

THE LONG TERM CARE OMBUDSMAN PROGRAM UNIQUE CHARACTERISTICS

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PURPOSE

This paper discusses some of the unique characteristics of the Long Term Care Ombudsman Program (LTCOP) which can be a source of misunderstanding and tension when interacting with others. Throughout its history, the LTCOP has been criticized as well as praised. Critics of the program sometimes say the program does not do enough to improve care for residents. Others complain that the program exceeds its scope and is too outspoken and too demanding. Long Term Care Ombudsmen are continually defining and explaining their responsibilities to other individuals.

There are some basic reasons that misperceptions about the program occur. Being aware of these can assist ombudsmen in explaining the unique aspects of the program and in finding ways to address these differences when working with others. This paper looks at some of the core distinctions. The topics covered are reflected in the section headings:

- History,
- Adaptations of Classic Ombudsman Model,
- Distinctions Within the Aging Network,
- Distinctions in Definitions,
- Accountability, and
- a closing Summary.

HISTORY (in the beginning.....)

The Long Term Care Ombudsman Program was created to be responsive to the needs and concerns of nursing home residents. It began with five state demonstration projects in 1972 with two more added in 1973 that were funded by the U.S. Department of Health, Education and Welfare. In 1973 the responsibility for this program was transferred to the U.S. Administration on Aging. In 1975 funds were made available to all states that wanted to develop an ombudsman program. The LTCOP was included in the Older Americans Act (OAA) amendments of 1978 when all State Units on Aging were required to operate a statewide LTCOP. In subsequent amendments the scope of the Program was broadened to include residents of all long term care facilities, e.g. residential care facility, assisted living. The responsibilities of the program have also become more specific. Today, all 50 states, the District of Columbia, Puerto Rico, and Guam, operate LTCOPs.

ADAPTATION OF CLASSIC OMBUDSMAN MODEL

Since its inception, the LTCOP has been distinct from the classic model of the ombudsman.¹ The traditional purpose of the ombudsman was to be an impartial mediator who receives complaints, determines the pertinent facts, and seeks resolution. That role continues and is adhered to in many settings both public and private. Traditional Ombudsmen primarily see themselves as neutral parties, making sure that the system works as it was designed to work. As ombudsman positions have proliferated, variations on the original ombudsman model have emerged. The American Bar Association's Standards for the Establishment and Operation of Ombuds Office recognizes three types of ombudsmen: classical, organizational, and advocate.

The LTCO is an *advocate ombudsman*. The LTCO is impartial in investigation determining the facts pertinent to a case. Then the LTCO becomes an *advocate*, seeking a resolution the resident wants. In many cases, the institutional long-term care system is not working as it was designed to work, not meeting the needs that it is intended to meet and requires reform. Long term care ombudsmen represent residents and resident concerns in seeking resolution for both individual issues and systemic issues.

This program is charged with a wide range of responsibilities in the Older Americans Act including:

- resolving complaints on behalf of *individual* residents, including directly advocating for residents;
- working with citizen organizations, resident and family councils;
- representing the interests of residents before governmental agencies;
- seeking administrative, legal, and other remedies to protect residents; and
- initiating and participating in systems advocacy such as monitoring, commenting on, and seeking necessary changes in laws, policies, and regulations affecting residents.

While some of the confidentiality issues, fact finding activities, and even some of the advocacy components of the LTCOP are similar to those of other ombudsmen programs, the LTCOP has a few unique elements.

Unique Elements of the LTCOP

- **Jurisdiction:** The jurisdiction of the LTCOP is the *interest* of the resident.
- **Resolution standard:** At the end of the investigation and resolution process, the key question for a LTCO is, "Has this complaint/issue been resolved to the satisfaction of the resident?"
- **Works on Issues Apart from Specific Complaint:** The LTCOP has a mandate to advocate on behalf of the needs of a resident, or residents, separate from an individual complaint. Therefore the LTCOP is free to be involved in broader long-term care issues than only those originating from a complaint. The LTCOP is expected to be involved in public policy work affecting residents in general.

¹ *Ombudsman* is a Swedish term. In 1809 the office of *riksdagens justitieombudsman* was created to act as an agent of justice, that is, to see after the interests of justice in affairs between the government and its citizens. Excerpted from *The American Heritage® Dictionary of the English Language, Third Edition* © 1996 by Houghton Mifflin Company.

- Promotes Development of Groups: The LTCOP promotes the development of citizen organizations to participate in the program and provides technical support for the development of resident and family councils to protect the well-being and rights of residents.

DISTINCTIONS WITHIN THE AGING NETWORK

Within the network of services provided under the Older Americans Act, the LTCOP has some mandates that set it apart from other services. Much of the structure of the program and operational guidelines are specified in the federal law. The net effect of these mandates can create a sense of competition with other aging programs or of misunderstanding. These provisions also mean that the LTCOP sometimes does not easily fit within a typical bureaucratic agency or structure.² One result of these mandated distinctions is that ombudsmen might hear comments such as, *Why do you always want special privileges? What makes you different? Why do you need an office with a door when everyone else has a cubicle? The LTCOP isn't a team player. The LTCOP always wants to be an exception.*

Some of the distinctions that might prompt such comments are listed and briefly discussed. The LTCOP is:

- Established as a separate program with the Office of the LTCO, headed by a State Long Term Care Ombudsman (SLTCO), responsible for the statewide program. The SLTCO may delegate some responsibilities of the Office to other individuals only after assuring that these individuals are free of conflict of interest, have the necessary training, and meet any other qualifications established by the Office. Likewise, the SLTCO may choose to designate local entities to carry out the activities of the program. Designation is contingent upon compliance with conflict of interest provisions and other criteria.
- Able to pursue administrative, legal, and other appropriate remedies on behalf of residents. The actions a SLTCO can take on behalf of residents are broad. Local ombudsmen, by delegated authority, can also act on behalf of residents. These activities range from administrative remedies such as representing and/or assisting a resident with an administrative hearing to legal actions, such as initiating a lawsuit or seeking injunctive relief for residents. The Institute of Medicine's study of the LTCOP has the following comment about the program's mandate to speak out about government laws, regulations, policies and actions when justified by the circumstances.

Taking such steps, however, is antithetical to the hierarchical rules of government. It is not surprising therefore, that conflicts occur. The imposition of a state's routine chain-of-command rules on the ombudsman can significantly constrain his or her independence, although no person in such situations may intentionally act to interfere with the work of the ombudsman.³

- Subject to specific conflict of interest provisions. The organizational placement of the LTCOP, both state and local, and the individuals working with the program must comply with conflict of interest provisions. This includes individuals who make decisions about the

² "Conflict of Interest," Chapter 7. *Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act.* Institute of Medicine. 1995.

³ "Summary," p. 8. *Ibid.*

selection of ombudsmen and program entities. These requirements underscore the importance of maximizing the ability of the ombudsman to adequately and freely represent residents on all levels — individual to system. In a specific facility, an ombudsman can resolve an individual’s problem or achieve a change in the facility’s practice affecting many residents. There are also times when ombudsmen need to speak honestly and publicly about conditions experienced by residents and about the impact of actions, policies, and laws, on residents.

- Responsible for upholding strict confidentiality provisions. Although confidentiality is important in the human services field, the LTCOP has specific and strict confidentiality provisions stipulated in the Older Americans Act. The ombudsman program is not expected to share identifying information with other state or provider agencies about residents or complainants without the resident’s consent. This provision can become a source of misunderstanding with other agencies or even other programs co-located with the ombudsman program.
- Protected from willful interference while fulfilling the duties of the program. States are directed to create provisions for sanctions for willful interference with the work of the ombudsman and also for retaliation or reprisals against anyone who files a complaint with or cooperates with the ombudsman.
- Has legal counsel that is available and free of conflict of interest. The State is required to ensure that the LTCOP has adequate legal counsel for advice, consultation, and assistance to the program and representation of ombudsmen. The stipulation that legal counsel for the program be free of conflict of interest frequently creates another aberration from standard practice in the agency/organizational “host” of the program.

Basically, the LTCOP stands out because it delivers services to individual residents *and* it calls upon others to fulfill their responsibilities to residents *and* it is a public voice advocating for improvements needed by residents. Most other OAA programs deliver services. They may also work for legislative and regulatory changes on behalf of their clients. It is rare that other programs have the complete range of responsibilities — individual to system changes on behalf of residents — that the LTCOP does.

DISTINCTIONS IN DEFINITIONS

There are a number of words in the OAA describing the LTCOP’s responsibilities that other programs also use to discuss their responsibilities. When these words are used in the LTCOP they have different connotations or stipulations than when used by most other programs. Just as the term *ombudsman* has been adapted in the OAA to include a resident advocate function, these other words have some distinct meanings. These distinctions can lead to misunderstanding. Ombudsmen may find themselves in a disagreement with someone from another program or agency because each person is attaching a different meaning to the same word. A few primary examples follow.

- **Investigation**

Investigation is listed as a LTCOP function in the provisions of the OAA. Many other agencies also conduct investigations and employ investigators. Everyone agrees that the purpose of an investigation is to determine facts. Although many agencies use the term

investigate to describe what they do, the LTCOP typically uses this term with a different connotation than do others. There are two primary distinctions.

- **Purpose of the Investigation**

The purpose of an ombudsman investigation is to determine whether the complaint is valid and to gather the information necessary *to resolve* it. A key aspect of an ombudsman investigation is to determine what the real issue is. In seeking information about the presenting issue an ombudsman might discover that a different issue must be addressed in order to resolve the complaint. An example is a complaint stating that there aren't enough activities. The problem might be: a lack of activities, the time the activities are scheduled, a lack of information and assistance for the resident who wants to participate, or a lack of activities individualized for the resident. During the investigation, the ombudsman discovers which of the possible problems is the one that must be resolved—the real issue.

The primary purpose of an investigation by other agencies is gathering facts to determine whether there has been a violation of a law, standards, or regulations. The outcome of the investigation leads to a decision regarding any official action that needs to be taken. In contrast to the primary outcome sought by ombudsmen, the primary purpose of other agencies is determining whether enforcement action is needed.

- **Standards of Evidence**

There are three legal standards of evidence used by the courts: preponderance of the evidence, clear and convincing, and beyond a reasonable doubt. Agencies with investigatory responsibility must meet specific evidentiary standards to prove intent or harm before they can act. State survey agencies must meet only the preponderance of evidence standard. Other agencies, such as the Medicaid Fraud and Abuse Control Unit, police departments, or county prosecutors, use different and possibly, higher evidentiary standards. Unlike other agencies which conduct investigations, long term care ombudsmen are not bound by legal standards of evidence.

The LTCO gathers enough evidence to understand what the real issue/problem is in order to resolve it as the resident desires. Reflecting their federal mandate, ombudsmen work *on behalf of residents*. Thus, the LTCO advocates on behalf of the resident even if there has been no violation of a standard or regulation.

Other agencies may discount the quality or thoroughness of the LTCOP investigation because it does not follow their agency's protocols. The root of this perception is a lack of understanding of the *purpose* of the ombudsman's investigation.

- **Confidentiality**

The OAA stipulates strict parameters for protecting the confidentiality of the *identity* of complainants. There are also very specific provisions for the release of LTCOP information. Virtually all human services agencies have confidentiality provisions. Typically there is some

mutual sharing of client information among programs or agencies serving the same population, particularly among programs within the same agency.

The LTCOP often seeks information from other programs or departments about facilities or follow-up on complaints. Ombudsmen are criticized for not freely sharing information in return. The reason is that ombudsmen cannot reveal identifying information without consent.

Several states have adult abuse and neglect laws that list LTCO as mandated reporters. Such laws conflict with the federal OAA confidentiality provisions. In a letter to the Center for Social Gerontology clarifying the intent of the LTCOP confidentiality provisions, two of the authors of these provisions made the following statement.

Senator Glenn, Congressman Bonker:

Section 307(a)(12)(1) of the OAA clearly prohibits an ombudsman from disclosing the identities of nursing home residents and complainants. It would also violate the spirit of the law to provide other information that would serve to help identify a resident or complainant without officially naming them. The federal law, therefore, takes precedence over a state law that is in conflict with it.

Moreover, beyond the particular identities of individuals, Section 307(a)(12)(E) limits disclosure of information in the ombudsman program files. It gives to the ombudsman the sole discretion over whether to reveal any information in program files; thus state law cannot force disclosure of such information. The law does not, however, preclude ombudsmen from encouraging residents or complainants who allege abuse, or are the subject of an abuse allegation, to consent to disclosure of their identities.⁴

Adhering to these confidentiality provisions can be misconstrued. Others may think the LTCOP believes it is better than other programs because others in the agency cannot access the ombudsman files. Others may feel that the program is trying to circumvent supervision by not opening its files to administrative supervisors. Hard feelings can result if others think the program is unfairly withholding information. In reality, the LTCOP does have confidentiality provisions that are more stringent than those of many other programs.

- **Conflict of Interest**

Many agencies, particularly governmental agencies, have conflict of interest provisions. Some also have ethical guidelines that extend to post-employment services for a period of time. In its early days, the conflict of interest provisions of the LTCOP were typically defined as having a financial or spousal conflict of interest. These concepts are commonly accepted among other programs and agencies. With the growth in long term care services and the maturing of the LTCOP, *conflict of interest* has encompassed some additional

⁴ “Best Practice NOTES.” The Center for Social Gerontology, Inc. 2307 Shelby Ave., Ann Arbor, MI 48103 (734)665-1126. tcsg@tcsg.org. Vol. 2, NO. 4. Nov. 1988.

dimensions. These additional dimensions are the source of misunderstanding and tension between the LTCOP and other programs or agencies.

The Institute of Medicine's study of the program devoted Chapter 7 to this topic.⁵ It identifies three dimensions of conflict of interest: loyalty, commitment, and control.

- *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 might also be an issue if the individual is an ombudsman in a facility which was the ombudsman's previous employer.
- *Commitment*: These are issues of time and attention. Which goals are being addressed? Who establishes the goals and work priorities of the "full-time" State Ombudsman? If local ombudsmen are part time, where is their greater commitment in terms of time and loyalty? This issue is very evident in states where the local ombudsmen are employed by another agency without direct participation from the SLTCO. The commitment of the local ombudsmen to their direct employer may be greater than their commitment to fulfilling the responsibilities of the LTCOP and working with the SLTCO.

The LTCO, whether state or local, is required to be a voice for residents. This mandate takes precedence over being a voice for the positions of the employer. As ombudsmen fulfill their role to be loyal to carrying the *resident's* message, their loyalty to their employer may be questioned. Thus, the commitment called for in the LTCOP is not the typical view of commitment expected by most employers.

- *Control*: These are issues of independence. Do other interests, priorities, or obligations of the agency that houses the ombudsman materially interfere with the LTCOP'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?

Because conflict of interest provisions are commonplace, when the LTCOP calls for a more strict view of what constitutes such conflicts, the program is viewed as wanting to be free from accountability. Just the opposite is true. The credibility of the LTCOP rests upon fulfilling its primary responsibility: acting on behalf of residents. If the program acts without being grounded in what residents want, its credibility and effectiveness will be lost.

ACCOUNTABILITY

Over the years the LTCOP has been scrutinized and has received increasing attention and recognition for its work on behalf of residents. Many of the evaluations of the program have been prompted by LTCO themselves. Ombudsmen expect to be held accountable and are continually seeking to determine if their advocacy makes a difference for residents. They want to be effective.

- As previously mentioned the Institute of Medicine thoroughly examined the LTCOP in 1995 and issued a number of recommendations. Following that report, many states reviewed the

⁵ Institute of Medicine. op. cit.

structure and placement of the LTCOP. Several states made changes in placement and/or in policies and procedures based on those recommendations.

- Other studies have been conducted by the Office of Inspector General.⁶ The LTCOP in individual states has been assessed by various entities such as legislative auditors, independent contractors, and the U. S. General Accounting Office.

All of these reports have stated that the LTCOP provides a needed service that is not a duplication of other services.

SUMMARY

The Long Term Care Ombudsman Program is indeed unique in its purpose and scope. The uniqueness of the LTCOP is also the source of inherent misunderstanding and tension as the program carries out its mandates. Whenever the LTCOP deviates from its unique characteristics and becomes more like other programs/services, it risks losing its purpose. It risks becoming a duplicative service. The LTCOP must continually strive to clarify its unique role in the aging network in order to carry out its mandate to be a resident advocate.

⁶ *Successful Ombudsman Programs*. Department of Health and Human Services. Office of Inspector General. June 1991. OEI-02-90-02120. *Long Term Care Ombudsman Program: Overall Capacity*. Department of Health and Human Services. Office of Inspector General. March 1999. OEI-02-98-00351.

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ABOUT THE REPORT

For more information about this topic, contact the National Long Term Care Ombudsman Resource Center, National Citizens' Coalition for Nursing Home Reform, 1424 16th St., Suite 202, Washington DC 20036-2211, 202-332-2275.

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