

## Legal Counsel

### Question

Are there examples of how states are:

- equipping the Long-Term Care Ombudsman Program to pursue administrative, legal, and other remedies to protect residents ?
- providing legal counsel that is adequate and without conflict of interest for the program?

### Response

The [Final Rule](#)<sup>1</sup> includes the following requirements for the responsibilities of the State Long-Term Care Ombudsman regarding pursuing administrative and legal remedies and of the State Agency regarding legal counsel for the program.

***\*Note: Effective July 1, 2016 the Administration for Community Living (ACL) consolidated their regulations into one subchapter resulting in the LTCOP rule number changing from 45 CFR 1327 to 45 CFR 1324. We are in the process of revising our resources to reflect that change. Information about the consolidation is available [here](#).***

#### **§1324.13 Functions and Responsibilities of the State Long-Term Care Ombudsman**

(5) Represent the interests of residents before governmental agencies, assure that individual residents have access to, and pursue (as the Ombudsman determines as necessary and consistent with resident interests) administrative, legal, and other remedies to protect the health, safety, welfare, and rights of residents

#### **§1324.15 State Agency Responsibilities Related to the Ombudsman Program**

##### **(j) Legal counsel.**

(1) The State agency shall ensure that:

(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;

(ii) The Ombudsman and representatives of the Office assist residents in seeking administrative, legal, and other appropriate remedies. In so doing, the Ombudsman shall coordinate with the legal services developer, legal services providers, and victim assistance services to promote the availability of legal counsel to residents; and

(iii) Legal representation, arranged by or with the approval of the Ombudsman, is provided to

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<sup>1</sup> U.S. Department of Health and Human Services, Administration for Community Living, Administration on Aging (HHS ACL AOA), Final Rule Vol.80, No.28.

the Ombudsman or any representative of the Office against whom suit or other legal action is brought or threatened to be brought in connection with the performance of the official duties.

(2) Such legal counsel may be provided by one or more entities, depending on the nature of the competencies and services needed and as necessary to avoid conflicts of interest (as defined by the State ethical standards governing the legal profession). However, at a minimum, the Office shall have access to an attorney knowledgeable about the Federal and State laws protecting the rights of residents and governing long-term care facilities.

(3) Legal representation of the Ombudsman program by the Ombudsman or representative of the Office who is a licensed attorney shall not by itself constitute sufficiently adequate legal counsel.

(4) The communications between the Ombudsman and legal counsel are subject to attorney-client privilege.

Refer to the chart, **Final Rules: Long-Term Care Ombudsman Program, Regulatory Language and Pertinent Preamble Language** for additional clarification of the requirements that is discussed in the preamble questions and comments. [Chart with Preamble](#)

Refer to the **Frequently Asked Questions, ACL/AoA**, for additional responses to questions related to legal counsel, pages 7 – 10. [FAQs](#)

### **State Policies and Procedures**

Here are some examples of policies regarding the provision of legal counsel from SLTCOP Policies and Procedures. Complete policies and procedures manuals/documents are available on the NORC [website](#).

#### **Alaska**

<https://consumervoice.box.com/s/ymwffzy5ef1amhyftkha9sn63bq9sx3g>

Alaska's policy for legal consultation and representation defines potential conflicts of interest and resolutions with staff of the Attorney General's office.

#### **Georgia**

<https://consumervoice.box.com/s/uakcun6n2t30gejwwk7hdchc24njp9up>

Georgia's provision for legal counsel and/or representation of LTCO with contingencies for conflicts of interest is a combination of departmental legal counsel, Attorney General's office and/or private attorney. The Legal Services Developer provides counsel for residents' rights issues.

#### **Illinois**

<https://consumervoice.box.com/s/7vy73uurxczld1jczg5ksgm2704dnjky>

Legal counsel is provided to the LTCOP by the Department of Aging's legal staff and/or the Attorney General's office. Legal representation of LTCO is provided by the Attorney General's office either directly or through reimbursement of expenses to a private attorney.

#### **Texas**

<https://consumervoice.box.com/s/kkbk6y04fe1lq70rgl3rbxlkty8oysup>

Legal counsel for the Office is provided by the Attorney General's office. The policies contain guidance for ombudsman in seeking legal assistance, representation for themselves, residents who may need legal assistance or representation, and how to respond to requests from attorneys and to subpoenas.

Although the Texas policies reference MLO (managing lead ombudsman), those individuals may have similar responsibilities to those of the two ombudsmen in Nevada who represent the Office in the north and in the south. The policies list several resources for legal assistance that may be utilized by ombudsman representatives on behalf of residents.

### **Additional Resources**

[LTCOP Management Highlights](#) (Updated April 2015) is a document that contains the most current information on the source of legal counsel and representation for the Office and representatives. Some states use more than one resource to provide the range of responsibilities required by the Older Americans Act and the Rule.

[Legal Counsel and Representation of the Long-Term Care Ombudsman Program](#) (March 2005) contains information about the entities that provide legal counsel and representation to the LTCO at the state and local levels. It includes the types of support provided, and how LTCOPs assist consumers to obtain legal assistance when necessary. A chart showing the responsibility of counsel provided and the source of the counsel by state is included in an appendix. Another chart lists the states and the source of each state's legal counsel and representation. [Note that Appendices E, F, and G are not included. Contact NASUAD or NORC for a hard copy.]

[Legal Supports to Long-Term Care Ombudsman Programs: Seven Years Later](#) (1994) is a National Clearinghouse for Legal Services article that discusses the Older American's Act requirements for adequate legal support for the LTCOP and various ways that some states are providing the required legal counsel.