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CONFLICT OF INTEREST AND THE LONG-TERM CARE OMBUDSMAN PROGRAM

RESOURCE PAPER

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ABOUT THE SESSION SUMMARY AND RESOURCE GUIDE

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CONFLICT OF INTEREST AND THE LONG-TERM CARE OMBUDSMAN PROGRAM

EXECUTIVE SUMMARY

Identifying and preventing, removing, or remedying conflicts of interest is not a simple task. There is not an established solution for every potential conflict of interest situation. Addressing conflict of interest requires continual vigilance, dialogue, assessing the potential impact on residents, and thoughtful strategies to remove or remedy the conflict. The easiest solution is to avoid the conflict of interest.

This paper discusses the Older Americans Act provisions and dimensions of conflict of interest. Key resources and approaches utilized by several state and local ombudsman programs are included as examples of program management practices to address issues.

The following actions are recommended.

- Define conflict of interest for program placement and for individuals associated with the ombudsman program.
- Align the state's ombudsman program statute, regulations, and/or policies to be consistent with the current conflict of interest provisions in the Older Americans Act.
- Provide tools for conflict of interest screens to be used for individuals and for entities designated as a local ombudsman program.
- Be continually vigilant regarding conflict of interest and the potential for perceived conflicts of interest. Reinforce this through ongoing education.
- Create a process for removing or remedying conflicts of interest, both actual and potential.
- Establish a process for reviewing proposed remedies and criteria for accepting or rejecting remedies, and outcomes.

CONFLICT OF INTEREST

This paper will discuss conflicts of interest for the Long-Term Care Ombudsman Program and for individual long-term care ombudsmen, approaches to identify and remedy conflicts when they occur, and resources for further guidance.

Conflict of interest provisions have been part of the Long-Term Care Ombudsman Program's federal mandate from 1978 when the Program was included in the Older Americans Act. The 1992 and 2000 amendments to the Act added specificity to those provisions. What conflict of interest means, how to identify conflicts, and how to avoid or remedy conflicts, have been the topics of much discussion, debate, and study, from 1978 to the present. Refer to the appendix for a list of resources on this topic, including the Ombudsman Program's conflict of interest provisions in the Older Americans Act and sample provisions and tools.

DEFINITION

The Business Dictionary has two definitions of conflict of interest¹. Insertions illustrate how the definitions may be applied to the Long-Term Care Ombudsman Program.

- Situation that has the potential to undermine the impartiality of a person [long-term care ombudsman] because of the possibility of a clash between the person's [ombudsman's] self-interest and professional-interest or public-interest.
- Situation where a party's [ombudsman's] responsibility to a second-party [employer or another program] limits its ability to discharge its responsibility to a third-party [resident or client].

Conflict of interest for ombudsman programs and for individual ombudsmen is defined in the Georgia Policies and Procedures.

*"A conflict of interest exists in the Long-Term Care Ombudsman Program (LTCOP) when other interests intrude upon, interfere with, or threaten to negate the ability of the LTCOP to advocate without compromise on behalf of long-term care facility residents."*²

Indiana's Ombudsman Program Rules have an added dimension to the definition of conflict of interest.

*"Conflict of interest means that other interests intrude upon, interfere with, threaten to negate, or give the appearance of interfering with or negating the ability of the state ombudsman, state level staff of the office, local ombudsmen, volunteers, or local ombudsman entities to advocate without compromise on behalf of residents of long term care facilities. It also means any situation that would create a reasonable appearance of a conflict of interest."*³

1 Conflict of interest. BusinessDictionary.com. Retrieved May 06, 2009, from BusinessDictionary.com website: <http://www.businessdictionary.com/definition/conflict-of-interest.html>

2 Georgia Long-Term Care Ombudsman Program: Policies and Procedures. Part II, 401.1a. December 2008.

3 Rule 7. Indiana Ombudsman Program. 460 IAC 1-7-2 Definitions. Section 2(d).

OLDER AMERICANS ACT

The conflict of interest provisions for the Long-Term Care Ombudsman Program in the Older Americans Act are specific. Refer to the appendix for an excerpt of these provisions. For individuals who are familiar with these provisions, questions may arise regarding their application. Over the years, there have been several letters from the Administration on Aging to states responding to questions about the application of conflict of interest provisions.

In 1981, the Administration on Aging issued a program instruction containing supplemental guidance in the implementation of the long-term care ombudsman program.⁴ There are almost two pages discussing conflict of interest and the organizational location of the program.

“Determination of the placement of the program, whether in-house or outside the State Agency, should consider the need for the Long-Term Care Ombudsman to exercise independence in action and judgment, free from the control of significant influence by any person or organization which seeks to interfere with vigorous and impartial investigation and/or resolution of complaints.” - AoA-PI-81-8, page 8

When the 1992 amendments to the Act added specificity to the conflict of interest provisions, additional questions arose regarding the implementation of the provisions. The report language from the Senate⁵ clarifies the intent of the provisions and states the importance of public perception when examining ombudsman conflict of interest.

“The ability of ombudsmen to independently and fully carry out their functions, including the public perception of the program’s independence, is crucial to the program’s success and, therefore, addresses this through several improved provisions pertaining to actual and potential conflicts of interest. The Committee is concerned that every effort be made to minimize any perception of conflicts of interest affecting the program and directs the Commissioner to issue regulations on this and the Committee urges the Commissioner and the States to vigilantly monitor the program in this regard.” - Senate Report 102-151, page 106

The significance of the ombudsman’s ability to act to resolve issues and to be perceived as an independent voice on behalf of residents is stated in a letter from the Administration on Aging.⁶

“The ombudsman’s ability to compel action is to a very large degree dependent upon the strength of their perceived integrity and the ability to truly act upon the wishes of their clients. In other words, to the extent the ombudsman is not perceived as being truly independent to act on behalf of the complainant, his/her ability to fully and vigorously represent the client is limited. Anything that diminishes the actual or perceived independence of the program is likely to diminish the ombudsman’s ability to compel any other individual or entity...to take appropriate action in response to the complaint carried by the ombudsman. In truth, ombudsmen have very little in their tool box, so to speak, besides their word, their knowledge, their tenacity, and their freedom to act. If those attributes are not impaired, then ombudsmen do not need many more tools.” - page 7

SOURCES OF CONFLICT OF INTEREST FOR THE OMBUDSMAN PROGRAM

The Institute of Medicine’s seminal study of the Long-Term Care Ombudsman Program, *Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs* of the Older Americans Act, devoted Section 4 to

4 Administration on Aging, PI-81-8. Issuance date: January 19, 1981.

5 U.S. Senate Report 102-151, the report of the Senate Committee on Labor and Human Resources to report out S. 243. September 13, 1991. From memo to Sue Wheaton from Bill Benson. February 18, 1993.

6 Administration on Aging letter to L. N. Shedd and J. Hoberman. from William Benson, Deputy Assistant Secretary for Aging November 8, 1996.

conflicts of interest. Four types of conflicts of interest⁷ are identified in the study's report:

- Organizational: location and governance,
- Individual,
- Willful interference,
- Sources of legal counsel.

This paper discusses **organizational** and **individual** conflicts. The study discusses the difficulty in identifying and eliminating or remedying conflicts of interest. There is a direct impact on residents if conflict of interest issues are not addressed.

“Conflicts of interest may arise from the structure in which the ombudsman program exists, from situations faced by the ombudsman, and from individual ombudsman relationships or conduct. The OAA [Older Americans Act] charges the state agency and the state ombudsman with responsibility to establish mechanisms to identify and remove conflicts of interest pertinent to the ombudsmen (both state and local), their immediate family members, and the entities that host the program.

Implementation of this policy is very difficult to actualize. It is almost impossible to eliminate all potential conflicts of interest because of how the LTC [long-term care] ombudsman programs operate and where they are located... The OAA has clearly designated the LTC ombudsman program as the voice representing the LTC resident to government, yet in most cases the program continues to be housed within state and local governments that are increasingly responsible for service provision to older persons.

The Ombudsman Program has a mandate to focus on the individual resident. If the ombudsman finds him or herself in a conflict of interest situation (whether it is a conflict of loyalty, commitment, or control), the resident, even more than the program may suffer. The resident's problem may not be resolved, certain avenues of resolution may be foreclosed, the resident's voice may not be heard by policymakers, and the resident's interest will be inadequately represented or altogether absent from the table at which public policy is made.”⁸

Three dimensions of conflict of interest are described to provide additional guidance in identifying conflicts.⁹

- *Conflicts of Loyalty*: These involve issues of judgment and objectivity. These are the typical situations almost everyone understands—financial and employment considerations. An ombudsman's ability to be fair and a resident advocate might be questioned if the ombudsman also is a consultant to a facility, a board member of a facility or management company, or works as a case manager with responsibility for assisting individuals with moving into long-term care facilities. Loyalty may also be an issue if the individual is an ombudsman in a facility which was the ombudsman's previous employer.

7 *Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act.* Institute of Medicine. 1995. <http://www.nap.edu/openbook.php?isbn=NI000028>

8 *Id.*, pp. 108-109.

9 *Id.*, p. 107.

- *Conflicts of Commitment:* These are issues of time and attention. Toward which goals or obligations does one direct one's efforts—i.e., one's time and energies? Concerns about the adequacy of resources come into play because pressures to do more occur when available resources are limited. In regional or local programs, ombudsmen who assume several other employment-related responsibilities in addition to their ombudsman responsibilities may experience conflicts of commitment.
- *Conflicts of Control:* These are issues of independence. Do other interests, priorities, or obligations of the agency that houses the ombudsman materially interfere with the ombudsman's advocacy on behalf of residents? Do administrative or political forces materially interfere with the professional judgment of the ombudsman? Is the ombudsman able to act responsibly without fear of retaliation by superiors?

EMERGING CONFLICTS IN A CHANGING LONG-TERM CARE SYSTEM

This 1995 study was prescient in discussing conflicts that may arise as the state units on aging, the area agencies on aging, and/or the ombudsman program expand their services as part of a changing long-term care system. Examples that remain relevant today are included in Section 4, Conflicts of Interest, and in Section 7, Expansion of the Long-Term Care Ombudsman Program, of the study.

“...if the LTC ombudsman program expands its purview to include community-based LTC services in addition to institutional LTC, some of the complaints investigated by the program will probably involve services that are funded or even operated directly by the SUA [state unit on aging] or by local entities, such as AAAs [area agencies on aging] housing the local ombudsman program. Second, the role of the aging network is expanding to include far greater responsibilities for aspects of care for residents of LTC facilities than was envisioned when the OAA was written...Some are responsible for the preadmission screening of nursing facility residents; some either contract for or operate services that are provided to residents of LTC facilities; some are responsible for providing adult protective services; and some are responsible for the operation of home- and community-based service programs that operate under waivers granted by the federal government. Any of these AAA functions can lead to conflicts of interest. The housing and funding of the ombudsman program in AAAs that directly provide in-home supportive services to residents of LTC facilities creates the same conflicts as would occur if the ombudsman program were housed or funded in a nursing or B&C [board and care] home association.”¹⁰

“An ombudsman program, at the federal, state, or local level, may be constrained—either implicitly or explicitly—from intervening on behalf of consumers to challenge eligibility decisions, speak out publicly about long waiting lists, or comment on proposed policy if the program is housed within the agency responsible for such programs and policies. Likewise, consumers may hesitate to contact an ombudsman whose phone number and office location are the same as the case manager whose actions they wish to question.”¹¹

IDENTIFYING AND REMOVING OR REMEDYING CONFLICTS

It is impossible to avoid all conflicts of interest, actual and perceived, in the Long-Term Care Ombudsman Program. There is not a perfect structure for the Long-Term Care Ombudsman Program that eliminates all conflicts of interest. There are some that seem to minimize conflicts. States where the Ombudsman Program is either a separate entity within government or is operated by contract and where the local ombudsmen are employees of the state

¹⁰ Ibid., p. 111.

¹¹ Ibid., p.224.

ombudsman, report few conflicts that are not addressed by screening prior to employment.¹² Prohibiting all conflicts of interest may not be desirable when programs recruit staff and volunteers. Ombudsman programs often seek to recruit individuals who have some long-term care experience. If programs did not consider any individuals with a potential conflict of interest, the advocacy skills of many excellent ombudsmen would not have been available to residents. The Older Americans Act acknowledges this reality by permitting the removal of conflicts of interest.

Identifying and preventing, removing or remedying conflicts of interest is not a simple task. There is not an established solution for every potential conflict of interest situation. Addressing conflict of interest requires continual vigilance, dialogue, assessing the potential impact on residents, and thoughtful strategies to remove or remedy the conflict. The easiest solution is to avoid the conflict of interest.

There are four key documents which contain descriptions of situations that may be actual or perceived conflict of interest and salient questions for ombudsman programs to use in determining if a conflict exists. Suggested solutions or guidance in developing a remedy is given. The fifth document, *Long-Term Care Ombudsman Program Core Principles*, contains principles for guidance in avoiding or minimizing conflicts of interest. Refer to the Resource List in the appendix for more information:

- *Charting the Long-Term Care Ombudsman Program's Role in a Modernized Long-Term Care System*,
- *Guidance for Long Term Care Ombudsman Program, Participation in Developing Consumer Advocacy Programs*,
- *Home Care Ombudsman Affinity Group. Teleconference Summary*,
- *Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act*, and
- *Long-Term Care Ombudsman Program Core Principles: Effectiveness in Representing Residents*.

TIPS FOR DEALING WITH CONFLICTS OF INTEREST

The information contained in this section is based on a review of a sample of state and local long-term care ombudsman programs' conflict of interest regulations, policies, screening tools, interviews with several state and local ombudsmen, area agency on aging directors, and documents listed in the Resource List.

States where the ombudsman program has expanded into home care or another client directed service have made few, if any, changes in their conflict of interest provisions or screening instruments. They report that every situation must be handled individually and that the basic litmus test is:

- client directed advocacy,
- public perception of the ombudsman role as an independent voice for consumers, and

¹² Interviews with state and local ombudsmen conducted in developing this paper and Estes, C. *Independence: The LTCOPs Ability to Fully Represent Residents. Appendix IV. The Long-Term Care Ombudsman Program: Rethinking and Retooling for the Future. Proceedings and Recommendations*. National Association of State Long-Term Care Ombudsman Programs. April 2008.
<http://nasop.org/papers/Bader.pdf>

- the ability to bring issues to the attention of other agencies or programs for resolution.

Specific questions and decision-making criteria are contained in the five documents in the preceding list. Refer to *Guidance for Long Term Care Ombudsman Program, Participation in Developing Consumer Advocacy Programs*, for the most comprehensive list.

The Older Americans Act places some prohibitions on the Ombudsman Program and on individual representatives of the program. These are factors such as prohibiting a direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service. The program may not be contracted to an entity that fulfills those licensing responsibilities. Such prohibitions generally are straightforward. The more difficult areas to determine whether a conflict of interest exists and if so, what actions to take, are the areas where questions may arise. These tips attempt to provide some guidance to programs regarding a course of action pertinent to the questionable areas. It is impossible to foresee every potential conflict and to devise a clear cut response that applies to each situation. These tips suggest a framework that is applicable to decision making and that will provide some consistency in operation for an ombudsman program.

FOUNDATION

- Define conflict of interest for program placement and for individuals associated with the ombudsman program.
 - Be sure that the definition enables the program to fulfill its Older Americans Act responsibilities and to be publicly viewed as an independent voice for residents.

The Oklahoma Ombudsman Program's rules define conflict of interest as "a conflict of interest exists when any organizational or supervisory relationship, policy, or action, or individual ombudsman relationship or action conflicts with or impairs the ability of an ombudsman to carry out his or her responsibilities to investigate, resolve, or refer complaints or otherwise advocate for long-term care facility residents."¹³ This definition encompasses individual and organizational conflicts.

- Align the state's ombudsman statute, regulations, or policies to be consistent with the current conflict of interest provisions in the Older Americans Act.
 - Add clarification by incorporating more specific information.

A few states have done this by drawing upon the Institute of Medicine's work or the regulations proposed by the National Association of State Long-Term Care Ombudsman Programs. The Georgia State Long-Term Care Ombudsman Program's Policies and Procedures is one example of a state that has used these resources as a basis for conflict of interest provisions. Refer to the appendix for the Georgia conflict of interest provisions.¹⁴

13 340:105-11-235. Conflict of interest. revised 6-1-07.

14 Go to http://www.ltombudsman.org/uploads/File/Georgia_Policies_and_Procedures_Manual_2009.pdf Part II, Administration of the Program, for the entire section and the complete document.

Some states list other functions which are conflicts of interest if combined with the ombudsman position such as serving as the sole witness for “do not resuscitate” orders, adult protective services, or as a resident’s guardian or agent, performing case management or pre-admission screening for residents or potential residents, or supervising other programs that may come into conflict with the ombudsman program. The identified functions are **prohibited** roles which cannot be remedied. Removal is necessary. Refer to the Table *Ombudsman Program Conflict of Interest Provisions and Recommendations*, in the appendix for other specific functions recommended by the National Association of State Long-Term Care Ombudsman Programs and in *The Long-Term Care Ombudsman Program: Rethinking and Retooling for the Future*.

Some states define “immediate family” in their rules and several states require one to three years between an individual’s employment by a long-term care provider and being an ombudsman. The Georgia, Ohio, and Oklahoma rules and policies in the appendix are examples of how states have clarified conflict of interest provisions.

- Provide tools for conflict of interest screens to be used for individuals and for entities (agencies or organizations) designated as a Local Ombudsman Program.
 - Require annual renewal and signatures. The Ombudsman Compendium Chapter I, Recruitment contains a brief overview of conflict of interest provisions and documents from Oklahoma and Ohio as sample instruments.

<http://www.ltombudsman.org/sites/default/files/library/documents/Compendium-Recruitment.pdf>

The Ohio conflict of interest screen is designed for use by volunteers, employees, or board members. It asks for descriptive information if a potential conflict of interest is identified and for a waiver request or a proposed remedy to be submitted by the local program if a conflict of interest is identified. An annual renewal is required.

The Oklahoma tool is a conflict of interest statement and ethical guidelines. By reading and signing this form, an ombudsman (staff or volunteer) is agreeing to uphold the ethical guidelines and that there is no conflict of interest.

An example of an assurance by a local program with an annual renewal is the Area Ombudsman Program Assurance from Oklahoma and included in the appendix. This assurance includes statements about the agency’s freedom from conflict of interest and also specific assurances that enable the ombudsman to pursue individual and systems advocacy and other duties.

- Be continually vigilant regarding conflict of interest and the potential for perceived conflicts of interest. Reinforce this through ongoing education.

Ohio routinely includes time to discuss the role of the ombudsman in its ongoing training programs throughout the year. These sessions provide opportunities for role clarification and guidance regarding ombudsman practice. They assist in preventing conflict of interest situations. Training on ethical issues, including being aware of how an ombudsman’s actions may be perceived by consumers, is another training program that Ohio routinely conducts. One purpose is to increase ombudsman sensitivity to actions that may comprise their ability to be the resident’s advocate.

REMOVING OR REMEDYING

The Older Americans Act requires states to establish mechanisms to remove conflicts of interests that are identified. In reality, most ombudsman programs seek to find ways to remedy conflicts of interest where removing the conflict may not be a desirable outcome. The Institute of Medicine's study acknowledged this reality. "The complexity of the ombudsman program and the serious nature of its mission do not allow for easy, simple answers to remedy all the real of potential conflicts of interest."¹⁵

Examples:

The regional agency that operates the local ombudsman program also provides case management services for nursing home transition and home and community based waiver services. The ombudsman program has worked with residents who have complaints about the case management services. This regional agency is the only non-profit agency serving elders in that part of the state. The agency has a long-standing reputation as an advocate with consumer-friendly services. Removing the conflict of interest by terminating the ombudsman program's contract with this agency may not be a viable alternative if there is a way to remedy the conflict of interest.

A former nursing home administrator applies to work with the ombudsman program. There are no facilities owned or operated by the corporation where the administrator previously worked in the area covered by the local ombudsman program. It has been two months since the administrator quit her nursing home job. She has excellent expertise, is very active in the state's culture change coalition, and has a reputation for knowing the individual residents in her facility. If the ombudsman program does not employ her, she will find another job. Her expertise and perspective could be beneficial to the local ombudsman program which motivates the program to look for a remedy instead of refusing to consider her application.

Clear written and oral communication is essential. State Ombudsmen say that identifying conflicts of interest and potential remedies is easier when a specific client case example of how the conflict may arise is used to focus the dialogue. The case may be real or hypothetical, such as a case where the ombudsman and another employee of the same agency appear at a hearing, each person arguing a different perspective. How will the agency deal with this situation? How will the colleagues deal with any potential residual tension in the office? What will the client, family or public perception be about each program's ability to freely do its work?

- Create a process for removing or remedying conflicts of interest, both actual and potential.

INDIVIDUAL

The Institute of Medicine's study suggests a few mechanisms for addressing conflicts of interest when prohibitions are not applicable.¹⁶ Several of the states where the ombudsman program has expanded its role beyond the responsibilities listed in the Older Americans' Act use these actions. The key with the three disclosure options is to provide disclosure up front, as soon as the potential for conflict of interest surfaces.

15 *Real People, Real Problems*. op.cits., page 119.

16 *Ibid.*, pages 120 - 121.

The suggested mechanisms are:

- disclosure,
- disclosure with alternative options offered,
- disclosure with recusal,
- everyday ethical behavior, and
- public accountability.

Other mechanisms that programs use include:

- Providing another role for an individual until more time has elapsed between prior employment and serving in an ombudsman complaint handling capacity and there is assurance that the individual understands the ombudsman approach and resident directed advocacy. Examples of another role is data management or other administrative, non-advocacy functions.
- Ombudsman responsibilities are in facilities not owned or operated by the same corporation where the individual was previously employed.
- Provide guidance and decision making criteria for determining what type of activities may present a conflict of interest for an ombudsman or for the program, such as a work group, task force, committee, or a coalition.

The Institute of Medicine suggests the following decision-making protocol regarding LTCO participation in community groups, professional associations, or other activities.¹⁷

- Will the association (or community group or church) benefit from the “in name only” participation of the ombudsman, irrespective of the actual contribution the ombudsman makes?
- Is there a possibility that the mission of the ombudsman program will be advanced in equal proportion to the benefits that might accrue to the other group? Does the ombudsman bear responsibility for deciding on the balance of competing views and forging points of compromise, or is the ombudsman’s role primarily to represent and assert the views of long-term care residents?
- Will the association, task force, or committee ensure in any final product that dissenting or minority views (if any) held by the ombudsman will be communicated?

The Georgia Ombudsman Program’s policies include similar criteria.¹⁸

In determining whether LTCO participation in community groups, professional associations, or other activities constitutes a conflict of interest, the following questions shall be considered:

¹⁷ Ibid., page 115.

¹⁸ Georgia Long-Term Care Ombudsman Program Policies and Procedures. Section II. 403.3. revised December 2008.

- Will the LTCOP benefit from LTCO involvement in this activity?
- Will the LTCO be able to represent and assert the views of long-term care residents in this activity?
- Will the role of the LTCO in the activity benefit residents?
- How will participating in the activity affect the public perception and the residents' perspective of the LTCOP?
- Will the LTCO be put in a position of participating in a decision about a resident without the resident's involvement or permission?

ORGANIZATIONAL

Other than the prohibited locations of the Ombudsman Program stipulated in the Older Americans Act, there is little additional guidance. The documents listed in the Resource List (appendix) discuss principles that enable a long-term care ombudsman program to fulfill its federally mandated responsibilities. There is a common theme among the documents that the program must be perceived as being independent in representing residents and able to pursue public advocacy in representing the views of residents. Some states have captured this concept in their rules, policies, and/or conflict of interest assurances that must be signed by programs.

One example is an excerpt from the Oklahoma Area Ombudsman Program Assurance required for designation of the area program as a subdivision of the Office of the State Long-Term Care Ombudsman.

“Assurance is needed from you that the area agency:

...is not located within an organization that may impair or inhibit the ability of the Ombudsman to objectively and independently investigate and resolve complaints.”

An example of a remedy is removing the Ombudsman Program from under the supervision of the person who supervises the case management or pre-screening or adult protective services program.

Prohibitions regarding conflict of interest among board members or supervisors of the Ombudsman Program typically are included with individual conflicts of interest as previously discussed in this paper.

- Establish a process for reviewing proposed remedies and criteria for accepting or rejecting remedies, and outcomes.

The Ohio Ombudsman Program's Rules add some principles to a list of provisions that are included in the rules or policies of a few other states. Collectively, these provisions give consistent guidance for the program in developing and assessing the adequacy of proposed remedies. Program responsibilities while a decision is pending are stated.

“(D) Prior to offering an ombudsman position to an applicant or training a volunteer, the sponsoring agencies and/or regional program directors shall report any identified conflict of interest to, and may propose a remedy to, the SLTCO. The SLTCO shall report any identified conflict of interest in the state program and propose a remedy to the director of the department of aging. Within thirty days of receiving a proposed remedy, the SLTCO or the director of the department of aging shall review the nature, scope, and extent of the conflict and shall determine whether or not to allow the proposed remedy. While the decision is pending, the program responsible shall assign any individual

with a conflict of interest to duties that do not pose a conflict.

The proposed remedy shall be submitted in writing and shall reveal the nature, extent, and potential impact of the conflict of interest, and shall be a remedy which will neutralize the conflict of interest. Current employment with any type of provider is a conflict of interest that cannot be remedied. Any remedy granted shall remain in effect for as long as the conflict continues to exist to the same extent as reported and for as long as the remedy continues to work.

Examples of remedies which may be approved include, but are not limited to, remedies that assure:

(1) The independence of the representative of the office to provide unbiased investigations, successful problem resolution, advocacy services, and other ombudsman services;

(2) That no employee, representative of the office, or policy board member having a conflict of interest is involved with or influences any decision to hire, or appoint, evaluate, or terminate a representative of the office;

(3) That no employee, representative of the office, or policy board member having a conflict of interest is involved with or influences the designation of any regional program;

(4) That no policy board members having a conflict of interest in their capacity as board members are involved in a complaint being handled by the program involving the entity that is the source of the conflict of interest;

(5) That any policy board members having a conflict of interest in their capacity as a board member will declare any conflict of interest as regards a complaint or advocacy issue, and will excuse themselves from deliberations and voting on the issue, and review of the case records; and,

(6) That the policy board's by-laws, the organization's position descriptions, and personnel policies reflect procedures to identify and remedy conflicts of interest and ensure independence of action for the program and its representatives.

(E) Prior to offering an ombudsman position to an applicant or training a volunteer, the sponsoring agencies and/or regional program directors shall report any identified conflict of interest to, and may request a waiver of a conflict of interest, in writing, to the SLTCO, or in the case of the SLTCO making the request, to the director of the department of aging. Within thirty days of receiving a waiver request, the SLTCO or the director of the department of aging, as appropriate, shall review the nature, scope, and extent of the conflict and shall determine whether or not to approve the waiver. A waiver request will reveal the nature, extent, and potential impact of the conflict of interest, and will ask to determine whether sufficient circumstances exist to eliminate a conflict of interest.

(1) Any conflict of interest not waived or remedied, and any prohibition resulting therefrom, shall be recorded in the central registry.

(2) The SLTCO may take into consideration the following when determining the granting of a waiver:

(a) The length of time an individual was affiliated with a provider;

(b) *The view of the SLTCO of the objectivity of the individual;*

(c) *The position held by the individual when working for a provider; and,*

(d) *The change in the ownership/management of a facility and the length of time since the change in ownership/management.*

(F) Deliberate failure to disclose any conflict of interest or any prohibition shall be sufficient grounds for the removal of the candidate from the professional development program, the decertification of the representative, or the withdrawal of the designation of the regional program involved. Effective: 12/28/2006”¹⁹

The consequences of failure to remove or remedy a conflict of interest is clearly stated in Georgia’s Policies and Procedures.

“Failure to Identify or Remedy a Conflict of Interest

a. Failure on the part of a LTCO, provider agency, or AAA to identify and report to the SLTCO a known conflict of interest shall be sufficient grounds for refusal to designate, suspension of designation, or de-designation of the LTCOP or the LTCO (II-200, above).

b. Existence of an unremedied conflict of interest shall be sufficient grounds for the de-designation of the LTCOP (II-202, above).

c. Existence of an unremedied conflict of interest shall be sufficient grounds for the suspension of or de-designation of the LTCO (II-204, above).”²⁰

SUMMARY

Conflict of interest issues for Ombudsman Programs may be actual or perceived. Some issues are easy to identify and can be prohibited and avoided. In other circumstances, it may be necessary and preferable to identify a remedy for a conflict of interest. As the long-term care system continues to change and more services are provided in the community, Ombudsman Programs are likely to encounter different conflict of interest situations that require a renewed analysis.

Despite the permutations of conflicts of interest or the complexity of a situation, the litmus test for ombudsman programs remains constant. How will this situation or circumstance impact the Ombudsman or the Ombudsman Program’s ability to be resident directed and to be viewed by consumers as an uncompromised voice for residents? Ombudsman Programs need clear, definitions, guidelines, policies, and tools for consistently identifying and dealing with conflicts of interest.

¹⁹ 173-14-15 Conflicts of interest. <http://codes.ohio.gov/oac/173-14-15>

²⁰ Georgia. op.cit. Section 404.

CONFLICT OF INTEREST RESOURCES FOR LONG-TERM CARE OMBUDSMAN PROGRAMS

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STATE OF OKLAHOMA
DEPARTMENT OF HUMAN SERVICES
LONG-TERM CARE OMBUDSMAN PROGRAM

AREA OMBUDSMAN PROGRAM ASSURANCE

This is a request for written assurances of freedom from conflict of interest as required by the Older Americans Act for official designation of the area program as a subdivision of the Office of the State Long-Term Care Ombudsman.

Assurance is needed from you that the area agency:

1. is not a part of an entity responsible for licensing or certifying long-term care facilities, or part of a provider organization;
2. does not hold interest in, manage, own, or contract with a long-term care facility; and
3. is not located within an organization that may impair or inhibit the ability of the Ombudsman to objectively and independently investigate and resolve complaints.

Assurance is provided that the Ombudsman will be free to:

4. take action on behalf of residents;
5. publicly represent the concerns of residents;
6. bring together individuals who have the authority to solve problems;
7. make recommendations to boards, committees, and task forces in developing long-term care policy, etc.;
8. forward unresolved formal complaints to the Office of the State Long-Term Care Ombudsman according to program policy; and
9. publicize the Long-Term Care Ombudsman Program and issues affecting older institutionalized persons.

There are inherent conflicts in the role of the Ombudsman. The area agency will support the role and goals of the Ombudsman Program and the Ombudsman staff through any conflict associated with their official duties.

Please read, review with staff and sponsors and sign below if you can provide the above assurances.

Area Agency director

Date

Sponsoring agency director

Date

**POLICIES AND PROCEDURES SPECIFIC TO THE OFFICE OF THE STATE
LONG-TERM CARE OMBUDSMAN (OKLAHOMA)**

340:105-11-235. Conflict of interest

Revised 6-1-07

(a) An officer, employee, volunteer, or other representative of the Office of the State Long-Term Care Ombudsman (Office) may not be subject to a conflict of interest that has the potential to impair the ability of said person to carry out his or her official duties in an impartial manner and may not stand to gain financially through an action or potential action brought on behalf of persons the ombudsman serves.

(b) A conflict of interest exists when any organizational or supervisory relationship, policy, or action, or individual ombudsman relationship or action conflicts with or impairs the ability of an ombudsman to carry out his or her responsibilities to investigate, resolve, or refer complaints or otherwise advocate for long-term care facility residents.

(c) No persons involved in the designation of the state long-term care ombudsman, whether by appointment or otherwise, or the designation of the head of any subdivision of the Office may be subject to a conflict of interest.

(d) Freedom from conflict of interest is established through interview of prospective state long-term care ombudsman staff and volunteers, and through a signed statement in a form prescribed by the Office and other appropriate means.

(e) Persons listed in this paragraph must complete and sign Form 02OM001E, Conflict of Interest Statement and Ethical Guidelines, annually, and when there is any change of facility or area assignment by:

- (1) prospective and current ombudsman staff;
- (2) prospective and current ombudsman volunteers; and
- (3) any other person involved in the direct operation of the State Long-Term Care Ombudsman Program.

(f) Agencies must annually review Form 02OM002E, Freedom from Conflict of Interest Assurances, which must be signed annually by:

- (1) directors of agencies designated, or seeking designation, as a local ombudsman entity; and
- (2) directors of sponsoring agencies.

340:105-11-236. Remedies in conflict of interest situations

Revised 5-13-02

(a) **Volunteers.** If a conflict of interest is identified before certification, the volunteer is not certified in any facility in which the conflict of interest could be expected to affect performance. If a conflict of interest or potential conflict of interest involving a certified volunteer is identified, the ombudsman supervisor promptly notifies the Office of the State Long-Term Care Ombudsman (Office) to recommend decertification or reassignment of the volunteer, or other appropriate action.

(b) **Ombudsman staff.** No applicant for a long-term care ombudsman staff position, at any level of the program, is selected to fill that position if a conflict of interest is identified during any stage of the application or hiring process. If a conflict of interest or potential conflict of interest is identified involving a staff representative of the Office, action must be taken to remedy the conflict within 30 days. Remedies may range from elimination of the conflict to withdrawal of designation of the individual as a representative of the Office.

(c) **Directors of sponsoring agencies and agencies designated as ombudsman entity.** If a conflict of interest or potential conflict of interest is identified involving the director of a sponsoring agency or the director of an agency designated as a subdivision of the Office, action must be taken to remedy the conflict of interest within 30 days. Remedies may include:

- (1) removal or resolution of the conflict of interest;
- (2) withdrawal of the agency's designation as area ombudsman entity;
- (3) withdrawal of designation of the agency as an Area Agency on Aging; or
- (4) other reasonable action.

**EXCERPT from the GEORGIA LONG-TERM CARE OMBUDSMAN PROGRAM
POLICIES AND PROCEDURES**

**PART II. ADMINISTRATION OF THE LONG-TERM CARE OMBUDSMAN
PROGRAM**

400. Conflicts of Interest

How to use this Chapter – This Chapter provides guidance in: 1) identifying and defining actual and potential conflicts of interest, 2) avoiding conflicts of interest, 3) remedying conflict where appropriate, and 4) describing consequences of operating a Long-Term Care Ombudsman Program with an unremedied conflict of interest. When a conflict has been identified under II-401, the reader should use the procedures set forth in II-402 to determine whether the conflict can be sufficiently remedied to permit the provision of ombudsman services.

POLICY

The organizational placement of the Long-Term Care Ombudsman Program and the individuals who carry out the duties of the Program must be free from conflicts of interest.

PROCEDURES

401. Identifying the Conflict

401.1 Definitions of conflict of interest

- a. A conflict of interest exists in the Long-Term Care Ombudsman Program (LTCOP) when other interests intrude upon, interfere with, or threaten to negate the ability of the LTCOP to advocate without compromise on behalf of long-term care facility residents. Types of conflict of interest include:
 - i) **conflicts of loyalty** – incentives, often related to financial or employment considerations, that shape one’s judgment or behavior in ways that are contrary to the interest of residents;
 - ii) **conflicts of commitment** – goals or obligations that direct one’s time and/or attention away from the interest of residents; and

- iii) **conflicts of control** – limitations or restrictions that effectively foreclose one’s ability to take actions to advocate for the interest of residents.

401.2 Organizational conflicts

Conflicts arising from organizational location include, but are not limited to, LTCOP placement in an agency which:

- a. has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility or a long-term care service;
- b. provides long-term care services, including the provision of personnel for long-term care facilities or the operation of programs which control access to or services for long-term care facilities;
- c. operates programs with responsibilities conflicting with LTCOP responsibilities. Examples of such responsibilities include developing and carrying out care plans and serving as guardian or conservator of long-term care residents;
- d. has governing board members with ownership, investment or employment interest in long-term care facilities; and
- e. has direct involvement in the licensing or certification of a long-term care facility or long-term care services.

401.3 Individual ombudsman conflicts

Conflicts for a long-term care ombudsman (LTCO) include, but are not limited to, the following:

- a. employment of an individual or a member of his/her immediate family within the previous year by a long-term care facility in the service area or by the owner or operator of any long-term care facility in the service area;
- b. participation in the management of a long-term care facility by an individual or a member of his/her immediate family;
- c. ownership or investment interest (represented by equity, debt, or other

- financial relationship) in an existing or proposed long-term care facility or long-term care service by an individual or a member of his/her immediate family;
- d. involvement in the licensing or certification of a long-term care facility or provision of a long-term care service by an individual or a member of his/her immediate family;
- e. receipt of remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility by an individual or a member of his/her immediate family;
- f. accepting any gifts or gratuities from a long-term care facility or resident or resident representative;
- NOTE:** A LTCO should adequately compensate a facility for food provided by the facility with the exception of sample portions of food tested as part of an investigative process.
- g. accepting money or any other consideration from anyone other than the provider agency or other entity designated by the Office of the State Long-Term Care Ombudsman (SLTCO) for the performance of an act in the regular course of a LTCO's duties.
NOTE: This provision does not prohibit a provider agency from obtaining grants, donations or other funding for the LTCOP from entities without conflicts of interest;
- h. provision of services with conflicting responsibilities while serving as a LTCO, such as adult protective services; discharge planning; serving as guardian or conservator, agent under power of attorney, or other surrogate decision-maker for a long-term care resident in the service area; pre-admission screening; or case management for long-term care residents;
- i. serving residents of a facility in which an immediate family member resides; or
- j. participating in activities which:
- i) negatively impact on the ability of the LTCO to serve residents, or
 - ii) are likely to create a perception that the LTCO's primary interest is other than as a resident advocate (see II-403.3, below).

402. Remedying Conflict

402.1 General

a. **notification of the SLTCO**

Where an actual or potential conflict of interest within the LTCOP has been identified, the SLTCO shall be notified. All agents of the Department of Human Resources, area agencies on aging (AAAs), provider agencies, and LTCOs have a duty to notify the SLTCO of any actual or potential conflict of interest of which they have knowledge.

- b. The SLTCO shall determine whether appropriate actions may be taken to sufficiently remedy the conflict. A conflict can be sufficiently remedied only where the existence of the conflict does not interfere with any duties of the LTCOP and where the conflict is not likely to alter the perception of the LTCOP as an independent advocate for residents.

402.2 Remedying organizational conflicts

Where organizational conflicts have been identified, the following steps shall be taken where the conflict can be sufficiently remedied:

- a. A written remedial plan shall be developed within thirty (30) calendar days of identification of the conflict to the SLTCO.
- b. The remedial plan must identify the conflict and provide assurances which shall minimize to the greatest extent possible the negative impact of the conflict on the LTCOP. Examples of such assurances could include:
- i) The LTCOP will investigate complaints in an unbiased manner and independently determine actions to be taken in their resolution.
 - ii) No agency employee or governing board member with a conflict of interest will be involved with or influence any decision to hire or terminate the employment of a LTCO.
 - iii) Governing board members of the provider agency or AAA who have a conflict of interest:
 - A) must disclose the conflict to the governing board and to the SLTCO;
 - B) may have no involvement with LTCO activities concerning the entity which is the source of the

- conflict;
and
 - C) must abstain from voting on issues related to the operation of the LTCOP.
 - iv) The agency's policies and procedures adequately set forth procedures to remedy conflicts of interest and ensure that the LTCOs can fulfill their duties without interference.
 - v) A memorandum of agreement exists between the LTCOP and another program which provides services with conflicting responsibilities. Such a memorandum must adequately set forth the roles, responsibilities, and appropriate working relationships of the respective programs.
- c. The remedial plan must be mutually agreed upon and signed by the agency in which the conflict exists and the SLTCO. If either party cannot agree to the plan, the conflict has not been sufficiently remedied.

402.3 Remedying individual ombudsman conflicts

Where individual conflicts have been identified, the following steps shall be taken where the conflict can be sufficiently remedied:

- a. **development of a written remedial plan**
 - i) Where the individual is an applicant for a position as a LTCO, a plan shall be developed before the individual is hired for the position.
 - ii) Where the individual is an applicant as a LTCO volunteer, a plan shall be developed before the individual takes any actions on behalf of the LTCOP.
 - iii) Where the individual is a LTCO staff or volunteer, a plan shall be developed within thirty (30) calendar days of identification of the conflict to the SLTCO.
- b. The remedial plan must identify the conflict and provide assurances which shall minimize to the greatest extent possible the negative impact of the conflict on the LTCOP. An example of such an assurance could include:
 - i) prohibiting the LTCO with a conflict of interest from serving the residents of the facility with which he/she has a conflict and arranging for another staff LTCO to serve those

residents. Where appropriate, this arrangement could be time-limited.

- c. The remedial plan must be mutually agreed upon and signed by:
 - i) the provider agency, the LTCO or applicant with the conflict of interest;
 - ii) the LTCO Coordinator, and
 - iii) the SLTCO.
- d. Volunteer Visitors are not permitted to serve residents in facilities with which they have a conflict of interest. The SLTCO may delegate to an LTCO Coordinator the authority to:
 - i) consider the conflicts of interest of an individual who wishes to serve as a Volunteer Visitor; and
 - ii) determine whether conflicts exist which may impede the ability of the Volunteer Visitor to fulfill the duties of that position or may alter the perception of the LTCOP as an independent advocate for residents. If such a conflict exists, the individual cannot serve as a Volunteer Visitor.

403. Procedures to Avoid Conflicts of Interest

403.1 Persons seeking certification as ombudsmen

- a. **identification of the conflict**

The provider agency shall screen all persons seeking certification as LTCO staff or volunteers to identify any actual or potential individual conflicts of interest. Upon request by the SLTCO, the provider agency shall submit evidence of such screen to the SLTCO. The SLTCO may periodically request the provider agency to perform a conflict of interest screen of currently certified LTCO staff or volunteers.
- b. **disclosure of the conflict**

All persons seeking employment or certification as LTCO staff or volunteers shall disclose to the provider agency all information relevant to past employment, membership, or interests that may affect, or could reasonably be expected to affect, that individual's ability to carry out duties of a LTCO without conflicting interest.

403.2 Persons seeking to become Volunteer Visitors

- a. **identification of the conflict**
The LTCO Coordinator shall screen all persons applying to become Volunteer Visitors to identify any actual or potential individual conflicts of interest.
- b. **disclosure of the conflict**
All persons applying to become Volunteer Visitors shall disclose to the Ombudsman Coordinator all information relevant to past employment, membership, or interests that may affect, or could reasonably be expected to affect, that individual's ability to carry out duties of a Volunteer Visitor without conflicting interest.

403.3 Ombudsman involvement in activities

In determining whether LTCO participation in community groups, professional associations, or other activities constitutes a conflict of interest, the following questions shall be considered:

- a. Will the LTCOP benefit from LTCO involvement in this activity?
- b. Will the LTCO be able to represent and assert the views of long-term care residents in this activity?
- c. Will the role of the LTCO in the activity benefit residents?
- d. How will participating in the activity affect the public perception and the residents' perspective of the LTCOP?
- e. Will the LTCO be put in a position of participating in a decision about a resident without the resident's involvement or permission?

404. Failure to Identify or Remedy a Conflict of Interest

- a. Failure on the part of a LTCO, provider agency, or AAA to identify and report to the SLTCO a known conflict of interest shall be sufficient grounds for refusal to designate, suspension of designation, or de-designation of the LTCOP or the LTCO (II-200, above).
- b. Existence of an unremedied conflict of interest shall be sufficient grounds for the de-designation of the LTCOP (II-202, above).
- c. Existence of an unremedied conflict of interest shall be sufficient grounds for the suspension of or de-designation of the LTCO (II-204, above).

REFERENCES

OAA § 712(a)(5)(C)(ii), (f); IOM Report, pp. 101-127

OHIO LONG-TERM CARE OMBUDSMAN PROGRAM RULE

173-14-15 Conflicts of interest.

(A) As used in this rule:

(1) "Financial interest" means an ownership interest or investment in a provider by a representative of the office or a relative of the representative of the office,

(2) "Relative" means a member of the immediate family, which is the spouse, parents, children, siblings, or household member.

(3) "Remedy" means an action, restriction of action, restriction of contact, or other means proposed to the SLTCO that would neutralize a conflict of interest and ensure that the conflict will not adversely influence the activities of the representative on behalf of the office.

(4) "Waiver" means the SLTCO has determined that sufficient circumstances exist to eliminate a conflict of interest and the need to remedy a conflict of interest.

(B) No employee or representative of the office, no individual involved in designating, hiring, evaluating, or terminating the head of any regional program, and no policy board members may have an unremedied conflict of interest. Conflicts of interest shall include, but shall not be limited to, being employed by a provider of long-term care services at any time within the two years prior to being employed by or affiliated with the office of the long-term care ombudsman,; or being affiliated with or having a financial interest in a provider of long-term care services or a membership organization of long-term care providers,; or standing to gain financially through an action brought on behalf of individuals whom the ombudsman serves.

Actions prohibited by someone holding a conflict of interest shall include, but shall not be limited to, actions taken to influence any decision or action of a representative of the office which could be characterized as interference with or reprisals against a representative, or as causing reticence on the part of a representative to pursue vigorously a complaint or concern of a client.

Absent a waiver granted by the SLTCO, no representative of the office shall be assigned to investigate a complaint concerning a long-term care provider with which the representative was formerly employed, with which the representative was formerly or is currently affiliated or associated, from which a relative receives long-term care services, or that poses any other conflict of interest.

(C) The SLTCO, the regional programs, and the sponsoring agencies shall develop, for their respective programs procedures to screen potential and existing non-representative employees of the program, potential candidates and existing representatives of the office, individuals involved in designating, hiring, evaluating, or terminating the head of any regional program, and potential and existing policy board members for conflicts of interest. The procedures shall be applied upon initial screening and annually thereafter. When completed, the person who conducted the screen and the person screened shall

acknowledge the completion of the screen in writing. The completed screening instrument shall be made a record of the program and shall be subject to program review.

(D) Prior to offering an ombudsman position to an applicant or training a volunteer, the sponsoring agencies and/or regional program directors shall report any identified conflict of interest to, and may propose a remedy to, the SLTCO. The SLTCO shall report any identified conflict of interest in the state program and propose a remedy to the director of the department of aging. Within thirty days of receiving a proposed remedy, the SLTCO or the director of the department of aging shall review the nature, scope, and extent of the conflict and shall determine whether or not to allow the proposed remedy. While the decision is pending, the program responsible shall assign any individual with a conflict of interest to duties that do not pose a conflict.

The proposed remedy shall be submitted in writing and shall reveal the nature, extent, and potential impact of the conflict of interest, and shall be a remedy which will neutralize the conflict of interest. Current employment with any type of provider is a conflict of interest that cannot be remedied. Any remedy granted shall remain in effect for as long as the conflict continues to exist to the same extent as reported and for as long as the remedy continues to work.

Examples of remedies which may be approved include, but are not limited to, remedies that assure:

(1) The independence of the representative of the office to provide unbiased investigations, successful problem resolution, advocacy services, and other ombudsman services;

(2) That no employee, representative of the office, or policy board member having a conflict of interest is involved with or influences any decision to hire, or appoint, evaluate, or terminate a representative of the office;

(3) That no employee, representative of the office, or policy board member having a conflict of interest is involved with or influences the designation of any regional program;

(4) That no policy board members having a conflict of interest in their capacity as board members are involved in a complaint being handled by the program involving the entity that is the source of the conflict of interest;

(5) That any policy board members having a conflict of interest in their capacity as a board members will declare any conflict of interest as regards a complaint or advocacy issue, and will excuse themselves from deliberations and voting on the issue, and review of the case records; and,

(6) That the policy board's by-laws, the organization's position descriptions, and personnel policies reflect procedures to identify and remedy conflicts of interest and ensure independence of action for the program and its representatives.

(E) Prior to offering an ombudsman position to an applicant or training a volunteer, the sponsoring agencies and/or regional program directors shall report any identified conflict of interest to, and may request a waiver of a conflict of interest, in writing, to the SLTCO, or in the case of the SLTCO making the request, to the director of the department of aging. Within thirty days of receiving a waiver request, the SLTCO or the director of the department of aging, as appropriate, shall review the nature, scope, and extent of the

conflict and shall determine whether or not to approve the waiver. A waiver request will reveal the nature, extent, and potential impact of the conflict of interest, and will ask to determine whether sufficient circumstances exist to eliminate a conflict of interest.

(1) Any conflict of interest not waived or remedied, and any prohibition resulting therefrom, shall be recorded in the central registry.

(2) The SLTCO may take into consideration the following when determining the granting of a waiver:

(a) The length of time an individual was affiliated with a provider;

(b) The view of the SLTCO of the objectivity of the individual;

(c) The position held by the individual when working for a provider; and,

(d) The change in the ownership/management of a facility and the length of time since the change in ownership/management.

(F) Deliberate failure to disclose any conflict of interest or any prohibition shall be sufficient grounds for the removal of the candidate from the professional development program, the decertification of the representative, or the withdrawal of the designation of the regional program involved.

Effective: 12/28/2006

R.C. 119.032 review dates: 10/06/2006 and 10/15/2010

Promulgated Under: 119.03

Statutory Authority: 173.02

Rule Amplifies: 173.15

Prior Effective Dates: 7/11/91, 12/27/01

Office of the State Long-Term Care Ombudsman
Conflict of Interest Screen
Please Print Clearly



Last name	First name	Region

Please check all that applies:

Initial screen	Annual screen	Annual screen with no change (approval attached)	Volunteer	Employee	Board member	Person(s) involved in hiring program director

1. Have you or any members of your immediate family or household ever been employed by a long-term care provider: Yes _____ No _____

If yes, please list the following:

Dates of employment	Name of person employed	Your relationship	Employer	Position/duties

2. Do you have a member of the immediate family or household that is living in a long-term care facility or is a recipient of long-term care services: Yes _____ No _____

If yes, please list the following:

Your relationship	Facility/Agency

3. Do you or any members of your immediate family or household have any financial interest in any long-term care provider or any agency that funds or regulates the long-term care services? Yes _____ No _____

If yes, please list the following:

Name of person with ownership interest/investment	Your relationship	Provider Name & Address	Description of ownership interest or investment

4. Are you or any members of your immediate family or household affiliated with, consultant to, board member of, or have any relationship in which they may profit from a long-term care provider or provider membership organization? Yes_____ No_____

If yes, please list the following:

Name of person with the affiliation	Your relationship	Provider/Organization name & address	Nature of the affiliation

5. Do you or any members of your immediate family or household stand to gain financially through an action brought on behalf of individuals that the Long-Term Care Ombudsman Program serves? Yes_____ No_____

If yes, please describe the applicable action and potential gain that may pose any actual, potential, or perceived conflict of interest.

Signed _____ Date _____
 (Applicant/Representative)

Signed _____ Date _____
 (Regional Program Reviewer)

Please check all that apply:

New conflict & remedy	Old conflict & remedy (approved previously)	Previously approved conflict & remedy attached	Request for waiver

Request for waiver and/or proposed remedy to the identified conflict of interest:

SLTCO Comment(s):

State Ombudsman Approval: _____ Date: _____

State Ombudsman Denial: _____ Date: _____

Table 1 Ombudsman Program Conflict of Interest Provisions and Recommendations

Source	Older Americans Act	NASOP Proposed Regulations for the Long-Term Care Ombudsman Program ⁱ	Rethinking and Retooling for the Future: Recommendations ⁱⁱ
Designation of LTCO or LTCO Program	<p>§ 712 (f) Conflict of Interest.--The State agency shall-- (1) ensure that no individual, or member of the immediate family of an individual, involved in the designation of the Ombudsman (whether by appointment or otherwise) or the designation of an entity designated under subsection (a)(5), is subject to a conflict of interest; (2) ensure that no officer or employee of the Office, representative of a local Ombudsman entity, or member of the immediate family of the officer, employee, or representative, is subject to a conflict of interest;</p>	<p>§1327.21 Establishment (g) In carrying out the duties of the Office, the Ombudsman may designate an entity as a local ombudsman entity and if so, shall designate employee(s) and/or volunteer(s) to represent the Office of the State LTC Ombudsman. The Ombudsman shall establish criteria and a process for participation in the statewide LTCOP by local ombudsman entities and representatives. The criteria must: (4) Ensure that local ombudsman entities and representatives have no unremedied conflict of interest, as defined in section 1327.24.</p> <p>§1327.24 Conflict of interest For purposes of this Section, a conflict of interest includes, but is not limited to, administering the licensing and certification of long-term care facilities; owning, operating, or having a financial interest in such facilities; being affiliated with associations of long-term care providers; or providing long-term care services, by an individual or a member of the individual's immediate family. (a) Any individual involved in the designation or removal, by appointment or otherwise, of the Ombudsman or ombudsman entities must be free of conflict of interest. The Ombudsman or ombudsman</p>	<p>Independence: The LTCOP's Ability to Fully Represent Residents</p> <p>Conflict of Interest 1.1) A LTCOP located in an entity of government (state or local) or agency outside government whose head is responsible for the following faces potential conflicts of interest that must be prohibited: Licensure, certification, registration, or accreditation of long-term care residential facilities; Provision of long-term care services, including Medicaid waiver programs;* Long-term care case management;* Reimbursement rate setting for long-term care services; Adult protective services;* Medicaid eligibility determination; Preadmission screening for long-term care residential placements; Decisions regarding admission of elderly individuals to residential facilities (Harris-Wehling, Feasley & Estes, 1995; Recommendation 4.1, pg 124); Guardianship services; Management or ownership of a long-term care facility.</p> <p>*Conflict of interest may be managed rather than prohibited.</p>

Source	Older Americans Act	NASOP Proposed Regulations for the Long-Term Care Ombudsman Program ⁱ	Rethinking and Retooling for the Future: Recommendations ⁱⁱ
		<p>entities shall not be located within or subject to the supervision and control of any State agency or official that also directly supervises the licensing and certification of long-term care facilities, owns or operates such facilities, or provides long-term care services.</p> <p>(b) Where the State agency or area agency on aging contracts with another agency to operate the LTCOP, the State or area agency staff person or persons who oversee the contract, shall be free of conflict of interest.</p>	
LTCO	<p>(3) ensure that the Ombudsman—</p> <p>(A) does not have a direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service;</p> <p>(B) does not have an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility or a long-term care service;</p> <p>(C) is not employed by, or participating in the management of, a long-term care facility; and</p> <p>(D) does not receive, or have the right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility;</p>	<p>(c) The Ombudsman, representative, or administrative staff of the Office of the State LTC Ombudsman, and members of their immediate families:</p> <p>(1) Shall not have direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care services;</p> <p>(2) Shall not have an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility or a long-term care service. Ownership of shares in a mutual fund or other publicly traded pooled investment fund whose assets may include publicly traded securities of long-term care facilities or service organizations shall not generally constitute a conflict of interest, unless the investments of such fund are limited to such facilities and/or service organizations, or such</p>	

Source	Older Americans Act	NASOP Proposed Regulations for the Long-Term Care Ombudsman Program ⁱ	Rethinking and Retooling for the Future: Recommendations ⁱⁱ
		<p>investments normally form a large percentage of such fund;</p> <p>(3) Shall not be employed by, or participating in the management of, a long-term care facility;</p> <p>(4) Shall not receive, or have the right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility;</p> <p>(5) Shall not provide ombudsman services to residents of a facility or another facility within the corporation if the individual has been an employee of that long-term care facility or corporation within the previous year;</p> <p>(6) Shall not provide ombudsman services to residents of a facility which is a member of an organization of long-term care providers if the individual has been an employee of such organization within the previous year; and</p> <p>(7) Shall not provide ombudsman services to residents of a facility in which the individual has an immediate family member residing.</p> <p>(d) The Ombudsman, representatives, administrative staff of the Office of the State LTC Ombudsman, or members of their immediate family:</p> <p>(1) Shall not stand to gain financially through an action or potential action of the ombudsman, including but not</p>	

Source	Older Americans Act	NASOP Proposed Regulations for the Long-Term Care Ombudsman Program ⁱ	Rethinking and Retooling for the Future: Recommendations ⁱⁱ
		<p>limited to selling services or products to residents or to long-term care facilities;</p> <p>(2) Shall not serve as a resident's agent, medical decision-maker or surrogate; the sole witness for Do Not Resuscitate (DNR) orders or other medical directives; or as a member of a facility's ethics committee which makes medical decisions for residents without the capacity to evidence their preference. This does not prohibit an individual from serving as surrogate decision maker for a resident where the relationship originated outside of the role as ombudsman (for example, a family member) and the individual does not provide ombudsman services to that resident or in that resident's facility.</p> <p>(3) Shall not be directly supervised by or provide services on behalf of a program with conflicting responsibility. Conflicting responsibility includes, but is not limited to, an agency which directly administers or supervises the administration of the licensing and certification of long-term care facilities; controls access to a facility (e.g., pre-admission screener); adult protective services programs or program units which develop and carry out care plans for, provide involuntary services to, are authorized to take temporary custody of, or serve as guardians, conservators or legal representatives for any clients</p>	

Source	Older Americans Act	NASOP Proposed Regulations for the Long-Term Care Ombudsman Program ⁱ	Rethinking and Retooling for the Future: Recommendations ⁱⁱ
Mechanisms to Identify and Remove Conflicts	(4) establish, and specify in writing, mechanisms to identify and remove conflicts of interest referred to in paragraphs (1) and (2), and to identify and eliminate the relationships described in subparagraphs (A) through (D) of paragraph (3), including such mechanisms as-- (A) the methods by which the State agency will examine individuals, and immediate family members, to identify the conflicts; and (B) the actions that the State agency will require the individuals and such family members to take to remove such conflicts.	(e) Remediating conflict of interest (1) All individuals responsible for any aspect of the LTCOP have a duty to notify the Ombudsman of any actual or potential conflict of interest of which they have knowledge. (2) Upon report of a possible conflict of interest, the Ombudsman shall determine whether an actual or potential conflict exists and whether appropriate actions have been taken or planned to sufficiently remedy the conflict. A conflict can be sufficiently removed only where the existence of the conflict does not interfere with any duties of the LTCOP and where the conflict is not likely to alter the perception of the Ombudsman, representative, or local ombudsman entity as an independent advocate for residents.	1.2) States must identify and propose remedies to conflicts of interest and report to the Administration on Aging. The AoA Office of Long-Term Care Ombudsman Programs should review, for the purpose of approval or disapproval, states' proposed remedies to conflicts of interest. 1.3) In collaboration with stakeholders, AoA's Office of Long-Term Care Ombudsman Programs must identify conflicts that must be eliminated.

ⁱ Proposed Regulations for the Long-Term Care Ombudsman Program. the National Association of State Long-Term Care Ombudsman Programs. August 2008. <http://nasop.org/papers.htm>

ⁱⁱ Executive Summary. The Long-Term Care Ombudsman Program: Rethinking and Retooling for the Future. NASOP Retreat. Proceedings and Recommendations. April 2003. pp. 18 – 19. <http://nasop.org/papers/Bader.pdf>



NOV 28 1997

Washington, D.C. 20201

Heather L. Adams
Assistant Attorney General
State of Iowa Department of Justice
Hoover Building
Des Moines, Iowa 50319

Dear Ms. Adams:

This is in response to guidance you requested from Mr. Larry Brewster, Regional Administrator, Administration on Aging, Region VII, concerning issues related to a potential conflict of interest involving the Office of the State Long-Term Care Ombudsman. Since these issues involve policy which could impact on ombudsman programs in other states, Mr. Brewster referred your letter to me for a response. I apologize for the delay in responding.

Your request indicated that a new Iowa law, Iowa Code chapter 231C, requires the Department of Elder Affairs to certify and monitor assisted living programs. The State Long Term Care Ombudsman is located within that Department.

You question whether this placement may conflict with two provisions of the Older Americans Act (OAA), at Sections 712(a)(4) and 712(f)(3)(A). Under Section 712(a)(4), a State may not operate the Long Term Care Ombudsman Office through a contract or other arrangement with an agency that is responsible for licensing or certifying long term care services in the State. Section 712(f)(3)(A) requires that a State must ensure that the Ombudsman does not have direct involvement in the licensing or certification of a long term care facility or of a provider of a long term care service.

In response, I must inform you that assisted living programs of the kind you describe are considered long-term care facilities under Section 102(34)(d) of the OAA. The conflict-of-interest provision at Section 712(f)(1) pertaining to the designation of the Ombudsman is also relevant to this situation.

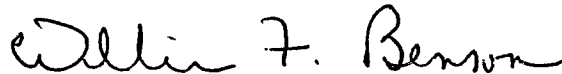
While these various provisions of the OAA do not, in and of themselves, preclude the placement of the Long Term Care Ombudsman within the Department of Elder Affairs, it is the position of the Administration on Aging that, in those situations where the State agency on aging has responsibilities for both directly administering the State Long Term Care Ombudsman Program and licensing and certification of long term care facilities, special care must be taken and great consideration given to

assure the protection of the Ombudsman Program on every point intended by Congress. Thus, if the Department of Elder Affairs continues to operate the Ombudsman Program, the Department must have policies which clearly and explicitly provide for the prevention of conflict-of-interest and which assure the independence of the program and its protection from conflicts and potential conflicts-of-interest.

Although the Department of Elder Affairs can, with adequate safeguards, continue to operate the Ombudsman Program, you should be advised that a number of states, when faced with the situation you describe in Iowa, have made the decision to have another entity administer the Ombudsman program. These states have thus resolved this difficult conflict of interest issue by completely separating the Ombudsman program from the State agency on aging. I am attaching a list of these states in case you wish to contact them for information about their program.

I hope this provides sufficient guidance to resolve the matter before you. If I can be of further assistance, please contact me at 202-401-4634, or call Brian Lutz (202-690-7525) or Sue Wheaton (202-619-7585) of our Elder Rights unit. Any of us would be pleased to discuss these issues with you in more detail.

Sincerely,



William F. Benson
Acting Principal Deputy
Assistant Secretary for Aging

Enclosure

cc: Betty L. Grandquist
Larry Brewster



Washington, D.C. 20201

APR 3 1992

TO: Thomas L. Hooker, MSW
Regional Program Director on Aging
AoA Region I

FROM: Acting Associate Commissioner
Office of State and Community Programs

SUBJECT: Organizational Placement of Vermont Ombudsman Program

This is in response to your November 22, 1991 memorandum to Frederick Luhmann regarding policy issues raised by the 1989 restructuring within Vermont State government which resulted in the State's Long-Term Care Ombudsman Program and the long-term care facility licensing and certification function both being located within the State Agency on Aging. We appreciate your alerting us to this situation and in so doing providing us with the opportunity to review policy on the crucial issues of ombudsman organizational location and conflict of interest.

The Statutory Requirements

Section 307(a) (12) (A) of the Older Americans Act requires the State Agency on Aging to:

establish and operate, either directly or by contract or other arrangement with any public agency or other appropriate private nonprofit organization, other than an agency or organization which is responsible for licensing or certifying long-term care services in the State or which is an association (or an affiliate of such an association) of long-term care facilities (including any other residential facility for older individuals), an Office of the State Long-Term Care Ombudsman....

The statutory language regarding organizational location may be tightened in upcoming amendments to the Act. The language from the Senate bill is attached. (See Attachment A)

Section 307 (a) (12) (F) of the Act states:

The State agency will (i) ensure that no individual involved in the designation of the long-term care ombudsman...or the designation of the head of any subdivision of the Office is subject to a conflict of interest. (emphasis added)

This same conflict of interest language appears in both the House and Senate versions of the forthcoming amendments to the Act and is thus virtually certain to be retained in the final Act.

As you note in your memorandum, the preamble to the current regulations implementing the Older Americans Act states that due to the structure of Section 307 (a)(12)(A) the statutory constraint on operation of the ombudsman program by an agency which also has licensing and certification responsibilities does not extend to the State Agency on Aging. However, it appears that oversight of the Ombudsman Program as well as the licensing and certification of nursing facilities would create a conflict of interest. The Ombudsman Program is responsible for:

- investigating complaints which are sometimes made against the licensing agency; and
- recommending changes in policies and procedures which frequently involve the licensing agency.

It is logical to assume that an individual directly responsible for the licensing and certification of a facility would be reluctant to entertain complaints against the performance of that individual's agency or forward to a higher or outside authority recommendations for changes in the agency's own policies and procedures.

Application of Federal Statutory Requirements to the Vermont Case

Vermont has taken steps to insulate the Ombudsman Office from conflict of interest through enacting legislation which establishes a special ombudsman oversight committee and provides for the committee's assessment of the ombudsman's capacity to perform free of conflict of interest. However, these measures do not assure that "no individual involved in the designation of the ombudsman...or the designation of the head of any subdivision of the Office is subject to a conflict of interest."

The director of the agency which designates the Ombudsman and oversees the Ombudsman Program is also the director of the agency which licenses and certifies facilities. Further, under the Vermont law, this same individual both establishes the oversight committee and "solicits its assessment of the State ombudsman's capacity to perform" free of conflict of interest. This arrangement fails to guarantee that both the Committee and the Ombudsman are completely removed from potential conflict of interest.

For these reasons, I am requesting that you inform the Vermont Commissioner of the Department of Rehabilitation and Aging that the present arrangement does not comply with the conflict of interest requirement in Section 307(a)(12)(F) of the Older Americans Act. The State should be asked to submit a plan which provides a clear and full explanation of the manner in which the State's present organizational arrangement can be revised to comply with the requirements of section 307(a)(12)(F) concerning the avoidance of conflict of interest.

If the State is unable to adequately explain how the present organizational arrangement will be modified to comply with the requirements of the Older Americans Act, the State should be advised to take appropriate reorganizational measures to come into compliance by completely separating the director of the licensing agency from any role in designating and supervising the State Ombudsman or overseeing any part of the statewide Ombudsman Program.

Background Information

One of the objectives of the Ombudsman Demonstration Projects, which were funded from 1972 - 1975, was to determine where the ombudsman program should be placed within a State to assure both maximum effectiveness and freedom from conflict of interest. The directors of the projects recommended that the program should be in a unit of the Executive Branch of the State government. They recognized the importance of the Ombudsman having access to decision-makers, a factor you mentioned as an advantage in the Vermont arrangement, but they stressed that the program should be completely independent of the State regulatory and service agencies. They added that placement within the State Agency on Aging should be encouraged.

Experience in many States has demonstrated that this recommendation and others made by the directors of those early projects provide a good blueprint for the operation of a sound ombudsman program. These recommendations and the section of the demonstrations report concerning organizational location are attached. (Attachment B) They provide important insights for anyone interested in how to structure and operate an effective long-term care ombudsman program.

Conclusion

As mentioned in the Vermont Department of Rehabilitation and Aging Issue Paper enclosed with your memorandum, the Missouri Division of Aging also licenses and certifies long-term care facilities as well as houses the Ombudsman office. I will be raising the issues in this memorandum with the Regional Program Director, AoA Region VII regarding the Missouri situation. It is worth mentioning that in a related situation, the District of

Columbia Office on Aging determined several years ago that it should contract its ombudsman program to an independent organization because the Office on Aging owned and operated a nursing home.

I do appreciate your bringing this important matter to our attention. I trust that Vermont will be able to make the necessary adjustments to bring its Ombudsman Program into full compliance with the letter and spirit of the Older Americans Act.


John F. McCarthy

Attachments

Nov. 8, 1996

Lea Nordlicht Shedd, Esq.
Judith Hoberman, Esq.
Shedd and Hoberman, LLG
2508 Whitney Avenue, Suite B
Hamden, CT 06518

Dear Ms. Shedd and Ms. Hoberman:

Thank you for your November 1, 1996 letter requesting information and my opinions regarding several issues related to the Long-Term Care Ombudsman Program (LTCOP). I am pleased to share with you information that I have available and my views regarding the questions that you raise.

As you know, I have a long and diverse history with the LTCOP. As a former state ombudsman, congressional staff person involved in writing the ombudsman provisions in the Older Americans Act (OAA) for both the 1987 and 1992 amendments to the OAA, and currently the federal official at the Administration on Aging charged with oversight of the national Long Term Care Ombudsman Program, I hope that I am able to convey in response to your questions my knowledge of both the intent and practical implication of certain provisions governing the LTCOP.

I will reiterate (paraphrasing in several instances) and respond to each of your questions in the order that you have posed them.

- 1.(a) What is the intention of the OAA requirements that the State Ombudsman determine who is capable to serve as representatives of the program and designate such representatives?

The intention is that a state ombudsman program be a single, cohesive, statewide program and that all representatives and entities which sponsor them meet criteria established by the State Ombudsman and be designated to participate in the statewide program by the State Ombudsman. By establishing the Office of the Ombudsman, the OAA makes the State Ombudsman directly responsible for all program representatives' actions relative to the program. These provisions reflect the concern raised from around the country that in some cases the State Ombudsman, and therefore the State Unit on Aging, were providing inadequate direction over the actions and

performance of substate or local ombudsman offices. Given the high level of statewide organization among long-term care facility trade associations and the impact on residents' lives of numerous state level agencies and organizations (survey and certification, health care providers licensure boards, Medicaid agencies, etc.) in order to secure the ability of ombudsmen to effectively represent the interests of facility residents, it is important that the Office of the State Ombudsman under the direction of the State Ombudsman have control over who serves as a representative of the Office, either through supervision or through contractual or other formal arrangements with designated entities.

- (b) What criteria must the Ombudsman consider in determining whether or not to designate local ombudsman entities and representatives?

The criteria are outlined in Section 712(a)(5)(C) of the OAA: Entities and individuals eligible to be designated to participate in the program shall have demonstrated capability to carry out the responsibilities of the Office; be free of conflicts of interest; in the case of the entities, be public or non-profit private entities; and meet such additional requirements as the Ombudsman shall specify. "Entity" means the structure which houses and operates the local program. Such an entity can only operate as an ombudsman program if it is designated as such by the State Ombudsman through a contract or other designation process or mechanism.

- (c) What criteria must the Ombudsman consider in determining whether or not to designate local ombudsman entities and representatives (i.e., to establish a state substructure)?

The Ombudsman must ensure that the representatives and entities are capable of carrying out all duties of local ombudsmen outlined in Section 712(a)(5)(A) of the OAA and are able to do so without conflicts of interest. Some of the specific situations which would constitute a conflict-of-interest for the Ombudsman are outlined in Section 712(f)(3). These same conflict-of-interest situations apply to representatives which the Ombudsman designates to participate in the statewide program.

Furthermore, because ombudsmen must "identify, investigate and resolve complaints made by or on behalf of residents that relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents" (712[a][5][B][iii]), an ombudsman would

certainly be subject to charges of conflict-of-interest if such ombudsman were employed in an agency or entity about which a long-term care facility resident or someone acting on such resident's behalf had complained.

- (d) Under the OAA, is the Ombudsman responsible for the actions of representatives of the Office? Does the OAA permit any other individual, entity, or agency to be responsible for the actions of representatives of the Office?

Under the OAA, the Ombudsman is responsible for the actions of representatives of the Office, either through supervision or through the designation of programs which meet the criteria of the Act. While other individuals or agencies may employ individuals who serve as representatives of the ombudsman program, only the Ombudsman may designate such individuals as an ombudsman representative.

- (e) Does the language and intent of the OAA contemplate the Ombudsman being the direct supervisor of such representatives, or may others perform that role? If others may perform that role, under what circumstances?

The language and intent of the OAA is that the State Ombudsman exercise responsibility for the actions of representatives of the Ombudsman office, either through supervision or through the designation of programs which meet the criteria of the Act. In order to be designated as a representative of the Ombudsman, an ombudsman representative would be required to meet criteria established by the Ombudsman and to carry out her/his duties in accord with policies and procedures established by the Ombudsman, and consistent with OAA provisions governing the LTCOP.

- (f) To whom are such representatives accountable for their actions?

Representatives of the Office are accountable in the performance of their activities on behalf of the Office of the State Long-Term Care Ombudsman to the State Ombudsman, who has direct responsibility for the Office of the State Long-Term Care Ombudsman, either as a result of supervision or through the designation of substate or local programs which meet the criteria of the Act.

- (g) The 1992 amendments to the OAA direct more attention to the role and responsibility of local programs and to the

designation process. What was the underlying intent of this new language?

It is instructive to look at language from the U.S. Senate Report 102-151, the report of the Senate Committee on Labor and Human Resources to report out S. 243, the Senate's OAA reauthorization language (dated September 13, 1991). This is particularly significant because of the fact that most of the Senate language regarding the LTCOP prevailed in negotiations with the House and was retained in the final bill enacted into law. On page 105 of the report the Committee states:

"In most States, day-to-day complaint investigation and resolution activities are carried out by local or substate offices. The Committee bill recognizes the significance of that level of ombudsman service and strengthens the relationship between State and substate or regional ombudsman activities by clarifying the process for designating such entities. The Committee believes that the State Agency and the State Ombudsman must have the ability to select the entities most suitable and likely to effectively resolve the problems of long-term care residents as the substate or regional representatives of the program."

The legislation recognizes the reality that most complaint investigation and related activities are not done by the State Ombudsman, rather such activities are typically conducted by their representatives especially at the regional and substate level. Thus the intent was to more effectively link the two levels together so that they could in fact operate as a cohesive and effective "Office."

2. If regulatory agency staff who are not part of the Ombudsman office were in any way involved in supervising or otherwise directing Ombudsman representatives, would the OAA's confidentiality requirements be abrogated?

The OAA requires that files and records maintained by the Ombudsman office "may be disclosed only at the discretion of the Ombudsman (or the person designated by the Ombudsman to disclose the files and records)" and prohibits "the disclosure of the identity of any complainant or resident with respect to whom the Office maintains such files or records" unless certain specified conditions are met. (Section 712[d][2]). It may be helpful to consider this response in conjunction with my response to your next question.

3(a). If regulatory agency staff who are not part of the Ombudsman office are involved in supervising or otherwise directing ombudsman representatives, would a conflict of interest exist under the OAA?

This of course depends upon what the "regulatory agency staff" are regulating. If the subject matter over which such staff had regulatory responsibility was the subject of or likely to be the subject of a complaint to be investigated by the State Ombudsman or his or her representatives, then this clearly raises conflict-of-interest concerns.

From my personal experience and from discussions about this topic over the years, as well as substantial involvement in the drafting of the OAA's provisions related to conflicts-of-interest, it is clear to me that certain situations easily raise serious concerns about an ombudsman's ability to operate independently and to perform their responsibilities free of actual or perceived conflicts of interest. Examples of such that seem obvious on the surface would be:

- ! the ombudsman supervisor has a direct or indirect role in licensing or certifying long term care facilities that may be or are the subject of a complaint brought to the ombudsman or are part of multi-facility entity of which one of its facilities is the subject of a complaint, or, as a variation on this, in similar situations where the supervisor is subject to direction from an official involved in licensing or certifying facilities;
- ! the local ombudsman program is housed in an office or agency which administers programs or implements or enforces policies about which residents and their representatives file complaints -- such as eligibility for nursing home stays or other Medicaid coverage determinations directly pertaining to long-term care facility residents; and/or
- ! the complaint concerns or involves questions about the performance of regulators themselves, such as failure to fully investigate complaints concerning investigation of complaints by a survey and certification agency.

I can say from my personal experience as a State Ombudsman in state government, complaints about the performance of other state officials are particularly sensitive and

difficult. It is important in such situations that there be no perception that an ombudsman is protecting fellow public officials by less than full pursuit of the matter until its appropriate conclusion.

- (b) Under the OAA, what is the responsibility of representatives of the Ombudsman office to facilitate public comment on laws, regulations and governmental actions affecting residents?

In 1992, the OAA was amended to specify direct duties of the local ombudsmen consistent with the duties of the State Ombudsman, as local ombudsmen are representatives of the Office of the Ombudsman. In regard to public policy matters, the representatives of the Office are expected to provide the foundation to support statewide efforts to represent residents' interests in governmental policy matters.

Facilitating public comment on laws, regulations and governmental actions affecting residents is an important duty of ombudsman representatives which is specifically required in Section 712(a)(5)(B) of the OAA.

- (c) Is it the intent of the OAA to ensure that representatives of the Ombudsman office openly address policy matters which have an impact on residents of nursing facilities.

As stated above, this duty of ombudsman representatives is specified in Section 712(a)(5)(B)(v)(I) of the OAA and reflects the importance of representatives of the office working in concert with statewide efforts as part of the State Office of the Ombudsman and State Long-Term Care Ombudsman Program.

- (d) Would the public perception of a conflict of interest between the regulatory agency and the Ombudsman, and/or the Ombudsman's representatives, be contrary to the OAA?

I believe it would. Please note my response to question 3(a) and my closing comments at the end of this letter. Those who call on ombudsmen for assistance must perceive that the ombudsman is an independent, objective party who is able to freely speak and act on behalf of the interests of residents; and the ombudsman must, in fact, be able to freely advocate for residents' interests.

Much of what you are seeking my comments about relates to the overall theme of the ability of ombudsmen to act independently on behalf of their clients. Issues such as conflicts-of-interest and confidentiality seem to be components of the overall issue of independent action in performance of their responsibilities. I would like to close with my general thoughts on this topic and offer additional insight as to why much of the OAA language governing the LTCOP has increasingly emphasized independent action by ombudsmen. As an example of this from the 1992 Amendments, note the modification to sec. 712(a)(3)(G)(ii) that now states that Ombudsman (or through representatives) shall "recommend any changes in such laws, regulations, policies, and actions as the Office [headed by the State Ombudsman] determines to be appropriate." As another example, note sec.712(h)(3)(A) which reads, in part that "(The State Agency shall require the Office to) provide such information as the Office determines to be necessary to public and private agencies, legislators, and other persons regarding..."

With very few exceptions long-term care ombudsmen throughout the country do not have the legal authority to compel action, such as through law or regulation or condition of participation or licensure, or to sanction for failure to act, such as through the use of civil monetary penalties, suspension or revocation of licenses or suspension of monetary payments. Typically, those authorities rest with regulatory agencies. The ombudsman's ability to compel action is to a very large degree dependent upon the strength of their perceived integrity and the ability to truly act upon the wishes of their clients. In other words, to the extent the ombudsman is not perceived as being truly independent to act upon behalf of the complainant, his/hers ability to fully and vigorously represent the client is limited. Anything that diminishes the actual or perceived independence of the program is likely to diminish the ombudsman's ability to compel any other individual or entity, whether it be a nursing home administrator, a regulatory body or others, to take appropriate action in response to the complaint carried by the ombudsman. In truth, ombudsmen have very little in their tool box, so to speak, besides their word, the knowledge, their tenacity, and their freedom to act. If those attributes are not impaired, then ombudsmen do not need many more tools.

Their ability to operate as an office is key to this. The ombudsman responsibilities are to be executed as part of a statewide program in order to ensure that residents' individual experiences are addressed, both on an individual and a systemic level.

I appreciate your raising these issues with me and hope that I have adequately responded to your questions. Please let me know if I can be of further assistance.

Sincerely,

(S)

William F. Benson
Deputy Assistant Secretary for Aging

April 4, 1997

The Honorable Joyce A. Thomas
Commissioner
Connecticut Department of Social Services
25 Sigourney Street
Hartford, CT 06106-5033

Dear Commissioner Thomas:

I am writing to you as Connecticut's Commissioner of Social Services because of your responsibility for Older Americans Act (OAA) supported programs in the Department of Social Services.

As you know, over the past several months I have received correspondence written to me expressing concerns related to the Connecticut State Long-Term Care Ombudsman Program. And, as you also know, I directed both my Deputy Assistant Secretary, Bill Benson, and our AoA Regional Administrator, Tom Hooker, to look into the concerns expressed and to report back to me with their findings and conclusions.

I am about to leave my position as Acting Assistant Secretary for Aging and believe that it is important that I respond to those who have written to me in my capacity here at AoA. My intent is do that through this letter. I am writing to you not only because of the position you hold but also because of the interest you have directly expressed regarding the issues raised about the Ombudsman Program and because of the time and courtesy you have give to both Mr. Benson and Mr. Hooker in their visits with you.

There are several matters that I wish to address in this letter. I anticipate additional comments will be provided to you when the report from the regional office is completed.

The OAA provides considerable detail regarding the operation of statewide long-term care ombudsman programs (LTCOP). These provisions have been enacted into statute and refined over several OAA reauthorizations and reflect Congressional responses to issues raised by ombudsmen, the aging network and others with an interest in the LTCOP. In sum, the OAA anticipates a LTCOP in each state that is able to fully and effectively represent the needs and interests of residents of long-term care facilities, on both an individual and collective basis.

The central issue that has been raised with AoA regarding Connecticut's LTCOP and the one discussed with you and with

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others in Connecticut has been in regard to the ability of the program to fully and freely represent the interests of long-term care facility residents. A key issue within this is related to the most suitable organizational location of the LTCOP within the state. I am aware that several options have been or are being considered for the Connecticut LTCOP including maintaining it within DSS.

As you know, the program 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 interests 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.

I recognize the difficulties presented in having regional state-employed ombudsmen located in regional DSS offices and in having direct reporting relationships to others than the State Long-Term Care Ombudsman. Mr. Benson reported to me that you made it clear that the regional ombudsmen report directly to the State Ombudsman for all program and policy matters except for certain administrative matters.

I am very appreciative of your commitment to that relationship between the State and regional ombudsmen. I do note, however, that even the ability to assign ministerial duties can have programmatic implications, as has been well stated in the recent opinion of the Connecticut Attorney General.

I am also pleased by Mr. Benson's report that you so strongly expressed your commitment to an LTCOP that is able to freely communicate about issues and problems of long-term care facility residents in Connecticut, as provided for in the OAA.

I trust that, based on your commitment to a strong and effective LTCOP program, the Connecticut program will be situated where it is most able to fully carry out its mission.

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As previously indicated in this letter, I am responding to those who have communicated with my office, including members of the Connecticut legislature, through copy of this letter.

I appreciate the time and courtesy you have extended to my representatives, who have relayed to me the substance of their conversations with you. I very much hope that a constructive and lasting solution will emerge from the difficult issues you are grappling with.

Sincerely,

(S)

Robyn I. Stone
Acting Assistant Secretary for Aging

cc:

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