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Reevaluating the Nursing Home Ombudsman's Role with a View Toward Expanding the Concept of Dispute Resolution

Jeffrey S. Kahana¹

The creation of ombudsman programs in diverse organizational contexts has paralleled growing interest in alternative dispute resolution ("ADR"). This reawakening of interest in a prototype of dispute resolution which was first used in European countries in the nineteenth century provides a useful case study into the parameters, promise and limits of formal alternative dispute resolution programs. This Article will focus on the conceptualization and implementation of ombudsman programs in long-term care facilities serving the elderly. By tracing the evolution and scope of such programs, it is hoped that a better understanding of ADR's limitations and benefits will emerge.

The multi-faceted and sometimes controversial role of the ombudsman has attracted attention in both the legal and non-legal communities.² Researchers have come to recognize that there is no single definition that accurately captures the role and duties of the ombudsman. The difficulty of relying on any one definition becomes apparent when we consider the varied functions of ombudsmen operating in different contexts. In setting out to explore the concept of the ombudsman, it is nevertheless useful to consider some general unifying characteristics.

At the most general level, an ombudsman is a third party who intervenes in addressing concerns of individuals or dependent groups in relation to powerful organizations or bureaucracies. She may do so either as an impartial mediator or as a committed advocate. Her power rests in investigating wrongdoing and making her findings known to the public and/or the relevant governmental agencies. Through these efforts she may "encourage practices that are fair, just

1. The author holds a B.A. and M.A. from Case Western Reserve University and a J.D. from Ohio State University College of Law. He is currently a graduate student in the history of American civilization at Brandeis University. The author gratefully acknowledges the helpful comments and suggestions received from Professor Craig McEwan on an earlier draft of this paper and the excellent research assistance provided by Nancy Schuster of the Case Western Reserve University Sociology Department. The essay is dedicated to my grandmother, Mrs. Sari Frost, a courageous nursing home resident.

2. See Kenneth C. Davis, *Ombudsman in America: Officers to Criticize Administrative Action*, 109 U. PA. L. REV. 1057 (1961); DONALD C. ROWAT, *THE OMBUDSMAN: CITIZEN'S DEFENDER* (1965); WALTER GELLHORN, *OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES* (1966); Paul R. Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845, 851 (1975).

and respectful."³ At the same time, there are limits to her authority. The ombudsman cannot make, set or change laws.⁴ Nor does she have independent authority to enforce particular recommendations. In this sense, the role of the ombudsman is auxiliary to that of the legal system. To what extent the ombudsman concept realizes its potential and is effective in achieving intended goals remains open to debate.⁵

The aim of this Article is to examine the function of the ombudsman in the context of long-term health care facilities.⁶ The first part of the Article will consider the broader history and purposes of the office of the ombudsman. The second part will focus on the traditional methods used to ensure quality of care in the nursing home. The third part will examine the specific role played by the ombudsman in the ecological context of the nursing home. Finally, the fourth part will consider the effectiveness of the nursing home ombudsman as an alternative form of dispute resolution. In view of the often powerless position of nursing home residents, many of whom are ill and suffer from assorted disabilities, there is an urgent need for discussion that will lead to a better understanding of the role of the nursing home ombudsman and their relationship to the larger ombudsman phenomenon.⁷

I. THE HISTORY OF THE OMBUDSMAN

The role of the ombudsman was first introduced in the Scandinavian countries during the early nineteenth century and gained momentum by the middle of the twentieth century. The "classical" concept, based on the early Scandinavian experience, maintained that the ombudsman was an independent defender of the citizenry against the competing interests of government. Thus, the main function of the classical ombudsman, even as seen today, has been to serve as a bridge between the citizen and the state.⁸

Professor Walter Gellhorn, whose writings from the 1960's still stand as the authoritative works on the subject, has described the ombudsman as a "high level, independent, legally constituted, greatly respected officer" who will "look into

3. Mary P. Rowe, *The Ombudsman's Role in a Dispute Resolution System*, NEGOTIATION JOURNAL 354 (October 1991).

4. *Id.* at 353-54.

5. Verkuil, *supra* note 2, at 846.

6. Most recently questions have been raised over the propriety of the New Jersey state long-term care ombudsman's request to be notified about all residents seeking to withhold or withdraw life sustaining treatment even in cases where the resident is competent. See Kathleen Bird, *Ombudsman in Center of a New Storm, His Comments on Nursing-Home Care Disturb Medical, Legal Experts*, 123(5) NEW JERSEY L.J. 1 (Feb. 2, 1989); David M. Price & Paul W. Armstrong, *New Jersey's "Granny Doe" Squad: Arguments about Mechanisms for Protection of Vulnerable Patients*, 17(3) LAW, MEDICINE AND HEALTH CARE 255 (1989).

7. See INSTITUTE OF MEDICINE, *IMPROVING THE QUALITY OF CARE IN NURSING HOMES* (1986).

8. See Stephen Owen, *The Expanding Role of the Ombudsman in the Administrative State*, 40(3) U. TORONTO L. J. 670, 676-86 (1990); C.C. Milton, *The Ombudsman as a Protector of Fundamental Personal Rights*, 7 THE OMBUDSMAN JOURNAL 89 (1988).

citizens' dissatisfactions with government."⁹ Gellhorn conducted research on ombudsman's offices in nine countries.¹⁰ He concluded that the classical ombudsman could be characterized by his training, selection, and authority. Holders of this office shared similar experiences, were selected by the legislature and were often trained in the law.¹¹ They were expected to be free and independent from political considerations¹² and responsible for responding to complaints, as well as initiating their own informal inquiries into government conduct.¹³

In addressing specific grievances, the classical ombudsman seeks to arrive at both substantive and procedural safeguards which will reduce the likelihood of similar grievances arising in the future. Accordingly, Gellhorn observed that the "primary purpose of the external critic (ombudsman) is to build for the future rather than to exhume the past. Constructive suggestions about the avoidance of similar controversies may not be precluded by inability to reach a firm conclusion about guilt in the present instance."¹⁴

Following this approach, the classical ombudsman was concerned with developing ways to reduce the occurrence of conflicts in the future, as opposed to admonishing or penalizing the wrongdoing party.¹⁵ An example of this approach is illustrated in the following case.¹⁶ A police officer, in possession of a warrant, entered a school classroom to arrest a boy charged with committing a crime. The parents of the boy (who had subsequently been cleared) sued the police for what they claimed was an unnecessarily embarrassing incident. Upon hearing this case, the court summarily dismissed the complaint and held that the police officer had acted legally since he had an arrest warrant. This decision was the end of the inquiry as far as the judges were concerned.

This is the type of case which, according to Gellhorn, would have benefitted from the presence of an ombudsman. The classical ombudsman would have been less concerned with the particular police officer and whether or not they had acted legally. Instead, he would have probably approached the chief of police and suggested that in the future arrests should be made outside of the classroom.

9. WALTER GELLHORN, *THE OMBUDSMAN CONCEPT IN THE UNITED STATES, OUR KIND OF OMBUDSMAN* 10 (1970).

10. GELLHORN, *supra* note 2.

11. *Id.* at 422-23.

12. "The officers chiefly discussed in these pages are expected to be bravely independent, untroubled by political pressures or personal insecurities." *Id.* at 425. Whether this is an accurate portrayal seems to be debatable in light of the fact that the ombudsmen were chosen through the legislature, a political body.

13. *Id.* at 429-32. These functions are performed in conjunction with the ombudsman's general powers of inspection and supervision. It should be recognized that the inquiries are not formal adversarial encounters. Rather, they are based on informal conversations with public officials and complainants. Perhaps, the most important process of inquiry is the ombudsman's privilege to review official papers and records.

14. *Id.* at 432-33.

15. Verkuil, *supra* note 2, at 846.

16. GELLHORN, *supra* note 9, at 16.

Here, the ombudsman recognizes that the law dictates the underlying policy of when an arrest is lawful. Rather, the ombudsman is concerned with finding the most satisfactory method for carrying out or implementing the law or legislative policy.

This example is an important illustration of the way in which the classical ombudsman was perceived to have operated. His role was principally to uncover instances where the implementation of governmental policy or laws was causing unnecessary friction with the public. Once uncovered, suggestions could be made regarding satisfactory methods for eliminating this friction. In this way, "the particular instance would have a generative force beyond the episode itself."¹⁷

Another important attribute of the classical ombudsman was his perceived and actual impartiality. Gellhorn emphasized the importance of impartiality when he wrote:

Wherever the ombudsman has functioned, he has been purely and plainly an advocate of sound administration, not an advocate of the position of the complainant. In this respect he has differed from many legislators who tend, when a constituent complains, to become an advocate of the complainant's case without much consideration of its merit The ombudsman, on the other hand . . . is simply stationed at the margin, as it were, between the citizen and the official, and he must be concerned with seeing that justice is done to public servants as well as to the public whom they serve.¹⁸

The significance of the ombudsman as an impartial actor attested to the belief that the ombudsman could improve public administration only where both parties perceived him to be acting fairly and not advocating either side's position. An impartial and non-adversarial orientation was viewed as a necessary condition to facilitating communication and promoting effective solutions to avoid similar disputes in the future.¹⁹

These considerations have led observers to distinguish between the ombudsman and more traditional dispute resolution mechanisms. Noting these differences, Verkuil commented that "the ombudsman and adversary systems are substantially competing procedures for the regularization of informal processes; each is based on a different conception of the dispute resolution process and reflects different underlying social and political values."²⁰

17. *Id.*

18. *Id.* at 13.

19. This view of the ombudsman as an impartial umpire and mediator is still widely held today. The lack of directive power on the part of the ombudsman has been considered an advantage in terms of maintaining at least the appearance of a separation between the ombudsman and the state bureaucracy. See Milton, *supra* note 8, at 91.

20. Verkuil, *supra* note 2, at 846.

The classical ombudsman's primary function was to facilitate communication between citizens and the government in order to promote more effective public administration. For traditionalists, the challenge posed to "good order," which the ombudsman was supposed to address, was not that government policy itself was flawed or insensitive to the needs of constituents. Rather, it was that in the process of implementing policies, governmental agents (broadly conceived as anyone who exercises governmental power) would act improperly, thereby causing unnecessary conflicts.²¹ The ombudsman's function was to deal with citizens' grievances and complaints about government. In this way the ombudsman was both an aid and alternative to existing formal mechanisms of governmental review.

Based on the early Scandinavian experience with ombudsman programs, Rowat identified the following three distinct and potentially divergent attributes:

1. The ombudsman is an independent and non-partisan officer of the legislature, usually provided for in the constitution, who supervises its administration;
2. The ombudsman deals with specific complaints from the public against administrative injustice and maladministration; and
3. The ombudsman has the power to investigate, criticize, and publicize, but not to reverse administrative action.²²

These definitions reflect a recognition of the elasticity of the ombudsman concept but one that is bound to certain traditional principles. They legitimate functions of variable impartial interventions, but do not specifically point toward partisan advocacy.

Such a view of the classical ombudsman is largely based on a Scandinavian prototype. It is consistent with the ideal represented in Denmark of an ombudsman with national stature and prestige who has access to public officials at all levels.²³ The rights-oriented American polity has not been receptive to this type of national ombudsman.²⁴ The ombudsman in America has typically not represented a national constituency. Her functions have also been less clearly defined and have varied depending upon the institution and parties she serves.

21. GELLHORN, *supra* note 2, at 1-2. Whether this is the real challenge to "good order" is debatable. Yet, this can clearly be a source of additional conflict that government needs assistance in detecting and resolving.

22. ROWAT, *supra* note 2, at XXIV.

23. GELLHORN, *supra* note 2, at 5-7. Professor Stephen Hurwitz who served as Denmark's first ombudsman entered the office as an already prominent citizen who could use his considerable reputation to promote and implement the concept of the ombudsman. *Id.*

24. The tendency in the United States has been for citizens to rely chiefly on legal remedies and not on internal dispute resolution processes such as the ombudsman. See John W. Wade, *Tort Law as Ombudsman*, 65 OR. L. REV. 309, 310, 322-25 (1986).

In contrast to the Scandinavian ombudsman, whose focus is primarily centered on designing ways in which future conflicts can be avoided, the American ombudsman has assumed a more active role in attempting to mediate and negotiate settlements. Here, the duality of the ombudsman's role as impartial umpire and partisan advocate is increasingly reflected. One reason for the divergence in the roles played by different ombudsmen can be explained by reference to the level of conflict between the disputants. It has been argued that "the classical ombudsman functions optimally in a consensus-oriented society."²⁵ It would follow, therefore, that as the degree of conflict between parties increases or as the political culture diverges from a consensus orientation, there is a greater need to develop alternatives to the classical ombudsman. This has been the American experience as ombudsmen have assumed greater responsibility in varying institutions.

As discussed above, the classical ombudsman was primarily viewed as a counterweight to the large and impersonal offices of bureaucratic governments. Interestingly, today ombudsmen occupy important roles in both public and private institutions such as businesses, universities, and hospitals.²⁶ Thus, an important challenge to understanding the utility of ombudsman programs is to explore them in their specific contexts. To the extent that alternative models apply and work in different settings, the multi-dimensional aspects of this form of dispute resolution may be understood.

The concept of the ombudsman both in its classical construction and its more modern implementation constitutes a non-traditional orientation to dispute resolution. Prior to considering the question of the effectiveness of this approach, it is useful to consider the rationale for its existence and practice.

Why an ombudsman? Gellhorn considers the ombudsman to be an addition to and not a replacement of existing channels for addressing individual and collective grievances.²⁷ He considers the ombudsman's appeal to be based both on its absolute and relative cost effectiveness.²⁸ The existence of such an office is also seen as having an overriding symbolic benefit. It inspires confidence in the legitimacy and "good order" of the institutions it serves.²⁹ More recent developments, especially the growing alternative dispute resolution field, lend additional credence to the ombudsman concept. An ombudsman program can address grievances through informal and flexible processes that might be

25. ABRAHAM MONK, ET. AL., RESOLVING GRIEVANCES IN THE NURSING HOME 16 (1984).

26. *Id.* at 19-34.

27. It is interesting to note that Professor Gellhorn while concerned with what has been termed the "classical ombudsman" anticipated the current debate over how and whether formal and informal mechanisms should be used to resolve disputes. He observed, "[h]eavy machinery need not be used on the great bulk of citizens' discontents and uncertainties about official actions. The main batteries of governmental power can be held in reserve, to be used sparingly when lighter machinery has failed." See GELLHORN, *supra* note 2, at 4.

28. *Id.* at 1-4.

29. *Id.*

considered less threatening to the parties involved.³⁰ Ombudsmen can also identify and focus on "interests" as opposed to "rights" as a way of encouraging the resolution of disputes.³¹ Finally, ombudsmen are often better equipped than courts for dealing with conflicts where there are no principled rules for deciding which outcome is best.³² These considerations should be recognized as "relevant" to the utility of an ombudsman program. They do not, however, lead to the conclusion that the ombudsman concept is appropriate for all contexts and occasions.³³

The ombudsman has become a ubiquitous phenomenon in American society. We currently have prison ombudsmen, academic ombudsmen, medical ombudsmen, social welfare ombudsmen, and consumer ombudsmen. What these settings have in common is a citizen in a vulnerable or dependent position surrounded by a powerful bureaucracy. While the citizen is not necessarily confronted with the broad panoply of governmental machinery, he still may be overwhelmed by a system he has little control over. The term "hybrid ombudsman" has been used to describe the role of the ombudsman on this more micro-level.³⁴ She is part mediator, part watchdog, and part advocate. The ombudsman may actually be hired by the organization in which she functions or she may be appointed by governmental agencies. It may be readily seen that diverse constituencies influence the definition and implementation of the ombudsman concept in these settings.

In like manner, the presence of an ombudsman program gives rise to numerous dualities. Let us consider the example of the nursing home. The administration may view the ombudsman as a quick and cost effective instrument for eliminating consumer grievances. The complainant may seek an advocate who provides him with increased access to justice. Government agencies or citizens' groups may see the role of the ombudsman primarily in a regulatory, reformist or

30. Formal systems generally refer to a "highly structured process in which the steps (for resolving the dispute) are defined in detail." Informal systems refer to an "intentionally open-ended process." Ingrid Clarke, *Grievance Handling Mechanisms for Universities*, DISPUTE RESOLUTION: AN OPEN FORUM, 33 (1986).

31. WILLIAM L. URY, ET. AL., GETTING DISPUTES RESOLVED 5-19 (1988). These authors propose that "interests" are an important element to any analysis of disputes. To the extent that more formal systems tend to focus on power and rights to the exclusion of interests an important dimension underlying the dispute is overlooked.

32. See Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Fuller argues that "polycentric" problems (multiple solutions and no principled way to choose among them) demonstrate the limits of adjudication. Fuller's concerns may be especially relevant to grievances brought to the attention of the ombudsman. Cf. J.W.F. Allison, *Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication*, 53 CAMBRIDGE L.J. 367 (1994).

33. It has been argued that disputes involving important personal rights should not be dealt with through alternative dispute resolution processes. See generally, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986). An alternative argument is that ombudsman programs and other ADR systems can in many (although not all) instances be used effectively in conjunction with the concept of a "multi-door courthouse." See STEPHEN B. GOLDBERG, ET. AL., DISPUTE RESOLUTION 514 (1985).

34. MONK ET AL., *supra* note 25, at 19.

advocacy context. The general public might view the ombudsman as representing the interest of the community and that the nursing home ensure a threshold level of fairness. The ombudsman may see herself in a more comprehensive role, both mediating disputes and advocating for procedural changes to safeguard the rights of citizens. She may do so both within the organizational structure or by advocating for reform or oversight by government agencies regulating the industry or organization. Focusing on the implementation of the ombudsman's role in the context of the nursing home will permit us to explore how these alternative definitions take shape.

II. THE REGULATION OF THE LONG-TERM CARE FACILITY

The concern that nursing home residents do not receive high quality care has been recognized by both federal and state review committees.³⁵ Generally, there are two methods through which quality of care issues in the nursing home are addressed: (1) private causes of action brought by or on the behalf of residents; and (2) government regulation.³⁶

Resort to private lawsuits has not been an effective method for protecting most frail nursing home residents.³⁷ The reasons for this are based on the nature of tort law and the general frailty of most nursing home residents.³⁸ Most nursing home residents do not have alternative support systems and are highly dependent on the nursing home. Even those who are mentally alert are understandably reluctant to sue the home, therein fearing possible retribution.

Assuming that the resident were able and willing to sue they would have to overcome the following obstacles:

1. The *prima facie* case, particularly requirements that the plaintiff prove causation and actual damages;

35. GEN. ACCT. OFF., MEDICARE AND MEDICAID: STRONGER ENFORCEMENT OF NURSING HOME REQUIREMENTS NEEDED (1987); see also INSTITUTE OF MEDICINE, *supra* note 7.

36. See Patricia Butler, *Nursing Home Quality of Care Enforcement, Part I- Litigation by Private Parties and Part II- State Agency Enforcement Remedies*, 14(7) CLEARINGHOUSE REVIEW 622, 665 (1980). In 1990, the Omnibus Budget Reconciliation Act of 1987 became effective revising the federal standards nursing homes are required to meet if they are to remain eligible for reimbursement under Medicaid and Medicare. See Pub. L. No. 100-203, 101 Stat. 1330 (1987). See also Toby S. Edelman, *The Nursing Home Reform Law: Issues for Litigation*, 24(6) CLEARINGHOUSE REVIEW 545 (1990); Toby S. Edelman, *The Nursing Home Reform Law: The Federal Response*, 27(5) CLEARINGHOUSE REVIEW 454 (1993).

37. SONDRÁ H. JOHNSON, ET. AL., *NURSING HOMES AND THE LAW; STATE REGULATION AND PRIVATE LITIGATION* (1985); S. Johnson, *The Regulation of Long-term Care: A Decade of Experience with Intermediate Sanctions*, 13(4) LAW, MEDICINE AND HEALTH CARE 160, 179 (1985); c.f. John J. Regan, *When Nursing Home Patients Complain: The Ombudsman or the Patient Advocate*, 65 GEO. L.J. 691 (1977).

38. See Joel F. Handler, *Community Care for the Frail Elderly: A Theory of Empowerment*, 50 OHIO ST. L.J. 541 (1989) (criticizing the legal rights approach when used in connection with the frail elderly).

2. The evidentiary hurdle especially where older residents suffer from physical disabilities including impaired vision and hearing that would detract from their credibility; and
3. Retaining adequate legal representation where punitive damages are not available. Since shorter lifespans of the elderly and greater disabilities are likely to lower damages that might be recovered should they prevail, attorneys will be less likely to accept such cases.³⁹

On the other hand, fear of liability on the part of nursing homes has led to protective strategies that may in fact be harmful to the residents. This has generally been the case with those nursing homes that employ physical and chemical restraints to ensure that residents do not injure themselves.⁴⁰ These factors have meant that for the most part quality of care issues are dealt with by the states through their power to license nursing homes and via the federal government which sets standards for participation in the Medicare and Medicaid reimbursement programs.

A. Federal Regulation

The power of the purse has been the primary vehicle for federal regulation of nursing homes.⁴¹ Those nursing homes that meet the standards set by the Health Care Financing Administration ("HCFA") may obtain certification and participate in the Medicare program.⁴² The guidelines for determining certification are contained in HCFA's long-term care certification form.⁴³ Questions relate to compliance with state and local laws, governance and management of the home, medical direction, physician, nursing, and rehabilitative services.⁴⁴ In the past, the survey instrument has been criticized for using vague criteria and for placing an inappropriate focus on facility capabilities rather than resident care.⁴⁵ The present regulations, reflecting the requirements of the Omnibus Budget Reconciliation Act of 1987, have expanded the focus on residents' rights and quality of life.⁴⁶ Although the current regulations do pay

39. See S. JOHNSON ET AL., *supra* note 37, at Chapter 6.

40. Sondra H. Johnson, *The Fear of Liability and the Use of Restraints in Nursing Homes*, 18(3) LAW MED. & HEALTH CARE 263, 270 (1990).

41. See Janice M. Caldwell & Marshall B. Kapp, *The Rights of Nursing Home Patients: Possibilities and Limitations of Federal Regulation*, 6 J. HEALTH POL. POL'Y & L. 41-42 (1981); Vija Kemanis, Note, *A Critical Evaluation of the Federal Role in Nursing Home Quality Enforcement*, 51 U. COLO. L. REV. 607, 615-621 (1980); Timothy S. Jost, *Enforcement of Quality Nursing Home Care in the Legal System*, 13(4) LAW MED. & HEALTH CARE 160, 162 (1985).

42. See 42 C.F.R. § 483 (1993), Kemanis, *supra* note 41, at 615.

43. See 42 C.F.R. §§ 488.100, .105 (1993).

44. *Id.*

45. Kemanis, *supra* note 41, at 622.

46. See 42 C.F.R. §§ 483.10, .15, .25 (1993); see also INSTITUTE OF MEDICINE, *supra* note 7.

greater attention to resident well-being and "resident outcomes," the regulations still rely heavily on structural indicators. With many more nursing homes and a limited number of inspectors, it is much easier to assess facility structure and organization than it is to monitor the care provided to residents. This is reflected as well in the enforcement of the federal regulations. Nursing homes that fail to meet the federal standards are first subject to extended surveys and opportunities to develop plans to improve the conditions of the home before more severe sanctions are sought.

B. State Regulation

The states, through their police powers, establish conditions which nursing homes must meet to obtain a license for operation and to receive certification for participation in Medicaid.⁴⁷ These standards require that nursing homes provide a reasonable level of care to residents in an environment that is safe and promotes resident autonomy to the extent possible. A number of states have attempted to provide greater structure to regulations and subdivide violations into classes based on the degree to which the violation directly impacts on the health of the resident.⁴⁸

The type of violation and the category within which the violation is classified is likely to influence the remedy which the state will pursue. In California, citations vary according to the nature of the violation, the risk of harm they present to the residents' mental and physical condition, the efforts of the nursing home to prevent the violation, and the licensee's history of compliance with regulations.⁴⁹ Class A violations are the most serious. They present either an imminent danger or substantial probability that death or serious harm will result to the resident.

These more serious types of violations are also prime candidates for state agencies to petition for decertification of the home or the appointment of a receiver for the nursing home. Where the remedy of a receivership is granted the provider retains ownership of the facility, but a court-appointed receiver controls and manages the facility.⁵⁰ Although the receiver acts within the powers granted to him by the court, receivership is usually an interim measure adopted where a nursing home is closing and the residents are likely to be subjected to precipitous transfer.⁵¹ For example, if a state agency determines that a nursing home's license should be revoked but the hearing has not yet taken place, courts may

47. See 42 C.F.R. § 442.12(a) (1993).

48. ABA Commission on Legal Problems of the Elderly Model Recommendations: Intermediate Sanctions for Enforcement of Quality Care in Nursing Homes (American Bar Assn., Washington, D.C. (1981)).

49. See CAL. WELF. & INST. CODE § 1424(a)(1)-(5) (1994); See also Johnson, *supra* note 37, at 186 n.20.

50. See Johnson, *supra* note 37, at 177.

51. *Id.*

place the home in a receivership if it is determined that the health of the residents cannot be guaranteed until the date of the hearing.

Class B or C violations are less severe in nature than class A violations and represent infractions that do not *immediately* threaten the health and safety of residents.⁵² These lesser violations are often dealt with through correction plans that are negotiated between the nursing home and the state agency and call for a specific time at which the home will be reinspected.⁵³ If the home is still unable to comply, the agency is supposed to issue a notice of noncompliance. The agency can then issue another date for reinspection, or if the violation is more serious, can fine the home or suspend the home's admitting privileges.

While revocation of a nursing home's license appears to be a rather stringent remedy, it should be noted that even in instances of class A violations most agencies are reluctant to use their authority to revoke the home's license and/or place it in receivership. There are important considerations behind this approach. First, revoking a nursing home's license, especially one that provides skilled care, would force many of the sickest residents to find a new place to live at a time when there is a shortage of available beds. Secondly, the effect of closing a nursing home is that many of the employees, such as nurses' aids, kitchen help, and custodians will have difficulty finding alternative employment because they have only basic skills which are not readily transferable.

This discussion indicates that state agencies are frequently overburdened and prefer to work with the nursing home as opposed to seeking judicial intervention. A central objective of agency regulation appears to be reaching an agreement with the nursing home without resorting to formal disciplinary measures. Even where remedial action is taken, state agencies have been reluctant to resort to delicensure or decertification.⁵⁴ They have, instead, relied on intermediate sanctions, including: civil fines, suspension of admissions, and, to a lesser degree, receiverships.⁵⁵ While this current approach to nursing home regulation may provide a less costly and more politically desirable alternative to litigation, it raises questions about whether nursing home residents are really receiving a second class version of justice. Considering these factors suggests that the nursing home residents' interests are not completely protected by the traditional methods of government regulation and that alternative strategies should be further studied.

52. See CAL. HEALTH & SAFETY CODE § 1424 (1994).

53. See Jost, *supra* note 41, at 164-65.

54. *Id.* at 162.

55. *Id.*

III. THE LONG-TERM CARE OMBUDSMAN

The requirement that state agencies on aging establish ombudsman offices is set out in the Older American's Act.⁵⁶ According to the Act, the duties of the long-term care ombudsman are primarily to "investigate and resolve complaints made by or on behalf of older individuals who are residents of long-term care facilities."⁵⁷ The statute specifies that the investigation will be initiated where the "action, inaction or decisions of providers . . . of long-term care services, public agencies or social service agencies . . . may adversely affect the rights" of the resident.⁵⁸

It is important to look beyond the words of this statute and to ask whether on the whole the long-term care ombudsman actually improves the quality of care and life for the elderly resident of the nursing home. Recent research on this question has pointed to three different modalities in which ombudsmen function, or are perceived as functioning, within the nursing home.⁵⁹

First, the ombudsman may function in a therapeutic or developmental role. The ombudsman who falls into this category is seen as providing support to individual residents, thereby facilitating their adjustment in the nursing home.⁶⁰ This ombudsman may also be viewed as playing a preventive role by reducing the likelihood that conflicts will arise and that legal action will ensue.

Second, the ombudsman may function as a mediator. The ombudsman who serves as mediator insures that some form of justice is made available to persons who would not ordinarily have access to the legal system.⁶¹ He also facilitates a method of dispute resolution that is cost effective, efficient, and ultimately affords individually tailored solutions that can be matched to the particular needs of the nursing home resident.

Finally, the ombudsman may function as an advocate. The ombudsman who acts as an advocate for the residents' interests can be expected to assume a more

56. 42 U.S.C. § 3027(12) (1992); see also INSTITUTE OF MEDICINE, REAL PEOPLE, REAL PROBLEMS: AN EVALUATION OF THE LONG-TERM CARE OMBUDSMEN PROGRAMS OF THE OLDER AMERICANS ACT (1995).

57. *Id.* § 12(a)(i).

58. *Id.* Under the mandate of the Act, states must also make adequate legal counsel "available" to their ombudsman program. 42 U.S.C. § 3058(g) (1994 Cum. Supp.). Studies, however, indicate that "most ombudsman programs are dissatisfied in some degree with the quality of their legal support." See Lori Owen & Michael R. Schuster, *Legal Support to Long-Term Care Ombudsman Programs: Seven Years Later*, 28(6) CLEARINGHOUSE REVIEW 617, 624 (1994).

59. Abraham Monk & Lenard W. Kaye, *The Ombudsman Volunteer in the Nursing Home: Differential Role Perceptions of Patient Representatives for the Institutionalized Aged*, 22 THE GERONTOLOGIST 194 (1989); Howard Litwin, Lenard W. Kaye & Abraham Monk, *Conflicting Orientations to Patient Advocacy in Long-Term Care*, 24 THE GERONTOLOGIST 275 (1984).

60. Litwin, et al., *supra* note 59, at 278.

61. Monk & Kaye, *supra* note 59, at 194.

partisan and adversarial role vis-à-vis the nursing home.⁶² The ombudsman advocate can use her information gathering powers on behalf of the residents to pave the way for political and/or legal action.

It should be recognized that these categories stand out as rough parameters that demarcate the different functions of the nursing home ombudsman. They can also be viewed as sequential roles that the nursing home ombudsman may assume as the circumstances require. In this way, the ombudsman is particularly well suited to handle a wide range of disputes and has broad latitude in the dispute processing options that she may pursue. Thus, conflicts in the nursing home can be responded to in many different ways based on (1) the type of dispute; (2) the individuals or groups involved; (3) the mandate of the ombudsman program; and (4) the orientation of the particular ombudsman.

The special need for flexibility among ombudsmen is illustrated by the fact that disputes range from incidents of resident abuse to conflicts involving decisions by residents to act in ways that are not in their best interests. For example, a diabetic resident may demand to be served sweets. Similarly, the ombudsman may often be called on to respond to conflicts between co-residents. Given the polycentric nature of many of these disputes, the ombudsman represents a complex but particularly adaptive response. It is not, however, without limitations. In particular, the availability of an ombudsman may lead to a greater number of complaints being filed since there is no economic disincentive similar to that which operates with the use of the legal system. Additionally, the ombudsman can be viewed as a weak advocate since she has limited personal prestige and lacks the power to sanction the nursing home. When viewed in context, however, these limitations seem especially relevant to low intensity (minor and trivial disputes) and high intensity (serious and important disputes) conflicts. For the majority of problems, the ombudsman has the capacity to respond and her effectiveness is greatest in the very same areas where the classical ombudsman functioned best, such as remedying marginal defects.

In this Article, we have thus far considered whether the ombudsman has the capacity to respond to resident problems. Assuming that this capacity exists, at least at a general level, we must now ask whether the ombudsman is an effective response when compared to the alternatives.

IV. EFFECTIVENESS OF THE OMBUDSMAN

The effectiveness of nursing home ombudsman programs has been debated. Program effectiveness is often difficult to ascertain because of the conflicting perspectives of diverse constituencies. Goals and role definitions differ among administrators and staff of the nursing home, nursing home residents, community stakeholders, regulatory agencies, and the ombudsman involved. Criteria of

62. MONK, ET AL., *supra* note 25, at 30. The advocacy role is compared to that of a lawyer who is characterized as "partisan in a social conflict, and his expertise is available exclusively to serve client interests." *Id.*

program success can be measured against the therapeutic, mediator, and advocacy functions described above. In addition, broader criteria of success may be applied in terms of the overall efficacy of the ombudsman as a dispute processing option. Such an analysis would consider transaction costs, party satisfaction with outcomes and procedures, the effect on the relationship of the disputant parties, and the recurrence of the same or similar disputes.⁶³

Two empirical approaches to assessing effectiveness have been documented in the literature. The first is based on reports of satisfaction with resolving grievances from perspectives of nursing home residents, staff, and the ombudsman.⁶⁴ A second approach considered the role of ombudsman program implementation in nursing homes in relation to quality of care.⁶⁵

Monk and Kaye conducted a survey to assess perceived effectiveness of ombudsman programs in urban nursing homes.⁶⁶ Responses were compared for residents, staff, and ombudsmen. Among patients who used the services of an ombudsman to address their grievances, there was a divided view regarding the success of the ombudsman in resolving disputes. Among residents polled, forty-three percent reported satisfactory resolution, thirty-nine percent reported lack of resolution and eighteen percent were unsure. As a whole, residents were satisfied with the respectfulness, sensitivity and interest of the ombudsman, notwithstanding their moderate success in the outcomes achieved. This seems to suggest that ombudsmen were most effective in their supportive or therapeutic roles which were highly valued by residents.

Another study, conducted by Cherry focused on quality of care indicators in nursing homes served by ombudsmen and those without similar programs.⁶⁷ In a state wide survey of nursing homes in Missouri, Cherry demonstrated that quality of care is generally better in facilities with active ombudsman programs. He attributed this improved quality of care to the ombudsman's capacity to bring a community presence to the nursing home rather than to specific mediating or advocacy functions. He also suggests that the effectiveness of ombudsman programs on the local level may be best served by collaborative approaches. Whereas on the state level, a more aggressive and adversarial approach may be most effective. This distinction may fit with the prevalent use of volunteer ombudsmen at the local and professional ombudsmen at the state level.

Consideration of the following studies indicates that ombudsmen are generally highly regarded by the parties who are themselves involved in disputes. This criterion of "perceived satisfaction with the fairness of a dispute resolution procedure" has been termed procedural justice.⁶⁸ It is interesting that there is a

63. URY, ET AL., *supra* note 31, at 11-12.

64. Abraham Monk & Lenard W. Kaye, *Assessing the Efficacy of Ombudsman Services for the Aged in Long Term Care Institutions*, 5 EVALUATION AND PROGRAM PLANNING 363 (1982).

65. Cherry, *Agents of Nursing Home Quality of Care: Ombudsmen and Staff Ratios Revisited*, 31 THE GERONTOLOGIST 302 (1991).

66. Monk & Kaye, *supra* note 59, at 363.

67. Cherry, *supra* note 65, at 302.

68. URY, ET AL., *supra* note 31, at 179 n.11.

marked difference between the disputants' satisfaction with the process, as opposed to the outcome ("distributive justice") notwithstanding the literature which suggests a high correlation between the two.⁶⁹ Perhaps one reason for this is that disputants tend to measure success not against a buffered version of their interests but against an absolute conception of their rights. In the nursing home, satisfaction with fairness of process does not necessarily translate into satisfaction with the end result.

The questions of whether the ombudsman is able to significantly reduce transaction costs and the recurrence of disputes remains to be addressed in the literature. The costs of disputing are generally considered to be primarily economic. In the context of the nursing home, there might also be significant human costs especially in cases where the physical well-being of the resident is concerned. It would appear that the ombudsman is a transactionally cost efficient alternative in cases of low to middle intensity disputes while less effective in high intensity disputes. One reason for this difference is the likely correlation between party willingness to make decisions based on their "interests" in low to middle intensity disputes. In contrast, it can be expected that parties will make decisions based on their "rights" in high intensity types of disputes.⁷⁰

Similarly, the ombudsman may be most effective in avoiding the recurrence of disputes where she identifies procedural as opposed to substantive conflicts. Where these procedures result in low intensity conflicts, they may be more readily amenable to change based on notice and recommendations of the ombudsman.

Another important criterion for the success of a dispute resolution relates to the ability of the parties to the conflict to maintain a continuing relationship. This is of special concern to residents in nursing homes who typically lack the option of relocating to another residential facility. In fact, fear that they may be asked to leave or that their funding may be disrupted is likely a factor that prevents institutionalized aged from expressing dissatisfaction. *Non-adversarial* intervention of the ombudsman is useful because of her ability to give voice to resident grievances in a way that allows the administration to save face and does not result in dismissal of the resident. It remains to be seen to what extent adversarial interventions would undermine the continuance of such relationships.

Different approaches to evaluating program effectiveness converge in pointing to the unique contributions of the nursing home ombudsman as a citizen advocate who by her very *presence* may accomplish far more than through the success of her *mediating* efforts. Our focus on the ecological context of the nursing home permits us to recognize that for the frail resident, living in a setting which cuts him off from the outside world, the humanizing influences of a community presence provided by the ombudsman may be the most salient contribution.

In order to understand the implementation of ombudsman programs in specific localities, we must acknowledge the decentralized manner in which these programs are funded and operationalized. Although ombudsman programs are

69. *Id.* at 180.

70. *Id.* at 7.

nationally mandated, the funding and staffing of ombudsmen's offices are regulated by the states as are the duties and powers delegated to the individual offices.

Specific state legislation outlines the duties and responsibilities of the state long-term care ombudsman. In most states, the key duties of the ombudsman are to investigate complaints by residents, establish a statewide uniform reporting service and establish public forums for the discussion of issues relating to the health and safety of residents.⁷¹ The primary power of the ombudsman is investigative, and most states allow them considerable access to nursing home residents and their records.⁷² Many states also authorize the ombudsman to refer complaints to the agencies responsible for nursing home licensing and to publicize their findings.⁷³ These powers illustrate that although the ombudsman is not an advocate in the traditional legal sense, she can serve a crucial function in safeguarding the interests of residents by blending her therapeutic, mediating and advocacy skills.

V. CONCLUSION

It is hoped that the foregoing discussion illustrates the many opportunities and challenges of ADR programs when used to address situations in which the law is intimately interwoven with questions of social policy. This Article has considered the historical development of the ombudsman program from its classical origins to the more recent hybrid versions. In the process, it has revealed a progression from a broad government-based focus to one that is narrower and tied to specific organizations. This narrowing focus was well adapted to dealing with conflicts encountered by citizens in their interactions with increasingly complex and diverse organizations.

This Article next turned to the ecological context of the nursing home and both the situational factors that shaped disputes as well as the ombudsman's options for encouraging their resolution. For the elderly residing in nursing homes, the therapeutic functions, on the one-hand, and advocacy functions, on the other, emerged as significant adjuncts to the traditional mediating roles of the ombudsman. These different functions may embody conflicting requirements for

71. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 9, § 6660.2; MASS. GEN. LAWS ANN. ch. 19A, § 33 (1981); OHIO REV. CODE ANN. § 173.17 (1990); FLA. STAT. ANN. § 400.0065 (1993); CAL. WELF. & INST. CODE § 9720, 9721 (1984). A recent study reviewing the complaint reporting system found significant divergence between the states in how information is collected, analyzed and responded to by the responsible state agencies. F. Netting, et. al., *The Long-Term Care Ombudsman Program: What Does The Complaint Reporting System Tell Us?* 32(6) THE GERONTOLOGIST 843-48 (1992).

72. See N.Y. COMP. CODES R. & REGS. tit. 9, § 6660.12; MASS. GEN. LAWS ANN. ch. 19A, § 30 (1981); CAL. WELF. & INST. CODE, §§ 9722-9724 (1984); FLA. STAT. ANN. § 400.0081 (1993); OHIO REV. CODE ANN. § 173.20. (1990).

73. See CAL. WELF. & INST. CODE, §§ 9721, 9726 (1984); MASS. GEN. LAWS ANN. ch. 19A, § 33(c); FLA. STAT. ANN. § 400.0075(2); OHIO ADMIN. CODE § 173 (1993).

collaboration or adversary approaches to dispute resolution. Consideration of the structural framework set up by the states for discharging these alternative functions and also permits a better understanding of the way structure may facilitate function in ADR.

Finally, this case study of the ombudsman program in its historical, ecological and structural contexts allows one to make some generalizations about the ombudsman as an ADR mechanism *vis-à-vis* the judiciary. Limitations of ombudsman programs as they currently function include lack of clear funding mechanisms and an absence of directive power. The ombudsman's broad range of jurisdiction is offset by a lack of authority which may hinder enforcing recommendations. Advantages of the ombudsman system include greater flexibility, accessibility, cost effectiveness and a better fit with preventive as opposed to ameliorative orientations to safeguarding interests of the individual. As such, ombudsman programs may transcend the objective of resolving specific disputes between individuals and organizations and may represent a foray into the realm of formulating and implementing social policy. The program goals and ultimate accomplishments thus both supplement and parallel those of the legal system.

The nursing home ombudsman program clearly has the *potential* to significantly further the "good administration" of our current long-term care policy and enhance its future development. The question which remains is whether this potential will be realized as programs mature and as we become an older society.

