

National Association of State Long-Term Care Ombudsman Programs

Long-Term Care Ombudsman Program

Core Principles: Effectiveness in Representing Residents

Position Paper, Adopted March 1998

Adopted as Amended May 2005

Preface

The Older Americans Act (OAA) of 1965 established a network for advocacy and coordinated service delivery for older persons. This aging network has a history of focusing public attention on the needs of older adults and developing services to address those needs. One of the primary objectives of the OAA is to assist older persons in having:

Freedom, independence, and the free exercise of individual initiative in planning and managing their own lives, full participation in the planning and operation of community-based services and programs provided for their benefit, and protection against abuse, neglect, and exploitation. (Section 101(10) of P.L. 89B73)

The commitment to advocacy in the OAA was reaffirmed with the 1992 amendments. The essence of these amendments was described by Dr. Arthur Flemming as,

The Congress expects them [heads of the State agencies on aging and the heads of the area agencies on aging] to be vigorous and effective advocates in behalf of older persons and especially the vulnerable.....The Act.....has provided those charged with the responsibility of advocacy with access to two very important processes - the legal service process and the ombudsman process - these are open to them and available to them in their efforts to make sure that older persons have access to and receive the quality of services to which they are entitled by law.....I believe that a strong advocacy program is a must if the rhetoric of the Declaration of Objectives for Older Americans as set forth in Title I of the OAA.....is to be translated into reality for a maximum number of the older persons of our Nation.

Dr. Arthur Flemming, former US Commissioner on Aging, Congressional Testimony, 1991.

Just as advocacy is a foundational principle of the OAA, independence has been a hallmark of the Long-Term Care Ombudsman Program (LTCOP) within the OAA. Program independence is the vehicle that enables ombudsmen to carry the message of residents, to ensure that the laws and regulations are being applied. A LTCOP that functions with independence can effectively give voice to residents' concerns within individual facilities and at local, state, and federal government levels and fulfill the advocacy responsibility called for in the OAA.

Program independence is essential to the ability to fully and effectively represent the interests of residents, and it applies to ombudsmen at all levels of service. Independence is not created or guaranteed based upon where a LTCOP is located. The State Long-Term Care Ombudsman and

ombudsman program representatives should be housed in a setting where they are free of conflict of interest and where independence is maximized.

....The program [LTCO] is organizationally placed in a variety of settings in states throughout the nation. No one setting is necessarily inherently preferable to another. What is most important is that the LTCOP be located organizationally where it is most fully and effectively able to respond to the complaints, individually and collectively, made on behalf of facility residents and to otherwise represent the interest of such residents in the manner delineated in the ombudsman provisions of the OAA. In AoA's view, the organizational location that is the most free of conflicts of interest, potential conflicts of interest, and conflicts with the mission and operations of other programs organizationally co-located, is the one that will enable the program to best serve the mission and requirements of the OAA. Dr. Robyn Stone, Acting Assistant Secretary for Aging, April 4, 1997

In 2002, the Office of General Counsel in Region V of the Administration on Aging issued a memorandum to the bi-regional administrator that further detailed one area of the practical application of program independence – the responsibility of the State Ombudsman to testify before the State legislature.

The Ombudsman's duties include testifying before the State legislature on long-term care issues. Such testimony may include an analysis of existing regulation of long-term care facilities, needed changes in such regulation, and any other problems or concerns affecting the elderly in long-term care facilities. 42 U.S.C. §§ 3058g(h)(2); (h)(3).

(1) The Older Americans Act establishes that a State Long-Term Care Ombudsman should be allowed to independently determine what testimony or information should be provided to a State legislature, and a State Director may therefore not impose a requirement of advance approval for the submission of such testimony or information, or otherwise act to prevent testimony or information from being submitted.

(2) Although a State Director may not exercise a right of approval over what testimony or information may be submitted, nothing in the Older Americans Act prohibits proposed testimony from being shared in advance, or circulated for comments or in-put, provided that the Ombudsman has the absolute right to decide what should be presented by the Ombudsman's Office, and provided that any requirement for advance notice or consultation is not so burdensome or time-consuming as to amount to an effective prohibition that is barred under our response to (1).

A 2002 NASOP retreat, “Rethinking and Retooling for the Future,” reaffirmed NASOPs position through a number of recommendations including

The State Long-Term Care Ombudsman and ombudsman program representatives, at the direction of the State Long-Term Care Ombudsman, shall have the ability to advocate on behalf of residents in the following nonexclusive ways:

- *Represent the interests of residents before governmental agencies, legislative committees, individual legislators and other individuals, groups or entities where issues that affect residents are addressed;*

- *Communicate directly with directors of government entities, legislators, policy makers, and the media about issues affecting residents; and*
- *Provide uncensored public testimony.*

Program independence does not imply a lack of accountability or responsibility and does not exempt ombudsmen from fulfilling the basic responsibilities of employment. State Long-Term Care Ombudsmen and the LTCOP they lead and manage are accountable to two primary groups: residents and citizens. The OAA is clear that the LTCOP's advocacy is to be on behalf of residents and determined by representing their interests. The LTCOP must account for its actions in an annual report required by the Administration on Aging and in other reports required by the State and/or other funding sources. Ombudsmen are responsible for the good faith performance of their duties as specified in the OAA and in state enabling legislation and program rules. Additionally, the State Long-Term Care Ombudsman abides by professional standards set forth in the Ombudsman Code of Ethics adopted by the National Association of State Long-Term Care Ombudsman Programs.

The core principles in this paper are similar to the criteria developed by the American Bar Association for the creation of any ombudsman office.

The ombuds is and appears to be free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry.

In assessing whether an ombuds is independent in structure, function, and appearance, the following factors are important: whether anyone subject to the ombuds jurisdiction or anyone directly responsible for a person under the ombuds jurisdiction (a) can control or limit the ombuds performance of assigned duties or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the budget or resources of the office.¹

In summary, an ombudsman must have independence to be credible and effective. These principles apply to all LTCOPs whether they are located within or outside of government.

Core Principles

Long-Term Care Ombudsman Program Mission Statement

As mandated by the Older Americans Act, the mission of the Long-Term Care Ombudsman Program is to seek resolution of problems and advocate for the rights of residents of long-term care facilities with the goal of enhancing the quality of life and care of residents.

The LTCOP is unencumbered in its response to complaints made by or on behalf of individual residents. This includes working within facilities to resolve problems as well as representing the interests of the residents before governmental agencies; seeking administrative, legal, and other

¹ Standards for the Establishment and Operation of Ombuds Offices, ABA Policy Adopted August 2001; American Bar Association, Section of Administrative Law and Regulatory Practice.

remedies to protect the health, safety, welfare, and rights of the residents; and seeking appropriate intervention from other agencies or organizations.

The LTCOP is unencumbered in its ability to responsibly represent the concerns and interests of long-term care consumers through ombudsman program public reports, forums, printed information, and media contacts.

The LTCOP is unencumbered in making public recommendations and providing educational material to legislators, policy makers and the media to effect positive change for long-term care residents.

The State Long-Term Care Ombudsman (SLTCO) has full authority and accountability for all aspects of the LTCOP at all levels within the state. This includes the ability to designate, and de-designate local entities and representative of the program, establish program policy and maintain program standards.

The SLTCO is responsible for maintaining the confidentiality of program information at all levels. The SLTCO is the only authority with discretion to disclose ombudsman program information as limited by federal and state law.

The SLTCOP facilitates public comment: (a) about a facility policy at the individual facility level and (b) about a public policy at the regional, state, and/or national level.

The SLTCOP has adequate legal counsel that is free of conflict of interest.

The SLTCO and all individuals designated as LTCO are free from retaliation for the good faith performance of their official duties.

The SLTCOP is free from conflict of interest which hinders its ability to fully and effectively represent the interests of residents. Conflict of interest* may be present in a number of ways such as:

- loyalty issues involving judgment and objectivity: the incentives shaping one's judgment and the loyalties driving one's behavior;
- commitment issues of time and attention: ombudsmen who assume additional (non-LTCO) employment-related responsibilities may experience conflicts regarding the focus of their time and attention;
- control issues regarding the LTCOP's independence to pursue all reasonable courses of action that are in the best interest of the resident. This includes the ability to consider a full range of problem-resolution or advocacy actions that might be taken.

* This sections uses categories identified and discussed in *Conflicts of Interest. Real People Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act*, Institute of Medicine. Washington, D.C. 1995, pp. 101B127.

Conflicts of interest may exist due to:

- organizational location;
- organizational governance; and
- individual conflicts for ombudsman program representatives.

All such conflicts should be minimized through program placement and policy, with procedures to identify conflicts as they occur and provide effective remedies that do not compromise the LTCOP's ability to fulfill its responsibilities to long term care consumers.

The SLTCO and representatives uphold the Long-Term Care Ombudsman Code of Ethics adopted by the National Association of State Long-Term Care Ombudsman Programs.