

Role and Responsibilities of Ombudsman Programs Regarding Systems Advocacy

LOCAL OMBUDSMAN PROGRAM REPRESENTATIVES

“In addition to working on individual cases and complaints, ombudsmen must address and attempt to rectify the broader or underlying causes of problems for residents of LTC facilities. When working on the systems level, ombudsmen advocate for policy change by evaluating laws and regulations, providing education to the public and facility staff, disseminating program data, and promoting the development of citizen organizations and resident and family councils.”¹

OVERVIEW

The Older Americans Act (OAA) and State Long-Term Care Ombudsman Programs Rule outline the responsibilities of the State Ombudsman and their representatives, clearly stating that the primary role of the Long-Term Care Ombudsman Program is to serve as resident advocates.² Ombudsman programs are charged with serving as the resident advocate in response to individual complaints as well as advocating for the concerns of residents and need for change on a systems level. This reference guide will briefly define systems advocacy, review the federal mandate and support for systems advocacy work by Ombudsman programs, define several systems advocacy strategies, share examples of Ombudsmen involved in systems advocacy and provide resources for additional information.

KEY POINTS

What is Systems Advocacy?

“Advocacy” means “the act of pleading for, supporting or recommending” and “system” is a broad term that means, “a combination of things or parts forming a complex or unitary whole” or “a coordinated body of methods or a scheme or plan of procedure.”³ Therefore, “systems advocacy” means to recommend changes to a system (e.g., a long-term care facility, a government agency, an organization, a corporation, policies, regulations and law) to benefit long-term care residents. Effective and credible systems advocacy should generally be supported by data and complaint trends, but can also be in response to policy, regulatory and legislative proposals that could negatively impact residents.

Older Americans Act Provisions

Systems advocacy is a core responsibility of the Office of the State Long-Term Care Ombudsman (OSLTCO) as the Older Americans Act requires States to establish and operate its OSLTCO to:

- Represent the interests of residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of residents;
- Analyze, comment on, and monitor the development and implementation of federal, state, and local laws, regulations, and other governmental policies and actions, that pertain to the health, safety, welfare, and rights of the residents, with respect to long-term care facilities and services in the state;

¹ Institute of Medicine. Real People Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act. 1995. p.72.

² Older Americans Act of 1965. Section 712 (a)(3)(A) <https://legcounsel.house.gov/Comps/Older%20Americans%20Act%20Of%201965.pdf>; State Long-Term Care Ombudsman Programs Final Rule <http://ltcombudsman.org/uploads/files/library/2015-01914.pdf>.

³ Dictionary.com. 2013. Dictionary.com LLC (IAC Corporation). March 6, 2013.

- Facilitate public comment on laws, regulations, policies, and actions related to residents of long-term care facilities and the ombudsman program;
- Recommend any changes in laws, regulations, policies, and actions that will further promote the interests, well-being and rights of residents.

Additionally, the OAA states that the State agency must require the OSLTCO to:

- Provide such information as the OSLTCO determines to be necessary to public and private agencies, legislators, and other persons, regarding: (1) the problems and concerns of individuals residing in long-term care facilities; (2) and recommendations related to these problems and concerns.

Designated Local Ombudsmen Entities and Representatives are likewise to:

- Represent the interests of residents before government agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;
- Review, and if necessary, comment on any existing and proposed laws, regulations, and other government policies and actions, that pertain to the rights and well-being of residents;
- Facilitate the ability of the public to comment on the laws, regulations, policies, and actions;
- Support the development of resident and family councils; and
- Carry out other activities that the [State] Ombudsman determines to be appropriate.

(Older Americans Act of 1965, Sec. 712(a)(3), 712(a)(5)(B), 712(h)(3), 42 U.S.C. §3058g)⁴

In 1987, amendments to the Older Americans Act provided additional protection of OSLTCO responsibilities by requiring each state to:⁵

- Protect from liability ombudsmen who properly carry out the functions of the Office; and
- Make unlawful the willful interference with representatives of the OSLTCO in the performance of their official duties.
- Prohibit retaliation against an LTCOP representative, resident or other individual for assisting representatives of the program in the performance of their duties

For the OSLTCO to fulfill the program's core responsibility of systems advocacy, the State must ensure that the OSLTCO has full authority granted by the OAA, such as:

- Access to long-term care facilities and residents;
- Access to decision-makers within state agencies;
- Adequate legal counsel;
- Authority to make recommendations to legislators without interference;
- Freedom to discuss non-confidential information with the media.⁶
- Access to the administrative records, policies, and documents, to which the resident has, or the general public has access, of long-term care facilities; and
- Access to and, on request, copies of all licensing and certification records maintained by the State with respect to long-term care facilities.⁷

⁴ Systems Advocacy: Issue Brief Prepared for the Long-Term Care Ombudsman Guidance Strategy Session. December 8, 2011

⁵ Special Committee on Aging. United States Senate. Older Americans Act of 1987: A Summary of Provisions. Public Law 100-175. An Information Paper. December 1987. p. 14

⁶ National Association of State Long-Term Care Ombudsman Programs. *White Paper: Systems Advocacy and The Long-Term Care Ombudsman Program*. March 2007.

⁷ Older Americans Act of 1965. Sec. 712(b)(1)

State Long-Term Care Ombudsman Programs, Final Rule ⁸

The State Long-Term Care Ombudsman Programs Final Rule was published in February 2015 and went into effect July 2016. The Rule expands upon the intent of the Older Americans Act and gives more detail regarding the role and responsibilities of the LTCOP, including systems advocacy. In response to comments on the proposed Rule, ACL states, “the Act creates the Ombudsman program to resolve problems for residents of long-term care facilities on individual as well as systemic levels. Therefore, the ability to take positions and make recommendations that reflect the interests of residents is critical to the effectiveness of the Ombudsman program.”

§1324.11 (e)(5) Systems advocacy.

Policies and procedures related to systems advocacy must assure that the Office is required and has sufficient authority to carry out its responsibility to analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services and to the health, safety, welfare, and rights of residents, and to recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate.

- (i) Such procedures must exclude the Ombudsman and representatives of the Office from any State lobbying prohibitions to the extent that such requirements are inconsistent with section 712 of the Act.
- (ii) Nothing in this part shall prohibit the Ombudsman or the State agency or other agency in which the Office is organizationally located from establishing policies which promote consultation regarding the determinations of the Office related to recommended changes in laws, regulations, and policies. However, such a policy shall not require a right to review or pre-approve positions or communications of the Office.

§1324.13 Functions and responsibilities of the State Long-Term Care Ombudsman.

(a)(7)(iv) Provide leadership to statewide systems advocacy efforts of the Office on behalf of long-term care facility residents, including coordination of systems advocacy efforts carried out by representatives of the Office;

(a)(7)(vii) In carrying out systems advocacy efforts of the Office on behalf of long-term care facility residents and pursuant to the receipt of grant funds under the Act, the provision of information, recommendations of changes of laws to legislators, and recommendations of changes of regulations and policies to government agencies by the Ombudsman or representatives of the Office do not constitute lobbying activities as defined by 45 CFR part 93.

§1324.15 State agency responsibilities related to the Ombudsman program.

- (j) Legal counsel.
 - (1) The State agency shall ensure that:
 - (2) (i) Legal counsel for the Ombudsman program is adequate, available, has competencies relevant to the legal needs of the program and of residents, and is without conflict of interest (as defined by the State ethical standards governing the legal profession), in order to—
 - (A) Provide consultation and representation as needed in order for the Ombudsman program to protect the health, safety, welfare, and rights of residents; and
 - (B) Provide consultation and/or representation as needed to assist the Ombudsman and representatives of the Office in the performance of their official functions, responsibilities, and duties, including, but not limited to, complaint resolution and systems advocacy;

⁸ Published in the Federal Register, 02/11/2015, Vol. 80, No. 28. LTCOP Final Rule <https://www.federalregister.gov/documents/2015/02/11/2015-01914/state-long-term-care-ombudsman-programs>, correcting document with technical and typographical errors amended published in December 2016 <https://www.federalregister.gov/documents/2016/12/20/2016-30455/state-long-term-care-ombudsman-programs>

§ 1324.19 Duties of the representatives of the Office.

In carrying out the duties of the Office, the Ombudsman may designate an entity as a local Ombudsman entity and may designate an employee or volunteer of the local Ombudsman entity as a representative of the Office. Representatives of the Office may also be designated employees or volunteers within the Office.

(a) Duties. An individual so designated as a representative of the Office shall, in accordance with the policies and procedures established by the Office and the State agency: ...

(4) Represent the interests of residents before government agencies and assure that individual residents have access to, and pursue (as the representative of the Office determines necessary and consistent with resident interest) administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;

(5)

(i) Review, and if necessary, comment on any existing and proposed laws, regulations, and other government policies and actions, that pertain to the rights and well-being of residents; and

(ii) Facilitate the ability of the public to comment on the laws, regulations, policies, and actions;

Administration on Aging (AoA)/Administration for Community Living (ACL) Statements Regarding the LTCOP and Systems Advocacy

In addition to the program requirements regarding systems advocacy outlined in the Older Americans Act and Rule, the Administration on Aging/Administration for Community Living has responded to questions regarding the OSLTCO’s systems advocacy responsibilities. Three examples are below.

- “The State [Unit on Aging] must affirmatively require the LTCOP to carry out issue advocacy and logically may not simultaneously erect barriers to the advocacy.”⁹
- “The State agency does not have the right to approve the communications that the Ombudsman’s Office chooses to make to policy makers, including a State legislature. However, the OAA does not prohibit [the Agency] from adopting a policy requiring proposed testimony from being shared in advance or circulated for comments or in-put, provided that in the end the ombudsman retains the absolute right to decide what finally should be presented by that Office.”¹⁰
- “...Information dissemination is often one of the most effective ways for the LTCO to conduct issue advocacy on behalf of residents and their interests as well as to provide valuable information to the public...Effectively conducting information dissemination depends upon the program’s ability to freely respond to media inquiries, issue press releases and hold press conferences.”¹¹

HOW CAN OMBUDSMEN GET INVOLVED IN SYSTEMS ADVOCACY?

The OAA and Rule requirements regarding systems advocacy apply to the Long-Term Care Ombudsman Program and the program’s representatives, meaning State Ombudsmen and local Ombudsman program representatives are expected to engage in systems advocacy. However, the role of State Ombudsmen regarding systems advocacy varies from the role of Ombudsman program representatives (e.g., the SLTCO creates a statewide systems advocacy plan and typically represents the Office of the SLTCOP in testifying before the legislature). As the “head” of the OSLTCO, the State Ombudsman has a responsibility to set the tone and messaging as it relates to systemic advocacy to maintain program consistency and coordination in advocacy work for all Ombudsman program representatives. Although the roles and approach of the Ombudsman and representatives in systems advocacy differ, the requirement to voice resident concerns at a systems level is the same whether in individual facilities, a corporation, locally, or statewide.

⁹ Administration on Aging. *Review of the State of Florida Long-Term Care Ombudsman Program*. September 1, 2011. p. 14.

¹⁰ Administration on Aging Region V Memorandum to Iowa State Agency, April 26, 2010.

¹¹ AoA. *Review of the Florida LTCOP*. op.cit, p. 19.

Legislative advocacy is an excellent example of systems advocacy, but it is not the only strategy as there are a variety of ways for the Ombudsman and representatives to voice resident concerns and address issues that impact residents at the systems level. There are three strategies listed below. The examples are not comprehensive, rather they are a sampling of Ombudsman program systems advocacy work.

SYSTEMS ADVOCACY STRATEGIES

COALITION BUILDING/DEVELOPMENT OF PARTNERSHIPS

Another effective way to engage in systems advocacy and expand the reach of the LTCOP is to develop partnerships or build or join a coalition with other entities that share an interest in improving long-term care. Working with other entities, such as Citizen’s Advocacy Groups (CAGs), Culture Change Coalitions, resident or family councils or serving on advisory committees or task forces ensures that the resident or consumer of long-term care services is represented.

Example of Coalition Building/Development of Partnerships

A local LTCOP entity in West Virginia received a complaint that residents received a letter from management stating they had to remove all items that sat directly on the floor, take everything off their walls and doors and in the future, items could only be displayed on a bulletin board provided by the facility. The nursing home is part of a multi-state chain and the administrator claimed the changes were instituted by the corporate office. The program representative met with a spokesman from the corporate office and was told the changes were being instituted in all facilities the corporation owned across thirty states. The program representative then met with members of the Resident Council and encouraged the members to speak with the corporate representative about the changes. The LTCOP provided the Resident Council members with copies of the applicable state and federal regulations and the residents met with the corporate representative. Following that meeting, the corporation withdrew all the proposed changes, except for the one rule stating storage bins could not be stored directly on the floor.¹²

ISSUE ADVOCACY

When LTCOPs analyze their complaint and activity data to identify trends and develop a systems advocacy approach in response to identified issues or a timely “hot topic” issue outside of LTCO complaint data, the program is engaging in issue advocacy. State Ombudsmen may choose an issue for statewide systems advocacy after analyzing statewide program data and/or local Ombudsman program representatives may identify a local issue based on their local data and activities and coordinate with the State Ombudsman for systems advocacy locally to address the issue. There may be different local issues and concerns across the state. State Ombudsmen and program representatives share information a variety of ways including: utilizing the internet, press releases, letters to the editor, community education sessions, discussions with Resident and Family Councils and creating and distributing fact sheets.

Example of Issue Advocacy

A local Ombudsman entity in Texas developed a training and advocacy program called “Areas of Focus.” Every 2 months the program would choose a topic based on issues they were seeing in their facilities to be their “Area of Focus.” As a team, they would create a handout of activities or actions that the volunteer representatives could take to the facility to help regarding the identified topic. The handout would include ideas for things to look for during visits, residents’ rights and relevant regulations, the role of the representative related to advocacy and the topic and tips for conversations that they could have with facility staff, residents and family members. Topics for their “Areas of Focus” have included: nails and skin care, grooming; hydration; dementia; nutrition; religion and spirituality; medication administration; sexuality and dental care.

¹² The National Consumer Voice for Quality Long-Term Care and The National Long-Term Care Ombudsman Resource Center. The Gazette. June 5, 2012. Adapted from original story received from Suzanne Messenger, State Long-Term Care Ombudsman (WV).

LEGISLATIVE ADVOCACY

The OAA and Rule requires the LTCOP to participate in legislative advocacy. Legislative advocacy includes analyzing, commenting on and monitoring the development and implementation of federal, state, and local laws, regulations, and policies related to long-term care; facilitating public comment on laws, regulations, policies, and actions related to residents of long-term care facilities and recommending changes in laws, regulations, policies, and actions to further promote the interests, well-being and rights of residents. The Ombudsman and representatives engage in legislative advocacy in a variety of ways including, but not limited to: sharing information about pending legislation or regulations that impact residents; encouraging consumer participation in the legislation or rule-making process; providing testimony on behalf of residents before the legislature; meeting with individual legislators; submitting comments; participating in the drafting of local, state, and federal laws and regulations; communicating with local, state and federal representatives; determining legislative activities and agenda for the LTCOP.

Example of Legislative Advocacy

A few states have local representative professional associations. The state associations usually provide support, leadership and advocacy (including legislative advocacy) for local entities. Members of the California Long-Term Care Ombudsman Association (CLTCOA) are active in legislative advocacy. The CA State Ombudsman and CLTCOA Executive Director meet monthly to discuss long-term care issues and opportunities for collaboration. Recently, CLTCOA have coordinated their efforts with the State Ombudsman to advocate for an increase of the civil penalty for individuals that willfully interfere with lawful action of the OSLTCO. On several occasions, California long-term care facility staff has not allowed ombudsman representatives to walk into residents' rooms without an escort and have prevented them from accessing certain parts of the facility. This has interfered with residents' rights to speak confidentially with an ombudsman and with the ombudsman's ability to observe conditions of residents and facilities and identify complaints.

Although California law authorizes the Director of the California Department of Aging to assess a civil penalty against anyone interfering with the lawful actions of an ombudsman representative, the maximum amount of the penalty remained at \$1,000 for thirty years. Noting an increase in the incidents of interference, the Office of the State Long-Term Care Ombudsman and the California Long-Term Care Ombudsman Association sponsored legislation that increased the amount of the civil penalty to \$2,500 and specified that the Director could assess the penalty per incident. The bill was signed into law by the Governor.

As noted earlier, only a few states have local Ombudsman program representative associations, but program representatives do not need to be a part of an association to participate in legislative advocacy. Ombudsman program representatives are an important part of statewide systems advocacy and often support State Ombudsman efforts in legislative advocacy by sharing information about pending legislations or regulations, encouraging consumer participation, and providing testimony.

LONG-TERM CARE OMBUDSMAN PROGRAM CONSIDERATIONS WHEN DEVELOPING A SYSTEMS ADVOCACY AGENDA

There are some fundamental questions LTCOPs should consider prior to engaging in systems advocacy. The following chart is a sampling of questions to be used when developing a systems advocacy agenda or plan. LTCOPs often need to respond to time-sensitive issues; therefore, not all systems advocacy work will be part of a predetermined systems advocacy agenda or plan. However, the questions below will help representatives assess their program and lay the foundation for effective systems advocacy. For those seeking a more in-depth discussion and considerations regarding systems advocacy, please review the materials listed in the "Resources" section on the last page.

BASIC QUESTIONS TO CONSIDER WHEN ENGAGING IN SYSTEMS ADVOCACY ¹³

PREPARATION

Plan Development

- In addition to federal law and the Rule, does the LTCOP, state level and local level, have a clear state mandate to pursue systems changes on behalf of residents?
- What direction and guidance have you received from the State LTCO?
- Is your local systems advocacy work part of the statewide systems advocacy plan? Are you coordinating your effort with the State LTCO and other local LTCOPs?
- What external influences are impacting your systems advocacy agenda (e.g., media attention, budget cuts, changing landscape of LTC)?
- Do you and your program representatives understand all the processes and procedures relevant to the issue (e.g., legislative process, regulatory process)?
- Are there critical deadlines to take into considerations (e.g., legislative session cut-off dates, regulatory rule making dates, media deadlines)?
- Do you know experts who can assist you and your program (e.g., legal counsel to help interpret laws and regulations, someone with policy expertise or knowledge of city/county ordinances, someone to help you learn the legislative process)?

Data/Problem Identification

- Is this issue significant to residents and supported by LTCOP data and information?
- Do you have clear examples of the impact on residents and stories to share?
- What goals do you want to accomplish and how will “success” be measured?

Potential collaboration and coordination

- What have others already done pertinent to this issue?
- Are there other agencies and/or organizations with which your program should work?
- What needs to be considered prior to and while working with other agencies or organizations (e.g., perceived or actual conflict of interest)?

Scope

- How widespread does the strategy need to be implemented?
- Is the strategy to change facility practices and policies? Regulations? Legislation?
 - ◊ For example, can the issue be resolved by changing procedures within one facility, within one corporation/chain of facilities, in one region of the state, or is a regulatory or legislative change needed?

Risks and Rewards

- What are the potential ramifications of your advocacy strategies (e.g., positive, negative, possible unintended consequences)?

¹³ The National Long-Term Care Ombudsman Resource Center. *Ombudsman Best Practices: Using Systems Advocacy to Improve Life for Residents*. June 2002.

RESOURCES	<p>What program resources will be devoted to systems advocacy?</p> <ul style="list-style-type: none"> • Do you have internal program resources that could be utilized (e.g., staff or volunteers with skills or expertise related to the issue)? • Will your program need support from external sources? If so, is there a potential for perceived or actual conflict of interest or other concerns when enlisting such support (e.g., university research, experts)?¹⁴ • Will there be any expenses to your program for this advocacy (e.g., administrative costs, creating and printing educational materials, travel)?
	<p>How will this advocacy impact your program?</p> <ul style="list-style-type: none"> • Is this a long-term or short-term commitment? • Is this on-going? Or cyclical? For example, a rule making process has an end point; while participating in an elder abuse prevention coordinating council may be an on-going commitment. • How will your program focus on systems change and continue to respond to the concerns of individual residents? • Does the impact on residents justify the amount of resources required to pursue this issue?
PROGRAM MANAGEMENT	<p>Roles, Responsibility and Training</p> <ul style="list-style-type: none"> • Who will be involved and what are their roles (e.g., paid LTCOP staff and/or volunteer LTCOP representative)? • Is additional training necessary for the individuals involved?
ADDRESSING POTENTIAL BARRIERS	<p>Host Agency Support</p> <ul style="list-style-type: none"> • Does your host agency support your program's requirement to act on behalf of residents even if the result is a public stance that differs from that of the agency? <ul style="list-style-type: none"> ◊ If not, are you working with your State Ombudsman to gain the support of your host agency regarding the OAA systems advocacy responsibilities? administrative costs, creating and printing educational materials, travel)?
	<p>Communication</p> <ul style="list-style-type: none"> • How will you share your plan and systems advocacy activities with your State Ombudsman? • Are individuals in the chain-of-command over the LTCOP informed of the system advocacy agenda and actions taken? • Do you and your program representatives have experience communicating with outside entities (e.g., the legislature or the media)? If not, prior to communicating with an outside entity seek training, advice and/or examples from people with experience working with that entity. • In addition to the submission of required reports, do you plan on sharing the outcome of your systems advocacy action? If so, how? • Is there any opposition to your systems advocacy agenda? If so, do you have responses to their concerns?

¹⁴ Office of the Ombudsperson. Province of British Columbia. Planning Checklist.

RESOURCES

Long-Term Care Ombudsman Program Strategy Session: Final Report. Issue Brief- Systems Advocacy (Appendix D4). December 8, 2011. <http://ltcombudsman.org/uploads/files/library/ltcop-strategy-session.pdf>

Older Americans Act. NORC Issue Page. <http://ltcombudsman.org/issues/older-americans-act>

Ombudsman Best Practices: Using Systems Advocacy to Improve Life for Residents. Sara S. Hunt. National Long-Term Care Ombudsman Resource Center. June 2002. <http://ltcombudsman.org/uploads/files/support/systems-advocacy-paper.pdf>

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/catalog.php?record_id=9059

State Long-Term Care Ombudsman Programs, Final Rule. NORC Library. http://ltcombudsman.org/library/fed_laws/ltcop-final-rule

Systems Advocacy and the Local Long-Term Care Ombudsman Program. Brooke Hollister. 2008. <http://ltcombudsman.org/uploads/files/library/Systems-Advocacy-and-LTCOP-Hollister.pdf>

Systems Advocacy and the Long-Term Care Ombudsman Program. National Association of State Long-Term Care Ombudsman Programs. March 2007. <http://www.nasop.org/papers/45.pdf>

The Long-Term Care Ombudsman Program: Rethinking and Retooling for the Future. NASOP Retreat Proceedings and Recommendations. Appendix IV: Independence and LTCOP's Ability to Fully Represent Residents. National Association of State Long-Term Care Ombudsman Programs. April 2003. <http://www.nasop.org/papers/Bader.pdf>

The Long-Term Care Ombudsman Program: Rethinking and Retooling for the Future. NASOP Retreat Proceedings and Recommendations. Appendix V: Systems Advocacy in the Long-Term Care Ombudsman Program. National Association of State Long-Term Care Ombudsman Programs. April 2003. <http://www.nasop.org/papers/Bader.pdf>

*Additional systems advocacy resources available on the NORC website: http://www.ltcombudsman.org/ombudsman-support/systemic-advocacy#Ombudsman_Program_Examples

SHARE YOUR EXPERIENCE

We invite and encourage you to share your policies, practices, training and activities regarding systems advocacy by sending an email to ombudcenter@theconsumervoice.org.

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