

**CHAPTER 700: LEGAL ISSUES**

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**701: Legal Advice and Consultation**

- A. Ombudsmen shall have access to adequate legal counsel to support Program activities.
- B. Ombudsmen shall assist residents and participants in seeking administrative, legal and other appropriate remedies in accordance with Section 506(D) of this Manual.
- C. An Ombudsman may contact either the Older Americans Act funded legal services provider or the Office when seeking legal advice regarding issues raised by or on behalf of residents and participants. The request for advice may be made to the Office via phone or in writing.
- D. The Office will seek to respond to the request within five (5) business days by:
  - 1. providing the requested legal advice to the Regional Program, after conferring with counsel;
  - 2. requesting additional information from the Regional Program;
  - 3. providing an update to the Regional Program on the progress in obtaining the necessary information and an anticipated time frame for providing the requested legal advice; or
  - 4. indicating to the Regional Program that the request submitted is inappropriate and why the Office will take no further action.
- E. For the Office to obtain legal advice, the State Ombudsman may:
  - 1. confer with the Legal Service Developer; or
  - 2. contact the Department's General Counsel for guidance on Department policy or procedure; or
  - 3. contact the Department's General Counsel's Office for assistance from the State of Illinois Office of the Attorney General by following Department procedures for such requests.
- F. The Regional Ombudsman may consult with an established multidisciplinary team (see Section 508 of this Manual).

**702: Representation for Civil Legal Action**

- A. An Ombudsman acting in the good faith performance of his or her official duties has immunity from liability in legal proceedings brought as a consequence of the performance of his or her official duties. For an Ombudsman to obtain legal representation in accordance with the Illinois Act on the Aging [20 ILCS 105/4.04(h)] and the State Employee Indemnification Act [5 ILCS 350/1 *et seq.*]:
1. an Ombudsman shall immediately notify the Regional Ombudsman or Deputy State Home Care Ombudsman who shall notify the Office upon receipt of any complaint, summons, subpoena, lawsuit, injunction, court order, or notice of any other legal action taken against the Regional Program, Home Care Ombudsman Program, or any Ombudsman in connection with the performance of official duties. The notice shall be provided within 24 hours, in writing, and shall include a copy of the legal documents along with a brief case summary. Copies of the case notes and records shall be forwarded to the Office, upon request;
  2. the Office may consult with the Department's General Counsel about the legal action or threatened legal action against an Ombudsman; and
  3. when appropriate, the State Ombudsman, or Ombudsman, will submit a written request to the Office of the Attorney General for legal representation.
- B. Legal Representation
1. Should the Attorney General's office agree to represent the Ombudsman, by acceptance of this representation, the Ombudsman agrees to fully cooperate with the Attorney General's office.
  2. Should the Attorney General's office decline to represent the Ombudsman subject to the legal action or identifies a conflict, the Ombudsman may choose to obtain private counsel. The services of the private legal counsel may be subject to reimbursement at reasonable rates approved by the Attorney General.
  3. No federal or state funds may be expended by a Regional Program, Provider Agency or Ombudsman for the reimbursement of private legal counsel where it is the final judgment of the court that the actions, decisions, or conduct which are the basis for the legal action for which the private legal counsel was employed were not undertaken in good faith or were outside the scope of official duties.

**703: Willful Interference**

- A. The Ombudsman statute provides that no person shall willfully interfere with any Ombudsman in the performance of official duties [20 ILCS 105/4.04(f)]. A violation is a business offense subject to a fine.
- B. The Office shall investigate any report of willful interference.
- C. When an Ombudsman believes that willful interference was attempted or has occurred, the Ombudsman will inform the perpetrator of the sanctions provided by law, and, when the perpetrator is an employee of a facility, advise the appropriate supervisor or the administrator of the facility of the situation and the sanctions provided by law. All attempts to prevent or correct willful interference shall be recorded in the case records.
- D. If the interference continues, the Ombudsman shall immediately inform the Office about the interference and provide supporting documentation concerning the interference.
- E. The prosecution of any willful interference may involve a trial, and, accordingly, any corroborating evidence should be carefully collected, preserved, and safeguarded for delivery to the appropriate law enforcement official.
- F. The State Ombudsman shall notify the appropriate State's Attorney or the Office of the Attorney General that an apparent violation of the Illinois Act on the Aging [20 ILCS 105/4.04(f)(1)(i)] has occurred, and request prosecution for a business offense.

**704: Retaliation and Reprisals**

- A. The Ombudsman statute provides that no person shall intentionally retaliate, discriminate against, or effect reprisals in any manner against any resident, or any employee of a long-term care facility for filing a complaint with, providing information to, or otherwise cooperating in good faith with any Ombudsman [20 ILCS 105/4.04(f)(1)(ii)]. Violation of this provision is a business offense subject to a fine.
- B. The Office shall investigate any report of intentional acts of discrimination, retaliation, or reprisal.
- C. When an Ombudsman believes that intentional acts of retaliation, discrimination or reprisal are occurring, have occurred or have been attempted, the Ombudsman should take such steps as are feasible to prevent the retaliation, discrimination or reprisal from continuing. These steps may include, but are not limited to:
  - 1. warning and educating the perpetrator of the sanctions provided by the law;
  - 2. documenting the intentional acts of retaliation, discrimination or reprisal; and/or
  - 3. educating the alleged victim about their rights in regard to being free from retaliation, discrimination or reprisal.
- D. The Ombudsman shall immediately notify the Office about the intentional acts of retaliation, discrimination, or reprisal and submit supporting documentation of the act or acts. The Office shall review the information provided, and conduct further investigation, if necessary, to confirm the occurrence of the interference or retaliation.
- E. The prosecution of any intentional acts of retaliation, discrimination or reprisal as a business offense may involve an administrative procedure or trial, and accordingly, any corroborating evidence should be carefully collected, preserved, and safeguarded for delivery to the appropriate law enforcement official.
- F. If the Office, based on such review, determines that enforcement action is warranted, the Office shall pursue the following course of action:
  - 1. the State Ombudsman, or Ombudsman, shall inform the Office of Attorney General or the appropriate State's Attorney that an apparent violation has occurred, and request prosecution of the individual or entity for a business offense; and
  - 2. when the perpetrator is a long-term care facility employee or agent, the Office shall file a complaint with the Department of Public Health or the Department of Healthcare and Family Services.

**705: Guardianship**

- A. The Program should always advocate for the wishes of a resident and participant as determined by the Ombudsman's best investigatory and counseling efforts. It is appropriate, for example, for an Ombudsman to advocate on behalf of a resident or participant who wishes to oppose a guardianship petition, who wishes to have his or her guardianship revoked or is being abused by the guardian.
- B. The Program encourages residents and participants and their families to execute and use a Power of Attorney, a Living Will and obtain a representative payee whenever possible to avoid unnecessary guardianships. Ombudsmen should regard guardianships only as a last resort and when no other alternatives are available.
- C. Ombudsmen may advocate on behalf of a resident or participant for the least restrictive or limited guardianship in proceedings to establish guardianship of the person. The Ombudsman may request that the court place specific limitations or instructions in the final guardianship order when the resident or participant has voiced such a desire (e.g., that the guardian may not remove the resident from the nursing home, limit the resident's ability to visit friends or relatives, or limit the resident's access to funds).
- D. No Regional Program or any Ombudsman shall serve as guardian of either the estate or the person, as a representative payee, or as an agent under a Power of Attorney for any participant or resident, due to the potential conflict of interest or the appearance of a conflict of interest. This restriction does not apply to an Ombudsman acting as a guardian, a representative payee, or as an agent under a Power of Attorney for his or her own family member. However, an Ombudsman serving as a guardian, representative payee or agent of a Power of Attorney for his or her own family member may not act as the Ombudsman in the facility which the family member resides, or advocate or serve as an authorized representative for a family member during an appeal or fair hearing. In such an instance an Ombudsman from another Regional Program should provide Ombudsman services to the Ombudsman's family member. The Deputy Home Care Ombudsman should re-assign the case in the event of a conflict.
- E. Nothing in this Manual is meant to diminish the responsibilities of the Program or individual Ombudsmen to provide information to residents, participants, their families or the community about the appropriate use of guardianship and its alternatives.