons, state governments.
- o The purpose of the ombudsperson is to guard against abuses within systems and to help develop fair solutions to a wide range of problems.
- o An ombudsperson provides an alternative resource for individuals involved in conflicts or disputes with individuals or with organizations.
- o An ombudsperson facilitates resolution of problems that individuals have been unable or unprepared to handle in other formal or non-confidential systems.
- o An ombudsperson is frequently able to resolve conflicts and disputes informally, thus reducing the need to resort to formal systems, thereby serving a vital public interest.
- o Use of the services of an ombudsperson does not preclude or jeopardize future use of other resources.
- o An ombudsperson may be a mediator, but is not an arbitrator.
- o An ombudsperson works to promote a solution that is satisfactory to all participants.
- o An ombudsperson's offer of confidentiality encourages individuals to come forward and report problems that they are otherwise reluctant to reveal, thereby serving a vital public interest.
- o An ombudsperson works to protect the rights of everyone involved, not just the rights of a single client.
- o Unlike other representatives of parties to conflicts, an ombudsperson is likely to know the confidences of all participants.
- o An ombudsperson must remain neutral and not take the side of any participant. If an ombudsperson is drawn into an adversarial process, confidence in the ombudsperson's neutrality may be critically jeopardized.
- o Confidentiality of the ombudsperson is consistent with established non-discovery of settlement negotiations or mediation proceedings.
- o The ombudsperson's function fulfills all four of the traditional criteria for privileged communications:
 1. The communication originates in the belief it will not be disclosed.
 2. The inviolability of that confidence is essential to achieve the purpose of the relationship.
 3. The relationship is one that society should foster.
 4. The expected injury to the relationship, through fear of later disclosure, is greater than the expected benefit to justice in obtaining later evidence.
- o In other privileged relationships, the privilege belongs to the client. However, an ombudsperson works with multiple participants. Therefore, ombudsperson testimony on one issue for one participant may compromise the rights of other participants.
- o Therefore, granting immunity to the ombudsperson will protect the rights of all participants.



**A BILL FOR AN ACT
REGARDING OMBUDSPERSONS**

Bill Summary

Grants confidentiality to ombudspersons.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 13-90-106, Colorado Revised Statutes, 1987 Repl. Vol., is amended BY THE ADDITION OF THE FOLLOWING NEW SUBSECTION, to read:

13-90-106. Who may not testify. (1) The following persons shall not be witnesses:

(a) Persons who are of unsound mind at the time of their production for examination;

(b) (I) Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly.

(II) This proscription does not apply to a child under ten years of age, in any civil or criminal proceeding for child abuse, sexual abuse, sexual assault, or incest, when the child is able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined.

(c) (I) AN OMBUDSPERSON AND HIS/HER STAFF SHALL NOT BE A WITNESS, TESTIFY, OR PRODUCE EVIDENCE IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING WITH RESPECT TO ANY MATTER INVOLVING THE EXERCISE OF THEIR OFFICIAL DUTIES.

(II) FOR PURPOSES OF THIS PARAGRAPH (c), AN OMBUDSPERSON IS A PERSON FORMALLY DESIGNATED BY THE CHIEF EXECUTIVE OFFICER OF AN ORGANIZATION AS A NEUTRAL OR IMPARTIAL DISPUTE RESOLUTION PRACTITIONER INDEPENDENT OF THE USUAL ADMINISTRATIVE AUTHORITIES WITHIN A COLLEGE OR UNIVERSITY, CORPORATION OR OTHER BUSINESS ORGANIZATION, GOVERNMENT ENTITY, HOSPITAL, NURSING HOME OR OTHER HEALTH CARE FACILITY, WHO OFFERS CONFIDENTIALITY, PROVIDES ASSISTANCE IN RESOLVING DISPUTES AND CONCERNS ON AN INFORMAL BASIS, AND PRACTICES ACCORDING TO THE CODE OF ETHICS OF A



PROFESSIONAL OMBUDS ASSOCIATION OR ACCORDING TO STATUTORY PROVISIONS GOVERNING THE OFFICE.

(III) FOR PURPOSES OF THIS PARAGRAPH (c), ALL RELATED MEMORANDA, WORK PRODUCT, NOTES, OR CASE FILES OF AN OMBUDSPERSON ARE CONFIDENTIAL AND NOT SUBJECT TO DISCLOSURE IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING.

(IV) SUCH IMMUNITY SHALL NOT ATTACH:

(1) WHEN THE OMBUDSPERSON OR HIS/HER STAFF IS PERSONALLY WITNESS TO A FELONY;

(2) WHERE IMMINENT RISK OF SERIOUS HARM IS COMMUNICATED TO THE OMBUDSPERSON OR HIS/HER STAFF;

(3) WHERE DISCLOSURE IS NECESSARY AND RELEVANT TO AN ACTION ALLEGING WILLFUL OR WANTON MISCONDUCT OF THE OMBUDSPERSON OR HIS/HER STAFF; AND

(4) WHERE THE OMBUDSPERSON HAS BEEN ASKED TO PROVIDE GENERAL INFORMATION REGARDING THE GENERAL OPERATION OF THE OMBUDSPERSON'S OFFICE AND THE GENERAL PROCESSES EMPLOYED.

(V) ANY COMMUNICATION THAT IS DISCLOSED IN VIOLATION OF THIS PARAGRAPH (c) SHALL NOT BE ADMITTED INTO EVIDENCE IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING.

(VI) NOTHING IN THIS PARAGRAPH (c) SHALL PREVENT THE DISCOVERY OR ADMISSIBILITY OF ANY EVIDENCE THAT IS OTHERWISE DISCOVERABLE, MERELY BECAUSE THE EVIDENCE WAS PRESENTED IN A COMMUNICATION TO THE OMBUDSPERSON OR HIS/HER STAFF.

(VII) NOTHING IN THIS PARAGRAPH (c) SHALL PREVENT THE GATHERING OF INFORMATION FOR RESEARCH OR EDUCATIONAL PURPOSES, OR FOR THE PURPOSE OF EVALUATING OR MONITORING THE PERFORMANCE OF AN OMBUDSPERSON OR HIS/HER STAFF, SO LONG AS THE PARTIES OR THE SPECIFIC CIRCUMSTANCES OF THE PARTIES' CONTROVERSY ARE NOT IDENTIFIED OR IDENTIFIABLE.

SECTION 2. Safety Clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.



MEMORANDUM IN SUPPORT OF AN OMBUDSMAN PRIVILEGE STATUTE

- o Ombudsmen serve as designated neutrals or impartial sources of assistance in a variety of settings. They work in prisons, nursing homes, hospitals, corporations, newspapers, colleges and universities, federal agencies and state governments providing an alternate resource for individuals. Their purpose is to guard against abuses within systems and to develop fair solutions to a wide range of problems.
- o An ombudsman facilitates resolution of problems that individuals have been unable or unprepared to handle in other formal or non-confidential systems.
- o The ombudsman works to protect the rights of everyone involved - not just a single client.
- o The ombudsman's offer of confidentiality encourages individuals to come forward and report problems that they are otherwise reluctant to reveal. This serves a vital public interest.
- o The ombudsman is not a direct participant and is not necessary to achieving justice. Information is discoverable from direct sources.
- o Unlike other representatives, an ombudsman is likely to know the confidences of all parties.
- o The ombudsman must remain neutral and not take sides. Should an ombudsman be drawn into an adversarial process, confidence in the ombudsman's neutrality may be critically jeopardized.
- o Use of an ombudsman does not preclude or jeopardize future use of other resources.
- o The ombudsman function fulfills all four of the traditional criteria for privileged communications:
 - 1) The communication originates in the belief it will not be disclosed.
 - 2) The inviolability of that confidence is essential to achieve the purpose of the relationship.
 - 3) The relationship is one that society should foster.
 - 4) The expected injury to the relationship through fear of later disclosures, is greater than the expected benefit to justice in obtaining later evidence.
- o The ombudsman works to promote a solution that is satisfactory to all participants. The ombudsman is not a trier of fact.
- o Confidentiality of the ombudsman is consistent with now established nondiscovery of settlement negotiations or mediation proceedings.
- o In other privileged relationships the privilege belongs to the client. Because an ombudsman works with multiple parties, testimony on one issue may compromise the rights of another individual. This is why the privilege must remain that of the office as well as each client's.

Your active support of this proposal is earnestly requested.



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