

OMBUDS AND TITLE IX COORDINATORS:
PROCEDURAL CONVERGENCE OF UNIVERSITY DISPUTE RESOLUTION
MECHANISMS FOR HANDLING SEXUAL MISCONDUCT

BY

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ABSTRACT

This dissertation examines university non-law organizational dispute mechanisms (Ombuds and Title IX Coordinators) and their handling of sexual misconduct disputes. In 2011, the U.S. Department of Education Office of Civil Rights issued a Dear Colleague Letter to all colleges and universities receiving federal funding. In the letter, the Department of Education substantially redefined compliance with Title IX's requirements regarding the university response to sexual abuse by faculty, staff or students. The 2011 letter imposed new liabilities on colleges and universities and greatly increased attention to the problem of sexual misconduct at universities. In response, universities faced a growing number of lawsuits, a proliferation of advocacy groups, and a White House Task Force on Protecting Students from Sexual Assault. What, precisely, universities should do in response to these pressures remains somewhat unclear. Universities face a dilemma in determining how to create fair, consistent, and reliable processes that respect the rights of both alleged perpetrators and victims, while at the same time encouraging people to bring complaints forward. Universities also must determine how to change the culture and norms surrounding campus sexual misconduct. These goals are neither easily achieved nor fully compatible. This dissertation examines how two university offices responded to these challenges. One is the long-standing office of Ombuds, which by tradition and ethical norms has been committed to using informal processes for hearing complaints. The other is the office of Title IX Coordinator, which uses formalized processes modeled in some ways on procedures used by prosecutors and courts. Data collection comprised of a review of 1200 documents and interviews with 14 Ombuds and 13 Title IX Coordinators from 22 large institutions of higher education. This dissertation observes that Ombuds and Title IX Coordinators, despite being designed in sharply contrasting ways, both face some pressures

favoring formality and others favoring informality. In responding to these cross-cutting pressures, the two offices have converged (but not fully) toward a hybrid that blends elements of formality and informality. Drawing on theories of non-law ordering, neo-institutional norms, and street-level bureaucracy, this dissertation proposes a theory of procedural convergence to understand the evolution of these two offices. The theory of procedural convergence posits that organizational processes are shaped by both law-like norms favoring legal formality and competing norms of managerial effectiveness and substantive justice favoring informality. Rather than being drawn uniformly away from fidelity to law-like norms, as some theories of organizational responses to law would suggest, both Title IX Coordinators and Ombuds have become a complex blend of informality and formality.

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CHAPTER 1: INTRODUCTION

Sexual misconduct is an ongoing problem on university campuses, and universities are struggling to develop procedures to address it. This dissertation focuses on two alternative structures for addressing this problem that are characteristic of a long-standing tension in the United States legal system: the tension between legal formality and informality. The first of these university structures is the Title IX Coordinator, an official charged with enforcing the law, through law-informed procedures. The second is the Ombuds, an official who, although given no formally defined responsibility, is available to hear all manner of complaints and usually performs this role through *no* law-like procedures. Each of these structures hears and responds to complaints of sexual misconduct. The fact that they do so through what are ostensibly radically different procedures offers the opportunity to compare the institutionalized practices of legal formality and informality. That is the subject of this dissertation.

The difficulty facing universities in the area of sexual misconduct, and the high stakes accompanying the tension between these two alternative procedures, is compounded by sharp cross-cutting pressures. On the one side there is an epidemic of peer sexual violence (one student sexually harassing another in a manner that includes physical conduct) occurring on campuses across the nation. For example, a survey of over 5,000 undergraduate women and over 1,000 undergraduate men at two large public universities and found that 13.7% of undergraduate women reported at least one completed sexual assault since entering college and 6.1% of undergraduate men reported experiencing attempted or completed sexual assaults (Krebs et al., 2007, p. vii, 5-5; see also Lisak and Miller, 2002, 73). In this dissertation I will refer to those who have experienced sexual assault as “survivors,” the term that is commonly used by their

supporters.¹ Drugs and alcohol surely contribute to many of these assaults, accentuating the problem as so many college students drink to excess (DeJong, 2004, p. 104).

Universities were clearly put on notice about these problems, if they had not been before, by a groundbreaking “Dear Colleague” letter issued by the U.S. Department of Education in 2011 that required universities to take steps to address the problem or risk loss of federal funding. According to the Association for Title IX Administrators (ATIXA) website, the 2011 Dear Colleague Letter “created a new profession and a new field” (“About ATIXA and Title IX”, 2014). A watershed moment that redefined the administration of school sexual misconduct disputes, the 2011 Dear Colleague letter clarified a university’s obligation to take immediate action to eliminate, prevent, and remediate any harassment the school should know about that creates a hostile environment. It also required universities to address peer-to-peer sexual misconduct.

As a result of the changes in enforcement, a network of self-identified survivors and allies called Know Your IX (referring to Title IX of the Civil Rights Act) began in 2013 and seeks to advocate for changes and educate students across the country about their civil right to education free from sexual violence and harassment (“About Know Your IX”, 2014).

Universities face contrary pressures, too. Some male college students who feel unfairly accused of sexual assault, along with their families, have organized a new national advocacy group known as Families Advocating for Campus Equality (FACE) and are pushing for greater procedural protections in university procedures for those accused of sexual assault (Wilson, 2014a, p. A38). Likewise, in October, 2014, 28 members of the Harvard Law School Faculty signed a letter objecting to the policy and procedures enacted by Harvard in July of 2014. They

¹ This dissertation uses the term “survivors” throughout as it represents self-determination and strength instead of the more commonplace usage of victim that implies weakness and powerlessness. The term “victim” is retained in its original form in quotations. When discussing Title IX processes, often the term “complainant” is used.

argue the procedures “lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX or regulation” (Rethink Harvard’s Sexual Harassment Policy, 2014).

This dissertation examines universities’ responses to the 2011 Dear Colleague Letter and subsequent requirements. The dilemma facing universities is how to create fair, consistent, and reliable processes that respect the rights of both alleged perpetrators and victims, while at the same time encouraging victims to bring complaints forward. As will be described below, these contrasting goals are often deeply in tension with each other. The difficulty of the dilemma is compounded by the fact that universities are increasingly expected to change the culture and norms shaping campus sexual misconduct so as to reduce the extent of the problem. As will be described below, some measures to achieve these goals seem to require greater formality in procedures; some seem to require greater informality. There is no easy resolution of these tensions.

Since 2011, universities have scrambled to revise their policies and procedures for addressing sexual assault, and how they are doing so makes it possible to examine an age-old debate in American law and socio-legal studies between those who favor legal formality and those who favor informal alternatives. As briefly noted above, complaints of sexual misconduct on university campuses are addressed via two different mechanisms: Title IX Coordinators and Ombuds. The origins, development, institutional structures, and ideologies of these offices differ considerably. Title IX Coordinators partake of a formal legal structure and ideology that emphasizes notice, law-like due process, and punishment. Ombuds use an informal structure and ideology that emphasizes confidentiality, psychological values of truly hearing the perspectives of affected parties in all of their complexity, and use of this knowledge to inform systemic

change. These differing mechanisms represent sharply divergent ways of addressing the difficult issues posed by campus sexual misconduct.

Some past research examines each of these types of offices. Title IX Coordinators are a type of formal legal compliance office that was widely adopted in response to the Civil Rights Act. Similar formal offices, particularly Equal Employment Opportunity (EEO) and Affirmative Action (AA) offices, have been widely studied (Edelman, 1990, 1992; Edelman et al., 2010, 2011; Dobbin & Kelly, 2007). These studies identify EEO/AA offices as a sort of “non-law” structure that is meant to interpret and enforce law inside a bureaucratic organization. These studies of EEO/AA offices mainly compare these offices to a court-like ideal and, in light of this comparison, generally observe that these types of offices, although legally framed, tend toward more informality in practice. Title IX Coordinators are just such a structure, and, like EEO/AA offices, operate somewhat more informally than the court-like ideal.

Some other past research examines how Ombuds work (Harrison, 2003, 2004, 2007; Harrison & Morrill, 2004). This research mainly compares these Ombuds’ practices to an ideal type of Ombuds and generally observes that these offices face considerable pressure to become more formal in comparison to this ideal type.

While it is undoubtedly true that Title IX Coordinators are less court-like than true courts, and Ombuds are, in practice, not fully true to their guiding model, it is also likely that these different offices remain different from each other: Coordinators are likely to act more formally and legally, and Ombuds are likely to act more informally and non-legally. But no research has empirically compared these internal offices to each other, nor has any examined how in practice they address the difficult matter of sexual misconduct, nor how *well* they address sexual misconduct. My dissertation examines these questions with a comparison of Title IX

Coordinators and Ombuds at universities across the United States. Both of these offices may be thought of as “non-law” interpreters of legal norms: one in a more formal mode, the other in a more informal mode.

In examining these mechanisms, my data consist of interviews of fourteen Ombuds and thirteen Title IX Coordinators from twenty-two institutions of higher education nation-wide, along with documents authorizing and regulating Ombuds and Title IX Coordinators. My thesis is that Ombuds and Title IX Coordinators, despite being designed in sharply contrasting ways (informal versus formal), both face some pressures favoring formality and others favoring informality. This research finds the two offices, in responding to these cross-cutting pressures, have converged (but not fully) toward a hybrid of formality and informality. This research has important implications for efforts to effectively combat sexual misconduct on university campuses. This research also has important implications for the creation of non-law dispute mechanisms and the balance between individual rights and the organizational development of legal norms. The remainder of this introduction briefly introduces the basic institutional and ideological differences between Title IX Coordinators and Ombuds and then outlines the theoretical lenses to be used in studying how they work in practice.

THE LEGAL CONTEXT FOR SEXUAL MISCONDUCT ON CAMPUS

The legal environment puts pressure on universities to address the problem of sexual misconduct through the lens of individual complaints. The Department of Education’s Office of Civil Rights (OCR) is tasked with enforcing Title IX of the Educational Amendments of 1972 (20 U.S.C. § 1681; 2006 & Supp. V. 2011). Title IX promotes equity in academic and athletics programs, prohibits hostile environments on the basis of sex, prohibits sexual harassment and sexual violence, and directs universities to protect complainants against retaliation and to remedy

the effects of other gender-based forms of discrimination. Title IX was adopted by Congress in order to effectuate an individually-based remedy, activated by individual complaints, rather than authorize a federal enforcement agency (like the National Labor Relations Board) to oversee and direct broad reforms in the regulated sector (Farhang, 2010). In response to Title IX, universities created Title IX Compliance officers and organizational mechanisms for addressing individual complaints of sexual harassment and gender inequities.

The legal standards for compliance by universities remained unclear until OCR issued the groundbreaking “Dear Colleague” letter on April 4, 2011. The letter clarified a school’s obligation to take immediate action to eliminate, prevent, and remediate any harassment the school should know about that creates a hostile environment. Among other mandates, the letter required schools to create nondiscrimination policies that prohibit sex discrimination and sexual violence, to provide notice of grievance procedures, to use a preponderance of the evidence burden of proof, and to require training on sexual misconduct and knowledge of sexual violence for fact finders and decision makers.

Subsequently, the 2013 reauthorization of the Violence Against Women Act sought to provide clarity to the requirements surrounding Title IX (American Council on Education, 2014, p. 1). Section 303 requires that institutions create a coordinated community response and establish prevention and education programs and train all campus law enforcement and members of campus disciplinary boards to respond effectively. In concert with the new law, federal administrators are making it clear that preventing and handling campus sexual assaults must be a university priority.

In January 2014 President Obama pledged to develop a coordinated federal response to combat campus sexual assault (Sander, 2014a, p. A7). President Obama created a White House

Task Force on Protecting Students From Sexual Assault, designed to provide colleges with information on best practices, to ensure compliance with legal obligations, to increase the transparency of federal enforcement, increase the public's awareness of individual colleges' compliance with the law, and to facilitate coordination among federal agencies (Sander, 2014a, p. A7). The White House Task Force (WHTF) issued its first report, "Not Alone," in April 2014, and created a website, notalone.gov to provide resources for schools and students. The task force report recommends campus climate surveys (WHTF, Not Alone, 2014, p. 8) active engaging with men, and actively creating campus bystander programs to change campus cultures (WHTF, Not Alone, 2014, p. 2). The report also recommends giving survivors more control over the process by ensuring a place to go for confidential advice and support (WHTF, Not Alone, 2014, p. 17). It recommends training for officials in how to address the trauma that attends sexual assault (WHTF, Not Alone, 2014, pp. 3-4).

Since OCR began tracking sexual misconduct Title IX complaints in 2009, the number of complaints filed against colleges has tripled from 11 in 2009 to 33 through April of 2014 (Newman & Sander, 2014, p. A24). As of November 1, 2014, more than 80 colleges were under federal investigation for possible violations of Title IX (Lewontin, 2014, p. A4). Despite this trend, an analysis of Title IX complaints filed with the Department of Education from 2003 to 2013 found that fewer than one in ten led to a formal agreement to change campus policies (Newman & Sander, 2014, p. A24).

Increased attention to sexual misconduct has also led to a proliferation of complaints and lawsuits. In January of 2013, student Andrea Pino, two other students, an alumna, and a former administrator made a federal complaint against the University of North Carolina at Chapel Hill accusing the university of negligently handling its responses to rape (Sander, 2013b, p. A20).

Students elsewhere filed similar complaints against universities like Amherst, Berkeley, Dartmouth, Occidental, Swarthmore, and Vanderbilt (Sander, 2013b, p. A20). In July, 2013 the University of Connecticut announced it would pay nearly \$1.3 million to settle a federal lawsuit filed by five current and former female undergraduate students claiming the university had mishandled their sexual assault complaints (Vendituoli, 2014, p. A4).

Students accused of sexual misconduct are also filing complaints. Daniel Kopin, a former student at Brown University, sent a letter to the U.S. Education Department's Office for Civil Rights, sharing his side of a sexual encounter that resulted in his suspension (Vendituoli, 2014, p. A4). In June 2013, Peter Yu sued Vassar College, arguing that the college denied him due process throughout the sexual misconduct disciplinary process and had discriminated against him because of his sex (Sander, 2013a, p. A14). Specifically, Yu claimed officials did not properly advise him of grievance policies and did not allow him legal representation at the disciplinary hearing (Sander, 2013a, p. A14). Similar complaints were filed against St. Joseph's University in July 2013, and a federal lawsuit was filed against Xavier University in August 2013, claiming that the university conducted a fundamentally unfair hearing (Sander, 2013a, p. A14). These three lawsuits all share several allegations in common: Campus officials withheld key evidence in hearings, were hasty to rush to judgment, and a general presumption of guilt prevailed (Sander, 2013a, p. A14). In sum, young men are as unhappy with the outcome of college investigations as their accusers, and often both sides find the process unfair (Wilson, 2014b, p. A11).

Attorneys representing both survivors and the accused report they are seeing an uptick in cases. Brett Sokolow, president of the National Center for Higher Education Risk Management (which also oversees ATIXA, the Association of Title IX Administrators) notes receiving nearly

60 calls from accused students and their parents, of which he is now representing roughly a dozen (Wilson, 2014a, p. A38). Another attorney, Andrew Miltenberg, reported receiving fifteen calls each month in 2014 (Wilson, 2014a, p. A38).

In sum, Title IX Coordinators and Ombuds address campus sexual misconduct in an increasingly legalized environment that is characterized by growing complaints, liability pressure, and legalized directives from the Department of Education's OCR.

THE PROBLEM OF SEXUAL MISCONDUCT ON CAMPUS

Sexual misconduct among fellow students and professors is a very serious problem and universities face a dilemma in how to deal with it. There is an epidemic of peer sexual violence (one student sexually harassing another in a manner that includes physical conduct) occurring on campuses across the nation. With studies ranging from the mid-1980s to 2007, the effort to combat campus peer sexual violence is in its fourth decade (Cantalupo, 2012).

Research shows that a small number of repeat perpetrators commit the vast majority of sexual violence (Lisak & Miller, 2002), requiring mechanisms for identifying and stopping these repeat offenders. A 2002 study surveyed 1882 male university students and found that 4% of the study's subjects accounted for 28% of the violence, a rate ten times greater than that of non-rapists (Lisak & Miller, 2002, p. 76). Fraternity men have been identified as more likely to perpetrate sexual crimes than non-fraternity men (Krebs et al., 2007, pp. 2-11). Crosset et al. (1996) found that while male student-athletes made up 3.3% of the population at Division I institutions, they represented 19% of the alleged sexual assault or domestic violence perpetrators in judicial affairs records (pp. 171, 73). High profile cases of sexual violence by athletes persist, including the rape allegations facing Heisman Trophy-winning quarterback Jameis Winston (McCann, 2014, p. 13), the delay and ultimate expulsion of University of Michigan Kicker

Brendan Gibbons (Slovin & Rubenfire, 2014), and the 2011 suicide of University of Missouri Swimmer Sasha Menu Courey, sixteen months after an uninvestigated allegation of rape by a football player (Farrey & Noren, 2014).

Evidence indicates sexual misconduct is widely underreported. A 2007 survey indicated that only 16% of physically forced survivors and 8% of incapacitated sexual assault survivors contacted a survivor's, crisis, or health care center after the incident. Only 2% of incapacitated survivors and 13% of physically forced survivors report the incident to law enforcement (Krebs et al., 2007, p. xvii). Other studies estimate that ninety percent or more of survivors of campus sexual assault do not report the incident (Fisher et al., 2000).

Evidence indicates non-reporting occurs due to a fear of reprisal and a belief the process will not work or not be fair. In a 2001 survey of graduate students, 21% of those experiencing harassment reported the behavior, 30% experienced retaliation after reporting, and 58% believed the reporting process and complaint handling could be improved (UMN-TC Survey, 2011, p. 5). The problem especially occurs within relationships (romantic as well as hierarchical), making it more difficult for survivors to come forward. Most perpetrators of rape or attempted rape are known to the survivor, including classmates and friends (70% of completed rapes) and boyfriends or ex-boyfriends (23.7% of completed rates and 14.5% of attempted rapes) (Fisher et al., 2000, p. 19). Employee-to-student and faculty-to-student sexual misconduct are also campus problems that implicate Title IX. Employee misconduct more generally is an ongoing problem as indicated by the Jerry Sandusky child sexual abuse scandal and scandals at Syracuse University, University of Texas, the University of Arkansas and many other examples (Dennie, 2012, p. 830; Heckman, 2009). Tepper and White (2011, p. 83) suggest that the decentralized

environment, the focus on academic pursuits, and the hierarchical intellectual environment allow harassing behaviors to go unchecked in academic institutions.

In part, the breadth of the problem is a product of the university context itself, requiring that institutions take action to remediate the effects of sexual misconduct. In a 2014 survey of more than 300 schools commissioned by Senator Claire McCaskill, more than 40% of U.S. colleges and universities conducted no investigations of sexual assault allegations over the past five years (Marklein & Shesgreen, 2014). Further, the survey found that only 16% of schools conduct “climate surveys” to determine the prevalence of sexual assault on campus, and only about half of colleges have a hotline that survivors can call to report a sexual assault (Marklein & Shesgreen, 2014). Nearly 73% of schools do not have protocols for how campus authorities and local law enforcement should work together on cases (Marklein & Shesgreen, 2014).

Employee perceptions of organizational tolerance to sexual harassment are significantly related to the frequency of sexual harassment incidents and the effectiveness in combating the problem (Gallivan Nelson et al., 2007; Miner-Rubino & Corina, 2004). Organizationally, studies reveal that where a choice of sanctions for harassment is available, it is common for the least stringent to be selected, such as a formal or informal warning without further action (Salin, 2007). Such responses indicate a deflection of organizational responsibility and may indicate a ‘climate of tolerance’ (McDonald, 2012).

In sum, Title IX Coordinators and Ombuds face a context in which there is a lot of sexual misconduct by students and university employees, repeat offenders cause a lot of the problems, misconduct especially occurs within romantic and other relationships involving power dynamics, and survivors are very hesitant to come forward. It is important to have processes in place that facilitate rather than discourage individuals to make complaints. It is also important to have

processes that fairly adjudicate responsibility for misconduct. Finally, it is important to have mechanisms for ensuring that university leaders know about significant problems and to develop ways to address them.

THE THEORETIC LENSES AND THIS DISSERTATION'S THESIS

The lens used for studying how universities respond to the dilemma of university sexual misconduct is the literature on non-law forms of ordering and neo-institutional theory. In *Rules versus Relationships: The Ethnography of Legal Discourse* Conley and O'Barr (1990) describe a useful way for differentiating Ombuds and Title IX Coordinators. According to Conley and O'Barr (1990, p. ix) litigants with a relational orientation "come to the legal system seeking redress for a wide range of personal and social wrongs. In talking about their problems, they predicate rights and responsibilities on a broad notion of social interdependence rather than on the application of rules. The courts often fail to understand their cases, regardless of their legal merits, and this frequently results in frustration and alienation." Typical of women, the poor, the uneducated, and those traditionally denied access to sources of social power (Conley & Barr, 1990, p. 173, citing O'Barr, 1982; Conley et al., 1978), those with a relational orientation feel they do not have a proper opportunity in formal processes to tell their story (Conley & O'Barr, 1990, p. 172). By contrast, litigants with a rule orientation "evaluate their problems in terms of neutral principles whose application transcends differences in personal and social status... they emphasize these principles rather than such issues as individual need or social worth." (Conley & O'Barr, 1990, p. ix). This discourse treats "rules as transcending the social particulars of individual cases... [and] thus rejects the fundamental premise of the relational orientation" (Conley & O'Barr, 1990, p. 172).

Conley and O’Barr’s research describes different litigants, but it just as easily describes the differences between the archetypal Ombuds and Title IX Coordinator. The archetypal Ombuds and Title IX Coordinator operate with very different purposes, structures, and norms. While the model Ombuds has an informal, relational orientation based on the core principles of impartiality, confidentiality, informality, and independence, the archetypal Title IX Coordinator has a formal, rule-based orientation based on compliance with and enforcement of Title IX. These orientations and the differing sources of authority affect each mechanism’s typical mission, the formality of the processes used, and how each views the key principles of impartiality, independence, and confidentiality. In later chapters I will describe in more detail how these two differing offices follows sharply different models: formality versus informality.

Nonetheless, although Ombuds and Title IX Coordinators follow sharply different models, they are likely to be drawn in similar directions by common elements of their institutional and legal environment. Both are examples of what scholars call “non-law” dispute-processing mechanisms (Auerbach, 1983; Ellickson, 1991), and a large body of literature on such mechanisms finds that they are pulled by a complex mix of legal and institutional pressures toward a sort of hybrid, quasi-law like organizational form.

To understand “non-law” mechanisms, it is helpful to examine the classic studies on avoidance of law in the United States. Informality in dispute processes is driven by people and organizations that dislike formal procedures and the publicity and loss of control that attends them. As a result they try to resolve things informally, “behind the scenes.” Auerbach (1983), Ellickson (1991), and Robinson (2013) all examine such instances of non-law order, with McAdams (1997), Blocher (2012), and Kostritsky (2013) investigating how norms and law interact. In *Justice without Law* (1983), Auerbach analyzes how particular communities of

American society resolve disputes without recourse to law. He argues that because the United States is an exceptionally rule-oriented and litigious society with the law residing exclusively in the hands of lawyers, myriad groups—minority religious sects, commercial business associations, progressive policy reformers, and universities, to name just a few—have established non-law dispute resolution systems to avoid the strictures and proceduralism of the formal legal system.

There is a large neo-institutional literature on how these “non-law” offices and processes inside bureaucratic organizations develop (Edelman, 1990, 1992; Edelman, Uggen, & Erlanger, 1999; Edelman et. al., 2010, 2011; Dobbin & Kelly, 2007). Formal, “non-law” organizational alternatives were first examined by Selznick (1969) who observed the law as a normative influence on organizations, contributing to increasing levels of formalism in organizations’ internal dispute-processing systems. Building on this institutional perspective in organizations theory, legal environment theory emphasizes the isomorphic influence of the normative environment on organizational structure and behavior (Meyer & Rowan, 1977; DiMaggio & Powell, 1983; Scott & Meyer, 1983). While classical organization theory emphasizes efficiency and control as the motivation for the formalization of organizational governance (Weber; Blau & Schoenherr, 1971), neo-institutional theorists (Edelman, 1990, 1992; March & Olsen, 1989, 1995) argue that organizations tend to adopt internal structures that mimic responsiveness to norms in the external legal environment so as to facilitate their legitimacy. Recent scholarship (Edelman, Uggen, & Erlanger, 1999; Edelman et al., 2010, 2011.) has increasingly observed that organizational “responses” to external law so greatly shape what is meant by “compliance” that we should think of organizations as “constructing” their legal environment. That is to say, courts have come to accept organizations’ internal EEO/AA policies and procedures as what the law

requires. In this way institutionalized organizational structure influences judicial views of compliance with the law. Effectively formal organizational dispute systems create non-law mechanisms of avoiding liability. As non-statutorily required structures are created, judges first reference the structures, then employers point to these structures to justify their actions as nondiscriminatory, and finally over time an iterative process develops in which judicial opinions and precedents treat such structures as indicators that the organization is complying with the law (Edelman et al., 2011).

Although these internal offices are a type of “non-law” alternative, observers have long noted that they come under pressure to mimic the formal processes of law. Although Edelman has long argued that this mimicry is often akin to empty symbolism (Edelman 1990, 1992), she has acknowledged that the managerial structures representing compliance often are quite legal (i.e. formal) in nature, and look superficially like legal institutions (policies and rules resemble legal rules, grievance procedures look like judicial proceedings, etc.) and that the more an organizational process mimics the formality of a legal process, the greater the likelihood that the process will receive deference and legitimacy by the courts (Edelman et al., 2011). Auerbach (1983) also describes how alternatives come under pressure to mimic formal processes. He notes how non-law dispute resolution systems, particularly small claims courts, commercial arbitration, and labor arbitration, among others, have become significant parts of the legal system. Auerbach (1983) observes that many such reforms have subtly gravitated toward greater procedural formalism over time as they have faced criticisms for a perceived lack of procedural fairness. Likewise, Epp (2009) has argued that organizational managers often are pressured by threats of liability to adopt law-like policies and procedures that are more formalized and extensive than they initially preferred. Contrary to the image depicted by Edelman (1990, 1992)

and Edelman et. al (2011) of managerial control over this internal institutionalization of law, Epp's evidence (2009) suggests that under pressure from liability, bureaucratic organizations are often drawn far along the path toward legal formality.

Title IX Coordinators and Ombuds can *both* be thought of as very different versions of the tendency to create “non-law” vehicles. Ombuds typify the use of “non-law” community norms as they have no inherent power to hire, fire, or enact and enforce organizational changes. The levers available to Ombuds are all persuasive in nature. As a result, an Ombuds's influence is organizationally created, but without coercive authority. It is entirely determined by the legitimacy ascribed by organizational members and stakeholders. In a 2007 International Ombudsman Association Survey, one Ombuds respondent noted, “We have no coercive power. Our power comes from our ability to persuade, to act quickly, and to take on what no one else will” (Erbe & Sebok, 2008, p. 30). Less obviously Title IX Coordinators, too, are a version of the various internal organizational offices that are created to avoid having internal disputes automatically shunted out to regular courts for resolution. Thus they, too, are a type of “non-law” alternative to the formal law.

In sum, although Title IX Coordinators and Ombuds start from very different institutional premises, these theories suggest that *both* are likely to be subject to similar cross-cutting institutional pressures. Some of these pressures favor greater informality. Others favor greater law-like formality. Since the ideal-type of Title IX Coordinator is already quite formal, I expect to find that this office will be pulled in practice more toward greater informality. Since the ideal-type of Ombuds is already quite informal, I expect that this office will be pulled toward greater formality. How they respond in practice to these cross-cutting pressures is the subject of this dissertation. This dissertation proposes the following thesis: Formal and informal non-law

organizational dispute mechanisms (in this instance, Title IX coordinators and Ombuds) converge over time and begin to resemble one another. This will be called *procedural convergence*. In the case of these Coordinators and Ombuds, this procedural convergence is evident on the key values of confidentiality, impartiality, and procedural formalism. The issue of confidentiality implicates a tension between the individual's interest in controlling others' access to personal information versus the organization's interest in divulging that information for the purpose of better managing and controlling abuses and insulating itself from liability for these abuses. The issue of impartiality implicates a tension between neutrally adjudicating a dispute between two individuals versus fully investigating that dispute to discover the truth. The issue of procedural formalism implicates a tension between the judicial model of fair procedures versus a psychological model that emphasizes the value of being heard and respected. These tensions will be summarized in more detail in the following section.

For now, the important point is that in addressing these tensions, Ombuds and Title IX coordinators start in principle from sharply different normative positions but converge toward similar practices. This convergence is not full and complete, but it is greater than would be anticipated by the normative principles of these two contrasting models. Thus, with regard to confidentiality, both roles offer complainants less confidentiality than promised by the principled Ombuds model, but more than offered by the enforcement-oriented Coordinator model. With regard to impartiality, both roles offer less impartiality than promised in principle by either the strict independence and non-partiality of the Ombuds model or the clear separation of investigative and adjudicatory roles mandated by administrative law. With regard to procedural formalism, Ombuds and Coordinators offer complainants less procedural formalism than a court of law, but considerably more than promised in principle by the wholly informal Ombuds model.

This proposed model of procedural convergence is distinct from the neo-institutional model of symbolic mimicry of the law favored by Edelman (1990, 1992). In that neo-institutional model, organizational responses to law are described as symbolic mimicry that follow the image of law but in practice are influenced mainly by managerial interests. We might call this a model of organizational *divergence* from law. In Edelman's description, while organizational structures may mimic the law, they diverge from it in order to serve managerial and organizational interests in efficiency. It must be remembered that Edelman studied mainly formal organizational structures that are based on a law-like model; it is not entirely surprising that these are less "law"-like in practice than they first appear. This dissertation, by studying both Title IX coordinators, a formal organizational structure, and Ombuds, an *informal* organizational structure, we see that the pull is not exclusively *away* from the law-like model. In fact, Ombuds are pulled in practice more toward the law-like model. Title IX coordinators and Ombuds thus do not engage in practice in a common divergence away from law; instead they engage in a common convergence toward a hybrid middle ground that incorporates some elements of law-like procedure and some elements of managerial efficiency.

This convergence toward some elements of law and some of managerial efficiency appears to be driven by two major forces. The first of these is perceived liability pressure and the need to protect the official (whether the Title IX Coordinator or the Ombuds) and the university from exposure to liability. This perceived pressure draws both Coordinators and Ombuds toward taking some law-influenced actions that will be described in detail in the following chapters. The second of these pressures is very different. It is the desire to produce substantive justice (good outcomes) in individual cases as opposed to strictly following a principled model.

In addition to theories of non-law ordering, how universities have responded to this dilemma may be understood in part through the lens of bureaucratic politics theory, and specifically the theory of street-level bureaucracy. Theories of bureaucratic politics focus on how administrative officials make discretionary decisions that shape administrative policy. . Theories of street-level bureaucracy specifically focus on how individuals on the front lines of administration play active roles in this process of bureaucratic politics, and how their discretionary decisions shape the enforcement of rules and laws (Lipsky, 1983; Maynard-Moody & Musheno, 2003). As Maynard-Moody and Musheno note, “street-level work is ambiguous and marked by conflicting signs, leaving the worker to determine how to respond” (Maynard-Moody & Musheno, 2003, p. 153). As illustrated by the below hypotheticals, “the needs and character of [the individuals served] (as defined by the [Title IX Coordinator or Ombuds]) and the demands of rules, procedures, and policies (as understood by the [Title IX Coordinator or Ombuds]) exist in unresolvable tension” (Maynard-Moody & Musheno, 2003, 156).

The deep dilemma facing university officials, and the cross-cutting pressures on them, may be illustrated by a hypothetical scenario based loosely on many of my interviews. Imagine you are a Title IX Coordinator and a female undergraduate student is in your office telling you she was a victim of a sexual assault. You believe her, but you believe it is a coin-toss as to whether the evidence will be enough to prove that the assault occurred. She never wants to see the perpetrator again, she does not want her parents to find out, and she is wary of going through a public hearing. She is very emotional and simply wanted someone to know what happened. According to the 2011 Dear Colleague letter and your university’s official policies, you have an obligation to investigate every instance of sexual misconduct. Yet you also know that the hearing process in this case would be arduous and could generate considerable publicity. You also know

that, if you begin even the first step of the formal process of investigation and hearings as required by the 2011 letter and university policy, you will be unable to guarantee confidentiality to this distraught student. What do you do?

Consider another scenario. Imagine you are an Ombuds and the same female undergraduate student is in your office telling you she was a victim of a sexual assault. Your institution is under investigation by the Office of Civil Rights for the mishandling of prior sexual assault complaints. Because of this investigation and the heightened attention to adhering strictly to the guidelines in the 2011 Dear Colleague letter, you face considerable pressure to report any instances of sexual misconduct. To do otherwise would seem to the investigators, and your university superiors, as an instance of precisely the sort of problem the Dear Colleague letter aimed to correct: a pattern of sweeping abuses under the rug. But, as an Ombuds, you are bound by a long tradition and an ethical commitment requiring you to maintain the confidentiality of every person who makes a complaint to you. This confidentiality is the essence of the Ombuds role. The undergraduate student before you asks you about the investigation and hearing process, which you know to be difficult for victims and often does not result in a finding of misconduct. Hearing your description of the process, she says that she does not want to be dragged through such an ordeal. This is the second person over the past two years to come into your office and make such an allegation against this particular perpetrator. The two complaints are quite similar. They seem to you to be quite credible and compelling evidence that the university has in its employment a sexual predator. What do you do?

Both Ombuds and Title IX Coordinators act as street-level bureaucrats when faced with individuals needing their help. Like street-level bureaucrats everywhere, they are pulled in different directions by competing norms and pressures. Title IX Coordinators are buoyed by the

increasing attention paid to Title IX, but must navigate the often conflicting interests expressed by university legal counsel, administrators, students, and activists. Ombuds face greater threats to institutional legitimacy than Title IX Coordinators. The attention and pressure on universities to discover, investigate, and eradicate sexual misconduct places significant pressure on organizational actors like Ombuds with the ability to provide absolute confidentiality. Operating outside traditional operating procedures, and without an ability to evidence results, Ombuds are experiencing pressure to relax their stated principles and act as an additional compliance mechanism.

As will be described in the following chapters, both Coordinators and Ombuds sometimes believe that in order to stop an abuse or hold an abuser accountable they must depart from the strict requirements of their respective models. In many such instances they do so. In addition to these two major forces, the evidence in following chapters also suggests that individual officials vary in their degree of principled commitment to their respective official roles. Thus, some Ombuds are more willing than others to depart from the ideal-type of an Ombuds; some Title IX Coordinators are more willing than others to depart from the prescribed Coordinator role.

As opposed to symbolic mimicry, procedural convergence is what occurs when formal and informal organizational dispute mechanisms, facing liability pressures and the felt need to bring justice, depart from their respective models. The law is a powerful force that paradoxically pushes Title IX Coordinators and Ombuds to utilize each other's core strategy. By becoming more formal or informal, each role seeks to serve both the institution and the individuals involved. Fundamentally, convergence occurs due to complex tradeoffs that require Ombuds and Title IX Coordinators to maintain or relax their standards in the face of significant pressure to

protect the university community and vulnerable individuals from harm. These cross-cutting pressures arise in the context of several key tensions between competing values. These tensions are reviewed in the next section.

KEY TENSIONS FACED BY OMBUDS AND TITLE IX COORDINATORS

Some pressures on Ombuds and Title IX Coordinators push toward greater formality; some push toward greater informality. Many years ago Verkuil (1975) noted how the pervasive model of legal formality is likely to push Ombuds toward greater formality:

The ombudsman's potential as a procedural system is largely bound up with our commitment to the adversary system. 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. While the two systems could coexist in harmony if spheres of influence were delineated reflecting the appropriateness of their respective procedures, the spread of the adversary system, in response to the perceived commands of procedural due process, into many areas of administrative decisionmaking has stymied the development of the ombudsman alternative. (p. 846)

The tension between formality and informality encompasses several particular conflicts or tensions, and this section will examine these. Generally speaking, they are parts of a general conflict between individual self-determination and broader organizational interests. On the one hand, an individual who feels she has been subjected to sexual harassment or assault has a strong interest in shaping whether and how the university pursues an investigation and disciplinary action in response to her grievance. Often these individuals do not even file a complaint because they fear losing control of the process. By contrast, universities have a strong interest in vigorously investigating these cases and carrying out discipline when it is merited, in the view of the university. This interest serves the value of setting clear norms, punishing bad actors, and deterring future misconduct. It also serves the value of protecting the university from liability for

failing to do enough to stamp out misconduct. In pursuit of these goals, often a university will want to investigate and discipline even if the complainant does not.

Confidentiality versus mandatory reporting

Confidentiality and the reporting of sexual misconduct illustrates the tension between self-determination and organizational interests. Confidentiality is the principle that information disclosed by one party to another may not be disclosed to third parties except upon the consent of the party who initially disclosed it. Thus, if a person complains to an official of a sexual assault, under the principle of confidentiality that official may not report this to anyone else unless the complainant wishes this to be done. By ensuring confidentiality, officials serve the values of encouraging people to report misconduct, assisting survivors in getting any needed support, and providing survivors with self-determination in maintaining control regarding what will happen with the complaint.

The principle of confidentiality is in tension with the principle of mandatory reporting. Mandatory reporting is the requirement that any employee of an organization who learns of a violation of a policy must report this to organizational officials charged with enforcing this policy. Thus, many universities have a policy requiring that any employee who learns of sexual misconduct in violation of law or university policy must report this to the Title IX Coordinator or a similar official. The values served by mandatory reporting are to set clear norms against sexual violence by encouraging reporting, punishing bad behavior, and deterring future misconduct. These organizational values also serve to protect the organization from liability.

Title IX Coordinators and Ombuds take different approaches to the tension between these two principles. Title IX Coordinators promise confidentiality, but only to the extent that it does not interfere with the law and interests of compliance. Put simply, Coordinators give priority to

reporting and compliance. Ombuds give priority to confidentiality. They promise absolute confidentiality, and do not make reports about specific individuals. Ombuds only make reports about trends when the complete anonymity of the visitor can be ensured.

The tension between these two approaches to confidentiality was clearly articulated in *Not Alone*, the first report of The White House Task Force to Protect Students from Sexual Assault (2014):

Sexual assault survivors respond in different ways. Some are ready to make a formal complaint right away, and want their school to move swiftly to hold the perpetrator accountable. Others, however, aren't so sure. Sexual assault can leave survivors feeling powerless—and they need support from the beginning to regain a sense of control. Some, at least at first, don't want their assailant (or the assailant's friends, classmates, teammates or club members) to know they've reported what happened. But they do want someone on campus to talk to—and many want to talk in confidence, so they can sort through their options at their own pace. If survivors don't have a confidential place to go, or think a school will launch a full-scale investigation against their wishes, many will stay silent. In recent years, some schools have directed nearly all their employees (including those who typically offer confidential services, like rape crisis and women's centers) to report all the details of an incident to school officials- which can mean that a survivor quickly loses control over what happens next. That practice, however well intentioned, leaves survivors with fewer places to turn. (p. 11)

Confidentiality is thus both a challenge and an opportunity for Title IX Coordinators and Ombuds. As an opportunity, confidentiality can be used to build trust, provide self-determination, and ensure privacy for survivors and alleged perpetrators. Confidentiality also presents significant challenges because it may prevent people from the reporting of all known instances of sexual misconduct. Without knowing about an instance of sexual misconduct, university officials are unable to investigate and remedy problems, potentially exposing the institution to liability.

How much confidentiality is honored has implications for survivors' choice of whether and how to report. Cantalupo (2009, p. 680) argues that due to the epidemic nature of peer

sexual violence on campuses and the overwhelming non-reporting, and the cycle of non-reporting and violence perpetration, survivors have an obligation to come forward and report. In this view, the survivor's self-determination is subordinated to the broader interest in deterring sexual misconduct. Beloof (1999) notes that it is important to preserve the possibility of non-reporting at the request of a survivor because doing so acknowledges "the victim's desire to retain privacy; the victim's concern about participating in a system that may do [her] more harm than good; the inability of the system to effectively solve many crimes; the inconvenience to the victim; the victim's lack of participation, control, and influence in the process..." (p. 306).

Some have argued that confidentiality encourages the filing of complaints by survivors. According to Rowe, Wilcox, and Gadlin (2009, p. 52), the most common reasons individuals decide not to make a complaint or take other steps to stop behavior they find unacceptable includes "fear of loss of relationships, and loss of privacy, fear of unspecified 'bad consequences' or retaliation, and insufficient evidence." A 2002 *Time/CNN* Survey/Harris Interactive poll revealed that 87 percent of the public perceived that whistleblowers face retaliation some or most of the time (Commission on Public Trust Report, 2003, 23). In a 1999 survey of whistle blowers, 69% stated that they lost their jobs or were forced to retire as a result of coming forward, and another 69% reported that they were criticized or avoided by their co-workers (Rothschild & Miethe, 1999, p. 120). Rowe, Wilcox, and Gadlin (2009) note that fear of retaliation is a common reason to avoid reporting, but that forbidding retaliation is not very effective because "few people understand or trust such a policy" and retaliation is hard to prove and prevent where "delayed, indirect, diffuse, outside the workplace, or covert" (p. 54).

Anonymous hotlines or reporting mechanisms are sometimes proposed as a way of encouraging the making of complaints, but some research suggests that these mechanisms are not

as effective for this purpose as sometimes believed. Despite a 2007 survey indicating that half of employees had personally observed violations of company ethics standards, policy, or the law (Gabriel, 2008, pp. 1-2), a 2007 *Corporate Governance and Compliance Hotline Benchmarking Report* surveyed over 650 companies and revealed an aggregate reporting rate for all sectors was 8.27 reports per 1,000 employees or less than 1 percent (Corporate Governance and Compliance, 2007).

A possible explanation for why anonymous reporting mechanisms do not much encourage reporting is because survivors want someone they can talk to confidentially before deciding whether or not to make an official report. This is echoed in the data on bystander interventions, noting over half of respondents in a national survey of adults suspected a friend, family member, or co-worker that was a survivor of domestic violence, but 65% wanted more information about what to do (WHTF, *Bystander-Focused Prevention of Sexual Assault*, 2014, p. 3). Further, college students surveyed indicated that 58% did not know how to help a survivor (WHTF, *Bystander-Focused Prevention of Sexual Assault*, 2014, p. 3).

Rowe, Wilcox, and Gadlin describe the organizational context as a barrier to reporting, noting that when the complaint system is not seen as safe, accessible, and credible, it is because it may ignore “ugly behavior that is not overtly illegal” (Rowe, Wilcox, & Gadlin, 2009, pp. 54-56). Further there could be the perception that important people get treated differently, or the system’s procedures are not accessible, take a long period of time, do not respect privacy, or are overseen by the people seen as the source of the problem (Rowe, Wilcox, & Gadlin, 2009, p. 57). In contrast to anonymous hotlines, in-person mechanisms that promise confidentiality, like Ombuds, have been shown to increase trust in the organization and possibly encourage the making of complaints (Sulkowski, 2011, pp. 53-65). In a study of campus Ombuds, Harrison

and Doerfel (2006, p. 145-46) found that over 50% of students bringing an issue to an Ombuds perceived favorable or somewhat favorable outcomes. Of students who did not receive a favorable outcome, a majority still thought the process was fair and contributed to feeling trust and commitment toward the organization (Harrison & Doerfel, 2006, p. 145-146).

Ombuds are capable of providing survivors with confidentiality and self-determination, and research indicates student satisfaction rates of 60 to 90 percent after using an Ombuds on a range of student-faculty disputes from grading policies to harassment (Harrison, 2004; Robbins, 1993; Rowe, 1993). Most importantly, prior research indicates female students may especially benefit from speaking with an Ombuds. Surveying students who used an Ombuds, Harrison (2007, p. 358) found female students were significantly more likely to pursue a future grievance of harassment. Women were also significantly more concerned than men about confidentiality, specifically the effect of pursuing a grievance on their department standing, potential retribution, and they were more likely than men to expect negative outcomes (Harrison, 2007, p. 358).

Utilizing an Ombuds is not, however, the easy answer to the problem of unreported sexual misconduct. There are several issues complicating an Ombuds's ability to provide survivors with confidentiality, self-determination, and control over the process. First, research indicates that although many students know about the Ombuds, there is confusion about what the office can do (Harrison, 2007, p. 359). Second, there is although Ombuds promise confidentiality, whether this promise is legally enforceable remains somewhat unclear. There is little case law protecting the confidentiality of communications with Ombuds, and often the level of confidentiality is controlled by the organization itself. No U.S. State embraces the ombudsman privilege as it is envisioned under the standards of the premier professional Ombuds organization, the International Ombudsman Association (IOA) (Van Soye, 2007, pp. 128). Four

states (Alaska, Arizona, Hawaii, and Nebraska) grant the ombudsman a privilege not to testify (Van Soye, 2007, p. 129). A federal court common-law privilege is sometimes recognized for employee communications with a corporate Ombuds (*Monoranjan Roy v. United Technologies*, 1990; *Kientzy v. McDonnell Douglas Corp*, 1991; *Carman v. McDonnell Douglas Corp.*, 1997). Established on a case-by-case basis, the burden is on the party claiming the privilege to establish the following Wigmore Factors (8 John Henry Wigmore, *Evidence* § 2285 [McNaughton rev. 1961]): 1) The communication is made in the belief it will not be disclosed; 2) confidentiality is essential to maintaining the relationship between the parties; 3) the relationship is one society considers worthy of being fostered; and 4) the disclosure causes an injury to the relationship greater than the benefit of the correct outcome of the litigation. Macallister (2001, p. 16-17) and Howard (2011b, pp. 277-294) caution Ombuds to have widely and consistently publicized information in print and online that consistently asserts the confidentiality of the office. This forms the basis for an “implied contract,” or that the ombudsman program is made available to those who abide by the principles upon which the office was established (Howard, 2011a, p. 10). The barriers to using an Ombuds office to provide self-determination to survivors includes a lack of understanding of what an Ombuds does and uncertainty regarding confidentiality.

Universities encourage mandatory reporting to support their interest in bringing forwarded complaints of sexual misconduct so they can be investigated, the perpetrators punished, and abuses deterred. The key question for Title IX Coordinators is whether it is appropriate for organizational members without a recognized privilege (medical, legal, religious, or psychological) to be exempt from mandatory reporting requirements. In order to bring as many complaints forward as possible, organizations often impose zero-tolerance mandatory reporting requirements. Lewis et al. (2013) indicates the tension between preserving privacy and

requiring reporting by every employee so no complaint “slips through the cracks” (p. 10). Many campus attorneys favor mandatory reporting to limit potential exposure to liability. Specifically addressing the reporting question, David Miller (2011) notes:

“Who could not want to see perpetrators of sexual violence (or any other kind of violence...exposed to the full consequence of their actions, along with those who knowingly abet their horrible behavior? Knowledge is responsibility, and those in the know must also be held responsible for not acting on what they know if not acting betrays the public trust” (p. 6).

Miller (2011) notes that confidentiality in such instances may be used to protect perpetrators:

“[F]or some, Ombudsman informality offers too much ambiguity, and confidentiality is seen as conspiracy to preserve the interests of such perpetrators against the exercise of justice” (p. 6)

Mandatory reporting policies may inhibit reporting because individuals do not want to get other people fired or in trouble, and do not trust the employer to do a fair investigation (Rowe, Wilcox, & Gadlin, 2009, p. 57). Rowe, Wilcox, and Gadlin (2009) note, “if the dilemmas are managed badly by providing too few options (and zero tolerance may offer no options), fewer people will come forward” (p. 58). Miller echoes this view (2011):

“[T]he provision of a safe place in which options for action and response can safely be heard, away from the clamour of police sirens and media-fuelled public approbation, can help to protect the public interest by ensuring that matters have a greater likelihood of swift resolution... [An Ombuds] very informality, neutrality and confidentiality enable the exercise of justice by ensuring that alleged victims and perpetrators can safely and more fully consider their options for exercising their rights” (pp. 6-7)

How can institutions encourage survivors to come forward? Rowe, Wilcox, and Gadlin (2009, p. 63) encourage the use of Ombuds offices as “[t]here is no single policy that will make an organization seem trustworthy and no single procedure or practice that will guarantee that people will overcome all the barriers to coming forward.” Chapter 5, on confidentiality, examines the different approaches used by Title IX Coordinators and Ombuds to address the

tension between confidentiality and reporting, and in doing so, illuminates the tension between survivor rights and self-determination and organizational interests in avoiding liability.

Settlement versus Precedent

A second tension lies between the value of settlement and the value of establishing clear precedent. Settling a complaint through a mutual agreement rather than an official determination serves the interests of individual self-determination over how a dispute is handled, privacy, and efficiency; settlement may also serve an institutional interest in avoiding publicity and public liability. By contrast, making an official decision regarding a complaint establishes a precedent and this serves the interest in setting clear norms regarding sexual misconduct; these precedents may clearly send the message that misconduct will not be tolerated.

Ombuds are predisposed to settlement; Coordinators are predisposed to official decisions and official precedent. Each has a potential down-side. Jennifer Reynolds (2012) contends that Ombuds could be used to protect against liability and that “one could imagine the Ombuds, a silky-voiced character who manipulates the hapless, under resourced Employee or Consumer through various cognitive heuristics into willingly foregoing meritorious claims, thus protecting the organization from shouldering costs associated with investigation, procedure and possible impacts on human resources” (p. 532). By the same token, Coordinators who are set on establishing an official precedent may drag hapless individuals through an official process that they may greatly wish to avoid and which further harms their emotional health.

These tensions implicate confidentiality, as mandatory reporting policies are often designed to trigger the use of formal mechanisms. Rowe, Wilcox, and Gadlin (2009) note that zero tolerance policies create “a powerful tension between ‘getting problems solved efficiently at the lowest possible level’ by helping people to act on their own—which requires delegating a

significant proportion of conflict management—and trying to establish complete control over all unacceptable behavior by centralizing conflict management” (p. 57). Essentially the question of settlement versus precedent is also one about individual self-determination versus organizational interests.

What Constitutes a Hearing and Fair Procedures?

A third tension is between fair procedures and efficiency in hearing and deciding a contested complaint. The value of fairness in procedures serves two important goals: treating the parties with dignity by fully hearing their perspectives, and accurately determining a just outcome. For survivors, fairness requires universities to follow the law and investigate, punish, and deter misconduct in order to ensure a hostility-free educational environment. For alleged perpetrators, it requires universities to adjudicate complaints in a way that adequately protects their right to due process: to present their side of the story and challenge the complainant’s story if they wish. Fairness also serves the goal of avoiding mistakes in assessing the facts. Nonetheless, fairness, if taken to an extreme, can be extremely time-consuming and inefficient, and institutions have a strong interest in hearing and deciding on complaints in an efficient manner.

The two structures, Ombuds and Coordinators, address this tension between fairness and efficiency differently. Ombuds are to be advocates for fair procedures generally while Title IX Coordinators are bound to comply with and enforce Title IX law and policy. A Title IX Coordinator must ensure that the investigation and adjudication processes are fair to both complainants and respondents.

Still, there is ambiguity in how each mechanism defines fair procedures. As advocates for fair procedures, Ombuds use overarching principles to guide their work, but there is no IOA

Standard of Practice defining what types of procedures are required to meet the general principle of fairness or how to determine what is fair. Doing this requires “multi-partiality” or a commitment to fairness and everyone’s best interests (Erbe & Sebok, 2008, p. 31). Gadlin (2011) describes the difficulty in applying formal rules, processes, or procedures in all situations:

“In educational settings and workplaces, many tension points and conflicts arise within the context of relationships and work-related interactions. In these situations assessing fairness is extremely complex and highly subjective; complex because it is confounded with other factors and subjective because there may not be common standards against which to assess actions” (p. 42).

Inherently, the Ombuds must navigate tensions between 1) What constitutes advocacy for specific individuals versus principles (and is there a difference) and 2) How to determine when, whether, and which policy violations contravene conceptions of fairness that demand intervention. Sturm and Gadlin (2007, p. 7) respond to the critique that organizational dispute resolution satisfies disputes at the individual complaint level without aggregating claims and addressing institutional problems. They argue that settlement and informal organizational dispute systems do have the capacity of achieving both organizational interests in efficiency and in systematic improvement in compliance with the law. Ombuds are also to serve fairness in general by providing what is called “upward feedback” that reports general trends in individual complaints in order to recommend systematic changes to improve institutional fairness generally (Sturm & Gadlin, 2007, p. 10; see also Reuben 2005, 56). In general, though, the character of the Ombuds commitment to fairness is as a general principle favoring respect for the voice of all affected parties, rather than to specific procedures.

By contrast, Title IX Coordinators tend to address the tension between fairness and efficiency by establishing specific rule-based procedures for addressing complaints. In part this

is a response to growing pressure from the legal environment and liability concerns to provide increasingly formal processes for handling sexual misconduct. According to Triplett (2012, p. 498), public college students have constitutionally protected due process rights, but courts disagree as to the parameters of those rights. Due process demands that both the procedures and the results must be fundamentally fair even if they are not perfect or precise (Kaplin & Lee, 1995, p. 455). Procedural due process rights that must be followed prior to a suspension or expulsion (*Goss v. Lopez*, 1975) includes notification of the complaint, providing the evidence against the accused, time to respond and present evidence to the contrary before an impartial decision maker, and clearly understood burden of proof. The accused student must have the opportunity to present his own defense, but there is no requirement of a judicial hearing with the right to cross-examine witnesses, call witnesses, or secure counsel (*Goss v. Lopez*, 1975, p. 583). Substantive due process also includes the universality of the rule application to all persons similarly situated (Kaplin & Lee, 1995, p. 456). Private institutions must abide by what they have promised students in the school's policies and procedures (Cantalupo 2012, p. 514), which must be fundamentally fair (*Psi Upsilon of Phila. V. Univ. of Pa.*, 1991).

How Coordinators are to balance fairness and efficiency remains a matter of much dispute. One area of dispute is what constitutes a "hearing" for due process purposes. As described in Chapter 2, there are "Hearing," "Investigation," and "Hybrid" models identified by the Association for Student Conduct Administration for resolving allegations of sexual misconduct (ASCA, 2014, p. 15). ATIXA's Model Investigation Process is a hybrid model in which the investigator makes a determination but the accused is entitled to a hearing if they reject the findings in whole or in part (ATIXA Training Manual, Model Investigation Process, 2013, p. 40).

OCR does not require a hearing, with the OCR Q&A Document (2014, p. 25) broadly interpreting a hearing to be satisfied by an investigation in which there is equal opportunity for both parties to present witnesses and other evidence. There is no requirement that universities provide an appeal, as long as any appeal is equally provided for both parties (OCR Q&A, 2014, p. 26). Further, while OCR requires Title IX Coordinators to guard against conflicts of interest, the Title IX Coordinator may act as the investigator as long as they are not involved in any subsequent appeal process (OCR Q&A, 2014, p. 12). While OCR does not mandate any of these aspects of due process, the Q&A document (2014) specifically states, “The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights” (p. 13). What procedures are legally required will vary depending on whether the defendant has a constitutionally protected property interest at stake. Students have no such interest in living in the residence halls or even in enrollment at a university. Employees, including faculty, may have such an interest in their employment or the terms of their employment. These questions are further explored in chapter two.

The hearing question is exemplified by the differing procedures used for students and for faculty at the University of Kansas. The University utilizes a hybrid model for students, providing for an initial investigation and determination of sanctions, followed by an appeal as students are “entitled to a hearing in accordance with procedure established by the Office of Student Affairs.” The formal hearing is known as a panel hearing, “conducted with more formal procedures” including the chance to present evidence, and ask questions of any witnesses or the other students involved (University of Kansas, Formal v. Informal Processes). The panel will then make recommendations to the Office of the Vice Provost for

Student Affairs, with an appeal possible on the grounds of 1) Failure to follow procedures, 2) Inconsistency with applicable provisions of other rules or state or federal law, 3) Factual determinations not supported by the record, and 4) Arbitrary and capricious decisions (University of Kansas, Appeal Process). The appeal policy notes that “[a]ppeal requests may be denied in cases not having sufficient grounds in one or more of these areas” (University of Kansas, Appeal Process).

In contrast, the University of Kansas appeal procedures for faculty do not provide for an adversarial hearing, and thus may not adhere to due process requirements (See Formality Chapter, p. 276-279). A question persists about whether individuals accused of sexual misconduct should be afforded due process rights to adversarial hearings, and at what point in the process it must be included. As indicated in Chapter 2 (pp. 59-62), there is uncertainty regarding the requirement to separating the investigator and hearing officer functions, with one key factor being whether the procedure is governed by federal or state law. The question of what constitutes a hearing is further discussed in Chapter 7.

A second unresolved procedural issue is the equality of interim accommodations. Recent OCR guidance indicates that interim measures to address a complaint (e.g., to ensure that misconduct is stopped) should be taken immediately and should “minimize the burden on the complainant” (OCR Q&A, 2014, pp. 32-33). Henrick (2013, p. 62) argues this is harmful to the due process rights of the accused as “alleged perpetrators [would thus face] expulsion from their residences upon accusation...” By contrast, Cantalupo (1999, p. 686) sees “innocent until proven guilty” as beneficial to the accused, harmful to the rights of the survivor, and an indication of the depth to which the criminal-law mindset still pervades institutional responses.

A third issue is the burden of proof. In a criminal court, the prosecutor bears the burden of proving the charges “beyond a reasonable doubt.” This is, in theory, a high standard. Coordinators have a considerably lower burden in university administrative proceedings. The OCR Question and Answer Document released in 2014 confirms as the burden of proof the use of a preponderance-of-the-evidence standard (OCR Q&A, 2014, p. 26). This simply means that the university must show that the alleged perpetrator was more likely than not (over fifty percent) to have perpetuated the act.

There is significant disagreement regarding the OCR-mandated use of the preponderance-of-the-evidence standard (OCR Q&A, 2014, p. 26). Commenters and one federal court have suggested that “clear and convincing” proof is the standard necessary to ensure adequate protection of the accused student’s right to procedural due process (Weizel, 2012, p. 1639). “Clear and convincing” is typically applied in civil cases in which the “individual interest at stake is deemed extremely important” (Weizel, 2012, p. 1640). The *Mathews* test (*Mathews v. Eldridge*, 1976) of three factors is used to determine whether the liberty interest is significant enough to warrant a higher evidentiary standard. These factors effectively attempt to balance the competing tensions between individual rights (first, the interests impacted and second, the risk of being deprived of those interests given the procedures use) with organizational interests (the fiscal and administrative burdens of additional procedural requirements). Commentators like Triplett (2012, p. 517) and Weizel (2012, p. 1643) argue that the preponderance standard is appropriate, but argues that accused students have liberty interests in preserving their good names and reputations, but Hendrix (2013, p. 614) argues against the preponderance standard because it only requires a “feather” more of proof on the accuser’s side, and creates unacceptable

risk for the accused. Hendrix (2013, p. 614) argues that a clear and convincing standard would ensure that those punished are actually guilty.

The case law regarding accused students' due process rights supports the idea that colleges and universities are not required to imitate the criminal justice system in structuring their student disciplinary processes (Cantalupo, 2012, p. 512). Courts have consistently reiterated the distinction between disciplinary hearings and criminal proceedings (Cantalupo, 2012, p. 516, n. 150-151). The case law thus confirms that institutions are under no obligation to treat accused students like criminal defendants and provide them with the required constitutional due process rights (Cantalupo, 2012, p. 513). Cantalupo (2012) argues that the "criminal" institutional response to sexual violence is ineffective and perpetuates campus sexual violence. The "criminal" response is largely due to legal incentives to create an administrative model geared to achieve the school's goals through "kangaroo courts" that favor the alleged perpetrator (Cantalupo, 2011, p. 208). Institutional disciplinary procedures adopt standards of proof, evidentiary, and due process requirements provided to criminal defendants. Such responses contravene the intent of the laws that govern campus peer sexual violence (Cantalupo, 2012). Under Title IX, sexual harassment in schools is prohibited as a form of discrimination, but because Title IX enforcement does not account for the frequent survivor non-reporting, there is an incentive for institutions to adopt a criminal approach to reporting. In this way, fewer individuals come forward because of the nature of the proceedings necessary for vindicating sexual misconduct.

On the other hand, Stephen Henrick (2013) argues that institutions of higher learning have incentives to falsely convict students. Henrick (2013, p. 51) argues for removing sexual violence claims from college campuses to civil and criminal judicial systems. Henrick (2013)

bolsters his argument for removing sexual violence claims from campuses by analyzing OCR administrative enforcement decisions and noting considerable inconsistency. For example, OCR has held that giving an accused student access to the complainant's statement before requiring a response is in one circumstance a Title IX violation and in another, not a violation.² OCR decisions were also contradictory as to whether a complainant has an obligation to clarify that she or he has been sexually harassed, and whether providing the accused with an opportunity to appeal without notifying the complainant of the appeal is a Title IX violation (Henrick, 2013, p. 68). Henrick concludes that OCR does not adequately protect the rights of accused students, and argues that a school deliberately indifferent to an accused's suffering should also implicate Title IX, providing for gender equity in administering the law (Henrick, 2013, p. 75). Questions regarding the requirement to provide a hearing are revisited in chapter two.

In sum, questions of due process are fundamentally about the differences between formal and informal processes. This research examines the tensions underlying formal and informal processes: How do such Ombuds and Title IX Coordinators use rules versus relationships, and navigate tension between individual rights and interests versus organizational policies and prerogatives? Changing legal norms and liability concerns further heighten the pressure on Title IX Coordinators and Ombuds to strike an appropriate balance between these conflicting interests. The following empirical chapters examine how the archetypal models of Coordinators and Ombuds strike this balance, and then how actual Coordinators and Ombuds do so in practice. Both mechanisms are torn by these competing values, considerations, and tensions, and despite

² Henrick compared Bethany Lutheran College, OCR Complaint No. 05-08-2043 (June 23, 2008) (giving the accused access to the complainant's statement before requiring him to respond to sexual assault allegations does not violate Title IX) with Sonoma State University, OCR Complaint No. 09-93-2131 (Apr. 29, 1994) (giving the accused access to the complainant's allegations before requiring him to respond is a Title IX violation).

very oppositional archetypes, in practice Ombuds and Title IX Coordinators converge and resemble one another more often than they diverge and stand in sharp contrast.

RESEARCH DESIGN AND DISSERTATION OUTLINE

I interviewed fourteen Ombuds and thirteen Title IX Coordinators from 22 institutions of higher education nation-wide. The research methods consisted of open-ended interviews, content analysis of these interviews, and the analysis of documents relating to each role. The first step was the creation of a subject selection matrix. The participants were from every region of the country, with participants primarily from large doctoral degree granting public and private research institutions, but several master's level institutions were also included.

Ombuds and Title IX Coordinators selected to participate 1) served in full time roles, 2) served in centralized Title IX or Ombuds offices, and 3) claimed to follow the standards of practice used by Ombuds and Title IX professionals. Once interviews were underway, two Ombuds were interviewed who serve in dual institutional roles and only perform duties as Ombuds on a part-time or temporary basis. Also for purposes of analyzing the role's archetype and its possible departures, one of the key variables used for selection purposes was whether Ombuds claimed to follow the International Ombudsman Association Standards of Practice. Often this was indicated on the Ombuds's website, and while many Ombuds specifically noted practicing to the standards, it was sufficient to state that the Ombuds values informality, independence, impartiality, and confidentiality.

It is important to note that Ombuds who served as an office of notice were not included in the study. This ensured Ombuds were "real" instead of some other kind of office that is called an Ombuds but is really something different. It was important to eliminate from consideration any Ombuds offices that served as official "offices of notice" for legal purposes, as these offices

are in explicit violation of the norms of the Ombuds profession and are mimicking the formal dispute resolution mechanisms. Eliminating these “Ombuds in name only” offices ensured that any observed variation by Ombuds away from the archetypal model is informal, rather than official, divergence. Further, individuals serving as both Ombuds and currently in a significant management function were also eliminated from consideration as they de facto served as notice to the institution. Among the Ombuds chosen, none officially served as offices of notice, but one was required to report instances of sexual misconduct.

It is also important to note that the sensitive nature of the topic restricted the sample size. Despite contacting hundreds of Ombuds and Title IX Coordinators, fourteen Ombuds and thirteen Title IX coordinators agreed to participate in the study. While it is possible that the twenty-seven officials who agreed to be interviewed were somehow systematically different from others who declined, I suspect that they were more typical than unique. Participants described working to address a wide range of complaints of sexual misconduct, including some cases of what can only be described as egregious abuse by high-level university employees, and so those who agreed to be interviewed were not limited to officials who had faced only low-level, uncontroversial cases. Nor were the participants limited to people new in their role; they included a number of seasoned veterans. In all of these ways, the participants, while relatively small in number, do not appear to be systematically skewed in any obvious way

Research subjects were first contacted via e-mail followed by a phone call. Often many conversations were needed until the subjects agreed to participate in the study. I received many interesting e-mail responses in my efforts to encourage participation. One prestigious institution’s Title IX coordinator noted:

“Of course, the [General Counsel] will have to approve the Title IX Coordinator’s discussion with you...[School name] obviously does not want to waive attorney-

Client privilege in speaking with you.”

Confidentiality of participants’ communications was a foremost concern. More than one Ombuds indicated that they believed participation in this study to constitute a violation of the confidentiality requirements of the profession, but almost universally asked to receive the results of the study. My consent script ensured participants that I was not comparing the work of any Ombuds and Title IX coordinators at the same institution or regarding the same conflict, but instead was examining the work of Ombuds and Title IX coordinators more generally. I also promised not to share what anyone told me with anyone else, including not revealing who participated or did not participate. My consent script described the project and discussed confidentiality as follows:

As a lawyer and a mediator, confidentiality is essential to my work. For this project I will be recording the conversations, but the recordings will be deleted once the conversation is transcribed. No identifying information (by specific incident, individual, or institution) will be included in the transcriptions, and I will utilize a numeric code identifiable only to me that will allow me to identify the interviewee. These transcripts will not be made public or even available to anyone for subsequent research. The transcripts will be coded for key words and I will use portions of the transcript to illustrate my research findings. For any example I use in my dissertation I will first contact the person who told me the story to ensure that in no way does the example provide any identifying information in terms of institution, incident, or individual. The control over these stories rests with you. While I may interview Ombudsman and Title IX coordinators from the same institution, I will not share what one person tells me with any other. This study is not designed to compare (and will not compare) the work of any ombudsman or Title IX coordinator on a specific case. I will be comparing (generally) the experiences of Ombudsman as a whole and Title IX coordinators as a whole. In addition, I will not share with anyone who is participating or not participating.

Generally, the interviews with each participant consumed 1.5-2 hours, but in some instances conversations lasted up to three hours and multiple sessions. The first interview typically lasted an hour and included a list of is to gain basic information about the individual’s role and background. The questions for the first interview are included in the appendix.

Roughly one to two weeks after the first interview, I conducted a second interview. Both interviews were conducted by phone. For the second interview I sought non-specific accounts of three types of cases: 1) their most recent case to collect a quasi-random sample, 2) a case where the individual being served perceived a positive outcome, and 3) a case where the individual perceived a negative outcome. At the interviewee's discretion, this could be the interviewee's perception of the individual's views of positive or negative outcomes, or it could be direct knowledge that the individual perceived a positive or negative outcome. The definition of positive and negative was left to the interviewee's (and visitor's) interpretation. "Individuals" included students, faculty, or staff. These stories initially related to grade disputes, racial discrimination, and sexual harassment. With the Dear Colleague Letter changes at the front of Title IX coordinator's minds, sexual harassment disputes quickly became the focus. Racial discrimination served as a reliable proxy due to the rights-based nature of those issues and their relative importance for complainants and respondents. One major limitation of this research was in asking the Ombuds and Title IX Coordinators about their perceptions of the visitors and not learning first hand of the visitors' perceptions. Another limitation is the increased attention focused on sexual misconduct on university campuses. Confidentiality became a barrier to utilizing the participants' stories. In order to encourage participation I agreed to provide the participants with complete control over the content of their stories, and as a result I was unable to publish almost any of the specific details shared in any specific instance. This curtailed my ability to fully illuminate the participants' statements with concrete examples. Following the interviews, the recordings were transcribed and destroyed. The transcripts were then redacted to omit any identifying information.

My data collection also included documents relating to Title IX, Ombuds, and university sexual misconduct. The documents reviewed fall into distinct categories, illustrated in the below chart:

Category	Documents	Pages
Title IX/Professional Association Ethical Guidance, Policies, and Best Practices Documents	116	1484
International Ombuds Association Ethical Guidance, Policies, and Best Practices Documents	92	888
Government (OCR, White House) Policy Documents	44	776
Judicial Opinions and Laws	51	625
University Ombuds Reports, Brochures, Policies & Authorizing Documents	98	389
University Title IX Reports, Brochures, Policies & Authorizing Documents	123	1026
Title IX and Ombuds Job Postings	64	138
News Articles on University Sexual Misconduct	622	2098
TOTALS	1200	7219

The first category includes documents published by the Association of Title IX Administrators (ATIXA), The Association for Student Conduct Administration (ASCA), and the National Center for Higher Education Risk Management (NCHERM). These include the ATIXA training manual for Title IX Coordinators, and documents providing best practices, ethical guidance, and policy recommendations. ATIXA and NCHERM are the definitive source of guidance for university Title IX administrators. The next category includes all ethical, policy, and best practices documents provided by the primary Ombuds professional association, the International Ombuds Association (IOA). These documents augmented the interviews by providing the framework for the Title IX and Ombuds archetypes and each role's requirements. To the author's knowledge, almost every document authored by these organizations over the past ten years was included in the review.

A third category includes all government documents, including Department of Education Office of Civil Rights Dear Colleague Letters and findings of the White House Task Force on

Protecting Students From Sexual Assault. These documents, along with multiple judicial opinions and statutes, formed the basis for understanding the changing nature of the law governing university sexual misconduct. These documents are reviewed beginning in chapter two and include all Dear Colleague Letters and the vast majority of policy documents issued by OCR.

The fifth and sixth document categories include any rules, regulations, documents, standards, reports, and procedures relating to the Ombuds and Title IX offices at any institutions meeting my case (university)-selection protocol. University documents provide context and depth for understanding the university response to the changing legal requirements. Many university policies and procedures changed during the course of this project, but most Universities utilize a “hybrid” approach of the “Investigation” and “Hearing” models for handling sexual misconduct. Pennsylvania State University, Harvard University, and the University of Kansas are utilized as specific examples of the three approaches. Specifically, The University of Kansas utilizes a hybrid approach for students in which the Title IX office conducts an investigation and makes a recommendation and if the findings are disputed, the student may request a hearing (University of Kansas, Discrimination Complaint Resolution Process, Investigation). In cases involving faculty, the process is more similar to the investigation model, and the faculty may not be entitled to a hearing (University of Kansas, Governance Procedures, Procedures of the Faculty Rights Board, VI.A.). Pennsylvania State University utilizes a hearing model in which no hearing is provided but is experimenting by utilizing either an investigation or a hearing model, to be determined on a case-by-case basis (PSU, Code of Conduct and Student Conduct Procedures). Harvard University utilizes an investigation model that provides no hearing (Harvard, ODR, Procedures for Handling

Complaints Involving Students Pursuant to the Sexual and Gender-Based Harassment Policy) while the Harvard Law School process utilized a hearing model in which the Title IX investigation determines whether there is enough information to proceed to a hearing (Harvard, HLS Sexual Harassment Resources and Procedures for Students). Harvard Law School now uses an interim policy complying with the university policy (HLS Sexual Harassment Resources and Procedures for Students), and 28 members of the Harvard Law School Faculty signed a letter objecting to the policy and procedures enacted by Harvard in July of 2014. They argued the procedures “lack the most basic elements of fairness and due process,” most notably the lack of an adversarial hearing (Rethink Harvard’s Sexual Harassment Policy, 2014).

The University of Kansas and Michigan State University are also specifically utilized as representative examples of an Ombuds office conforming to the IOA standards. The majority of Ombuds offices in higher education conform to the IOA standards, but a significant minority do not. Job postings for both Title IX Coordinators and Ombuds make up the seventh document category and provide insights into each role’s preferred qualifications and job requirements. The document review included the majority of job postings for Ombuds and Title IX Coordinators between 2013 and 2015.

Finally, the last document category includes news articles on university sexual misconduct, compiled from a wide variety of sources. Typically this dissertation utilizes articles from the Chronicle of Higher Education, which continues to cover the issue of university sexual misconduct extensively. The news articles included the vast majority of articles available between 2011 and 2015, and provide context for the attention the issue is receiving and the environment in which universities are operating. In total, the document review encompasses over twelve hundred documents totaling over seven thousand pages.

Organization of the dissertation

This dissertation is organized as follows: Chapter two describes formal organizational dispute systems, legal mandates, and effectiveness in addressing university sexual misconduct. It also reviews informal organizational mechanisms for addressing sexual misconduct, including organizational Ombuds and the use of mediation. Chapters three through seven explore these tensions in an empirical analysis of the archetypal Ombuds and Title IX Coordinator in terms of their adherence or departure in the areas of authority, mission, confidentiality, impartiality and independence, and formality. Chapter eight analyzes these results in the context of the theoretical questions and provides context for the results.

CONCLUSION

Universities are struggling to balance institutional concerns with individual rights. Donna Shestowky argues that as universities try to address sexual misconduct, self-determination and institutional efficiency often work at cross-purposes, making justice difficult to obtain (2008, p. 551). Examining formal and informal organizational mechanisms, this dissertation uses a lens of rules versus relationships, and individual versus organizational interests to evaluate how these mechanisms interrelate in their handling of sexual misconduct on university campuses.

CHAPTER 2: OMBUDS AND TITLE IX COORDINATORS

This chapter provides a succinct summary of what is known about Title IX Coordinators and Ombuds. This includes a thematic analysis of the main elements of these different entities. For this analysis, I rely on data from statutes, judicial decisions, university documents, and professional guidance from the Title IX and Ombuds' professional associations. Educational Ombuds first appeared in the 1960's with the establishment of offices at Michigan State University and Eastern Montana College to hear student and faculty complaints during a time of widespread student unrest (Van Soye, 2007, p. 123). Today there are at least 200 college and university Ombuds in the United States who handle problems affecting students, faculty, and staff (Yarn & Jones, 2006, p. 373). Functionally, a university or college Ombuds is a confidential resource for anyone with an issue both with and within the organization, including staff, faculty, or students. Ombuds and other organizational dispute resolution processes were initially seen as a way to respond internally to complaints, reduce litigation costs, and demonstrate organizational concern (Edelman, Erlanger, & Lande, 1993; Shapiro & Kolb, 1994).

The work of Title IX Coordinators originated with Title IX. Originally codified in the Title IX implementing regulations (35 C.F.R. § 106.8 (a)), federal funding recipients are required to “designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Title IX], including any investigation of any complaint communicated to such recipient alleging its noncompliance with [Title IX] or alleging any actions which would be prohibited by [Title IX].” The April 4, 2011 Dear Colleague Letter reaffirmed the requirement (p. 6) of designating a responsible employee, a role which over thirty-years after the Title IX's implementation is now known as a Title IX Coordinator. According to ATIXA estimates, there are 25,000 individuals who assure Title IX compliance in schools, colleges, and universities

across the country (“About ATIXA and Title IX”, 2014). This means coordinating investigations and providing information and consultation to potential complainants, and receiving formal notice of complaints. Title IX Coordinators or their staff schedule, coordinate or oversee grievance hearings, conduct investigations, make findings of violations of Title IX, notify parties of decisions, and provide information of the right and procedures of appeal. They also train staff, maintain records, ensure that timelines and procedures are followed, and provide ongoing training, consultation, and technical assistance. The authority of a Title IX coordinator is to conduct a formal and defined process to determine whether there has been a violation of the law. All educational institutions are bound by their own policies and procedures, by constitutional due-process mandates, state contract and civil rights law, federal education laws, and the oversight of the Department of Education Office of Civil Rights.

This chapter describes the key institutional features and procedures used by both Ombuds and Title IX Coordinators. For Coordinators, the focus is on the legal requirements governing Title IX compliance work and the processes Title IX Coordinators use in handling complaints of sexual misconduct. For Ombuds, the focus is on Ombuds’ standards and practices. These descriptions illustrate the sharp differences between the informal role of an Ombuds and the formal position of a Title IX Coordinator.

TITLE IX COORDINATORS: LEGAL REQUIREMENTS AND PROCESSES

Universities are legally required to have a Title IX Coordinator in order ensure compliance with Title IX and other applicable laws that address sexual misconduct and confidentiality rights. As these Title IX Coordinators are essentially legal compliance officers, there is a maze of law and regulation controlling the requirements relating to campus sexual violence. Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(2006)) prohibits

employers from discriminating in the terms and conditions of employment based upon “race, color, religion, sex, or national origin.” Title VII applied in employee sexual harassment in 1986 when the Supreme Court in *Meritor Savings Bank v. Vinson* held that sexual harassment was a form of prohibited discrimination. There are two main bases for employment sexual harassment liability under Title VII, the quid pro quo and hostile work environment theories. Quid pro quo harassment occurs when a supervisor inflicts a tangible job detriment or conditions a job benefit on acceptance of sexual advances. In a “hostile work environment,” employers may be liable when the employer has notice of a “sufficiently severe or pervasive” environment such that it alters the plaintiff’s conditions of employment (*Burlington Industries, Inc. v. Ellerth* 1998, p. 67). In *Faragher v. City of Boca Raton* (1998) and *Burlington Industries* (1998) the Supreme Court provided that an employer may be held vicariously liable for an actionable hostile work environment created by a supervisor in the survivor’s chain of command (Edelman et al., 2011, p. 908). The employer may raise an affirmative defense to liability or damages if there is no tangible employment action (i.e., demotion, discharge, or undesirable reassignment) (Edelman et al., 2011, p. 908). In order to raise this defense, the employer must show that 1) the employer exercised reasonable care to provide accessible complaint procedures and to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any complaint procedures provided by the employer or to otherwise avoid harm (*Burlington Industries, Inc. v. Ellerth*, 1998, p. 765; *Faragher v. City of Boca Raton*, 1998, p. 807).

Title IX of the Educational Amendments of 1972 (20 U.S.C. § 1681; 2006 & Supp. V. 2011) promotes equity in academic and athletics programs, prohibits hostile environments on the basis of sex, prohibits sexual harassment and sexual violence, requires institutions to protect

complainants from retaliation, and requires them to remedy the effects of other gender-based forms of discrimination. Specifically, Title IX states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” In regulations effective in 1975, every school district and college in the United States is required to have a Title IX Coordinator who oversees implementation, training, and compliance with Title IX (35 C.F.R. § 106.8 (a)).

Title IX is silent about what constitutes discrimination, what must be done to prevent it, and what remedies are available if discrimination occurs. In *Oona v. McCaffrey* (1998), *Kinman v. Omaha Pub. Sch. Dist.* (1996), *Franklin v. Gwinnett County Public Schools* (1992), the courts continued their tradition of interpreting Title IX to impose similar requirements as Title VII. In 1999, after twenty-four district and six appellate courts divided on the issue (Short, 2006, p. 40), the U.S. Supreme Court in *Davis v. Monroe County Board of Education* held that a private damages action for sexual harassment may proceed on Title IX grounds only where the funding recipient acts with deliberate indifference to known acts of harassment. The court’s majority noted that the harassment must be “so severe, pervasive, and objectively offensive that it effectively bars the survivor’s access to an educational opportunity or benefit” (p. 632). According to Walker (2010), the resulting test for cases involving sexual assault or rape on college campuses includes four components. First is substantial control over the harasser and the environment in which the harassment occurred. Second is actual knowledge of the harassment. Third is harassment “so severe, pervasive, and objectively offensive” that it deprives the survivor of equal access to educational programs and activities. Finally, there must be deliberate

indifference to the acts, defined as a “clearly unreasonable” response under the circumstances (pp. 110-111).

Colleges and universities must be compliant with both Title VII and Title IX (Lewis et al., 2013, p. 4). One key difference between Title VII and Title IX is when an investigation must occur. In situations implicating Title VII, once notice is given to the institution a full investigation is automatically triggered (Lewis et al., 2013, p. 14). This can be contrasted with Title IX, where there can be a preliminary investigation to determine the necessity of a formal investigation (Lewis et al., 2013, p. 12).

These court cases and the lack of clarity surrounding Title IX require Title IX Coordinators to oversee compliance in an uncertain environment. Coordinators must investigate to determine if the harassment deprives individuals with equal access to educational opportunities. If it is found to be harassment under Title IX, Coordinators must ensure that the school’s response is not deliberately indifferent to the harassment. Under the *Faragher* test, the Coordinator must make sure the institution exercises reasonable care to provide accessible complaint procedures and to prevent and promptly correct any sexually harassing behavior. Confronted with survivors who may not want to participate in the investigation and subsequent processes, Title IX Coordinators are under pressure to balance institutional interests in avoiding liability and fulfilling the legal mandate, and survivors’ interest in getting needed support.

In addition to a survivor’s private right of action against her school (*Franklin v. Gwinnett Cnty. Pub. Schs.*, 1992), Title IX is also enforced through administrative enforcement by the Department of Education’s Office of Civil Rights (OCR). Typically, OCR enforcement takes place following a complaint being filed regarding a school’s response to a sexual harassment case. The OCR process is not compensatory, so student survivors are not awarded monetary

damages. When a complaint is filed, OCR conducts a comprehensive investigation of that school's response system, including a review of institutional policies and procedures, the steps the school took to resolve a complaint, and files relating to past sexual harassment cases. OCR interviews individuals and ultimately issues a "letter of finding" ("LOF") addressed to the school. Often a "commitment to resolve" is attached and must be signed by the school (Cantalupo, 2012, p. 504, n. 78-82).

Periodically OCR issues letters of clarification, interpreting the regulations governing Title IX. While these "Dear Colleague" letters lack the force of law, courts pay them great attention due to deference prescribed by *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, (1984), a landmark Supreme Court decision that directed courts to defer to administrative interpretations of their authorizing legislation except when those interpretations contravene the law. As noted above, under Title IX a school's primary responsibility is to take immediate action to eliminate, prevent, and remediate any harassment the school should reasonably know about that creates a hostile environment. The Dear Colleague Letter issued on April 4, 2011 dramatically shifted the interpretation of this university responsibility by prescribing the knowledge and evidentiary standards for handling sexual misconduct disputes and by requiring universities to address student-to-student sexual misconduct.

The letter requires a university to take action "[i]f a school knows or reasonably should know about student-on-student harassment that creates a hostile environment" (DCL, 2011, p. 4). This interpretation represented a sharp departure from the "actual knowledge and deliberate indifference" standard for private lawsuits for monetary damages. Schools can no longer avoid knowledge of sexual harassment and it is much easier to show that responsible university employees knew *or* should have known of the misconduct. The letter also required universities

to make determinations in cases of alleged harassment or misconduct on the basis of a preponderance-of-the evidence standard, noting that “[t]he ‘clear and convincing’ standard ... currently used by some schools, is a higher [and improper] standard of proof” (DCL, 2011, p. 11). A perpetrator will be found responsible if it is more likely than not, i.e. a 50% threshold, that the misconduct occurred. Clear and convincing, requires the evidence to indicate that it is substantially more likely to be true than not.

The letter also explained that campus adjudicatory proceedings are wholly distinct from criminal proceedings and that neither proceeding’s outcome should affect the other (DCL, 2011, p. 10). As a result any criminal charges or criminal investigation will neither impact nor be impacted by the university’s investigation and handling of the misconduct. The 2011 Dear Colleague Letter also requires schools to consider the effects of off-campus conduct when evaluating whether or not a hostile environment exists on campus. The letter stated that “[s]chools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school’s education program or activity” and “[i]f a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures” (DCL, 2011, p. 4). Under *Davis*, the institution must have substantial control over the harasser and the environment in which the harassment occurred in order to proceed with a private lawsuit. OCR requirements, meanwhile expands substantial control to include student-on-student sexual harassment, wherever it occurs, dramatically increasing the scope of the cases for which Title IX Coordinators are responsible.

The letter also provides guidance on what constitutes fair procedures, including discouraging schools from allowing the parties to question or cross-examine one another, giving

institutions discretion to determine whether to permit parties to have counsel (provided both sides are treated equally), and mandating that both parties have the right to invoke an appeal process (DCL, 2011, p. 12). The letter reiterates the opportunity for both parties to present witnesses and other evidence, describes time frames for the stages of the process, and provides for notice to parties of the outcome of the complaint (DCL, 2011, p. 9). Further, mediation should not be used to resolve sexual assault complaints (DCL, 2011, p. 8) and that other rule violations (such as alcohol or drug use) will be addressed separately and do not make the survivor at fault for sexual violence (DCL, 2011, p. 15). Further the complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing (DCL, 2011, p. 11). In terms of the rights of the accused, the Dear Colleague Letter (2011, p. 12) states, “[p]ublic and state-sponsored schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due-process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant”

The Dear Colleague Letter (2011) requires training for employees likely to witness or receive reports of sexual misconduct, including teachers, law enforcement, administrators, counselors, attorneys, health personnel, and resident advisors (p. 4). Further, it declares that in sexual violence cases the fact-finder and the decision-maker should have adequate training or knowledge regarding sexual violence (DCL, 2011, p. 12). All schools should implement preventative education programs and make comprehensive survivor resources available (DCL, 2011, p. 14). Finally, the Dear Colleague Letter (2011) affirms the requirement that universities are required to employ a Title IX Coordinator and clarifies that Title IX coordinators should not have other job responsibilities that may create a conflict of interest (p.7). For example, the

letter specifically states “serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest” (DCL, 2011, p.7).

The 2013 reauthorization of the Violence Against Women Act (VAWA, Pub. L. 113-4) specifically included the Campus Sexual Violence Elimination Act in Section 303 (Grants to Combat Violent Crimes on Campuses) and Section 304 (Campus Sexual Violence, Domestic Violence, Dating Violence, and Stalking Education and Prevention). Originally signed into law in 1994 as Title IV, sec. 40001-40703 of the Violent Crime Control and Law Enforcement Act, the Violence Against Women Act (VAWA) provided \$1.6 billion toward investigation and prosecution of violent crimes against women, imposed automatic and mandatory restitution on those convicted, and allowed civil redress in cases prosecutors chose to leave unprosecuted. Reauthorized by Congress initially in 2000 and 2005, the Act also established an Office on Violence Against Women (OVAW) within the Department of Justice. OVAW administers grant programs to reduce domestic violence, dating violence, sexual assault, and stalking on campus.

In 2014, federal regulations were issued (34 CFR Part 668) clarifying the 2013 VAWA reauthorization. Specifically, they require institutions to maintain statistics (including numbers of unfounded crime reports), to educate incoming students and new employees, to engage in ongoing awareness campaigns, to describe disciplinary proceedings in detail, to detail a list of possible sanctions, and to indicate the range of protective measures the institution may offer. Additionally, these regulations allow students who report or are accused of a sexual assault to have an advisor of their choice (including an attorney) accompany them to any meetings (Sander, 2014c, p. A12). Colleges may not restrict the choice of adviser or limit the adviser to some meetings, but may control the extent of the advisers’ participation as long as these restrictions are

applied equally (Sander, 2014c, p. A12). This echoes the guidance provided in the OCR Q&A document regarding attorney participation (p.26).

In concert with the new law, federal administrators are making it clear that preventing and handling campus sexual assaults is a priority. In January 2014 President Obama pledged to develop a coordinated federal response to combat campus sexual assault (Sander, 2014a, p. A7). This included creating a White House Task Force on Protecting Students From Sexual Assault, designed to provide colleges with information on best practices, to ensure compliance with legal obligations, to increase the transparency of federal enforcement, increase the public's awareness of individual college's compliance with the law, and to facilitate coordination among federal agencies (Sander, 2014a, p. A7). The White House Task Force's first report, "Not Alone," was released in April 2014, along with a website, notalone.gov to provide resources for schools and students. The administration's goals are to 1) Identify the scope of the problem on college campuses; 2) Help prevent campus sexual assault; 3) Help schools respond effectively when a student is assaulted; and 4) Improve, and make more transparent, the federal government's enforcement efforts (WHTF, Not Alone, 2014, p. 6). The task force report recommends that universities should carry out surveys of their students to assess the extent of the problem. The report declares that it is the Administration's goal to make the surveys mandatory in 2016.

Further, the Task Force's report recommends that university officials should work to engage with men to encourage them to step in when someone's in trouble (WHTF, Not Alone, 2014, p. 2) and actively create campus bystander intervention programs (WHTF, Not Alone, 2014, p. 9). The report also recommends that university officials should give the survivors of sexual misconduct more control over the process by ensuring a place to go for confidential advice and support (WHTF, Not Alone, 2014, pp. 11-12). The report observes that survivors are

especially concerned about maintaining their confidentiality and are hesitant to make reports (Not Alone, 2014, p. 11). While many survivors want the school to respond quickly, others are not so sure and want someone to talk to before they lose control of what happens next. Mandating that all employees report sexual misconduct, including those designated to provide rape crisis services, leaves survivors with fewer places to turn (Not Alone, 2014, p. 11). The report thus recommends that “schools should identify trained, confidential survivor advocates who can provide emergency and ongoing support” (Not Alone, 2014, p. 11). It recommends that these opportunities should include on-campus counselors and advocates, survivor advocacy offices, women’s and health centers, and licensed and pastoral counselors (WHTF, Not Alone, 2014, p. 3). Responding effectively, according to the report, also includes ensuring a comprehensive sexual misconduct policy, trauma-informed training for school officials, better school disciplinary systems, and community partnerships (WHTF, Not Alone, 2014, pp. 11-16). The report recommends increased transparency, including how reports should be publicized to the campus community providing publicity about how survivors may find advocates on campus (WHTF, Not Alone, 2014, p. 17).

In addition to releasing the Not Alone report, OCR also issued answers to frequently asked questions relating to the April 2011 Dear Colleague Letter. It clarifies several important issues, including specifying that schools may use the same or separate procedures to resolve sexual violence and sexual harassment complaints (OCR Q&A, 2014, p. 14). Further the OCR Q&A document specifies that a balanced and fair process must include (p. 26):

- A preponderance-of-the-evidence standard used in any Title IX proceedings, including any fact-finding and hearings.
- Equal permission or restriction on either side’s ability to have an attorney or other advisor participate in any stage of the process.

- Equal permission or restriction of either side's ability to submit third-party expert testimony.
- Notification of both sides, in writing, of the outcome of both the complaint and any appeal.

The 2014 OCR Q&A document provides information on a host of issues and demonstrates a marked increase in guidance from the federal government.

Overall, the White House Task Force to Protect Students from Sexual Assault contributed to a dramatic increase in attention on university sexual misconduct; in general the Obama Administration has pushed greater administrative enforcement of Title IX. In February, 2014 OCR head and assistant secretary of education Catherine Lhamon stated that her office would be working faster and better to make sure colleges abide by federal law (Sander, 2014b, p. A9). Lhamon observed that too often universities had sent the message that victimized students are worth less than the people who assault them, and she declared:

My job as the chief enforce is to radically change that message. I know we can do that together. And I also know that if you don't want to do it together, I will do it to you. Do not wait until the next assault to make a change. Do not wait until a student files a complaint. Act now. (Sander, 2014b, p. A9)

These statements are further illuminated by the enforcement data. Since OCR began tracking sexual misconduct Title IX complaints in 2009, the number of complaints filed against colleges has tripled from 11 in 2009 to 33 through April of 2014 (Newman & Sander, 2014, p. A24). OCR now publicly releases the names of colleges and universities under investigation for Title IX violations, and as of November 1, 2014, more than 80 colleges were under federal investigation (Lewontin, 2014, p. A4). Despite the trend of increasing enforcement, an analysis of Title IX complaints filed with the Department of Education from 2003 to 2013 found that

fewer than one in ten led to a formal agreement to change campus policies (Newman & Sander, 2014, p. A24).

The larger significance of increasing administrative enforcement actions is that it radically alters the Title IX compliance landscape on university campuses. Title IX is a federal funding condition under Congress's spending power (Title 20 U.S.C. §1682), creating significant financial stakes for colleges and universities in the event of non-compliance. Increasing administrative enforcement is largely responsible for the increase in publicity on the problem of sexual misconduct and the resulting frenetic activity by universities to respond and achieve compliance.

Other laws are implicated by the work of Title IX Coordinators. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act") is a federal statute (20 U.S.C. § 1092(f)) that requires all colleges and universities that participate in federal financial aid programs to keep and disclose information about crime on and near their respective campuses. Schools must publish policies designed to prevent sexual violence and respond to it once it occurs (20 U.S.C. § 1092 (f)(8)(A)(2008)) that include specific information about: 1) reporting (20 U.S.C. § 1092 (f)(8)(B)(iii)(2008); 2) the survivor's right to notify law enforcement and receive school assistance in doing so (20 U.S.C. § 1092 (f)(8)(B)(v)(2008)); 3) instructions to survivors as how to preserve evidence of sexual violence (20 U.S.C. § 1092 (f)(8)(B)(iii)(2008); 4) information about options and assistance for changing living and educational arrangement (20 USC §1092 (f)(8)(B)(vii)(2008); and 5) disciplinary procedures that explicitly treat accuser and accused equally in terms of having others present at hearings and to know disciplinary outcomes (20 U.S.C. § 1092 (f)(8)(B)(iv)(2008)).

The Family Educational Rights and Privacy Act (FERPA)(20 U.S.C. § 1232g; 34 CFR Part 99) protects against the unauthorized disclosure of confidential student education records. It grants parents of minor-aged students and students 18 and older the right to access educational records, to challenge the records' contents, and to have control over disclosure of personally identifiable information in the records. Applying to all schools receiving federal funds, Congress has modified FERPA nine times, most significantly with the passage of the Clery Act. Congress never defined what constitutes an education record, so some schools apply the provision broadly to include any document that names a student. Confusion exists over how colleges should apply its provisions, and whether it requires closed disciplinary proceedings (The Center for Public Integrity, 2009).

FERPA's guarantee of student rights to confidentiality has important implications for sexual misconduct investigations. As described by Pavela & Swinton (2011), schools must inform the complainant that if she (or he) wishes to file a formal complaint, the school cannot ensure confidentiality; conversely, if the complainant wishes to maintain her (or his) confidentiality, the school must inform the complainant that the school's ability to address the problem may be limited because investigators will be precluded from giving the complainant's identity to the alleged perpetrator and this will foreclose a full investigation of the complaint. According to these authors, the school should weigh complainant requests for confidentiality against the following factors: the seriousness of the alleged misconduct, the complainant's age, any complaints about the same individual, and the alleged harasser's right to receive information about the allegations if the information is maintained as an "education record" under FERPA.

There are also due process and administrative laws implicated in the work of Title IX Coordinators. In U.S. law, the right to due process is based on the Fifth Amendment, which

binds the federal government and prescribes that “No person shall be held... nor shall be deprived of life, liberty, or property, without due process of law...” The states are bound by the same language in the Fourteenth Amendment. In *Board of Regents v. Roth* (1972), the court held that to trigger the protection of due process there must be a recognized liberty interest or specific property right. The court found no property or liberty right in student dismissals. According to Triplett (2012, p. 498), public college students have constitutionally protected due process rights, but courts disagree as to the parameters of those rights. As education is not deemed a fundamental right, there is no requirement to use an elevated burden of proof, such as clear and convincing evidence, or to provide a right to cross-examine witnesses. Due process demands that both the procedures and the results must be fundamentally fair even if they are not perfect or precise (Kaplin & Lee, 1995, p. 455). Procedural due process includes notification of the complaint, providing the evidence against the accused, time to respond and present evidence to the contrary before an impartial decision maker, and the understanding as to burden of proof. Substantive due process also requires that rules must be universally and equally applied to all persons who are similarly situated (Kaplin & Lee, 1995, p. 456).

Administrative law provides additional guidance for Title IX Coordinators.

Under the Administrative Procedure Act:

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings... (§ 554(d)(2))

As a result, under Federal law the functions of investigator or prosecutor and Administrative Law Judge or hearing officer must be kept strictly separate.

When the procedure occurs under state law, however, the separation need not be so strict, but it still must be there. In *Withrow v. Larkin* (1975), the Court held that a combination of investigative and adjudicative functions in a state agency is not per se impermissible. The court did suggest, however, that the combination of these functions in a single individual official would raise more serious concerns. When the procedure is governed by state law, constitutionally protected property interests trigger the required separation. As noted above, in *Board of Regents v. Roth* (1972), the court held that to trigger the protection of due process there must be a recognized liberty interest or specific property right. The court found no property or liberty right in student dismissals. This chapter returns to discuss due process rights in examining Title IX complaint handling processes.

In this complex legal environment, Title IX Coordinators must examine the changing requirements under each of these statutes, as Title IX, FERPA, Clery Act, and due process requirements serve as Title IX Coordinators' primary sources of authority. Title IX Coordinators must redefine their missions to include, among other requirements, investigating peer-to-peer sexual misconduct allegations both on and off-campus, and educating and surveying the campus in an effort to create misconduct-free learning environments. Title IX Coordinators must also reexamine the impartiality and independence of their role in these processes to ensure they are not serving in both an investigative and hearing officer capacity. Institutional grievance policies and investigation protocols must be scrutinized to ensure due process and the correct application of law and policy. Policies relating to confidentiality and reporting must be redefined in light of these changing goals. These changes provide much needed guidance to Title IX coordinators.

The 2011 Dear Colleague Letter resulted in the formation of the Association for Title IX Administrators (ATIXA) and the ATIXA website notes, "nearly 30 years after the Department of

Education mandated that school districts and colleges designate Title IX Coordinators, we're still not entirely sure what the appropriate role, functions, and expectations of Coordinators are" ("About ATIXA and Title IX", 2014). As a result, OCR's April 4, 2011 Dear Colleague Letter "created a new profession and a new field" ("About ATIXA and Title IX", 2014).

TITLE IX COMPLAINT HANDLING PROCESSES

Title IX compliance offices are structured in a variety of ways but their core responsibility is to oversee enforcement of federal civil rights law within universities. Title IX compliance operations studied are typically centralized in either institutional equity or equal opportunity offices, human resources offices, or diversity offices. Sometimes Title IX Compliance is paired with other functions, resulting in a variety of combinations of the above offices (for example, Institutional Equity and Diversity, or other combination). As a result of the changes in Title IX law described above, Title IX Coordinators increasingly hold the Coordinator title alone, but previously it was commonly paired with Director titles requiring race, age, disability or other discrimination compliance work. As opposed to Ombuds whose ethical requirements of independence and impartiality prohibit holding multiple roles, many Title IX Coordinators interviewed for this study held dual roles requiring other compliance or diversity responsibilities. This section provides an overview of the standard Title IX processes, based on observations from both interviews and university policies, rules, and procedural documents.

In the typical configuration observed in this study, a primary Title IX Coordinator and several deputies or investigators handle the investigations and processing of sexual misconduct complaints. This can range from one sole Title IX Coordinator who handles all Title IX compliance work to other institutions with offices encompassing multiple deputy coordinator or investigators. Often there is a primary Title IX compliance office overseen by a primary Title IX

Coordinator and additional deputy Title IX Coordinators. Typically deputy coordinators include administrators in Student Affairs, Athletics, and Human Resources departments and provide a more localized person to whom complaints can be made. Deputy coordinators funnel complaints back to the centralized Title IX office for investigation. Less commonly, but also observed in this study, the Title IX Coordinator is an upper level administrator tasked with overseeing the Title IX Compliance program, but has little responsibility for doing the actual investigating. Or alternatively, two or more Title IX investigation procedures are set up with a student conduct office handling student-to-student misconduct, and an institutional equity or human resources office handling employee misconduct.

Organizationally, the structuring of Title IX Compliance offices appears to result from two factors. First, the structure is affected by the relative influence of the institutional actors involved in their design, including general counsel, student affairs administrators, or human resources personnel. Second, the structuring of Title IX compliance offices appears to have developed organically over time as additional legal requirements were added to individuals' job responsibilities on a piecemeal basis. Universities now must navigate a maize of regulation (Carlson, 2014).

Wherever and however Title IX compliance offices are located and structured, the processes used include many common features. Guidance on correct policies and procedures existed for university administrators prior to the 2011 Dear Colleague Letter. This included Stoner and Lowery, (2004, p. 27, n. 86) who articulated a model code of conduct and processes for handling code violations, including sexual misconduct. As opposed to the informal processes used by Ombuds, Title IX actors follow relatively formal and prescribed grievance policies and procedures designed to efficiently resolve sexual harassment complaints in compliance with state

and federal law. This section does not describe a model process used by all Title IX Coordinators. In fact, there is significant variation from university to university. This section provides a starting point for understanding how Title IX conflicts are handled, describing a hearing model, an investigation model, and hybrid approaches utilizing features of each. This section also describes features common to most university and colleges irrespective of model.

The Association for Student Conduct Administration identifies “Hearing” and “Investigation” models for resolving allegations of sexual misconduct (ASCA, 2014, p. 15). In the Hearing Model, an investigation takes place prior to a hearing to determine there is enough information to substantiate a complaint, to provide separation between the investigation and adjudication functions, and to allow a trained professional complete the fact-finding work for the hearing body (ASCA, 2014, p. 15). The Title IX Coordinator in a Hearing Model may act as an investigator and present their findings of fact to the hearing body. Additionally, the Title IX Coordinator may act as an advisor to the hearing body regarding correct procedures, as logistical support to coordinate schedules, and as a complainant initiating complaints on behalf of the college (ASCA, 2014, p. 15). The hearing body may be administrative and involve only one adjudicator or a combined panel of at least three members comprising faculty, staff, or students (ASCA, 2014, p. 15). The key aspect of the hearing model is the initial determination is made by the panel or administrator and not the Title IX Coordinator.

For example, Pennsylvania State University follows a Hearing Model for resolving allegations of sexual misconduct. Each case is assigned to a case manager, who investigates to determine if the information acquired reasonably supports a Code of Conduct violation, and then recommends charges and sanctions. If the alleged perpetrator contests the charges,

the matter is forwarded to a hearing after which either side may appeal (PSU, Code of Conduct and Student Conduct Procedures, 13-14). Likewise, Harvard Law School's process utilized a traditional hearing model in which the Title IX investigation determines whether there is enough information to proceed to a hearing (Harvard, HLS Sexual Harassment Resources and Procedures for Students). The Harvard Law School procedures³ have been updated to mirror the investigation model adopted by the broader university and are in force on an interim basis, but not without dispute. Last October 28 members of the Harvard Law School Faculty signed a letter objecting to the policy and procedures enacted by Harvard in July of 2014. They argued the procedures "lack the most basic elements of fairness and due process," most notably the lack of an adversarial hearing (Rethink Harvard's Sexual Harassment Policy, 2014).

The absence of an adversarial hearing is one of the key features of the Investigation Model. Under an Investigation Model, a complaint is assigned to an investigator who interviews the victim and determines interim actions or remedies. The alleged perpetrator is then informed of the complaint and both sides have the opportunity to meet with the investigator and provide information regarding the complaint. Witnesses may be interviewed and the investigator drafts a summary of the information which both victim and alleged perpetrator may review. An investigation report is created and forwarded to an adjudicator to issue findings and sanctions (ASCA, 2014, p. 16). At Pennsylvania State University, an

³ The Harvard Law School website, <http://hls.harvard.edu/about/title-ix-information/>, last accessed April 1, 2015, includes both sets of procedures. Under the heading "HLS Students and Faculty" the website notes "HLS has amended its Guidelines Related to Sexual Harassment on an interim basis to align them with the new University policy." A link leads to the interim policy conforming to the investigation model used by the broader university. Further down the page, under the heading "HLS Students," the website states, "The following procedures for complaints against students have been adopted by the HLS faculty, and have been submitted to the U.S. Department of Education for review." A link to the HLS Sexual Harassment Resources and Procedures includes the opportunity for an adversarial hearing after an investigation determines there is enough evidence to proceed.

alternative “Investigative Model” is available in which the same process is followed as the Hearing Model, only the investigator’s findings are forwarded to a Title IX Decision Panel which reviews the information and makes a decision without utilizing a hearing (PSU, Code of Conduct & Student Conduct Procedures, p. 14-15). Appeals are available under either model, but only on grounds of stated procedures not being followed, the existence of new, unavailable evidence, and unfair sanctions outside of the normal ranges (PSU, Code of Conduct & Student Conduct Procedures, p. 18-19). As illustrated by Pennsylvania State’s procedures, the main difference between the Investigation and Hearing models is the right to have a hearing. In both circumstances the investigator issues a report with factual findings and conclusions.

A third approach is to use a “Hybrid” of hearing and investigation models, and this is the approach recommended by ATIXA’s Model Investigation Process. The Hybrid Model uses an approach in which the investigator makes a determination but the accused is entitled to a hearing if they reject the findings in whole or in part (ATIXA Training Manual, Model Investigation Process, 2013, p. 40). This is the approach utilized for students at the University of Kansas, whose procedures are described in detail in Chapter 7.

For nearly every University included in this study, the standard model is a hybrid in which the investigator makes interim findings that may then be appealed to a hearing before an administrator or a panel. It is not always easy to discern the difference between a hybrid model and the hearing model, especially because the difference rests on whether the investigative report includes formal outcomes and whether the hearing is the first determination or is instead an appeal. Regardless of model, as discussed in Chapter 6, Title IX Coordinators act similar to a police investigator or a prosecutor and can be contrasted

with Ombuds who are more akin to a Rabbi or a Priest. The next section describes the Title IX process from complaint through appeal along with the standard derivations for the Hybrid model most commonly observed in this study.

University sexual misconduct policies, per Title IX requirements, define and prohibit sexual misconduct and specify Title IX complaint procedures. These policies describe where complaints may be made, and they often require different campus groups (faculty, staff, students, etc.) to use specific offices for making reports. Common to all institutions, any complaint may be brought directly to the University's Title IX Coordinator or to any deputy coordinators. Complaint procedures typically indicate which community members are required reporters, including supervisors, managers, and any employees designated as mandatory reporters. For individuals who do not want to make a report, but want to speak with someone confidentially, some processes recommend that complainants should take their complaints to university counseling services or (less frequently) the Ombuds.

After a complaint is received, grievance procedures are used for carrying out the investigation and resolution of the complaint. Complaints are initially investigated under the oversight of the university's Title IX Coordinator, and typically involve interviews of the complainant, the alleged perpetrator, and other witnesses and a review of the applicable policies and the employee's or student's records. Interim measures such as changes to class or housing assignments for students or work assignments for employees may be taken to promote safety. These changes depend on a variety of factors, including but not limited to the severity of the alleged misconduct. Most policies provide for confidentiality to the extent allowed by law, prohibit retaliation for making complaints, and allow the institution to investigate incidents of which it has become aware without a formal complaint. Further, institutions typically will

conduct an investigation and proceed with further adjudication on the basis of that information, even without the cooperation of the individuals involved.

Grievance processes may specify that the Title IX Coordinator, at his or her discretion, may meet with both sides (if they both agree) in an attempt to resolve the issue (DCL, 2011, p. 8). There must be appropriate involvement by university personnel, for example a trained counselor, mediator, or a teacher or administrator (DCL, 2011, p. 8). Participants must be notified that at any time they can end the informal process and being a formal complaint process (DCL, 2011, p. 8). Even with voluntary agreement of both sides, mediation is not appropriate for use in resolving complaints of sexual violence and grievance procedures should state that mediation will not be used for such complaints (DCL, 2011, p. 8). Both Ombuds and Title IX Coordinators use mediation to resolve sexual misconduct, in some instances working cooperatively in the process.

Following the investigation, Title IX Coordinators may take multiple different routes. Most Title IX Coordinators interviewed for this study had the authority to make determinations of Title IX violations and to make recommendations regarding potential sanctions. These recommendations go to either an administrator tasked with reviewing and confirming the Title IX Coordinator's report and issuing sanctions, or to a hearing board or panel reviewing the Title IX Coordinator's report and issuing appropriate sanctions. Where the administrator reviews the Title IX Coordinator's recommendations and determines sanctions, often the respondent has the ability to appeal the result to a hearing board or panel. Or, where the Title IX Coordinator's recommendations triggers a hearing to determine whether a violation of Title IX occurred and to issue any resulting sanction, that determination can often be appealed to an administrator who makes a final decision. In some situations responsibilities are divided as a panel or board

determines the existence of fault and then an administrator or the Title IX Coordinator determines the appropriate sanctions.

If the complaint goes to a hearing, a panel or board comprised of students, faculty, and staff will seek to establish (depending on the processes used above) either 1) Whether or not there is a violation of Title IX or university policy, 2) What is the appropriate sanction for the violation, or 3) Whether the Title IX Coordinator's or the administrator's findings or sanctions were in error. Often the Title IX Coordinator in such situations assumes the role of the complainant and the survivor is allowed to decide whether or how much she or he will cooperate in the process (as co-complainant, witness, or not participating at all). In other situations, the Title IX Coordinator serves no role, or serves as an impartial witness in the conduct hearing, testifying about the results of the investigation.

There is significant ambiguity regarding whether the Title IX Coordinator's role is to make a judgment as if he or she were a judge, or a charge as if they were a prosecutor or grand jury. The Dear Colleague Letter (2011, p. 11) prescribes a preponderance of the evidence burden of proof, requiring the alleged conduct to be more likely than not to have occurred. In some situations the standard used during a hearing is whether the Title IX Coordinator's judgment was arbitrary or capricious, meaning it was without reasonable basis in fact. This deferential standard of review used in the review of discretionary administrative decisions generally upholds a Title IX Coordinator's determination and indicates that the "hearing" is really an appeal from a judgment. Using different standards at different stages is met with conflicting or ambiguous OCR guidance. On one hand OCR requires universities use a preponderance-of-the-evidence standard for all proceedings (OCR Q&A, 2014, p. 26). On the other hand, OCR then provides universities with the "flexibility to determine the type of review it will apply to appeals" (OCR

Q&A, 2014, p. 37). The OCR guidance states the type of review used on appeal shall be applied the same regardless of which side files the appeal (OCR Q&A, 2014, p. 37).

Much of the ambiguity in the Title IX Coordinator's role corresponds to uncertainty in what constitutes compliance. The Dear Colleague Letter (2011, p. 7) requires that Title IX Coordinators not have job responsibilities that create a conflict of interest (such as a disciplinary hearing board member or general counsel). This prescription resulted in efforts to more clearly separate investigative and adjudicatory functions. Motivated by liability concerns, at least one major education insurer recommends universities handling student-perpetrated sexual assault to not place conclusions in the investigators report, as these conclusions may be seen as a judgment that is not within the authority of investigators to make (United Educators Powerpoint, 2012). As a result, a minority of Title IX Coordinators in this study were limited to investigating and determining whether sufficient evidence (or probable cause) existed to trigger a hearing to determine Title IX violations and punishment.

The investigative/adjudicatory division of roles is not a requirement of Title IX or OCR, and Title IX Coordinators at many institutions make "judgments" regarding outcomes despite either conducting or directing the investigation. The OCR Q&A provides that the Title IX Coordinator does not necessarily have to be the person who conducts the investigation (p.25). If the Title IX Coordinator does conduct the investigation there must not be a conflict of interest (OCR Q&A, p. 25). Specific examples of a conflict of interest include where the Title IX Coordinator is also the Athletic Director, Dean of Students, or "serves on the judicial/hearing board or to whom an appeal might be made" (2014, p. 12). This conflict of interest definition suggests that Title IX does not bar the Coordinator from making the initial determination of guilt or innocence, as long as they do not oversee the appeal.

Further, what constitutes an investigation is broadly defined by OCR (Q&A, 2014) as including the investigation, any hearing, the decision-making process used to determine if the conduct occurred, and what subsequent actions will be taken (pp. 24-25). While this “investigation” must include the equal opportunity for both parties to present witnesses and other evidence, the OCR Q&A document states, “Title IX does not necessarily require a hearing” but there may be additional “legal rights or requirements under the U.S. Constitution, the Clery Act, or other federal, state, or local laws” (OCR Q&A, p. 25, n.28).

If a hearing is provided, OCR does not require universities to allow cross-examination of either side or their witnesses (OCR Q&A, 2014, p. 31). If schools allow for cross-examination of witnesses, both sides must have equal opportunity to do so. During a hearing on alleged sexual violence, OCR “strongly discourages a school from allowing the parties to personally question or cross-examine each other” as it “may perpetuate a hostile environment” (OCR Q&A, 2014, p. 31). OCR prohibits “[q]uestioning about the complainant’s sexual history with anyone other than the alleged perpetrator” and notes “the mere fact of a current or previous consensual dating or sexual relationship...does not itself imply consent or preclude ...sexual violence (OCR, Q&A, 2014, p. 31). These prescriptions indicate that a Title IX Coordinator’s investigation providing opportunity for the presentation of witnesses and evidence, without an adversarial hearing providing for confrontation of those witnesses, satisfies Title IX requirements of what constitutes a fair and balanced process.

Additionally, there is no requirement that universities provide an appeal, but “if the school provides for an appeal, it must do so equally for both parties” (OCR Q&A, 2014, p. 26). OCR recommends universities use an appeals process “where procedural error or previously unavailable relevant evidence could significantly impact the outcome

of a case or where a sanction is substantially disproportionate to the findings” (OCR Q&A, 2014, p. 37). OCR leaves the design of the appeals process to the university, “as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the school takes steps to protect the complainant in the educational setting during the process” (Q&A, 2014, p. 37).

While OCR and Title IX do not confer the right to an adversarial hearing, or an appeal, the Q&A document (2014) further clarifies the interplay between due process and Title IX:

The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights. Procedures that ensure the Title IX rights of the complainant, while at the same time according any federally guaranteed due process to both parties involved, will lead to sound and supportable decisions. Of course, a school should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant. (p. 13)

The ambiguity regarding the Title IX Coordinators’ role in the process is evidence of the “informality” that creeps into an ostensibly formal process within a bureaucratic organization. The 2011 Dear Colleague Letter and 2014 Q&A document provide evidence of the legalizing and formalizing pressures being experienced by Title IX Coordinators and Ombuds. The questions of what is the appropriate role of Title IX Coordinators in the investigation, what constitutes a hearing, and whether an appeal is required all implicate the norms of impartiality, independence, and formality discussed in chapters six and seven.

Outside of the University’s process, faculty and staff may file complaints under Title IX with the U.S. Department of Education’s Office for Civil Rights (OCR). The OCR process does not require the person or organization filing the complaint to be a survivor of the alleged discrimination, but the complaint must be filed with OCR within 180 days of the date of the alleged discrimination. If the complaint is also processed through the university’s grievance

process, an OCR complaint must be filed within 60 days of the last act of the institutional grievance process (“How to File a Discrimination Complaint with OCR,” 1998). OCR will wait for the conclusion of the institutional process prior to commencing its own investigation. Once a complaint letter is received, an investigation is conducted to determine if there has been a violation of Title IX. If so, OCR will attempt to obtain voluntary compliance and negotiate remedies. Enforcement action, such as court action by the Department of Justice before an Administrative Law judge to determinate federal funding, may be initiated if OCR is unable to obtain voluntary compliance (“How to File a Discrimination Complaint with OCR,” 1998). Such action has never been taken (Jones, 2010). Individuals can file a claim in court, and do not need to first file a complaint with OCR. If court action is commenced, OCR will not continue to pursue the complaint (“Q&A on OCR’s Complaint Process”).

In sum, Title IX Coordinators are an essentially *legal* compliance office within a university. They are charged by university administrations with enforcing the university’s legal obligations regarding illegal discrimination and sexual misconduct among students and employees. In carrying out these responsibilities, Coordinators oversee a law-like process of investigation and adjudication. As is typical of organizational compliance officers, there is likely to be a considerable degree of slippage for the requirements of the formal law. Nonetheless, the basic point is that the Coordinator is modeled on the formal legal process.

OMBUDS: STANDARDS AND PRACTICES

Ombuds are designed as informal mechanisms for resolving disputes, in direct contrast to the formal complaint handling role of a Title IX Coordinator. Unlike the myriad rules and regulations governing the work of Title IX Coordinators, Ombuds are guided only by professional standards of practice, best practices, and a code of ethics. They are also often

governed by institutional rules describing their role within the institution. Charles Howard, author of *The Organizational Ombuds* (2011b), describes the origins of the Ombuds function as a response to the ineffectiveness of formal complaint systems (p. 144). As legal, compliance, and human resources personnel are unable to provide confidentiality to employees seeking to report misconduct or other conflicts (Howard 2011b, p. 144), legislators and organizations sought other means of complying with the law and resolving inter-organizational conflict.

According to Howard Gadlin, the longtime Ombuds of the National Institute of Health, “the role of the ombudsman is perhaps the least well understood in the field of alternative dispute resolution” (2000 p. 37). Noting that “[a]ll ombudsman give voice to people who might otherwise be disadvantaged in their dealings with the management and bureaucracy of the institution...”, Gadlin (2000, p. 38) argues that there is confusion about what an Ombuds is and significant dispute on the issue among Ombuds themselves. There is basic confusion resulting from a lack of a common definition of the term Ombuds, how it is interpreted, and who uses it (Levine-Finley & Carter, 2010, p. 126). There is also confusion as to whether the term “ombudsman” is gender-specific. This dissertation uses the general term “Ombuds” except in quotations that use another term.

There are many different types of Ombuds. Gadlin describes (2000, p. 38) “classical Ombuds” as those originating from the Swedish parliament in the early 1800s and which have statutory independence, the authority to investigate complaints and the authority to issue reports or recommendations. By contrast, Organizational Ombuds are established not by statute but by their organization’s institutional governance structure and do not typically have a formal investigative function. Gadlin (2000, p. 40) notes that where the classical Ombuds of Sweden and western Europe were highly skilled and legally trained professionals with very high status,

the first university and corporate Ombuds were “truly amateurs” selected on the basis of their knowledge of the institution and their personal reputations for integrity, fairness, and sympathy. Over time, the Ombuds role became institutionalized and standards of practice developed.

Many organizations founded Ombuds programs as a means of providing alternatives to formal grievance systems and for attending to the underlying interests that give rise to disputes and which often are not well addressed by formal rules and organizational guidelines (Gadlin 2000, p. 43). Ombuds and other organizational dispute resolution processes were initially seen as a way to respond internally to complaints, reduce litigation costs, and demonstrate organizational concern (Edelman, Erlanger, & Lande, 1993; Shapiro & Kolb, 1994). Ombuds are now common mechanisms in both the private and public sector. One survey found that ten percent of responding corporations employed Ombuds and that over 1,000 U.S. corporations use Ombuds (Lubbers, 1997, p. 6). Educational Ombuds first appeared in the 1960’s with the establishment of offices at Michigan State University and Eastern Montana College to hear student and faculty complaints during a time of widespread student unrest (Van Soye, 2007, p. 123). Today there are at least 200 college and university Ombuds in the United States who handle problems affecting students, faculty, and staff (Yarn & Jones, 2006, p. 373).

Functionally, a university or college Ombuds is a confidential resource for anyone who has a complaint or concern about a university employee or policy. Ombuds are intended to help to defuse situations before they become larger problems by helping individuals think through options, clarify goals, and improve communication. Ombuds do not tell people what to do; instead, they are intended to listen without judgment. Most importantly, Ombuds provide confidentiality to individuals and do not put the institution on “notice” for purposes of creating a legal responsibility to act. Ombuds do not duplicate any services, in the sense that they have no

authority to formally resolve a dispute, impose a sanction, or order a remedy; instead, they merely provide a place for people to turn if they don't know where to go. Ombuds direct individuals to the appropriate service or department and have no administrative power to change grades, sanction, punish, or change policies.

One key question regarding Ombuds is whether they only assist with individual conflicts or whether they may address larger organizational issues. According to Charles Howard (2011b, p. 80) an Ombuds does have the power to check and inform organizational power because “[t]he freedom from management responsibility, combined with the everyday process of speaking with people from any and all levels or locations of the organization, give the Ombuds a unique perspective on how the organization is performing and what problems it and its people face.” Armed with this information, an Ombuds can provide recommendations to organizational leaders on how to address broad institutional problems. This is done anonymously in order to protect confidentiality. Through feedback, improvements can be instituted, but these are neither suggested nor administered by the Ombuds. By presenting the data that help to identify trends, Ombuds can persuade managers to buy into system change (Wagner, 2000, p. 108). Howard (2011b, pp. 80-81) sees the Ombuds as having many roles, including as “an institutional response to curb wrongdoing or unethical behavior, a facilitator of appropriate conduct by both individuals and the organization itself, and an agent for promoting systemic change where necessary.”

Through these organizational activities Ombuds serve an important function of identifying problems missed by other processes, due to the ability to provide confidentiality and to bring issues identified as trends to the forefront. The Ombuds mechanism may be an effective alternative, as research indicates that individuals are often hesitant to file formal complaints. For

example, in a 2007 study 39% of college students indicated that students had conflicts they wanted to pursue but did not, most commonly due to fear of retribution (37%), expectation of a negative outcome (38%), and lack of knowledge of how to pursue the conflict (33%) (Harrison, 2007, p. 355). Rowe (2009, p. 280) notes that several dozen reasons explain why people do not act directly and effectively when they see unacceptable behavior and do not use conflict management systems in timely and appropriate ways. Rowe (2009, p. 280) highlights fear of loss of relationships, fear of retaliation or other bad consequences, the fear that they will not appear credible to management, and inaccessibility or lack of credibility of those who might make a difference. Additional factors include a belief that people lack “enough evidence” to pursue an issue, lack of knowledge about relevant resources or policies, distrust of senior management, shame, and a belief that no one will listen.

Noted Ombuds Brian Bloch, David Miller, and Mary Rowe argue for alternatives to making formal complaints (Bloch et al., 2009: p. 241):

Our experience is that only a relatively small proportion of the population is comfortable with formal actions (although importantly, some in this group are satisfied only by formal investigations and formal action). But most people, most of the time, are quite reluctant to act on the spot, or report unacceptable behavior, if they believe this will result in formal action. This is one of the reasons why options are needed in a complaint system. (p. 241)

Ombuds issue annual or biannual reports, and the most recently available report from the University of Kansas Ombuds echoes the need for informal options. The report notes “No one solution, department, or university unit can respond effectively to all situations. It is important that the University of Kansas provides both formal and informal options for campus members to address their concerns” (University of Kansas Ombuds Office Bi-Annual Report, 2011, p. 15). The report describes the results of a user survey of 102 of the 786 individuals meeting with the Ombuds during the 2009 to 2011 reporting period. Individuals accessing the Ombuds office

included faculty, students, and staff with a diverse range of issues from grade disputes to promotion issues and tenure conflicts. When asked what they would have done without the Ombuds office, a sample of the survey respondents indicated: Resigned, hired an attorney, left the university, escalated the problem at additional time and cost, and nothing as they had nowhere else to go (University of Kansas Ombuds Office Bi-Annual Report, 2011, p. 15).

For purposes of a direct comparison of reporting rates for one campus, the Title IX Coordinator at the University of Michigan released an inaugural annual report indicating that 129 instances of sexual misconduct were reported between 2013 and 2014 (UM Student Sexual Misconduct Annual Report, 2014, p. 2). Of the 129 reports, 58, or 45%, were deemed to not fall under the purview of the sexual misconduct policy (UM Student Sexual Misconduct Annual Report, 2014, p. 2). By comparison, the most recent report of the Ombuds at the University of Michigan (2012-2013) indicates the Ombuds met with 217 visitors, 86% of whom were students (UM Ombuds Annual Report, 2013, pp. 2-3). Of 98 non-academic concerns brought to the Ombuds attention, 25 concerned harassment and discrimination (UM Ombuds Annual Report, 2013, pp. 2-3).

Evidence indicates Ombuds assist in restoring a visitor's trust and commitment towards the organization. According to Harrison and Doerfel (2006, 130), if conflict is handled in a way that violates expectations (taking time to actively listen when the person does not expect to be treated that way), trust and commitment are likely to increase. Likewise, violating expectations in a negative way will decrease organizational evaluations. Harrison and Doerfel's 2006 study demonstrated that perceptions of unfairness can lead to escalation of grievances and negative evaluations of the organization. In just over 50% of cases studied, students pursuing grievances through the Ombuds obtained favorably or somewhat favorable outcomes. The majority of those

who did not receive a favorable outcome still thought the process was fair and returned to feel trust and commitment toward the organization (Harrison & Doerfel, 2006, pp. 145-146).

In addition to identifying problems and restoring individuals' views that the institution cares about their concerns, much of the basis for the use of Ombuds offices is related to confidentiality and avoiding legal liability. Wagner describes (2000, p. 107) Ombuds as able to provide an "early warning" to "consult front-line staff or direct reports about morale or behavior or procedures in a certain area" as long as they protect the anonymity of the individuals involved. Remedial steps such as focused training, department level surveys to determine specific issues, and other such mechanisms can be used to address misconduct. Ombuds can provide these services if confidentiality can be maintained, and thus can ameliorate the effects of conflict that often linger within the organization. For example, Lee et al. (2004) examined a survey of government workers and that the damage caused by sexual harassment are not limited to the initial event but instead can hurt the target, harasser, and organization members for an extended period (2004, p. 318).

While employed by the university and typically reporting to the president, Ombuds sit outside the formal administrative structure. McGrath (1997, p. 473) notes several sources of Ombuds' authority other than their managerial position. These include the ability to gain access to information, establish professional relationships with the very top of the organization, the ability to recommend cases to more formal options, their problem-solving skills, and their personal credibility based in charisma and moral authority. As extensive knowledge of the organization and its operations is important, most Ombuds are picked from within the organization (McGrath, 1997, p. 471; Rowe, 1987, p. 137).

According to Harrison and Morrill (2004, p. 323), Ombuds are likely to use a set protocol

with visitors. Utilizing their research on students, Harrison and Morrill describe the standard interaction. First the Ombuds will describe the process, including the Ombuds' power and the boundaries of confidentiality. This is to manage expectations (specifically avoiding the belief that the Ombuds will unilaterally make a decision) and to aid in the free sharing of information without fear of retaliation (Harrison & Morrill, 2004, p. 323). The next step is for the Ombuds to ask the student to tell their story in order to gain information and determine options for proceeding. It is in this second step that the Ombuds "engages in active listening to show that a representative of the university is listening and cares about the rights and concerns of the disputant (Harrison & Morrill, 2004, p. 323). Other Ombuds may engage in more interrogation in order to determine the truth, according to the goals the Ombuds seeks to achieve (Harrison & Morrill, 2004, p. 323). Ombuds then seek to help the student gain access to information, brainstorm and think through options, or to intervene and facilitate some sort of resolution. The next section describes each of the main standards of the International Ombudsman Association, which, when upheld, contribute to trust and relationship building.

THE INTERNATIONAL OMBUDSMAN ASSOCIATION'S PROFESSIONAL STANDARDS

Early standards for organizational Ombuds are described as "abstract principles that the pioneers... translated into practices tailored to the structure, cultural dynamics and missions of particular organizations (Gadlin, 2005, p. 15). These early principles included a commitment to impartiality, neutrality, independence, confidentiality, and a justice orientation (Gadlin, 2005, p. 15). Standards coalesced around leading professional organizations for organizational Ombuds, including The Ombudsman Association (TOA) and the University and College Ombuds Association (UCOA)(Gadlin, 2005, p. 15). The International Ombudsman Association (IOA), a

merger of multiple Ombuds professional groups, is now the primary association for individuals working as Ombuds.

Updated to version three in 2009, the IOA Best Practices statement (2009) provides guidance to Ombuds on how to operationalize the main Standards of Practice. The IOA Code of Ethics (2007) provides the essential prescription and standards requiring Ombuds will remain 1) Independent to the greatest extent possible, 2) Neutral and not engage in conflicts of interest, 3) a confidential source of communications, except where there is imminent risk of harm, and 4) outside of the reach of formal adjudicative or administrative proceedings. Notably, Standard 4.8 states that the Ombuds “endeavors to be worthy of the trust placed in the Ombudsman Office” (IOA SoP, 2009). Tim Griffin (2010) sees the standards as valuable, but states:

[U]ltimately [it is] the perceptions of the people within the organization that determine whether and how the office is utilized, enable the ombudsperson to perform his or her duties, and ascertain the degree to which the office is a valued element of the organization. These perceptions are formed and sustained not by words written in obscure documents, but through the relationships developed between the ombudsperson and other people within the organization. (p. 66)

Each standard is briefly reviewed and described, beginning with independence.

Independence requires that the Ombuds and the Ombuds office are independent from other organizational entities (Standard 1.1), holds no other organizational position that might compromise independence (Standard 1.2), retains sole discretion with how to act regarding specific concerns or observed trends (Standard 1.3), has access to all organizational information and individuals as permitted by law (Standard 1.4), and the Ombuds has the authority to select their own staff and manage their budget and operations (IOA SoP, 2009, Standard 1.5). Specifically independence requires that the Ombuds report directly to the highest level of the organization, with an employment status indicating that they are not subordinate to senior

officials. Functionally, independence means operating independently from “control, limitation, or interference” (IOA Best Practices, 2009, p. 2).

Hayden (1997) conducted a survey regarding the role of the Ombuds office in higher education, and found that most university Ombuds report high up in the organization and are independent of lower-level supervisors. Over 80% of respondents reported to the President, Chancellor, or Vice-president and Provost levels of the organization (Hayden, 1997, p. 4). Roughly ten percent reported to student judicial affairs, student affairs, judicial affairs, or affirmative action offices (Hayden, 1997, p. 4). The survey also indicated that over 30 percent of Ombuds hold multiple roles, such as Dean, Director, Faculty, potentially threatening the independence of the role (Hayden, 1997, p. 5).

With regard to independence, the Ombuds model is radically different from Title IX Coordinators. While the Ombuds reports to the highest levels of the institution, the Ombuds is deemed to operate outside of the organizational structure, and not be subordinate to any individual’s control. A Title IX Coordinator is not independent of the organizational structure, existing within the organizational chain of command, and beholden to the organization’s directives. Despite the lack of independence, Title IX Coordinators must have the freedom to advocate for compliance with Title IX law and policy. An Ombuds independence has significant implications for a university’s legal obligations under Title IX. OCR’s Q&A document (2014) does not mention Ombuds and do not provided Ombuds with the ability to maintain confidentiality. As a result, significant liability concerns arise when organizational actors like Ombuds are independent of the organizational structure, not mandated to report, yet are able to hear and informally handle sexual misconduct concerns. This dissertation returns to issues of independence in chapter six.

A second, and closely related, IOA Standard of Practice is neutrality and impartiality (hereafter discussed as impartiality)(IOA SoP, 2009). Longtime Ombuds Frances Bauer (2000, p. 65) notes that early conceptions of what an Ombuds needed to do to remain neutral “was simply not explained.” Impartiality requires (Standard 2.1) Ombuds to be neutral, impartial and unaligned, while “striv[ing] for impartiality, fairness and objectivity in the treatment of people and the consideration of issues” (IOA SoP, 2009, Standard 2.2). This includes not advocating on behalf of any individual within the organization, and advocating for processes that are fair and equitably administered. Howard Gadlin (2011, p. 39) argues for reconsidering Standard 2.2 as “the boundary between advocating for a fair process and advocating for a person is not always clear, and in some circumstances exercising our discretion includes advocating on behalf of a person or even an outcome.” Gadlin is not arguing that Ombuds should be placed in the role of advocate, but that Ombuds should have the discretion to exercise judgment when fair process requires advocating for a person or a particular outcome (2011, pp. 39-40). Gadlin effectively asks who decides what is a fair process? Sebok and Rudolph (2010, p. 25) note that Ombuds, like everyone else, have biases and “have their own unique life experiences, values, perspectives, preferences, and opinions.” As Ombuds have no way of controlling how their actions will be interpreted by others, “[O]mbuds neutrality is often an elusive goal to which ombuds aspire but only sometimes achieve” (Sebok & Rudolph, 2010, p. 25). Tim Griffin (2010) notes the importance of the appearance of impartiality:

[I]f the ombudsperson is not perceived as able to offer a neutral and independent perspective to issues, constituents will assume that the options offered by the ombudsperson will instead reflect a particular bias. Consultees who perceive such a bias might suspect that the ombudsperson’s suggestions are somehow designed to achieve some purpose other than the outcome desired by, and in the best interest of, the consultee. (p. 67)

As the Ombuds is unable to serve as an advocate, Griffin (2010, p. 69) believes the Ombuds must have a “broad knowledge of the people in the organization who are willing and able to effectively serve as advocates for particular types of people.” Developing these relationships contributes to an Ombuds’ capacity to help visitors.

In striving to be impartial, Ombuds experience tension between “the desire to assist a complainant and a need to represent the best interests of the organization” (Kolb, 1987, p. 675). This is echoed in Levine-Finley & Carter’s study (2010, p. 134) of Ombuds: “[t]here is a tension between maintaining neutrality...[and] the responsibility to raise issues to leadership and offer suggestions for resolution.” Kolb argues that Ombuds balance these competing interests by framing the problems according to the kinds of remedies available to them. According to Kolb (1987, p. 680) the “ombudsmen’s positions in the organization and their interpretation of the role affect the way problems brought to them are diagnosed and defined.” While most Ombuds want to help individuals and represent their interests, they also identify with the “corporate aims of efficiency and lack of disruption,” understanding that protecting the company from civil suits and other problems “is part of the rationale for the function.” Gadlin (2012, p. 35) describes “a frighteningly passive interpretation of neutrality, one that eschews influence in any form” and questions how an Ombuds can exercise discretion about how to act without some kind of evaluation of what constitutes fair procedures? Gadlin is clear that he is not seeking to offer evaluation but that the Ombuds assessment of fairness should inform and guide subsequent actions (2012, p. 36). This tension in how Ombud determine what is fairness and in what areas they can advocate for systemic changes is further described in the chapter on impartiality.

Regarding the important value of impartiality, the Ombuds version of this value is similar to the Title IX Coordinator’s version in some ways and different in others. The IOA Standard

articulating impartiality requires Ombuds to be advocates for fair principles like the ability to be heard, but not to advocate for any one individual, or for the organization itself. Title IX Coordinators also must advocate for fairness, but in terms of maintaining the integrity of the grievance process. This is done by ensuring the fairness of the grievance processes, utilizing laws, rules, and other formal requirements instead of basic principles of fairness. Title IX Coordinators are to be impartial to the interests of both the complainant and the respondent, but partial to the goals and requirements of the law. Both roles' impartiality are implicated due to institutional goals to avoid liability, creating pressure to hedge towards formality or informality in various circumstances. Both roles vacillate on the question of whether they work primarily to protect students or the university from harm. Impartiality is further examined in chapter 6.

Confidentiality is another IOA Standard of Practice (2009), with Standard 3.1 requiring Ombuds hold communications in strict confidence by not revealing, nor being required to reveal (without express permission), the identity or information that could lead to identification of any visitors contacting the office. Further, the Ombuds only takes action with the individual's express permission. This is done at the discretion of the Ombuds, and only when it can be done safeguarding the individual's identity. Describing confidentiality as a privilege, the standard provides an exception where there appears to be imminent risk of serious harm, which is an assessment that is to be made by the Ombuds (IOA SoP, 2009, Standard 3.1). Standard 3.2 specifically states that communication between the Ombuds and others is privileged, with the privilege held by (and thus only waivable by) the Ombuds and the Ombuds office (IOA SoP, 2009). Confidentiality should be discussed with visitors prior to them sharing their concerns (IOA Best Practices, 2009, p. 6).

Other IOA standards regarding confidentiality include Standard 3.4, requiring that the Ombuds safeguard individuals' identities when providing systematic, upward feedback; 3.5, requiring the Ombuds to keep no records containing identifying information on behalf of the organization; 3.6 requiring the Ombuds to maintain information such as notes, phone messages, calendars, in a secure location, protected from inspection, with a standard, consistent practice for destroying information (IOA SoP, 2009). The IOA Best Practices (2009, p. 7) suggest that record-keeping systems and databases should be separated from the organization's technology system. Technology questions pose a particular challenge for Ombuds, given the dramatic increase in electronically stored information (Mousin, 2011). Many Ombuds use a record destruction policy, but there is a lot of information not within an Ombuds's control, including but not limited to smartphone and other device data backup systems.

IOA Standard 3.7 (2009) requires the Ombuds to prepare reports and data in a way that protects confidentiality. IOA Standard 3.8 (2009) describes notice directly, stating that communications made to the Ombuds are not considered notice to the organization. The Ombuds is not an agent of the organization, should not be designated as an agent, and will not accept notice to the institution but instead may refer individuals to the appropriate place to provide formal notice. IOA Standard 4.6 (2009) specifies that Ombuds identify trends, issues about policies and procedures, without breaching confidentiality or anonymity. These confidentiality guidelines create both opportunities and challenges for the practice of Ombuds.

Confidentiality is defined differently by Ombuds and Title IX Coordinators. For Title IX Coordinators, confidentiality can be provided to the extent that the law allows, requiring Coordinators to preference compliance with law and policy above confidentiality. This complicates efforts to encourage survivors to come forward and make complaints. For Ombuds,

confidentiality is an absolute concept within very limited exceptions and it serves as a pre-requisite to the work of assisting individuals with their conflicts. The less than certain nature of an Ombuds confidentiality privilege and status as a non-mandatory reporter complicates universities' legal obligations under Title IX. How each role handles confidentiality is further examined in chapter five.

The fourth and final IOA Standard of Practice (2009) is Informality. IOA Standard 4.1 (2009) describes the informal basis in which the Ombuds functions, including “listening, providing and receiving information, identifying and reframing issues, developing a range of responsible options, and – with permission and at the Ombudsman discretion—engaging in informal third-party intervention.” The standard also articulates empowerment as a goal, stating that “[w]hen possible, the ombudsman helps people develop new ways to solve problems themselves.” The IOA Best Practices supplement (2009, p. 9) further expands on the ways options may be individually tailored, with Ombuds options including third-party interventions like shuttle diplomacy, facilitating communication, and informal mediation. Mediation, when used by an Ombuds, is a voluntary process and may or may not produce a written document. These written agreements should not be maintained by or within the Ombuds office (IOA Best Practices, 2009, p. 9).

Rowe (2012, p. 8) describes informality as the fourth pillar of Ombuds practice, recognized slowly over a period of time after independence, confidentiality, and neutrality/impartiality were widely adopted. Rowe (2012, p. 8) asserts that informality is today as essential as any of the other principles, and that without it, an Ombuds practice “could not function in today’s legal climate...[as] many managers would find [Ombuds] to be interfering with their authority.”

Rowe (2012, p. 11) discusses several meanings for informality, including not putting complaints in writing, conflict management without a written record, and also the lack of management decision-making power. Rowe also mentions the inability to serve as witnesses or conduct investigations for the purpose of administrative decision-making (2012, p. 11). Sebok (2012) operationalizes the IOA Standard of Practice (2009) on Informality by explaining to visitors that he does not give legal advice, and also does not:

1) Accept formal notice for the organization about a problem...2) Arbitrate, adjudicate, or formally investigate complaints; 3) Make official determinations for the organization about violations of rights, performance failures, or who was right or wrong in a given situation; 4) Maintain written records on behalf of the organization; 5) Participate in—let alone administer—formal procedures such as grievances, hearings, or disciplinary proceedings, or appeals; 6) Sanction anyone; or 7) Meet with people who do not want to meet with me. (p. 38)

Rowe (2012, p. 11), notes that informality and the lack of formal power does not equate to powerless, and she cites as examples an Ombuds's referent authority, moral authority, power from information, expertise, problem-solving ability, perseverance and building relationships. Rowe (2012, p. 12) sees the four pillars of Ombuds practice as being essential to one another and analyzes the interdependence between them. For example, Rowe notes that an Ombuds cannot be considered independent without being impartial and neutral. She also notes that an Ombuds cannot be permitted to be confidential without being designated as "informal." Rowe further argues (2012, p. 12) that "[b]y definition, independence does not combine well with formal, hierarchical, decision-making power within an organization...[as] it is easier to come up with a variety of options...as an independent professional...apart from ordinary line and staff structures." Noorbakhsh (2012, pp. 28-29) also sees informality as tied into other Standards of Practice, noting how participating in a grievance hearing violates the informality standard, but also makes it very difficult to adhere to the confidentiality standard. Likewise, providing records

on a particular individual per a legal department request may violate the confidentiality standard, but it also implicates the principles of impartiality and independence (Noorbakhsh, 2012, pp. 28-29). Finally, it would be impossible to conduct a formal investigation and make judgments about wrongdoing without compromising independence and neutrality.

Referring specifically to sexual misconduct, Rowe (2012, p. 13) notes that “managers may feel that they must immediately take control of the disputes that come to them...[and] [i]t has become harder for ordinary line and staff managers to permit employees with concerns to have a voice in deciding how to handle the concern.” As a result interest-based options are often formally structured “by and around the General Counsel’s office, HR, and other compliance offices” (Rowe, 2012, p. 13). Rowe (2012, p. 12) argues for a spectrum of conflict management options as not all people are alike in how they pursue issues, thus “people need options—and organizations need options—for managing conflict.” As a result, “if these people are to come forward timely with their concerns, and if their conflict is to be managed effectively within an organization, it will help to have a near-zero-barrier office within the system” (Rowe, 2012, p. 13). In this way, an effective Ombuds can support the entire conflict management system by offering informal and formal rights-based options and often helping the visitor determine that they need to use a formal option (Rowe, 2012, p. 15).

Patterson echoes this sentiment and describes the benefits of informality as allowing workers to “maintain something valuable and rare—the ability to be empowered and involved in creating solutions and making decisions about process changes” (2012, p. 18). This allows visitors “to make up their own minds about how to proceed on some concern, once the options are explored” (Patterson, 2012, p. 19). This self-determination is supported, according to

Patterson (2012, pp. 19-20) by the informality standard that allows “non-punitive dialogue” and “professional and human growth.”

In contrast with these views, Gadlin (2012, p. 31) argues that informality “is not, and was never meant to be, a fundamental principle of Ombudsman practice.” Gadlin (2012, p. 32) sees the purposes behind the informality standard, not following fixed procedures but adapting interventions depending on the circumstances, as an interest in flexibility. So instead of a principle, Gadlin sees this informality as a style (2012, p. 32). Gadlin (2012, p. 33) does not disagree with any of the substance of the informality standard, but believes the standards of practice identified under the informality standard are covered within the independence, confidentiality, and neutrality principles. Each of those free the Ombuds from the legal responsibilities to be an agent of the organization, conduct formal investigations, make official decisions, and accept notice (Gadlin, 2012, p. 35). Practicing to the IOA Standards of Practice leaves Ombuds without control or powers behind persuasion and a relational orientation to effectuating their work. This is echoed in a study of Ombuds asking practitioners about their perceived bases of authority. Ombuds’ answers included using recommendations, persuasion, negotiation, suggestion, mediation, “clout”, persuasion and status (Hayden, 1997, p. 9).

As a whole, the IOA Code of Ethics, Standards of Practice, and Best Practices provide structure and guidance to an informal process that is not subject to appeals or other forms of oversight, and stands in sharp contrast with the myriad rules and regulations governing the work of Title IX Coordinators. The IOA standards govern an inherently informal mechanism of complaint handling, purposely designed to stand apart from formal processes. The Standards of Practice providing guidance to Ombuds pale in comparison to the increasingly formalized and

prescribed OCR requirements Title IX Coordinators must navigate amidst intense scrutiny by the Obama Administration, the media, and various advocacy groups.

CONCLUSION

In sum, Title IX Coordinators and Ombuds are structured in sharply different ways. Title IX Coordinators oversee a formalized process for addressing sexual misconduct. These formal mechanisms include an investigation and adjudication process involving human resources, student conduct or judicial affairs, university general counsel, university police, student affairs or student life, and Title IX personnel. Title IX Coordinators are to follow highly formal and prescribed grievance policies and procedures designed to efficiently resolve sexual harassment complaints in compliance with state and federal law. Ombuds, by contrast, are offices that assist visitors in thinking through options, accessing information, and determining informal ways of handling disputes.

The following chapters examine how each of these mechanisms reacted to the 2011 Dear Colleague Letter and the 2014 OCR Q&A document redefining Title IX compliance. As we will see, this is a story of how these two institutional actors, facing public and increasingly legal pressures, depart or adhere to their archetypal models. Ombuds and Title IX Coordinators, needing to address and resolve sexual misconduct, seek both to help survivors and to ensure fairness for alleged perpetrators. Ombuds who depart from their archetypal model want to stop a perpetrator or address a departmental problem; Title IX Coordinators who depart from their model are often concerned, in a normal human way, about a real individual's pain and they decide to help the person even if this does not yield institutional enforcement. Put another way, in both instances these are understandable responses to real moral dilemmas, occurring while

each role attempts to establish professional worth and influence in organizations pressuring them to ensure protection from liability.

Navigating these individual and organizational pressures results in both mechanisms departing from their professional norms and becoming more formal (Ombuds) or more informal (Title IX Coordinators). The resulting picture of university sexual misconduct dispute handling is one in which the practices of Title IX Coordinators and Ombuds converge, although not entirely. The next six chapters demonstrate this convergence by examining each archetype and adherence or departure from the ideal in the areas of source of authority, mission, confidentiality, impartiality and independence, and formality or informality.

CHAPTER 3: AUTHORITY

Archetypal Ombuds and archetypal Title IX Coordinators operate from very different sources of authority. The typical Title IX Coordinators' authority derives from bureaucratic rules and law and their authority includes the power to enforce Title IX. The standard Ombuds' authority derives from the ability to develop relationships and adhere to the core principles of impartiality, confidentiality, informality, and independence. These different sources of authority are framed by theoretic perspectives on authority and legitimacy.

According to Max Weber, successful leaders and institutions use more than mere force to execute their goals. Weber defined authority as the legitimate (normatively accepted) exercise of power. Weber explored the differences between three different types of legitimate authority: those based on tradition (deference to customs and inherited values), charisma (personal relationships and reputation), and legal-rational grounds (rule creation and interpretation) (Weber, 1978, p. 215). Although all systems combine these sources of authority to some extent, Weber's typology is useful for highlighting a key difference between Title IX Coordinators and Ombuds: Title IX Coordinators' authority is legitimated mainly by rational-legal sources, while Ombuds' authority is legitimated by some elements of rational-legal sources but with strong elements of charisma. Specifically, although Ombuds report to upper level administrators and have a role that is commonly outlined in university policy, they fundamentally rely on personal relationships and reputation in carrying out their roles.

In a similar vein, the theory of procedural justice illuminates a key source of Ombuds authority. Tom Tyler (Tyler 2006, p. 394; Tyler et al. 1996, p. 913; Tyler and Lind 1992) argues that trust in and legitimacy of those in authority are built not merely by these officials' following prescribed rules but when people perceive that these officials really "hear" and "respect" their

views. Virtually echoing this psychological theory, the Ombuds model places little or no emphasis on rule-following and great emphasis on “hearing” the voice of their visitors.

While the prominent theory of procedural justice thus illuminates a core feature of the Ombuds model, an equally prominent critique of this theory casts light on the Title IX Coordinator’s authority. MacCoun (2005), a social psychologist, cautions that Tyler’s theory is open to abuse, noting that “authorities can use the appearance of fair procedure (dignity, respect, voice) as an inexpensive way to coopt citizens and distract them from outcomes that by normative criteria might be considered substantively unfair or biased” (p. 189). As a result, the felt need for procedural voice and dignity can “leave [individuals] potentially vulnerable to manipulation and exploitation by those who control resources and the processes for distributing them” (MacCoun 2005, p. 193). MacCoun’s warnings are precisely the reason legalists prefer hard and fast rational-legal protections over looser charismatic voice processes that may lack substance.

While the source of authority for the archetypal Ombuds is their ability to be persuasive and develop relationships and the archetypal Title IX Coordinators’ source of authority is law and policy, in practice each role relies, to varying degrees, on both types of authority. Each role also uses authority for very different purposes. Title IX Coordinators use authority to enforce the law, whereas Ombuds use authority to empower individuals by providing access to information and a confidential resource, by advocating for fair process, and by assisting in exploring options.

The two different mechanisms’ bases for authority are now discussed in turn. First the chapter examines the archetypal Title IX Coordinator and how Coordinators adhere to the archetype by relying on rules-based authority. Next instances where Title IX Coordinators depart from the archetype and rely on relationship-based authority are examined. Then the

chapter explores archetypal Ombuds, and discusses how Ombuds adhere to the archetype by using relationships, persuasion, and the field's core principles as the primary sources of authority. Finally is an examination of how Ombuds depart from the archetype, deriving authority from a combination of role confusion, the apparent authority granted by their superiors, and institutional rules. These adherences and departures occur along a spectrum, as some Ombuds or Title IX Coordinators may aptly be described as “adherers” or “deviators.” Additionally, adherence or departure is often situational and context-specific as a Coordinator or Ombuds who goes by the book in one instance departs from their archetype in another.

AUTHORITY AND THE TITLE IX COORDINATOR ARCHETYPE

The main source of authority for archetypal Title IX Coordinators is Title IX itself. Title IX of the Education Amendments of 1972 (Title IX), 20 U.S. C. §§ *et seq.*, implemented by regulations 34 C.F.R. Part 106 prohibit discrimination on the basis of sex by recipients of Federal financial assistance. This includes sexual harassment and sexual violence against students in any academic, educational, extracurricular, and athletic school program, whether on school property or not. The U.S. Department of Education, through their Office of Civil Rights (OCR), enforces Title IX. “Dear Colleague” Letters, issued through OCR specify and clarify the requirements of Title IX. OCR released a Q&A document in 2014 to further provide clarification on what constitutes compliance with Title IX. The 2013 reauthorization of VAWA (Pub. L. 113-4), the Clery Act, FERPA, and due process and administrative law all add additional legal requirements.

As described earlier, the Obama Administration has developed new initiatives to ensure effective oversight of campus responses to sexual assaults. In January, 2014 President Obama pledged to develop a coordinated federal response to combat campus sexual assault (Sander, 2014a, p. A7). President Obama created a White House Task Force on Protecting Students From

Sexual Assault, designed to provide colleges with information on best practices, to ensure compliance with legal obligations, to increase the transparency of federal enforcement, increase the public's awareness of individual college's compliance with the law, and to facilitate coordination among federal agencies (Sander, 2014a, p. A7).

It is these sources, and specifically Title IX itself, that provide the Title IX coordinator "archetype" with the authority to carry out the responsibilities of the role. Title IX (34 C.F.R. § 106.8(a) requires schools to "Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX." A school's nondiscrimination statement must state: "[I]nquiries concerning the application of Title IX may be referred to the recipient's Title IX coordinator or to OCR. It should include the name or title, office address, telephone number, and e-mail address for the recipient's designated Title IX coordinator" (DCL, 2011, p. 6). According to the 2011 Dear Colleague Letter, "The coordinator's responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints" (p. 7). Clarified by the OCR Q&A Document (2014), "A Title IX coordinator's core responsibilities include overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints" (p. 11). Specifically, this can include training on Title IX issues, conducting Title IX investigations, and determining appropriate sanctions, remedies, interim measures, and policies for working with law enforcement and survivor advocacy organizations (OCR Q & A 2014, 11).

The ATIXA (Association for Title IX Administrators) Statement of Ethics and Title IX Coordinator Competencies (Core Job Duties and Responsibilities, 2012, §4) states the basic job requirement is to "Coordinate Title IX efforts including the development, implementation, and

monitoring of appropriate disclosures, policies, procedures and practices designed to comply with federal and state legislation, regulation, and case law requiring the prompt and equitable resolution of all complaints pursuant to Title IX” (p. 5). The ATIXA Statement of Ethics and Title IX Coordinator Competencies (2012, §4) cites as a core competency “[k]nowledge of current state and federal law and regulations, institution-specific policies, practices and procedures, identified best practices and trends in the field of education related to harassment and other discriminatory practices that violate Title IX” (p. 6). The Title IX coordinator must be given the training, authority, and visibility necessary to fulfill these responsibilities (OCR Q&A, 2014, 11).

Authority originating in the law is further evidenced by Title IX Coordinator job postings. The South Dakota State Job posting for Title IX & Compliance Coordinator describes the position’s responsibilities as “critical to the development, implementation, and monitoring of meaningful efforts to comply with Title IX, Title VII, Equal Opportunity and Affirmative Action legislation, regulation, and case law“(Title IX & Compliance Coordinator Job at South Dakota State University, ATIXA, 2013). Likewise, the Santa Clara EEO and Title IX Coordinator job posting (Higheredjobs.com, retrieved 6/12/14) requires the applicant to demonstrate “[t]horough knowledge of federal and state laws and regulations applicable to institutions of higher education, including Title VI, Title VII, Title IX, Section 504 of the Rehabilitation Act and ADA.” University of Cincinnati’s Title IX coordinator job posting requires “demonstrated knowledge of and ability to interpret federal and state equal opportunity and nondiscrimination laws and regulations, including Title IX, Title VII, Title VI, sexual harassment and other applicable laws and regulations (Director of Equity and Compliance job, University of Cincinnati, 2013). These job postings are typical of the 64 job ads reviewed for this dissertation.

Across these many job ads, Title IX Coordinators' main responsibility is to ensure compliance with the law.

Archetypal Title IX Coordinators' legal authority includes the power to investigate, make recommendations, and enforce both the law and university rules. Under the ATIXA Statement of Ethics and Title IX Coordinator Competencies (Core Job Duties and Responsibilities, 2012, §4) the coordinator must “consulting with relevant policy-making bodies and senior personnel for the purpose of advising, clarifying and identifying necessary action to eliminate sex and/or gender-based discrimination in all educational programs and activities...” (p. 5). Further, the model Coordinator must have the “[a]bility to recommend and/or effect changes to policies, to revise practices and to implement equitable procedures across many departments.” Further the archetypal Coordinator is expected “to manage a caseload of civil rights grievances to a prompt, effective and equitable remedy” (ATIXA Ethics §4, p. 6). When issuing investigative reports, the report should include an assessment of credibility, the weight of the evidence, and conclusions and findings (Guthrie, ATIXA Tip of the Week, 1/9/14). In a letter to Riverside Community College District, 2005, the Office of Civil Rights (OCR) stated: “At the conclusion of a case of sexual harassment or sexual assault ... regardless of the outcome of the case, the Title IX Coordinator will review all of the evidence used...to determine whether the complainant is entitled to any remedy under Title IX that may not have been provided for under the University's disciplinary procedures” (ATIXA Training Manual 2013, NCHERM 2011 Whitepaper, p. 149).

The model Title IX Coordinator requirements are echoed in Title IX Coordinator job postings. The examples that follow typify the duties commonly seen in Title IX Coordinator job postings. The Sacred Heart University Title IX Coordinator job posting (Higheredjobs.com,

retrieved 6/12/14) lists as one of the job duties to “Draft investigation reports, issue findings, determinations and recommendations on cases.” A Santa Clara University EEO and Title IX Coordinator Job posting (Higheredjobs.com, retrieved 6/12/14) describes a job responsibility as “[c]oordinat[ing] the implementation of any necessary remedial action to meet compliance requirement and goals.” The Montana State University Director and Title IX Coordinator job posting (Higheredjobs.com, retrieved 6/12/14) also requires the Coordinator to “[d]raft investigation reports, issue findings, determinations and recommendations on cases.” A job posting for Title IX Coordinator at Cal State University- Pomona notes that the coordinator “reviews information and recommendations from Title IX delegates and makes final decision, and issues final dispositions on complaints to relevant parties; notifies all parties regarding disposition; and notifies all parties regarding disposition and monitors compliance of all requirements and timelines specified in the complaint/grievance procedures” (Title IX Coordinator Job Posting, Cal State University, 2014).

The legal basis for Title IX Coordinators’ authority may be illustrated with a simple observation: Many job postings in this field list as a “preferred” or “highly desired” credential the J.D. degree. Simply put, legal authority is at the core of the qualifications for the position. Examples include, but are not limited to, recent job postings at Wake Forest University, University of San Diego, Montana State University, Sacred Heart University, and Eastern Illinois University (Higheredjobs.com, retrieved 6/12/14).

The archetypal Title IX Coordinator has the authority to enforce Title IX and to investigate, determine violations, issue recommendations, and make interim accommodations. This, too, is evidenced in Title IX Coordinator job postings. The Montana State University Director and Title IX Coordinator job posting (Higheredjobs.com, retrieved 6/12/14) requires the

Coordinator to “[d]raft investigation reports, issue findings, determinations and recommendations on cases.” Universities, as necessary, can initiate a complaint, serve as a complainant, and initiate conduct proceedings “without a formal complaint by the victim of misconduct” (ATIXA Training Manual 2013, University as Complainant, 43). These responsibilities are echoed in the common description of the Title IX Coordinator’s role provided on the the University of Kansas website:

[T]he individual designated by the University to coordinate the University’s compliance with Title IX, including overseeing all sexual harassment complaints and identifying and addressing any patters or systematic problems that arise during the review of such complaints. The Title IX Coordinator is also responsible for providing training regarding Title IX to the University community. (University of Kansas, “What is the role of the Title IX Coordinator?”)

In sum, Title IX Coordinators’ authority seems entirely founded on law and law-based policy. As we will next see, in practice Title IX Coordinators rely heavily on law and policy as their basis of authority. Nonetheless, they also use more relational sources of authority.

TITLE IX COORDINATORS’ AUTHORITY IN PRACTICE

In my interviews, Title IX Coordinators echoed law and policy as the primary source of their authority, describing the importance of correctly and consistently applying the law and organizational rules in each case. One Coordinator described their source of authority as the ability to correctly apply the law:

In my sixteen years I don’t think there’s ever been someone where I made a decision and they went to the [Government] that [the Government’s] opinion differed. I’ve always found that whatever conclusion I reached. If I reached a conclusion that we did something wrong, then we fix it so they don’t go to the [Government]. But if I reached the conclusion that it’s not [a violation], I’ve never had one go to the [Government] and [been told] ‘Yes it is’ ... I’m really proud of that. (T12A47:31)

Another Coordinator succinctly described the authority derived from consistent application of rules and procedure:

One thing that's critical is that we pay close attention to precedence, [that we are] consistent in how we carry out these cases. Because if we just start doing things all over the board, people are not going to have confidence in our process, so we try to be very consistent with our past, the way we've handled cases in the past. Sometimes we'll have to do something different, but we think through very carefully. Why are we doing this, what's different about this case, what's distinguishing this from any other case that we've had where we've handled it always a certain way. (T1B12:14)

The Coordinator's official title and reporting relationships, which are also key elements of rule-based authority, are important sources of authority for effective Title IX work. One Coordinator noted, "I think there's real authority and also reporting line helps to kind of engender that when you call or people know... and then your role has to be written, it has to be codified in the procedures and policy" (T8A39:80). Another Coordinator echoed the importance of standing in the organizational structure:

[T]he next layer above me is the vice president. I've been given the designated authority to do a lot of things that he does under his purview...and it was consciously done. It was invisible before [and now] it is at a level where I can compel a department to do something. We all understand the hierarchy of Higher Ed and other organizations, but you have to have that ability without having another layer to jump through. (T10A43:45)

Another Coordinator expressed a desire to "go somewhere where they appreciate me and elevate [the position] to...the political place [Title IX] needs to be, which is as close to the president as possible... Not because I don't like the person who's my boss, she's lovely, she's very kind. I get great reviews... I tried to bring it up to her once and she looked crestfallen as if I were saying 'I don't like working for you.'" (T12A47:12).

One Coordinator talked about how credentials can be just as important as the title, arguing "Respect comes with the title and the credentials...I've learned it and with [working

with] faculty...if we had a law school that's where I'd be right now...I'd be working on a law degree. Just for the sheer '[I'm] an attorney.' I watched my first boss [who had a J.D.] and the difference that [faculty] show for what they consider another...terminal degree" (T12A47:4-15). One deputy coordinator expressed frustration at not having the authority of being the main Title IX Coordinator title:

[If I could go back] I would say I would only do this work if you make me the [main] Title IX coordinator. You can't have responsibility without authority. I work really hard with the lead title IX coordinator to have a positive, healthy relationship, meeting monthly, but I can't afford [for that person] to get threatened or feel like I've overstepped. I often need the authority in the moment to make a decision to direct somebody that we've got to move forward and give notice at this point... I can talk about conflicts later, but there is a role conflict, we've attempted to address it, and at this point it's resolved from the perspective of 'I'm not the Title IX coordinator.' I am not the authority. (T8A39:19)

These quotes illustrate the importance of rules, law, policy, and organizational hierarchy in providing Title IX Coordinators with authority.

TITLE IX COORDINATORS DEPARTING FORM THE ARCHETYPE

While Rules and Title are the prescribed sources of authority for Title IX Coordinators, in practice they often depart from the archetype because developing relationships is just as, if not more, important for effectively carrying out the work. One Coordinator noted that the "biggest misconception...is that we're more powerful than we are" (T7A32:42). Coordinators must often establish relationships in order to educate decision-makers about the rules:

I deal with a lot of deans and they try to tell me what the law is all the time, and how...to do my investigations all the time, and I always have to bring them back to 'everything you see on TV on Law and Order and on CSI, I get that, but that's a criminal investigation, and that's not what we're doing here. It's a civil rights or civil investigation, and using the word civil means that we're going to build relationships and we're going to be civil to each other and figure out what happened. I am not trying to nail anybody to the wall...' (T11A54:11)

Another Coordinator expressed the inability to apply the rules without efforts to build relationships: “[I am] unable to eradicate the [negative] behavior if I don’t know who’s doing it. So we try to make the environment comfortable enough that they will at least come in and say something to me and at least give me or my investigators an opportunity to do something about it, even if it’s around the way” (T10A43:6). As a result, positive relationships are essential to ensuring compliance, with coordinators arguing that administrators fulfill their mandatory obligation to report because they “have confidence in our process [because]... we’ve established long relationships... (T1B12:20).

These relationships can be key to accomplishing Title IX work: “[S]ometimes I can’t deal with the person who is directly accused, but I can deal with their management...[and say] Here’s the way we can approach this, so to get what we need and not to disrupt things more than we need to. At the end of the day I’m going to need your help to make sure that we fix this. Usually they will get on board” (T5A26:20). Another Coordinator described the role relationships play in high profile situations involving sexual misconduct:

[I]t’s really hard to do the case work without the authority because when you [have] a [sexual misconduct] report you realize sometimes that you’ve got to go forward even though the complainant doesn’t want to. You have the authority to say to someone ‘issue the notice,’ but if people are really worried, if it’s been a faculty member, a high profile athlete, you’ve got to have the confidence...of the athletic director or the Provost’s office...[They need to trust and believe that] I know what I’m talking about and to go forward... (T8A39:76)

One Coordinator described the efforts necessary to re-establish good working relationships:

When I got here, it took me a minute to figure out ‘why the heck won’t they call me back?’... So I had to do a little bit of digging... [and] talk to other people to find out that there was a conflict of personality and a conflict of working styles with the person that was in the role before me. I had to smooth that out. I had to repair a lot of bridges and fix a lot of feelings and stroke a lot of egos in the beginning. I went to deans and directors meetings where they meet on a monthly or bi-weekly basis. I went to faculty senate to introduce myself. Anytime there

was a group of folks together and there was an opportunity for me to introduce myself, I was there. (T11A45:27-28)

Relationship building is an important source of authority for Title IX Coordinators, in that they are responsible for outreach and investigation as a part of their compliance work. As stated by one Coordinator, “[I]n order to accomplish [compliance with Title IX] we are responsible for coordinating education. And in order to get that you have to have good relationships...”(T2A13:6). Another Coordinator described a campus with an entrepreneurial spirit that often results in turf battles over resources and authority, necessitating “a focus on developing a strong relationship with the primary offices that we’re investigating” (T8A39:27).

This emphasis on relationships is also important for conducting effective investigative interviews:

[W]e deal with a lot of arrogant faculty members who are not accustomed to being questioned about anything...so our persistence in asking questions annoys them...They want us to accept their first answer which was ‘no, of course I didn’t sexually harass them. Occasionally we’ll have to interview a vice president...and we’ll get the same kind of huffy response. It happened recently with a student...who came in [the] same way as some professors and deans, throwing their weight around saying basically that he’s somebody very important on campus and he would never do the things that are being alleged and ‘you just need to ask around and find out who I am. (T7B33:21-23)

Likewise, some Coordinators described the necessity of building relationships in order to overcome the challenges of navigating complex bureaucracies: “[G]iven the kind of job that I do I have to know who my friends and who my enemies are... Always having to be careful and to look out for yourself...I think that’s true generally given the nature of the bureaucracy. There are people ready to stab you in the back, you know?” (T7A32:43). As a result many Coordinators expressed the importance of relationship building with many different types of stakeholders, from students to administrators to faculty. One Coordinator describes relationship building as a means of changing the paradigm:

I've sat down with football players that in the first hour they were the most arrogant kids I've ever met and then by the second hour when I'm talking about how would you want someone to treat your girlfriend, how would you want someone to treat your mom, your sister, we're talking about where is this acceptable to say... and they kind of start to get it. I feel like that's changing the paradigm. I think it's more on that individualized basis where we change values, that we have more success. I know there's a couple of kids that I've talked to, they're going to be more cognizant of their behavior, more sensitive to how people are treated... (T9B42:23)

The same Coordinator cited another example of shifting the culture one person at a time:

We had a great example of an RA [accused of making insensitive remarks]...initially he was really defensive about 'I don't think that's sexual in nature.' But he [eventually understood and] ended up doing a whole sexual harassment training for the whole dorm. We mentored him, he's a great kid, [and] I use him as one of my sounding boards...I'll call him and say 'what do you think about this,' or 'what's going on,' or we'll have an event and he'll come over. Every now and then he'll send me an email saying 'I heard this in the elevator, what do you think? Should I say something?' So I think that's how you shift [the culture], by individual connection. It takes a lot longer. I gotta say, I just really love that kid and...when we first met he thought I was the biggest beehive in the world. (T9B42:24)

Another Coordinator described the impact of developing relationships with the administrative offices on campus in order to prevent sexual misconduct: “[Without good relationships] I don't know if we would have been able to share the information to put all of those incidents together...It would have been in silos and it would have been more like a coincidence that somebody would have recognized the situation [in order to do something about it]” (T8B40:18). Many Title IX Coordinators described student turnover as the reason why their relationships with decision-makers were most important: “[Outreach] is one of the hardest things for an office like ours to do on campus, but part of it is building that rapport with the clientele that's here. It's not so much, like I said, the students, because they're in and out of here, but building that rapport with the chairs, the deans, the directors, the supervisors... part of that is just nurturing that relationship...” (T1B12:23).

For many Coordinators, the lack of clarity on their role and sources of authority is a source of frustration. One Coordinator described the different sources of authority when working for the government versus a university, and the expectations of university decision-makers:

I came from the federal government, and whatever we said, the institution had to do it. You don't get to mess around with us. I had instant credibility and respect because I could cut off people's funding. So now it's a much more delicate way of trying to influence people to recognize the importance of what I'm doing. It's tight budgetary times and I'm not bringing in huge dollar amounts, so the administrators, the provost, chancellor, vice provost, they want people who are going to bring in big dollars. (T9A41:49)

Several Title IX Coordinators observed that in their universities there was a lack of clarity on expectations for how they should do their job, especially related to how they are evaluated. This, too, shifts the attention away from legal requirements and toward more informal elements of the job. One Coordinator frankly explained, "You keep using that word requirement. There's nothing written in here 'you need to do this.' It's all having a working relationship with your legal advisors" (T7A32:15). Many Coordinators described not receiving reviews or not understanding the basis for their reviews, expressed by one Coordinator's statement, "[How the Title IX is evaluated] is a really good question, nobody's really answered that for me. I don't know" (T9A41:9). Another Coordinator described their supervisor's lack of knowledge: "I'm fortunate to have a boss that doesn't know what [Title IX] is in order to evaluate it. Am I doing all those things in the Dear Colleague Letter? Well, I am hoping to eventually..." (T12A47:8). The process of evaluation is a source of frustration for many Title IX Coordinators:

We're not [evaluated]. When I started here, I was under the impression that I was going to have a six month review and a yearly review. So my six month review came and I said to my boss 'um, want to do my review' and she said 'you get to keep your job, how 'bout that?' I said 'fine' and I walked away! I thought

‘okay...’ and of course people on the staff side that I work with said ‘how did you review go?’ and I was like ‘what review? She told me I get to keep my job’ and they were floored...So now it’s time for my yearly review...how my boss is going to evaluate me, we’ll see. (T11A45:35)

Title IX Coordinators unable to establish relationships face greater challenges in effectuating voluntary compliance:

I really felt like I wanted to make a more concrete impact. I wanted to be with the people making the change as opposed to how I felt OCR more or less directed change for institutions. I wanted to be in the positive collaborative approach to trying to get people to recognize we’ve got to do something about these issues. (T9A41:1)

Another Coordinator lamented not being able to do more relationship building:

I wish I had more time for those ‘hey, let’s go get a cup of coffee’ kind of conversations. I think that, gosh, if you can find a Title IX coordinator that has the kind of time to do that, that’s the ideal job right there. You really do need to be able to build that kind of trust with people and it’s hard to do when you’re in this role. (T9A41:21)

Without positive relationships, Title IX Coordinators lack the ability to influence organizational stakeholders, and this may result in formal changes to their authority. At many universities, the

Title IX Coordinator is unable to effectuate their recommendations:

I don’t have that kind of power, meaning I might, based on what I know of the case or of other cases, say ‘here’s what has happened previously under these circumstances in terms of discipline, counseling, what have you.’ But we can’t invoke discipline, that would be left to [the] department. (T2B14:21)

The disconnect between the recommended sanctions and those implemented can have negative consequences for Title IX enforcement:

We make recommendations to departments. Most of the time they follow our recommendations. In this situation the department felt they’d followed our recommendations but...from the perspective of the person that complained and from the other faculty it looked like there was a disconnect between the information we found...and the department’s response. (T3B20:2)

As a result of these challenges, many Coordinators described engaging in conversations much more like those of an Ombuds when attempting to influence a department to follow their recommendations:

It is rare [for the department to] come back and say ‘we don’t agree with your recommendations.’ In fact, I don’t know that I’ve had anyone say ‘we don’t agree.’ Now, when it comes to discipline, it’s a wide open field. I may say ‘this person needs to be disciplined at the level of suspension’ or ‘up to an including termination’ or something like that, so that division head can understand what we’re saying and the flexibility that they have. But there are conversations about that... We meet with them, and we give them the pros and cons of doing all of it or doing nothing, so that they can understand ‘this is what it’s going to look like if you don’t take any action. This is what this is going to look like if you do.’ (T10A43:40)

The conversations can also be less relationship-based and rely more on rules-based sources of authority, as the Title IX Coordinator continued:

And I always make sure the department knows ‘okay, if you set the bar there and I’m telling you this person has sexually harassed a student and you’re saying... “[We] don’t want to go with [the recommendation],” don’t [later] come to me about [it].’ Guess what? [Then the department] gets it. They understand ... (T10A43:40)

This sentiment is echoed by many Coordinators including one who stated, “Oh yeah, they don’t follow my recommendation because they think it’s too mean or too harsh or too whatever, and I’m like ‘fine, do what you want to do, but [you will] be back!’ (T11A45:53). Without effective relationships and the support of key decision makers, many Title IX Coordinators lack the necessary authority to do their jobs. One Coordinator articulated their lack of authority most poignantly:

I’ve proven that I have good judgment, wisdom, and an understanding, and I have a clear understanding of the definitions involved. It’s just heartbreaking to be involved and yet be so... I’m like a eunuch! They won’t let me do anything. (T12B48:31).

Often Coordinators without relationship-based influence are unable to influence needed changes to rules and policies, their primary source of authority. Coordinators described the lack of rules addressing faculty/student relationships as an impediment to Title IX compliance:

I have threatened to put a policy together [banning faculty/student relationships] and get it approved and you would have thought that I called every faculty member on this campus a pedophile, the uproar about me having the nerve to do such a thing... because why would I do that if there's no problem... On the flip side of that I have students running around here who are marking a chalkboard about how many professors they've bagged... (T11B46:20)

In sum, while the archetypal source of authority for Title IX Coordinators is the law, university rules and regulations, and the powers granted by their positions, relationship-based authority and influence is an important pre-requisite for carrying out the position's responsibilities. Building relationships at all levels of the institution, with students, faculty, staff, and administrators, is important to developing and maintaining influence.

AUTHORITY AND THE OMBUDS ARCHETYPE

The Archetypal Ombuds' authority derives from the Ombuds Field's core principles and ultimately from relationship building. The University of Kansas and Michigan State University are utilized as examples throughout this section, as both represent a common way for Ombuds offices to operate. While there are different types of Ombuds and the role is often misunderstood (Gadlin 2000: 37; Levine-Finley & Carter 2010: 126), the model organizational Ombuds operating on college and university campuses are not established by statute but from within the institutional governance structure. At the University of Kansas, for example, the University Senate Rules and Regulations, Article V, Section 1 provides for a University Ombuds Office with a Faculty Ombuds and a University Ombuds to be appointed by the Chancellor (University of Kansas, USRR, "University Ombuds Office"). At the Michigan State University, the Student Rights and Responsibilities, Article 10, requires the President to "appoint a senior faculty

member or executive manager with the title of University Ombudsperson” (MSU, SRR, Article 10: Office of the Ombudsperson).

Rowat (2007: 42) notes that the American version of the Ombuds role is not legitimized through law and legislative appointment, but instead through organizational appointment by the heads of universities, hospitals, and business corporations. Unlike Title IX Coordinators, archetypal Ombuds do not hold rule-based authority and do not hold formal investigative powers. Instead, their authority derives from the field’s core principles and ultimately from their ability to build relationships. This is echoed at the University of Kansas, as the University Senate Rules and Regulations list qualifications of the University Ombuds as requiring “a comprehensive knowledge of the university organizations and procedures and a post-baccalaureate degree” (University of Kansas, USRR, “University Ombuds Office”). Such knowledge is gained, presumably by the requirement of completing six years of service at the University of Kansas at the time of initial appointment (University of Kansas, USRR, “University Ombuds Office”).

The ability to build and maintain relationships is a form of power. According to Charles Howard (2011b) an Ombuds has the power to check and inform organizational power because “[t]he freedom from management responsibility, combined with the everyday process of speaking with people from any and all levels or locations of the organization, give the Ombuds a unique perspective on how the organization is performing and what problems it and its people face” (p. 80).

A key source of Ombuds’ authority, apart from building and maintaining relationships may be trust-building. As noted earlier, according to Tyler’s theory of procedural justice, trust is built by the experience (or perception) of being “heard” and “respected.” Tyler and Lind (1992) thus

articulate a “relational” as opposed to a rational-choice theory of trust. Tyler and Lind (1992) argue that relationships build trust, but they also may undermine trust if people feel they are not being heard and respected in the relationship. For Ombuds, trust is built relationally, but is not simply a function of relationships. It is a function of how people act towards each other, respecting and hearing versus not respecting and not hearing each other’s views and voice. Long-time Ombuds Tim Griffin (2010) describes trust as necessary for an Ombuds’ success:

[P]ersonal trust of the Ombudsperson is a necessary pre-condition for many people to fully utilize the services of the office. It is not the office and associated documents that foster this confidence and trust; rather, it is the consultee’s (or potential consultee’s) belief that the human being who currently serves as Ombudsperson (1) can be trusted to keep sensitive matters confidential, (2) will provide advice that is unbiased and wise, and (3) cares about others. (p. 67)

McGrath (1997: 473) notes several other types of Ombuds’ authority. They include the ability to access information, to develop relationships with the administration, and to refer cases to more formal options. Where archetypal Title IX Coordinators have legitimacy bestowed by their legal authority, archetypal Ombuds’ legitimacy is derived from their ability to build and sustain relationships through personal skills and credibility. This legitimacy is often formalized in university governing procedures. For example, the powers granted to the Michigan State University Ombudsperson include “broad investigatory powers and direct and ready access to all University officials, including the President (MSU, SSR, Article 10: Office of the Ombudsperson). Similarly, the powers granted to the University of Kansas Ombuds Office by the University Senate Rules and Regulations include access to all administrative officials and access (in accordance with law) to all University records (University of Kansas, USRR, “Ombuds Office Powers”). Notably, the powers description specifically denies the authority to take disciplinary action, reverse decisions, or circumvent existing University rules and

procedures (University of Kansas, USRR, “Ombuds Office Powers”).

Longtime University of Kansas Ombuds Robert Shelton (2000, 83) describes the traditional elements of a typical University Ombuds as: “active, significant experience within the community or organization; independence from power influences; impartiality and neutrality; investigative function to gather necessary information; community recognition of responsibility for recommendations to those in authority; and confidentiality in working with those who bring problems to the Ombudsman.” Long-time Columbia University Ombuds Marsha Wagner (2000: 103-105) also describes the model Ombuds as serving an educational or a training function, educating individuals about policies and building capacity through conflict resolution trainings.

Ombuds in higher education may participate in networks through the International Ombuds Association (IOA). The IOA is the product of a merger of The Ombudsman Association (TOA) and the University and College Ombuds Association (UCOA), and is now the primary association for individuals working as organizational Ombuds. The IOA Standards of Practice (2009) include Independence, Impartiality and Neutrality, Confidentiality, and Informality. The Ombuds Office at the University of Kansas, like many others, specifically states in its Statement of Best Practices that it acts in accordance with the IOA Standards of Practice and Code of Ethics (University of Kansas, Ombuds Office, Statement of Best Practices, 2008).

Where the typical Title IX Coordinators’ authority derives from the power to enforce Title IX, the standard Ombuds’ authority derives from the ability to develop relationships and adhere to the core principles of impartiality, confidentiality, informality, and independence. The next section examines Ombuds authority in practice.

OMBUDS’ AUTHORITY IN PRACTICE

Ombuds who adhere to the archetypal relational source of authority described their power originating from their ability to develop relationships and to be persuasive. One Ombuds noted, “[T]he only power you have is what you can convince people to see or do” (O954:38). Other Ombuds further defined the role’s persuasiveness as originating with the ability to develop relationships: “[K]nowing how to build and sustain relationships [is key]. And also getting to know the community before conflicts emerge, because once you develop relationships with decision makers... [an ombuds] definitely can influence how a decision is made if they’re asking the right question...” (O1A8:11). Building the relationships that sustain Ombuds’ authority can take time, and one Ombuds argued that while the role does not have any ascribed power, “once we earn it, it’s stronger than people who are given power. When you’re given power...to really make it work, you’ve got to apply it so people respect it, but I think when you earn it from the ground up, then it’s true power” (O1C10:24). To develop relationships, the same Ombuds further argued for personally meeting with decision makers:

[I]t takes more time...but gosh, it pays such huge dividends because you have a relationship and you took the time to say “dean this or professor so and so, or administrator so and so, these kinds of things are coming out of your office.” ... [Y]ou kind of endear yourself [as they think], “oh my...I have someone who’s really going to give me some information that I might not have been aware of.” (O1A8:63-66)

An Ombuds’s persuasiveness is evident in the description of “behind the scenes relationships where offices will usually say ‘listen, if you think that we should do it we’ll go ahead and do it, but we’ve got to stick to our policy and procedure [publicly]” (O6B35:9).

Establishing relationships is an important pre-requisite for exercising such influence, but Ombuds must also strive to maintain and nurture relationships:

[Y]ou never know the person you’re calling about, and this has happened to me, the person I call [this week] to get more information about a situation, [may] next week...be a visitor [in my office]. And the next week [the person] might be an

ally in a situation that we're all working out together... so I can't burn any bridges. (O14A63:79)

Given changing circumstances, building relationships is a never-ending task for the Ombuds adhering to the archetype. “[Y]ou still have to keep finding support for your office,” one Ombuds noted, “because when people leave that are in the administration and they’re replaced by people who may not have the understanding or appreciation for the office, you have to get in their good graces, so it’s kind of a constant process” (O1A8:106). Ombuds also discussed intervening in situations in which established relationships can get in the way of effectuating change:

Tomorrow I’m going in to meet with [a] supervisor who is totally behind an employee...being accused...of very serious behavior, probably emotional abuse, and I think workplace bullying. How am I going to convince that person to look into the situation, take it seriously, and figure out what’s going to be done? That’s really hard. (O14A63:77)

This frustration is best described by another Ombuds:

What I like least and what is most frustrating to me is that we, I know who the bullies and victimizers are on this campus. I know because I’ve told them... administrators know who these people are. And I know that these victimizers are going to send more victims to me this coming semester...[they] are going to be in my office...destroyed psychologically, educationally, professionally, other ways by these people’s outrageous, immoral behaviors and then the people in power [who can] do something about it aren’t going to do a damn thing. They could prevent this pain and this suffering very easily, and they refuse to do it. And that’s the hardest part of my job. (O10A55:33)

Ombuds also build relationships in order to use formal offices’ authority:

The Title IX Coordinator is an attorney...[who] takes a very legalistic approach... [and] is not one of the people that I can go to and say ‘have you been hearing things about [this] department? What’s going on over there? Have we got a faculty member losing it over there? Do we need as an institution to think about stepping in and doing something over there? Would it help if I went and talked with the chair or you went and talked with the chair?’ [There are a few staff members in these offices] with whom I have a relationship like that...[but their bosses] don’t know it. [The staff] trust me and know that I won’t out them and need my input, because what’s happening in the classroom is very useful for

[them], who then based on what I have heard from students about this faculty member [can take action]. (O10A55:28)

Note that the above Ombuds may be departing from the archetype's norms regarding confidentiality in order to achieve results.

Ombuds utilizing the archetypal source of authority also discussed relationship building to overcome barriers to change:

We have [an older faculty member]...and the [attractive female] students in his course are encouraged, to come to private tutoring for free at his house. And of course, once there they are subjected to being plied with alcohol and so on and so forth...and he's been doing this for years. Finally he got a new chair and I went to see the new chair as I do all new chairs, and not in the first meeting, but once I had a rapport developed and felt the new chair would be receptive and handle the information appropriately, I shared this guy's pattern ...and suddenly he quit... he now does his "private tutoring sessions" at a local off-campus [location] and while there invites the student to his house. But that at least in my way of thinking is some little baby step of an improvement. (O10B56:32)

The same Ombuds also described a negative example of intervening in a situation while lacking a relationship or the ability to persuade:

The tenured faculty member [says] go jump in the lake 'It's my life, I'll live it like I want to, we're consenting adults and there's no university rule that prohibits it, so if you don't like it tough.' More frequently the [supervisor or department chair] will say, 'well, you know, this is all third party hearsay information that you're giving me. I don't have any victim coming forward to tell me that this happened to them, all I have to operate on at this point is rumor, and I'm not going to confront one of my employees or faculty members with idle rumor and gossip.' ...What is really the case is they're afraid. They don't want confrontation, they know this will... put them in an uncomfortable situation of having this uncomfortable conversation with one of their people and they don't want to do it so they don't. They don't have to [and I can't make them]. (O10B56:33)

Another Ombuds succinctly described their inability to effectuate changes: "I can't make my own determination about what should happen in the situation and make it happen. That's not what we do as an office. I just say, "I talked to the people involved and this is the answer we're getting and I can't make them do what you want them to do. We have to live with this. There isn't any

other option” (O14B64:48). Ombuds utilizing archetypal authority frequently talked about their relationship building with Title IX Coordinators and other more formal compliance offices with the power to effectuate change:

I had a great relationship with the [formal compliance] office...[there were] a few individuals that would really understand my role, and we would refer cases back and forth. So a lot of times it really depends on the relationships with the office or the officer that you work with most. (O8B52:15)

Another Ombuds described the challenge that a lack of cooperation presents:

[T]he word on the street is [Human Resources] are never to send anyone here, they're not to talk about the office and they are to have no interactions with anyone in our office...They don't want us here, they don't appreciate us here, they'd like us to go away. They want to control employees. Employees will go out there and not be given all their options, frankly, because they don't want to have to deal with employees. And the T9 coordinator is an attorney. She takes a very legalistic approach to her work and she is not one of the people that I can go to and say “have you been hearing things about [this university] department? What's going on over there? Have we got a faculty member losing it over there? Do we need as an institution to think about stepping in and doing something over there? Would it help if I, you think, if I went and talked with the chair or you went and talked with the chair?” [There are a few staff members in these offices] with whom I have a relationship like that...[but their bosses] don't know it. [The staff] trust me and know that I won't out them and need my input, because what's happening in the classroom is very useful for [them], who then based on what I have heard from students about this faculty member [can take action]. (O10A55:28)

In this way Ombuds who adhere to the archetype can leverage, through relationship building, the power of more formal offices to address trends and institutional challenges. Another Ombuds noted “If I can't get any traction...I'm going to go to the head of the college... I'll start as low as I can where I think I'm going to make some headway...it's pretty situational, but I do use the chain of command as kind of a starting point” (O14A63:40). Without that authority, the Ombuds must rely more exclusively on their persuasiveness to convince individual visitors to step forward and use more formal investigatory options:

I might be struggling with do I go to the [formal] office that's mandated to look into it? [Yes if] there's a pattern...but [the visitors] don't want to go forward because they don't want to make waves or they don't want to be worried about retaliation, [or some of them] think they did something to bring it on...I have to weigh it case by case. Most [of the] time we can get people to go to those offices because ...they trust us. (O1A8:75)

Ombuds described struggling with how to maintain relationships while adhering to the IOA

Standards:

[A] very important part of being an Ombuds is to have the courage to step forward and say 'This has to be resolved. We can't let this go on anymore. Whether you want to hear this or not.' So how do you balance maintaining good relationships with people and yet adhering to the code of ethics and doing what needs to be done? (O14A63:80)

One Ombuds wrestling with this distinction articulated the priority of maintaining confidentiality over reporting sexual misconduct:

I would hope that I could be persuasive enough with one or more of the victims here that would put them in a place where they would be willing to speak to our Title IX coordinators or the police to go ahead and file reports about that or request a release from their confidentiality promise so I could do something on their behalf. I really do, again, think that it is a critical part of the service that I offer that it is confidential and would really protect that value, even at the risk of some others. (O4A22:28)

If an Ombuds' persuasiveness is based on the ability to develop trusting, lasting relationships with organizational stakeholders, the basis for developing relationships is adhering to the Ombuds field's core principles of confidentiality, impartiality, independence, and informality. One Ombuds stated, "Try to establish positive relationship with the constituents ...the important thing is to stress confidentiality and integrity and that you're a neutral party" (O5A28:44).

Another Ombuds described relationship building as leading to trust, echoing Tyler and Lind's (1992) relational theory: "[E]very time I interact with someone and we demonstrate that we are confidential and neutral and informal and people feel that they can trust us and that we've

helped them in their situation, I think that gives us more authority on campus. A lot of it's kind of personally based" (O14A63:36). One Ombuds described the role as "a keeper of secrets" and confidentiality as the aspect "where [Ombuds] start to [earn] trust and that's where...power comes, because people...know that you keep your word and you preserve their confidences" (O1A8:10).

Other Ombuds discussed their prior roles at the institution as both helpful and harmful to building relationships and earning trust. One Ombuds stated, "[T]he thing that helped it go well was the fact that I had worked with, in my role as dean of students and [other administrative positions], I had worked with faculty...throughout those years and that helped facilitate my working relationship with them. It helped establish my integrity with them" (O5A28:1). Another Ombuds saw the prior institutional experience as both a benefit and a detriment:

The [advantages] of [having a long history working at the institution] were that I knew everybody, and basically knew the culture and the history of the institution. I knew how it worked and who were the go-to people. [If you stay around long enough you see] the disadvantages, which are, I already had a history here in the [subject] department, I already have people that I thought well of and thought well of me, and vice versa. (O9A53:5)

Over time the ability to build relationships and to persuade individuals and offices with formal authority provides opportunities to impact the formal institutional rules and structures: "Because of my longevity here and my involvement with people, I frequently get draft copies of new policies or procedure revisions and [am] asked [informally by committee chairs or members] for input into those so that they don't have to be changed later after they found problems the hard way" (O10A55:12). Another Ombuds described their ability, through persuasion, to achieve more formal support for their role: "I was vehemently opposed to being a mandated reporter [on issues of sexual misconduct]. In fact, my arguments were persuasive and

the university has agreed that I can be a confidential [office], even in regard to [sexual misconduct]” (O4A22:31).

Relationship building and persuasion can be seen to operate on multiple levels for the Ombuds. On one level, it is used to encourage individuals to comply with existing rules, policies, and procedures. On another, persuasion is used to encourage institutional actors with the power to investigate, sanction, and effectuate change to use that power. Third, persuasion and relationship building is used by the Ombuds to influence the creation, revision, or maintenance of policies and procedures. Finally, persuasion can be used to protect the Ombuds’ role, often through the creation of rules that formalize and institutionalize the role.

Ombuds unable to access their authority through relationship-building and persuasiveness often expressed frustration at their inability to effectuate change. One Ombuds described meeting often with the president but wanting to present information to the board: “I wish I had been able to...There are a number of issues that I think needed to be addressed. [I]t would have been helpful to present...information to the board so they would have had a better understanding of some of the problems we had” (O5A28:11). Other Ombuds described their inability to build relationships and be persuasive as limiting the power of the role:

[O]ne of the big challenges I have is that there’s not a lot of appetite for having this office evolve to be what it should be. I spent time trying to take these baby steps around what we could be doing differently. That’s kind of not gone anywhere. I’m just now at the point where I’m saying to myself all I’m going to be doing is making people angry...let me just function within the organization as best I can (O7A37:8)

In sum, in keeping with the archetypal Ombuds model, many Ombuds emphasize how their authority is derived mainly from building relationships and establishing trust through hearing and respecting the views of people who bring complaints.

OMBUDS DEPARTING FROM THE ARCHETYPE

I nonetheless found that many Ombuds depart from the archetypal model and use rules and policies for influence. Many Ombuds rely for their authority not only on relationship building, persuasion, and the field's principles but also on rules, legal authority, and the power that comes from reporting directly to a senior university administrator.

A key reason for the slide to rule- and hierarchically-based authority is widespread confusion over what is the Ombuds' role and authority. The confusion over exactly what is an Ombuds is both a benefit and a detriment to an Ombuds authority. Regarding the Ombuds office itself, one Ombuds noted, "I hear that a lot, 'What is that?'" (O12A59:6). Another became Ombuds when the administration asked a longtime faculty member "[D]o you want to be the next Ombuds?" and the person replied, "What is that?" (O9A53:3). Yet another Ombuds stated "People don't seem to listen to us when I try to set them straight, which is that we don't have any power" (O14A63:34). The role confusion extends to the reporting relationship itself. Ombuds widely described confusion regarding how they were evaluated, and exasperation at rarely being evaluated. One noted "On paper yes [my evaluation] is stipulated to occur annually. It has occurred three times in the twenty years I've been here" (O10A55:7). Other Ombuds stated, "The way I'm evaluated is a little bit of a mystery to me" (O2A17:10), and "I don't think [the way I am evaluated] is very effective, quite honestly... we track [goals] through the year, [but in reality] that doesn't mean much of anything" (O3A21:14). One Ombuds described working to influence the President's perception of his influence, "even though there's no mention of the Ombudsman in the [student newspaper] article, this started in [my] office, and I [told my boss]... I will unabashedly take credit for it" (O11B58:9). Lack of consensus on the Ombuds role, what

it entails, and how to evaluate it often leads Ombuds to exercise power that is not relationship based.

A key response to ambiguity for some Ombuds is to emphasize to others that the Ombuds reports to powerful organizational actors: “We don’t have any power to do anything to make anybody do anything, but people seem to think we do because of our reporting relationship with the president. I think we get our authority from that...”(O14A63:34). Another Ombuds used the president’s authority to increase awareness: “[W]e asked the president to write a letter of introduction and send it to every employee on campus. And that actually was the one that initially that I think was most successful in terms of people that visited me said that, you know, “I got the letter from the president that’s how I learned about your office” (O13A61:18). In other situations, the administrator makes specific referrals, as one Ombuds described “[T]he chancellor ...whenever they had somebody complaining... they were turning it over to me...” (O11A57:15). Another Ombuds described the provost “walk[ing] down right to my office with a student in hand, knock[ing] on the door, and say[ing] ‘we have got a problem here, we need to resolve this.’” (O11A57:14). Yet another Ombuds talked about the difference between reporting to the president instead of the vice president: “When I reported to the president, when I called people’s offices people responded immediately, whereas when I reported to the vice president it was like ‘well, we had to go through gyrations about this that and the other...” (O5A28:30). One Ombuds saw the most important factors to an Ombuds success being “[C]lear lines of authority reporting, and...the support of your supervisor” (O5B29:19). Another Ombuds described the surprise at no longer directly reporting to the top, “The new President that came in about five or six years ago didn’t want as many direct reports as the older president, and so he started having me report to his faculty liaison” (O9A53:9).

Other Ombuds derive power not only from the authority of their supervisor, but from role confusion relating to their prior role at the institution. When asked if being the past Dean of Students provided him with some legitimacy as the Ombuds, one interview responded: “Definitely, and actually when I moved to this position, depending on where you look on the university’s website, I’m still listed as Dean of Students and a lot of people still call me the Dean of Students. In fact, the Student Affairs office...has talked to me recently about, “in everybody’s mind you’re still the Dean of Students, so I think we’re going to start calling you that again” (O3A21:6). In developing a research subjects list, this research identified two Ombuds at institutions who currently held a Dean of Students title, and multiple other Ombuds who served as special assistants to Vice presidents, Provosts, or Deans. Dual roles are problematic for Ombuds seeking to practice to the field’s ethical standards involving independence and impartiality. These issues are further discussed in chapter six.

While many Ombuds closely follow the IOA Standards, Ombuds departing from the archetype rely less on relationships, persuasion and principles, and use role confusion and authority presumed from reporting to institutional actors with significant actual authority. Ombuds use this apparent authority to enforce rules, or to favor specific preferred outcomes. Ombuds often expressed a frustration regarding a lack of rules and structure. One Ombuds noted “folks are used to not being rule bound, that’s one of the reasons they’re earning half or a quarter of the salary they could earn in the private sector to be here. They don’t want rules and structure, they are must more used to collegiality as they call it. Now at higher level administration, in particular at the Provost and dean level and up, [rules/procedures are welcomed]...” (O10B56:37). Ombuds in using this form of authority may be doing so to maintain their

relationship and influence with decision-makers responsible for the continued existence of the Ombuds office.

In my interviews I learned of many examples of Ombuds using some form of rules-based authority. In one example, an Ombuds described a situation in which a student was dismissed without reason from a work study role for being socially awkward:

I looked at the letter that was given to the student about dismissing them. It wasn't very clear...so I asked the department 'can you tell me why you weren't as forthcoming giving concrete examples as to why you made this decision?' ... [I told the department] in terms of procedural fairness, the student needs to know more clearly why you're asking the student to leave... they said 'okay, okay, we understand' ... And so the student received a [different] letter. (O1C10:3)

In another example highlighting how Ombuds use rules to favor specific outcomes a faculty member meets with an Ombuds who told the person "here's the process and this is what should be happening." The Ombuds then described what happened when the faculty member didn't follow the advice and tried to back track and fix it when it was really too late:

[At that point] I said, 'well, now you really need to do this' and she said 'I don't know why I need to...' and I said 'because... they have the option to appeal this decision, which is our policy' and she's like 'well, they've already confessed to their behavior' and I said 'yes, but they can appeal based on the severity of the sanction' ... Did I ruffle her feathers? Probably. (O3A21:54)

There are also examples of where Ombuds are unsuccessful in their attempt to use the rules to pressure visitors to take certain actions. One Ombuds described their process if they are unable to persuade a visitor to take formal action:

[If a policy has been violated] I will try to get the person's permission to take it forward and if I get that permission we'll try to talk to the offending person and see if there was a mistake made and if they want to correct. And if they don't want to correct that and we think that it was a violation of policy and we give them an opportunity to make it right and they don't, then we'll probably go onto their supervisor and work our way up the chain. (O9A53:43)

Another Ombuds described conversations with a department chair attempting to enforce the rules:

[L]ook, I know this is going to be a bitter pill to swallow because I've seen what the reality of the plagiarism charge is, but we haven't followed our own policy and we are going to have to swallow it." The chair agreed [but otherwise] I would have had to take it up to the dean level and if the dean had done nothing I would have taken it to the Provost. (O9B54:27)

These examples highlight Ombuds operating with the apparent authority to report rule violators to individuals with the actual authority to take action. Using this apparent authority to pressure compliance may be possible due to the relationships built with university leadership, but it directly contravenes the field's core principles of confidentiality, informality, impartiality and independence.

In many instances, Ombuds use their relationship and influence to formalize the Ombuds role in order to create a more independent basis of authority. One Ombuds explained that process: [E]ventually when we got a President that was more interested in what we were doing, shall we say, [and] we developed a charter that lays out what we do and how we do it, and grants us immunity, as far as the University is concerned, from being an office of notice" (O9A53:8). Another Ombuds described efforts to develop "...a draft charter or terms of reference for the office that addresses hiring criteria, term of office, and kind of ground rules and practice of the office. That is kind of going back and forth between me and Legal Counsel's Office and Provost Office. I would imagine in the next couple of years [the authorizing documents] will come to be [controlling]" (O13A61:5). Once established, some Ombuds rely on formalizing the Ombuds field's principles into institutional rules as a basis for authority:

The requirements on me... are stipulated in the constitution and bylaws of the university. When people ask [I tell them] I am responsible for providing the assistance required by university rules in a manner that ensures confidentiality, maintains neutrality, and exhibits independence from the institution. (O10A55:3)

Ombuds feel tension between adhering to the field's principles and maintaining their ability to be persuasive within the university. Almost uniformly they aspire to adhere to the IOA's Standards of Practice (2009). The IOA provide professionalization and authority for Ombuds to adhere to the field's best practices. A certification exam provides legitimacy and authority for Ombuds practitioners that meet the IOA Standards. Many Ombuds practicing further from the archetype expressed disappointment and frustration at the rigidity of the certification requirements. One Ombuds discussed passing the examination with flying colors only to learn that their dual role within the university was a problem. "They felt that there was sufficient enough ambiguity between my two positions that until that was further defined and made clear... they could not award me certification. I even appealed the thing as [practicing to the letter of the standards] is almost unheard of (O11A57:22). Another Ombuds talked about not receiving full IOA membership due to serving as an agent of notice (against their own preferences) for their university. "I feel like I'm not really legitimate because I'm not a full member... not a full participant, it's really kind of sad for me" (O7A37:5). Another Ombuds echoed these sentiments in stating:

I abide by the standards of the code of ethics...[but] I don't think there's only one way to be an ombudsperson...there's this fantasy that we're all doing it the same way. But we're not! Some people are saying you can't be a[n] [IOA] member unless you completely abide by our code of ethics and standards... if you can't you will be a second class citizen. I think it's too soon to say 'this is the way it has to be.' I think we should be embracing everyone. (O14A63:11)

One Ombuds expressed relief at attending an IOA conference and seeing experienced Ombuds in roleplays not operating to the letter of the standards:

You're taught the whole thing about some of the basics in terms of the people put out their things and then you do an affirmation: "that sounds like that must have been problematic for you, blah blah blah." I happened to be in an IOA group once where we were doing some role playing and one of the IOA participants was from

an Ivy League school, [someone] I have got a great deal of respect for. He immediately in his role playing went from the problem to “this is how we’re going to solve it.” It was so affirming inside of myself to think “okay, that’s not the way you do it, and even the people with some of the best credentials don’t always, aren’t able to always carry this out in the way that they should. (O11B58:10)

Roughly one third of the Ombuds interviewed had never been to an IOA Conference, typically not attending due to “conflicts with work responsibilities and other higher education or student affairs conferences” (O6A34:47). Many Ombuds provided an historical perspective on the development of the IOA Standards, represented best by this quote:

When I came into it [the field], we didn't even have standards of practice. We had cowboys. And we had a lot of people who did things almost like learning a profession by folklore or something. They would come together at various meetings and talk about how they did things. And for the first few years, I'd come back from those meetings fairly confused because people would be advocating for very different kinds of practices and approaches. So, at this point, I feel like we've come a long way toward coming to standards that we all understand. Although there are some variations on how people apply them, these standards are commonly accepted and utilized. I got to tell you, I'd pull my hair out before these standards because there were really wide differences, much wider than there are now. The practice has become a lot more standardized, but there’s still some room for interpretation. (O2A17:25)

In sum, many Ombuds described deriving their authority from rules or important reporting relationships. The tension between strict adherence to the Ombuds model and the felt need to rely on rules is further explored in later chapters that show how Ombuds often apply the IOA Standards of Independence, Impartiality, Informality, and Confidentiality very differently than prescribed. Ombuds lack prescribed rules-based authority and must develop relationships and use persuasion as the source of their power. Widespread confusion regarding the Ombuds role provides the context for many Ombuds to exercise a rule-based authority in their practices.

Conclusion

Title IX Coordinators and Ombuds, according to their archetypal models, derive their authority from very different sources. Title IX Coordinators' authority is legal-rational and derives from the power to enforce Title IX and university rules relating to the law. This includes investigating complaints, determining violations, recommending outcomes, and making interim accommodations. Ombuds authority is quite different. Lacking the authority to take disciplinary action, reverse decisions, or circumvent existing university rules and procedures, Ombuds' authority is charismatic and derives from the ability to develop relationships and truly hear and respect those who come with complaints (in which Ombuds are guided by the core IOA principles of impartiality, confidentiality, informality, and independence). Title IX Coordinators use their authority to enforce the law, whereas Ombuds use their authority to empower individuals by providing access to information and a confidential resource, by advocating for fair process, and by assisting in exploring options. Despite these seemingly distinct sources of authority, in practice Ombuds' source of authority is often rules-based and Title IX Coordinators' authority is also derived from their ability to build and sustain relationships. In practice, Title IX Coordinators and Ombuds both rely on rules and relationship-based sources of authority.

CHAPTER 4: MISSION

Ombuds and Title IX Coordinators vary widely in their respective missions. As a Title IX Coordinator's authority derives from enforcing the legal requirements of Title IX, the mission of the archetypal Coordinator is to enforce the law. This includes Title IX's requirements regarding safety, gender equity, protecting individual rights, punishing and deterring wrongdoing, and educating the campus. An additional goal arising from legal compliance is avoiding legal liability for the university. The mission of the archetypal Ombuds, meanwhile, is to provide an informal alternative for resolving disputes by providing information and an opportunity for voice, and by advocating for fair processes.

This chapter begins by examines the archetypal Title IX Coordinator whose missions revolve around compliance with Title IX. Coordinators adhering to that mission are analyzed followed by a discussion of Title IX Coordinators who depart from their archetype with missions that include voice, information, and procedural goals. Next the chapter describes the archetypal Ombuds's mission. It then explores Ombuds who adhere to the archetype with a mission of providing informal dispute mechanisms, voice, and fair process. It also describes Ombuds who depart from their archetype with missions that are often more rules- and outcomes-based. These adherences and departures occur along a spectrum, as some Ombuds or Title IX Coordinators may aptly be described as "adherers" or "deviators." Additionally, adherence or departure is often situational and context-specific as a Coordinator or Ombuds who goes by the book in one instance departs from their archetype in another. The chapter concludes that in practice the missions of Title IX Coordinators and Ombuds converge more often than they diverge.

THE ARCHETYPAL TITLE IX COORDINATOR'S MISSION

A Title IX Coordinator's archetypal authority derives from Title IX, thus the mission includes the goals underpinning the law. Each of these goals is now reviewed in turn. First, the archetypal Title IX Coordinators seek to protect individual rights and punish and deter wrongdoing. Compliance with Title IX effectively means protecting individual rights by punishing and deterring wrongdoing. The 2011 Dear Colleague Letter notes that if a college or university determines that student-on-student harassment has created a hostile environment, they must "take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects" (p. 4). This action may include counseling or disciplinary action against the harasser, remedies for the complainant, and changes to school policies (DCL, 2011, p. 15). Title IX requires that interim steps to protect the complainant be taken when necessary before the outcome of the investigation (DCL, 2011, p. 15). Other required activities include conducting periodic assessments and climate checks to assess effectiveness of school policies, investigating whether school employees with knowledge of sexual harassment allegations failed to respond, and submitting to OCR copies of all grievances and documentation related to the investigation (DCL, 2011, pp. 18-19). The OCR Q&A document (2014) echoes these requirements, and provides universities with the ability to give its Title IX Coordinator the specific responsibility of "conducting Title IX investigations, including investigating facts relevant to a complaint, and determining appropriate sanctions against the perpetrator and remedies for the complainant; determining appropriate interim measures for a complainant..." (p.10).

The archetypal Title IX Coordinator also works to appropriately avoid institutional liability. According to the ATIXA 2013 Training Manual, "the reasonableness of a college's handling of a sexual harassment/sexual assault complaint will ultimately determine the extent of monetary liability. As a result, the training manual recommends that Investigators/conduct

officers should be trained in civil rights investigations and have experience with the uniqueness of a college community and its governance structure” (p. 16). The OCR Q&A document (2014) provides “[a] school must ensure that its Title IX [C]oordinator is appropriately trained in all areas over which he or she has responsibility” (p. 10). The 2013 ATIXA Training Manual describes NCHERM’s reaction to the 2011 Dear Colleague Letter: “Acting on the Dear Colleague letter with revised policies and practices will more effectively shield campuses from liability because it offers campuses a roadmap for delivering prompt and effective remedies to campus sexual violence” (p. 195).

In the Bedrock Beliefs section of the 2013 ATIXA Training Manual (p. 11), effective sexual assault risk management practices are tied to reducing liability, including:

- Increasing the likelihood that colleges will prevail in lawsuits if they arise out of incidents of sexual assault
- Decreasing the likelihood of lawsuits between survivors and perpetrators
- Decreasing the likelihood of successful lawsuits against colleges by perpetrators and survivors, as the college will be less likely to violate their rights.
- Decreasing the likelihood of sexual assault on college campuses, thereby “protecting students and helping to insulate colleges from a potential source of litigation.”
- Decreasing the likelihood of lawsuits against colleges by media seeking access to campus crime data.

The 2013 ATIXA Training Manual, Bedrock Beliefs section indicates that where a survivor does not want a college to pursue a report and the threat of further harm is deemed insufficient, college officials “would be well advised to fully document their conclusion, supported by an appropriate investigation, and ask the victim to acknowledge that he/she concurs with the college’s conclusion, and asks that no further action be taken. A letter to the victim should

indicate that his/her refusal to cooperate with investigators and campus conduct personnel may prevent the college from pursuing the complaint to resolution” (p. 14).

Third, promoting equity, the core principle underlying Title IX, becomes a part of the model Title IX Coordinator’s mission. A job posting for Title IX Coordinator at Swarthmore typifies these missions, and states that the person “will play a key role in the College’s collective efforts to build and maintain an even safer and more gender-equitable campus climate for all members of the community” (Title IX Coordinator Job at Swarthmore College, ATIXA, 2013). Likewise a Sacred Heart University job posting (Higheredjobs.com, retrieved 6/12/14) for Title IX Coordinator lists one of the duties to “[p]rovide leadership for campus-wide initiatives that work to transform the campus culture and advance inclusivity, gender equity, and opportunities for individuals from traditionally under represented populations.” These goals are reflected in the Association for Title IX Administrators materials as well. The ATIXA Statement of Ethics and Title IX Coordinator competencies (§3 Statement of Ethics and Professional Standards) notes that Title IX Coordinators will:

Conduct themselves in accordance with the highest levels of integrity and competence in pursuit of equity -- as an expression of social justice -- in the academic, residential, social, and athletic programs of schools and colleges, and in the prevention of hostile environments on the basis of sex, the prohibition of sexual harassment and sexual violence, the prohibition of other forms of discrimination and harassment on the basis of protected class membership, the protection from retaliation, and in remedying the effects of discrimination and harassment for the benefit of the schools, colleges and universities they serve.
(p. 3)

Finally, the Coordinator’s mission to prevent sexual misconduct requires these officials to engage in education and outreach. The 2011 Dear Colleague Letter specified that full compliance with Title IX required taking proactive steps to prevent sexual misconduct. OCR recommended that “all schools implement preventative programs” and suggested options for

educational programs during student, faculty and staff orientations, school assemblies, and for residence halls advisors, student athletes and coaches (p. 14). Colleges were directed to include discussions about what constitutes sexual misconduct, the school's policies and procedures, and the potential consequences. Broad training of institutional constituents on these and related principles and practices is the best risk management (ATIXA 2013 Training Manual, p. 16).

Further, OCR recommends developing specific materials including information about policies, rules, resources, where to report, and what to do if you receive a report (DCL, 2011, p. 15). Under Title IX, schools are required to publish a notice of nondiscrimination (34 C.F.R. § 106.9 (a)) and to adopt and publish grievance procedures for dealing with complaints of discrimination (34 C.F.R. § 106.8 (b)) (DCL, 2011, p. 4). The notice must be widely distributed and prominently posted on web sites and at various locations throughout the campus. The ATIXA Statement of Ethics and Title IX Coordinator Core Competencies (Core Job Duties and Responsibilities, §4, p. 5) lists as part of the Coordinators' duties the following education related activities:

- Provide ongoing training, consultation, and technical assistance on Title IX for all students and employees, with specialized training content for hearing officers/boards, investigators, campus law enforcement and appeals officers;
- Develop, implement and coordinate campus and/or school-based strategic efforts aimed at the prevention of sexual violence and other forms of sex and/or gender-based discrimination;
- Develop and disseminate educational materials, including brochures, posters, and web-based materials that inform members of the school or campus community (students, faculty, administrators, staff, and parents) of Title IX rights, responsibilities and resources both within and external to school/campus premises.

Title IX Coordinator Job postings also indicate that one of the key missions for model Title IX compliance offices is education. A Title IX job posting at Kansas State University typifies

the requirement that the coordinator shall collaborate with “relevant campus departments/units to develop and conduct prevention of discrimination training, sexual harassment/sexual violence training, and other Title IX related presentations” (Investigator & Deputy Title IX Coordinator Job at Kansas State University, ATIXA, 2013). A Title IX and Compliance Coordinator Job posting at South Dakota State requires applicants to have “[s]trong presentation and facilitation skills with an emphasis on education and training fostering positive relations with diverse constituencies” (Title IX & Compliance Coordinator Job at South Dakota State University, ATIXA, 2013). The Swarthmore College Title IX Coordinator job posting lists as a responsibility, “oversee[ing], in partnership with colleagues across campus, the quality and consistency of training, education, and outreach programming regarding Title IX including gender-based inequity for the campus community” (Title IX Coordinator Job at Swarthmore College, ATIXA, 2013).

While education about sexual misconduct and its handling is a key element of the Coordinator’s mission, the emphasis is on *outcomes*, not simply pro-forma education. Thus, the 2013 ATIXA Training Manual, NCHERM 2011 Whitepaper notes that “community protection and remedying discrimination must become our top priorities...[with] [e]ducation, development and rehabilitation necessarily tak[ing] a back seat [to] outcomes...” (p. 154). The Whitepaper further states that “sanctions for serious sexual misconduct shouldn’t be developmental...[but] should protect the victim and the community.” Supporting this ranking of priorities, the Whitepaper cites David Lisak’s 2002 study on undetected campus rapists finding that 63% of the campus offenders were repeat offenders and that 91% of the offenses identified were committed by repeat offenders. The Whitepaper (2011, p. 14) concludes that “unless you can distinguish whether an offender is one of the 63% of repeat perpetrators, or one of the 37% of one-time

perpetrators (and you can't), can you really afford to take a chance with the safety of your community?" The educational goals of archetypal Title IX Coordinators are primarily to support the prevention, reporting, and remedying of sexual harassment.

The Mission Statement of the Office of Institutional Opportunity and Access (OIOA) at the University of Kansas evidences these goals and represents a typical Title IX mission statement. The KU office's core mission includes:

- Completing thorough investigations into matters of discrimination.
- Initiating policies and best practices that remove barriers to strengthen the campus community.
- Enhancing compliance, accountability and guidance on anti-discrimination laws.
- Communicating commitment through training, education and assessment of programs.
- Serving as a resource for the recruitment and retention of faculty, staff and students.
- Leading collaborative efforts through outreach with community partners (University of Kansas, OIOA, Mission Statement).

In fulfilling its compliance goal, the Institutional Opportunity and Access website includes a link providing web-based complaint reporting forms (University of Kansas, OIOA, File a Complaint). In fulfilling the training and educational goal, websites managed by the University of Kansas Office of Institutional Opportunity and Access provide a wealth of information. The main Institutional Opportunity and Access site provides a link to a sexual harassment training for students (University of Kansas, OIOA, Student Sexual Harassment Training, 2013). Further, a main gateway website, www.sexualharassment.ku.edu, defines Sex and Sexual Harassment (University of Kansas, OIOA, Sex & Sexual Harassment), and provide a gateway for information about sexual harassment that includes definitions of sexual assault and sexual violence, internet links to university policies and procedures, links to Federal and State Laws, specific examples of sexual harassment, where to report of sexual harassment, where to

get support, and what to do if you receive a sexual harassment complaint. The Sexual Harassment website is the highlighted first result when searching a variety of related terms from the main www.ku.edu website. Included on the site, the Sexual Harassment Resources page is a comprehensive list of university resources, local Lawrence, Kansas resources, and services that provide 24-hour assistance (University of Kansas, Sexual Harassment Resources). Notably, the KU Ombuds Office is listed as a university resource, despite the offices' very different goals. These outreach and publicity efforts described at the University of Kansas typify the efforts of universities nationwide to provide better sexual misconduct information and resources.

In sum, the primary mission of a model Title IX Coordinator is rules-based investigation, adjudication, and discipline in response to sexual misconduct complaints. An archetypal Title IX Coordinator is tasked with protecting individual rights, promoting gender equity, avoiding liability, and driving education and outreach. As the role developed, the education and outreach piece morphed into being an educational leader on all things related to sexual harassment and sexual assault. Outreach now includes enhancing “safety,” providing leadership to transform the campus culture, and advancing inclusivity, gender equity and opportunities for traditionally excluded groups.

CARRYING OUT THE ARCHETYPAL COORDINATOR MISSION IN PRACTICE

The archetypal mission of Title IX Coordinators is to “make sure that we respond in an appropriate way, that we follow our policy and that we’re in alignment with what our legal obligations are as an institution” (T8A39:17). Primarily this means investigating and handling allegations of Title IX violations and violations of policy. Many Coordinators report that they carry out this archetypal mission. One Coordinator noted “I get them for being in violation of the [consensual relationships] policy [even if I can’t prove it was non-consensual], because that’s

what I'm looking for...What policy did you violate?" (T11A45:51). Other Coordinators echoed this mission of determining violations of law or policy. Another Coordinator stated, "Over the years we sort of attracted some of the ones that don't really need us. They have a boss who is hateful and mean, but he's hateful and mean to everyone without regard to race, color, sex, religion, national origin, age, disability, [or] sexual orientation. So we have to tell people [we can't help you] a lot...and that's unfortunate" (T12A47:30). Other Coordinators described often sitting down with complainants and saying, "I understand you being a little concerned about that, but that's really not [a violation]" (T13A49:41-42). Coordinators described a burden to be met by the complainant:

We [take] a real close look at [the complaint]. Even if it were all true, [if] it's not discrimination...[the person] has not met a burden of presenting a valid complaint...We subject all complaints to that kind of analysis. People come in here all the time, they're pissed off about something, but is it really ... worthy of investigation? Sometimes it's...free speech, it's opinion, it can even be rude and offensive, but it's not discriminatory, harassment, or anything else. (T7B33:31)

In determining violations of law or policy, Title IX Coordinators provide a formal mechanism for resolution, echoed in one Coordinator's description of their retaliation policy: "[I] talk about retaliation [and say], 'please note that retaliation is also a form of discrimination that is prohibited by law and university policy. If you believe you're subject to retaliation because you have filed this complaint, you have a right to file a subsequent complaint that's not based upon this initial complaint of retaliation. You will need to do that with our office and let us know right away. A separate investigation will be conducted'" (T10A43:24). Title IX Coordinators' mission to provide a formal mechanism for complaint handling is particularly evidenced by the following Coordinator's statement:

I'm not handling informal [processes]...people who come to me and they don't want to go for the jugular, I don't deal with them as much. I send them [to the Ombuds] when I ascertain [a preference] for an [informal] intervention. I try to

tell them ‘[The] Ombuds is the soft touch, they’ll try to communicate and mediate and work it out, but when you come to me, that means you want the hammer on the nail.’ (T11A45:13)

This sentiment is echoed by another Coordinator who described the responsibility of investigating all complaints: “I tell people ‘once you sit down and start talking....’ In other words, this is not the office to come and vent. We have those offices. We have [multiple examples]. We have an Ombudsman... If you want to talk, you go there, because you’re putting the university on notice when you come to me” (T10A43:34). Another Coordinator noted “I usually always say ‘this is my role...I do an investigation based upon the information you give me. My role is not to talk and give you options’” (T10A43:35).

In providing a formal avenue for ensuring compliance with Title IX, a tangential mission of a Title IX Coordinator is to protect the institution against liability. Coordinators described discomfort when situations were not adequately addressed: “[If we don’t close the case] That’s [a] negative outcome and also makes me feel vulnerable, makes me feel the institution is vulnerable [to liability]...Anything that is left open is not closed, it’s not been handled, that makes me feel like we haven’t done all of our due diligence. That’s uncomfortable” (T6B31:7)

Coordinators also expressed concern by evidence of future risk:

[Even though it was consensual and not a violation] it was important on many levels to communicate to the respondent ‘this is grossly inappropriate, there’s potential liability for the institution in the future if you continue engaging in this kind of behavior. Even if it is consensual, there’s reason to concern ourselves with the point at which it may not be. And it has an impact on the individuals who might have regarded [it] as consensual, but it reflects both on that person as either a distinguished person of note, but creates some future risks for us. (T2B14:16)

Other coordinators framed liability and compliance in terms of avoiding negative publicity. One Coordinator described a complainant who brought in an outside advocacy group that threatened to go to the media.

[W]e had a meeting with them and our university attorney and chief diversity office just to try to do some damage control. Once we explained the situation...I think they realized that this complaint was not [valid], the reasons for the complaint were not pure... it was intended to incite a lot of chaos. We were trying our best to keep that from happening. (T13B50:23)

In addition to a formal process determining violations of law or policy that protects the institution against liability, an additional mission of Title IX Coordinators adhering to the archetype is to revise and improve existing policies. Representative of the changing state of the law, one Coordinator noted:

When I first started...my role was to read policies, understand policies, and do [racial discrimination] investigations. Period. Within another month it was 'we need you involved in some pretty serious situations that are going on...Can you do Title IX stuff too? Within two and a half months my role was 'what policies do we need to rewrite and update?' (T11A45:30)

Policy development also relates to education and prevention, a mission some Coordinators described as their greatest challenge: "Most people really just [do] not know what [Title IX] is and what we're trying to do. So part of it is educating people, [and] I think that creates the biggest challenge, how do you educate the campus to this level of understanding?" (T6A30:54). Another Coordinator described the challenge as ongoing: "We have 20,000 students and every year they ship us 4,000 new 18 year olds. They're drinking and groping and doing...oh...how do you stem the tide?" (T12A47:45). Many Coordinators frame the problem as one of culture and diversity:

[I]t's far more to me than an issue of non-discrimination or that we are following the letter of the law. I think that someone who is responsible for Title IX really has a role to play in shaping the culture of the institution, because Title IX requires more than just non-discrimination like some of the other laws. It requires that women be fully included in all aspects of work and academic life, and that full inclusion to me relates a lot to diversity. (T5A26:4-9)

Another Coordinator articulated the difficulty of changing the climate:

[W]e're trying to figure out how to get the word out more and I think...we really need to shift [the culture] from this idea that individuals need to report to one of we're all responsible for the campus safety. We're all responsible. So we're working on that...it's a daily process. It's hard to keep up with it. It's hard to keep up with trying to get positive messaging out there [and shift the culture], and do the investigative work at the same time. I think we do that one student at a time. I think you melt an ice cube not shift a glacier, so that's the way we've looked at it. (T9B42:22)

In sum, Title IX Coordinators oversee a formal process used to determine violations of law or policy that will protect the institution against liability. Title IX Coordinators also aim to revise and improve existing policies and educate the campus and thereby prevent future incidents of sexual misconduct.

DEPARTING FROM THE ARCHETYPE COORDINATOR MISSION

In practice Title IX Coordinators' missions often depart from the archetype by trying to solve problems, to help complainants feel heard, and to manage expectations. Title IX Coordinators depart from the archetype to effectuate informal resolutions and provide opportunities for voice. Just as Ombuds attempt to direct their visitors to the offices that can best be of service, many Title IX Coordinators also do the very same thing. One Coordinator described this support as outside of the formal mission of their office:

[T]here's so much at stake for everybody, so...when I hear the concerns that the complaining party is saying, if there's threats of suicide or homicide, if there's been self harming behavior, if there's drug or alcohol concerns, if there's mental health concerns, I might say to the dean 'let's work closely with housing or with this department, let's...hand deliver [the] notice of investigation, and at the same time leave that person, him or her, with the [information for the] Ombuds office or the EAP program or university counseling.' This is not how it technically works, but we have to work it into the system. (T8A39:64)

Coordinators also expressed a goal of sympathizing with both sides:

I think beyond that you have to have a real understanding of the nature of these kinds of situations, which are lose-lose propositions. You have to have a real human side that can understand and sympathize with [the] person and yet meet

with the other one and understand and sympathize with that one [too]. You have to really care about [them]. I do. I really do. (T12A47:3)

Another Coordinator described acting as a counselor in order to build trust: “[O]ur job is not to be counselors, but we are. To a degree we continue to be counselors until we feel it’s time [for them] to move on. And eventually they will, but that’s a delicate conversation to have because you want to continue to have that good rapport...” (T13A49:42). Yet another Coordinator described the importance of providing empathy for students:

I’m so lonely... It’s just tough work...just gut wrenching. Strangely, I still feel like it’s almost a calling for me. [I]f [student] had to go [to the alternative office] first, this place would be in a world of hurt because that is not an empathic person and I am. (T12B48:32)

In addition to the goals of providing voice, empathy, and support, Title IX Coordinators depart from the archetype by describing a preference for informal methods of resolution.

Coordinators talked the negative effects of using rigid formal processes:

I’ve had a real trouble dovetailing my process with [other offices] because they are very rigid, very. And it’s process-driven, to the point of dotting the I’s and crossing the T’s.... And it’s primarily staff with young, ambitious professionals who are really more interested in making a name for themselves that [in helping] students. (T12B48:7)

Another Coordinator described a preference for informal resolution in describing instances in which “I can look at it and say ‘if this is all you want, let’s go talk to the dean right now. We don’t have to do an investigation on it’” (T10B44:17). One Coordinator articulated frustration at a professor who refused to apologize in order to informally resolve a situation:

[The professor] refused to apologize [to the student]...I was trying to get him to calm down and see what was going on, to apologize to the student so they would let it go. I said to him ‘just apologize and all of this goes away’ but he told me there was no way in hell he would apologize. I said ‘you need to make sure that you [don’t] retaliate against this student [in your class].’ Term comes to an end, and the grade is [very low]... [and the student] appeals the grade based on retaliation and discrimination. At the end of the day I have to go see the president

to say.. ‘If he would have just said ‘I’m sorry’ we would not be where we are today.’ I overturned the grade... (T11B46:16)

In addition to often preferring informal mechanisms for resolution, Title IX Coordinators, like Ombuds, strive to ensure that processes are fair, but in terms of relational theories (Tyler & Lind, 1992) of fairness. Coordinators described their mission being about more than simply fact-finding:

I’m going to say the advantage that I had coming here was that I had already had almost 22 years of experience dealing with counseling both employees and employers on due process, fairness of process, why it was important to have procedures in place and apply them consistently. So there’s a lot more to this work than simply, or should be more to this work than simply being a fact finder and making a decision. (T2A13:43)

This observation is echoed by another Coordinator who described their goal of treating all respondents and complainants with respect: “You have to have respect, no matter what they have done or reportedly have done or admit to doing, if they’re not treated with respect, if you can’t see the humanity you shouldn’t be in the room with them.” (T8B40:14). Other Coordinators connected the goals of efficiency with providing fair process:

I think that affirmation is important and sometimes people are fearful that they’re going to come forward and they’re just going to suffer for it and they’re going to be apprehensive that they’re going to be labeled as a liar, they’re going to be labeled as somebody who got somebody important in trouble, and so when those fears are allayed I think that it does make them feel good. And in a very real way [with our changes] they don’t have to worry about that anymore [and people will come forward]. (T7B33:10)

Title IX Coordinators also departed from the archetype by articulating goals relating to empowerment, helping people think through their options, and resolving the underlying issues in a conflict, goals that are far from simply enforcing compliance with the law. One Coordinator described individuals returning back to their office again and again:

[W]e end up doing a whole lot of counseling after the fact because they’re continuing to have issues and they’ve received things, they become empowered

and they feel that ‘I can affect things if I go talk to [our office], they’ll change things.’ It is empowering to a lot of individuals and we kind of chuckle about it in house because we say ‘so and so is coming in again.’ Because now they feel they have somewhere they can go, but we want that. Sometimes we have to hand them off to other groups and oftentimes they’ve developed a relationship with us and don’t want to go [elsewhere]. (T13A49:41-42)

Title IX Coordinators, like Ombuds, also help people identify and think through options, as stated by a Coordinator who as a standard introduction says “I want to talk with you about your options, go over your resources, address any safety concerns you might have about housing or academic accommodations”

(T8B40:17). Another Coordinator described working with respondents’ goals and desires as a way of helping them make better decisions:

What’s going through my mind is ‘how do I reach him? I’m trying to look at his beliefs, look at his attitudes, looking for a way if maybe I can affect or help him change an attitude or belief, he’ll change a behavior. So I’m trying to inform and understand... so I [say] ‘You have a lot of aspirations, these attitudes and this behavior could get you off track and impact your ability to be successful. (T8B40:14)

One Coordinator described their own goals as less important than the needs of the survivors:

It’s not so much of an outcome that I need, it’s an outcome of the needs of the parties. Sometimes its where...the alleged victim need[s] to hear the full story to understand what had occurred [and understand their presumption about what happened was incorrect]. (T4B25:3)

Other Coordinators, similar to Ombuds, spend a considerable amount of time managing complainants’ goals and preferences. Where Ombuds manage expectations due to a lack of formal authority, Title IX Coordinators appear to manage expectations due to the challenge of definitively proving the occurrence of sexual misconduct. One Coordinator notes that “[m]anaging expectations is tricky for a whole lot of reasons...[a] lot of times these cases are very difficult to prove” (T1A11:37). This was also well articulated by another Coordinator who noted that complainants often believe, “I went to the office and [because] exactly what I said

[actually] happened, the only redress can be what I'm asking for... [because] this happened to me it has to be discrimination. It just has to be" (T10B44:18).

While clearly stating "[W]e [have]...to keep campus safe, we need to protect you, [and] stay respectful of his rights...[Title IX Coordinators] say 'okay, what do you want to have happen here?' There are some women that if you told them that we're going to recommend that this kid be expelled, they would fall apart" (T9B42:19). Another Coordinator talked about a standard question in the form to learn what action the complainant is seeking, noting "I kind of don't even want to ask that question anymore. In most cases the person doesn't say they want them fired, but they really do... just because you put that down doesn't mean that's what you're going to get" (T10B44:17). Providing a dose of reality to expectations is clearly expressed:

I always ask everyone what is it that they want out of all of this. 'At the end of the day, what is it you want?' is the standard question. And some of them will say 'I want my money back!' I say 'that's not going to happen, what else do you want?' [laughs] And I tell them 'I need [multiple options], don't pin your hopes on one thing.' A lot of them say 'I want the professor fired!' Well that ain't gonna happen. (T11A45:56)

Often Coordinators manage expectations in order to avoid complaints from unhappy complainants. Coordinators described educating as a part of managing expectations:

I tell people, '[I]f you file a complaint [against someone]...it's going to change you[r] relationship...You're not trying to make friends with them if you file a complaint... [y]ou've got to accept that. [W]hat you [are] tell[ing] them is you're not going to tolerate that kind of behavior toward you and you're willing to do what it takes to stop it.' And that's what we're going to do. We're going to do what it takes to stop that behavior... That's our job, to make sure that behavior stops and if it doesn't we'll do something else. If it stops, then we've done our job and you have to manage how you deal with how that person treats you from now on. [I tell them] 'If they stop talking to you...don't expect that we will say 'oh that's retaliation, we're going to do something else to them.' So, again, expectations [are key]. (T13A49:40)

Many Coordinators' words closely resemble what an Ombuds might say when managing expectations, including process description, outcome possibilities, and aligning the possibilities with the realities:

[I]t's so important to try to manage those expectations and know what people at least perceive as being a good outcome and then after explaining 'this is how our process works, you're probably not going to be able to achieve that, so let us begin the process of managing those expectations and trying to align them with reality. Sometimes it works and sometimes it doesn't. Sometimes people have a clear sense of what they want. (T13B50:25)

In addition to overseeing a formal process to determine violations of law or policy that will protect the institution against liability, Title IX Coordinators also aim to revise and improve existing policies and educate the campus and thereby prevent future incidents of sexual misconduct.

In sum, the archetypal mission of Title IX Coordinators does not tell the whole story. In practice Title IX Coordinators' missions often depart from the archetype by including goals relating to effectuating informal resolutions where possible, providing voice and empowering students, and ensuring fair process. In this way the mission of a Title IX Coordinator often closely resembles that of an Ombuds.

THE ARCHETYPAL OMBUDS' MISSION

The model Ombuds's mission is to provide an informal mechanism for resolving disputes, provide information and an opportunity for voice, and ensure fair process. Many organizations founded Ombuds programs as a means of providing alternatives to the formal grievance systems and for addressing the competing interests that give rise to disputes that not be well addressed by formal rules and organizational guidelines (Gadlin 2000, p. 43). Charles Howard (2011a) argues that organizations need confidential and anonymous channels of communication, and ideally Ombuds may resolve organizational conflicts that can't be resolved

through the standard channels. Informal dispute resolution is a key tenet of the International Ombuds Association's Standards of Practice. The ideal Ombuds thus operates a complaint mechanism by which organizational members can pursue their issues informally. Noted Ombuds Howard Gadlin described the value of an informal option (2011b):

In any organization, whether it is a governmental agency, a university, or a corporation, innumerable opportunities for wrongdoing, unfairness, injustice, mistreatment, and conflict present themselves. The Ombudsman is an important part of an organization precisely because s/he is someone to whom members of the organization can come with issues that are not covered by any aspect of the organization's governance mechanisms. (p. 42)

The University Senate Rules and Regulations governing the powers of the Ombuds Office at the University of Kansas provide a typical restriction in noting that the Ombuds "shall supplement, not replace, other means, where they exist, for redress of grievances" (University of Kansas, USRR, "University Ombuds Office"). In order to provide clarity for potential visitors, Ombuds offices typically include Frequently Asked Questions segments that differentiate types of disputes handled. Michigan State University's Ombuds office provides dozens of frequently asked questions on issues as wide ranging as grade appeals to study abroad policies to disruptive conduct. The office also differentiates academic versus non-academic disputes. The University of Kansas Ombuds Office website describes the catch-all safety net function of its office in answering the question, "What should be taken to the Ombuds Office?":

If you have a reason for not wanting to go through official channels, a talk with an Ombuds may help to identify alternative courses of action. For many problems, a normal procedure or route of appeal is set out in university policies and procedures. Academic advisors, department chairpersons, deans and directors are all, by virtue of their office, experts at handling specific types of problems, and should normally be consulted first. If you don't know whether there is a procedure that fits your situation, contact the Ombuds Office. (University of Kansas, Ombuds Office)

Providing information and an opportunity for voice is another mission of the archetypal Ombuds. Referring specifically to sexual misconduct, Rowe (2012) notes that “managers may feel that they must immediately take control of the disputes that come to them...[and] [i]t has become harder for ordinary line and staff managers to permit employees with concerns to have a voice in deciding how to handle the concern” (p. 13). As a result interest-based options are often formally structured “by and around the General Counsel’s office, HR, and other compliance offices” (Rowe 2012, p. 13). IOA Standard 4.1 articulates empowerment as an Ombuds’s goal, stating that “[w]hen possible, the Ombudsman helps people develop new ways to solve problems themselves.” Howard Gadlin notes (2000) that “[a]ll Ombudsman give voice to people who might otherwise be disadvantaged in their dealings with the management and bureaucracy of the institution...” (p. 38). Representing a common statement by Ombuds offices that they are a place to go for a confidential conversation without fear of retaliation, the Ombuds website at the University of Kansas describes the office’s purpose as to “act as ‘an ear to the people’ so every voice at The University of Kansas can be heard and receive impartial attention without fear of retaliation and loss of privacy” (University of Kansas, Ombuds Office, Mission/Purpose). Further, the office website includes a statement that is typical of Ombuds offices that an Ombuds “provides information,” including “maintaining resource files on campus policies, procedures, services” and “referrals to other resources” (University of Kansas, Ombuds Office, “What Does An Ombuds Do?”). Michigan State University’s Ombuds also includes links on University policies, grievance procedures, student rights, and student responsibilities (MSU, Office of the University Ombudsperson)

Yet another mission of the archetypal Ombuds is to be an advocate for fair processes generally. Section 2.2 of the International Ombudsman Association Standards of Practice states,

“The Ombudsman strives for impartiality, fairness and objectivity in the treatment of people and the consideration of issues...” This includes not advocating on behalf of any individual within the organization, and advocating for processes that are fair and equitably administered. Neutrality as fairness is a concept explored by many authors. Avgar (2011) argues that “[t]he ability of the Ombudsman to perform her tasks is, to a large extent, contingent on the belief that procedures, interactions, and decisions are all conducted in a manner that upholds basic notions of fairness.” (p. 7). As a result an archetypal Ombuds can provide for greater perceptions of interactional fairness within the organization (Avgar, 2011, p. 16).

Harrison and Doerfel’s 2006 study of Ombuds demonstrated that perceptions of unfairness can lead to escalation of grievances and negative evaluations of the organization. As advocates for fairness of process, the ideal Ombuds may resolve organizational conflicts that can't be resolved through the standard channels. Noted former Ombuds Robert Shelton equates the Ombuds role in advocating for fair and equitably administered processes as consistent with a restorative justice approach (2010, p. 24), and more broadly agrees that justice is a pre-eminent value of an archetypal Ombuds. Restorative justice “seeks to build partnerships to reestablish mutual responsibility,” and “[r]ather than privileging the law, professionals and the state, restorative resolutions engage those who are harmed, wrongdoers and their affected communities in search of solutions that promote repair, reconciliation and the rebuilding of relationships” (Suffolk University, Center for Restorative Justice, What is Restorative Justice). The Ombuds website for the University of Kansas describes as the mission of the office “[T]o ensure that all members of the university community receive fair and equitable treatment” by “receiving and attempting to resolve individual grievances on a confidential, informal basis” and “supporting systems change that advance the goal of a fair conflict management system” (University of

Kansas, Ombuds Office, Mission/Purpose). This is echoed by the Michigan State University Ombuds's website, which notes, the [O]mbudsperson seeks processes that are fair and equitable to all parties" (MSU, Office of the University Ombudsperson). In sum, the model Ombuds's mission is to provide a confidential, informal resolution mechanism that provides information and an opportunity for voice. Model Ombuds also aim to provide feedback to decision makers regarding trends and processes that need improvement.

OMBUDS' MISSIONS IN PRACTICE: ADHERENCE TO THE MODEL

In practice, most Ombuds try to faithfully serve the archetypal mission. This includes providing visitors with an opportunity for voice. For example an Ombuds said "the first thing is getting [visitors] to feel comfortable, convey to them that they're being heard, what their concern is...and we're acknowledging what they're feeling or what they're saying" (O1A8:18). Another Ombuds noted, "[S]ometimes I'll come out of the end of a case thinking it didn't go as well as I thought it would, and that person was perfectly happy that I just listened to him" (O8B52:19). Ombuds described "students who come in who just want to be heard, who just want to vent" (O3A21:31). One Ombuds provided an excellent example:

After we went through the basics, I never said another word... She went through the full range of emotions while telling her story. She went through crying, and I simply used my hand and pointed at the tissue box sitting next to her...she went through laughter, she went through everything. Then at thirty-five minutes into the appointment, her cell phone goes off, and she announces that it's her daughter and...she takes the [call] and says "I am just talking to the nicest [person] in the world...you've got to meet...I feel like we've known each other our entire lives..." [K]eep in mind, I've not said one darn word. So finally she ends the phone conversation...[and] goes back to talking about her situation...and at this point I started smiling...but I still didn't say anything. At one hour and ten minutes she gets up and says "I feel much better. Thank you very much. When do we meet again?" I had not said one darn word after the introduction the entire time, and I actually had to...follow her down the hall to simply...get some time sensitive information into her hands in case she wanted to make some decisions, but in essence it was simply one of empathic listening. (O11B58:12)

A second goal articulated by Ombuds who adhere to the archetype is to help visitors who do not know where else to go to resolve their issues. One Ombuds commented, “I’m the avenue of last resort. When a client does not know how to resolve an issue or a problem, cut through the red tape, where to go from here, then I would traditionally be the person that they would come to see” (O11A57:12). Another Ombuds noted, “I am the master troubleshooter for students on the campus...that is the role that I feel that I play...if you feel that something is not right, you don’t know what it is, come see us first. Come see us because we will then help to facilitate those conversations or get you to where you need to go” (O6A34:12).

A third goal articulated by Ombuds adhering to the archetype is to empower their visitors to resolve their own problems informally. One Ombuds noted “We want to give you the power to decide how you want to resolve this without it being given to someone outside of you and the other party like a formalized process or a legal process” (O1A8:16). In describing the limits of formal processes, one Ombuds talked about a visitor that could have gone through the formal process, “although that limits things to the one equity issue, and this is a much bigger problem that we can address informally” (O8B52:3). Another Ombuds described the goal of empowerment in stating, “I do not solve the issue, I do not solve the problem, my purpose is to help them explore options and empower them to resolve their own issues” (O11A57:12).

Many Ombuds expressed visitors expecting them to act on their behalf:

[M]any students come to me with a kind of vague expectation that I will solve their problems. That they only have to dump it onto my plate and I’ll take it from there and everything will come out fine...They’re sometimes disappointed when I don’t leap into the effort to solve their problems but help them explore things that they can do to solve their own problems. (O4B:23:6)

Ombuds who try to empower visitors do so by providing information to visitors and helping them explore options, as stated by an Ombuds who said “I think it always empowers people to be

educated of what their options are. I don't ever want to be deciding for anyone" (O8B52:27).

Another Ombuds described information as empowerment:

I operate under the philosophy that the ideal outcome in most cases will be to give the [visitor] some information...they don't currently have that will sort of empower them to go forward and solve their own problems. Oftentimes they haven't tried...and don't know that they actually have that right and responsibility, really, to try to solve their own issues. (O4A22:18)

One Ombuds described empowering visitors by encouraging them to ask for what they want:

The phrase I use is 'if mommy said no, go ask daddy until you get the answer that you want.' I think I'm the person more likely than not to say 'if you're not getting the answer that you want, it doesn't hurt to ask. You might be told no, but it doesn't hurt to ask.' Whereas other people might just say 'don't even bother asking.' (O3A21:31)

In addition to providing an informal mechanism for informing and empowering visitors, Ombuds adhering to the archetype seek to advocate for fair processes and procedures. This included, "letting decision makers know what policies are working and not working, where the organization needs to make some structural changes in the way that they run the organization" (O1A8:30). The Ombuds continued to relate fair process to efficiency: "We're trying to help the organization become more efficient in how it exercises its policies and procedures. Because some [policies] are archaic and so it creates problems to try to solve problems, but [decision makers] don't know it until someone tries to point it out" (O1A8:30).

Overall, Ombuds who adhere to the archetype articulate a goal of working within the guidelines set forth by the IOA Standards of Practice. One Ombuds stated, "I think one of the important parts of being an Ombuds is figuring out the culture of your organization and how to work within that and still be effective and still adhere to our code of ethics" (O14A63:69).

Another Ombuds noted, "You have to...be able to fulfill whatever role that the situation calls for while not breaking your principles when it gets political" (O1A8:14). Yet another stated, "I

always attempt to remember ... what the basics are supposed to be, from starting out the thing about going through the confidentiality tenants, the basic tenants of what an Ombuds does...if you stick with the basics for the most part, your interactions, even when the outcome is unfavorable, they are going to be... the interaction itself for the office is going to be a good one” (O11B58:11). One Ombuds described a visitor who wanted her to resolve their issue formally:

I talked about [formal options and told her] ‘there are plenty of people on campus that can do that’ ...and [I] referred this person to some of those people if she wanted to exercise that option. There is nobody else on campus that has confidentiality, independence, and neutrality, so if I [handle complaints formally], not only am I duplicating an existing service, I am negating the unique and essential function of my role. (O10B56:14)

Due to their lack of formal authority, managing expectations is a goal shared my most Ombuds. This statement represents the standard practice in which Ombuds “reality test” their visitors’ beliefs and help them to make decisions about what they would like to happen:

[A] lot of this is related to, you know, for a lack of a better word, “managing expectations” or preparing them for some of the potential difficult conversations in terms of understanding the full dimensions...[thinking through] their perceptions of the likelihood of success of various strategies. And success [is] defined by them according to what their goals are. Really I have to say sometimes people have unrealistic goals, more often than not, they have ill-defined goals and I think talking with us often helps them to get closer to understanding their own goals. (O2A17:38)

It took me a while to realize that one of our roles as an office is to give people the courage to do what they know they should do but they haven’t been able to get themselves to do it. It’s very difficult. (O14A63:81)

In sum, many Ombuds faithfully follow the role’s stated mission to provide an informal mechanism, consistent with the principles of confidentiality, informality, impartiality, and independence, for handling problems. In doing so, these Ombuds advocate for fair processes, strive to provide visitors with voice, and try to empower them to resolve their own problems.

DEPARTURES FROM THE ARCHETYPAL OMBUDS MISSION

Ombuds depart from the archetypal mission in order to access authority more commonly reserved for formal mechanisms. As a result, Ombuds departing from the archetypal mission often prefer to use rules and formal processes, to determine policy violations, and to actively resolve problems. These departures also occur along a spectrum, with some Ombuds adhering closely to the IOA Standards of Practice, and others more closely resembling Ombuds. In departing, Ombuds articulate a mission that is often more like that of a Title IX Coordinator. For example, often Ombuds stated a preference for formal rules and processes. One Ombuds lamented that “in a research university [academics] are used to not being rule bound...[t]hey don’t want rules and structure...[and] are much more used collegiality as they call it” (O10B56:37). Multiple Ombuds expressed preferring formal mechanisms for resolving sexual harassment or racial discrimination complaints:

Whenever we get into something that looks like it truly is sexual harassment or borderline sexual harassment or racial discrimination, I always try to involve [the formal office]. I try to get the person in my office to walk over ...and file a complaint with them, because as much as I’m willing to entertain people’s complaints about that and will promise them confidentiality, if they insist on it, I really think that everybody’s better served by going on the record with all that. (O9B54:2)

Another Ombuds described willingly participating in formal processes if necessary:

[After learning about the various options] the visitor wanted to have a meeting with our Title IX coordinator and...we all met together. Once the visitor started telling what happened, she was putting the organization on notice, saying that there was sexual harassment. I was part of that. Our professional association, IOA, does not approve of that, but I am willing to do whatever it takes to get one of these cases to come forward. (O14A63:43)

Yet another Ombuds sounded very much like a Title IX Coordinator in describing the steps they would use in order to convince a potential reporter of sexual misconduct to make a formal complaint:

[T]he first approach would be to try to help the reporter, the victim of the abuse or the assault or whatever it is, recognize that we'll protect that person from retaliation, that they came here because they wanted this thing to stop, and the way to get the thing to stop is to expose the perpetrator. Kind of basically convince the person that it's okay to come forward, it's safe to come forward, and it's in everybody's best interest...there could be other victims out there that we want to make sure that they are protected. Another Ombuds told me that we would never do nothing, we would keep moving forward until this thing got addressed. That would be my commitment. I would do whatever it would take. (O7A37:35)

In addition to often preferring rules and utilizing formal processes, many Ombuds also depart from the archetype by making judgments regarding policy violations, albeit on an informal basis. Sounding very much like a Title IX Coordinator, an Ombuds noted, "A lot of what comes in here talking about discrimination is really just I've been treated badly or I've been treated unfairly. It really isn't discrimination" (O9B54:21). The Ombuds continued, "A lot of times...I'll wind up educating people about what discrimination really is...that it's not just rudeness and incivility and disdain for people" (O9B54:16). Another Ombuds explained, "It never even crossed [the visitor's] mind that it was sexual harassment and one of the roles we play for students is that we've labeled the behavior for them. They come in and they describe and we say, 'You know that sounds like sexual harassment,' they go 'Really?'" (O14B64:33). One Ombuds noted, "A lot of times we have to check the policies and get information on what policies are and try to make sure whether anything has actually been violated. That's really the first step" (O9A53:16, 32). Often in attempting to make that determination, it conflicts with the visitor's goals:

[The visitor] came in with [a] conclusionary [sic] statement...but I wanted to probe some more to get more factual stuff...and I never got to all of that because she wanted something that she wasn't getting from me. I ...felt uneasy [when the visitor left suddenly] because I wanted to know more so that I [could] really comfortably conclude that it really was not in violation of university policy. (O7B38:13)

The effort to determine legitimate concerns is echoed by another Ombuds in describing their job to visitors:

I explain to them that my job is to sift through what you share with me or what is a legitimate concern, a concern that really needs to be addressed and attended to, and that gives me something to have a conversation about and around, and I say, this is where I can be an advocate. (O1B9:25)

The line dividing advocating for enforcement of university policies or for individuals' interests can be a fine one, and is further explored in chapter six. Beyond determining the existence of policy violations, Ombuds who depart from the archetype often express a preference for directly solving problems themselves. For example, one Ombuds described the challenge of helping visitors to reach their own conclusions:

[I]'m letting them do their spiel, affirming them...and this is probably where I'm not as successful because I want to jump in and go to the next step, but the whole thing of...asking questions in such a way that prompts the client to answer their own questions. That I still work on... (O11B58:11)

Other Ombuds more closely resemble Title IX Coordinators in directing the visitor on which steps to take, or simply taking the action themselves. For example, one Ombuds noted, "We [will generally] discuss [the issue] and I [say] to them 'based on the information you gave me I need to contact this person, or we need to do this.' [I]f we [can] resolve [the issue] by calling the instructor... I [do it]... [I]f I [do not] have a good relationship with the instructor I...call the department head" (O5A28:22, O5B29:1). Similar to a Title IX Coordinator, many Ombuds are more directive in terms of the options available and what might be achieved. Ombuds often described efficient resolution as the goal:

[My initial goal] I'm hoping number one to make it our last meeting! So my goal in any session is to basically short circuit all the other stuff ...affirming their feelings, their emotions, whatever, but [at] some point while we're doing the affirmation... [we need to] get to the point of saying 'this is the bottom line. These are your options, these are the things that can be tackled in terms of trying to address this issue.' (O11A57:27-28)

Many Ombuds expressed frustration at not being able to effectuate change:

[I]n order to get the administration to move on something they're going to do it really slowly and they're going to do it in a face saving way. So they're going to wait until a good juncture to give [the person] a soft landing, regardless of what he did. (O9B54:11)

The same Ombuds described their least favorite part of the job as “dealing with situations where it's obvious that people don't really want to fix the problem... they just want to get in there and be right, they don't want to actually problem solve...[I]t becomes a frustrating matter when people on either side refuse to work in good faith to fix the problem” (09A53:20). This is echoed by another Ombuds in describing how they handle difficult visitors:

I was very idealistic. I thought if you can get people to talk then they would really try to work to work things out, and in some cases that was true, but I found out for the ones that are a little more crafty, the ones that wanted to not compromise and get everything that they wanted at the expense of someone else...[I needed to] put them on the ropes, don't let them off as the saying goes. (O1C10:28)

Ombuds often learn to reframe their goals and their mission in order to align their work with their preferences:

[T]he person who was in the position before me was kind of miserable in the role, and I think that actually help[ed] me to not approach [this job in] the same way and...always say “all I'm ever doing is dealing with problems.” [M]y perspective...is I'm not always dealing with problems, I'm dealing with resolutions...[and] there's always a positive outcome...[e]ither you resolve the situation to the benefit of the visitor or [the person] learn[s] why it happened [to avoid] do[ing] it again. (O3A21:50)

Ombuds who depart from the archetype are similar to Title IX Coordinators in that they often take active, directive steps in working towards resolution. This becomes difficult when Ombuds must also navigate conflicting organizational goals. For example, one Ombuds described resisting administrators' preferences for student retention.

I know that from a certain standpoint there may be the expectation of administrators that we would try to keep people here, but that's not really realistic and we'll say that to them, 'that's not our role.' Our role is to help the people come here and figure out what options they have and what they want to do, and if leaving winds up being in their best interest, or at least they believe it is, we're not about trying to persuade them that they should stay. (O2A17:50)

In contrast, other Ombuds directly articulate the administrators' goals as their own. One Ombuds noted, "I really see my role as a retention role. That's a big part of it" (O3A21:60).

Yet another Ombuds described frustration at retention not being part of the faculty's goals:

To be honest my favorite part [of my work is] challenging the faculty. The faculty has somewhat [of a] privileged mentality. They act as if the sun rises and sets on [them], and their particular course is the only course of value at the institution. [O]ur faculty needs to be more flexible in how they teach [and in] understanding...the complex issues facing the students...if retention and graduation is important then providing the support to the students to be able to do that is part of what should be part of the mission. (O5A28:41)

Both Title IX Coordinators and Ombuds work for organizations that seek to avoid litigation and liability. In this context, Ombuds who depart from the archetype see the administration's goals of liability-avoidance as consistent with their own. One Ombuds noted a goal of bringing concerns to administrators "before people start leaving, quitting their jobs, before morale goes right down the toilet, before formal grievances start getting filed, or lawsuits, worse yet" (O10A55:29). This is echoed by an Ombuds who described "very public, very painful [sexual misconduct cases that led to] a determination as a campus [that] we were going to do everything possible to prevent [future incidences]" (O14B64:34). Yet another Ombuds described their goals, in order, as "[g]iving the organization a second opportunity to get it right, preserving people's reputations, minimizing litigation, [and] educating people within the organization on how processes and policies work" (O1A8:29).

Other Ombuds more directly describe a goal of protecting the institution from negative publicity:

Being preventative. Preventing potential problems that can go to the press, that can be embarrassing to individuals. So prevention is something that's valued and people... I think they don't say it, but I think it's an expectation that they would like us to prevent problems that are extremely sensitive from going outside of the organization. Decision makers prefer that it is contained and dealt with accordingly. (O1B9:19).

The same Ombuds also described the interests behind the goal of informal resolution:

[I want to] resolve problems at the lowest possible level, and that's really key there, because organizations prefer that an issue, if appropriate, gets resolved at the lowest possible level to minimize formal processes, or lawsuits for that matter, or people going to the press and saying not so nice things about people within the organization. (O1A8:23)

The Ombuds also notes a goal of making sure the administration is aware of problems that could cause damage to the institution:

[T]here are three [exceptions to confidentiality}. One is any time somebody discloses bodily harm to self or others, we can't keep that in confidence, or any disclosures of child or elder abuse, that can't be kept in confidence, and then the other, the third area is if someone was to disclose that they had knowledge of somebody's life or health being at risk, then we would have to disclose that to the appropriate authorities. Sometimes I have to make an executive decision. If something doesn't fall in those domains but if I think about it and over time it's going to do significant damage to the institution I might decide to do something with that information. But I have to be careful, because people didn't give me express permission to go forward. [So] if I [go forward it is] because I weighed it and I said 'you know, this office needs to be aware of this, it may cause significant damage to the institution'...[S]o part of my job as an Ombudsman is to give decision makers a heads up. (O1A8:32 35)

As noted above, Ombuds' stated goal of managing expectations is largely a result of lacking the authority to effectuate change. As stated, Ombuds manage expectations by helping the visitor to determine their best options. In practice, Ombuds managing expectations in ways more similar to Title IX Coordinators, by evaluating the likelihood of receiving a favorable outcome:

[A] lot of times I'll ask them what do you perceive as your preferred outcome for this, where do you want to go? And let them know if that's a possibility or not or if it's a good possibility or a remote possibility. (O3A21:29)

Some Ombuds go further and manage expectations by clearly stating their own preferences. For example:

I find myself doing this more so now, managing expectations. I'll say to [visitors] 'I need you to understand [my three values]: [First] given my role as an Ombudsman, I value the collaborative process. [T]he [s]econd value is compromise,' and then on the tail end of compromise I [articulate the third value as] sacrifice, and then I also say 'I need everybody involved to be adult and mature.' (O1C10:26)

Other Ombuds work to help visitors understand the obstacles to effectuating change. One Ombuds described their standard speech for visitors with academic concerns:

[I say] '[B]efore we even get started here in terms of looking at options, I want to give you a standard spiel that I give to many students. This is not meant to discourage you, it's not meant to diminish your hopes for resolution, but it is meant to give you an accurate appraisal, an accurate assessment of what the playing field is.' And then I launch into 'This is what we call a faculty governed university. What that means is that the faculty run the show, they have the power. 'Many times when students or clients have concerns or problems, they go immediately to the Chancellor or the President or the Provost, thinking they can resolve it. In reality, those individuals actually work at the behest of the faculty.' Then I specifically say 'From your perspective you're saying 'what power do [administrators] have?' The power that they have is one of the pocketbook. In other words, they can't order a faculty member to change their grade, they can't say 'you need to do this or that.' The only thing they can do is impact their budgets.' So I lay [it] out to them very clearly that that's what they're up against [and to avoid] any illusions that it's something other than what it is, because it isn't. (O11A57:29)

This is echoed by another Ombuds in providing a dose of reality about power and the opportunity for change:

[Y]ou may not like how things are done, or you may see things you think [are] just downright wrong, but if that person doesn't have...moral integrity and professionalism and ethics to do what's right, then they're going to run their organization in the manner that they see fit. He who has the gold makes the rules. The question becomes, can you find a way to function, to get what you need so that you can move on...[b]ecause that's the ugly reality. I wish I could paint a picture where somebody comes charging in on a white horse and save[s] the day, but we're talking about the real world and people have power, and...unless [the

leadership has] an internal transformation or epiphany...you're always going to be wondering "am I going to be given a fair shake? (O1C10:16)

In sum, some Ombuds depart from the archetype by articulating a mission that is often more like that of a Title IX Coordinator.

CONCLUSION

While the missions of the archetypal Title IX Coordinator and Ombuds are sharply distinct, in practice many Coordinators and Ombuds adopt elements of each other's missions. The archetypal Title IX Coordinator is charged with enforcing the underlying aims of Title IX, including protecting individual rights, ensuring safety and gender equity, and conducting education and outreach. A secondary goal is to avoid liability by correctly administering the requirements of the law. The goals of the model Ombuds, meanwhile, is to provide an informal process that is alternative means of addressing institutional problems, to provide an opportunity for voice, and to ensure fair organizational processes. Ombuds in practice often depart from the archetype by carrying out missions that are much more in line with goals stated by Title IX Coordinators. Departing Ombuds articulate preferences for utilizing rules and formal processes, evaluating situations to determine policy violations, and actively seeking to resolve problems on behalf of their visitors. Similarly, Title IX Coordinators often in practice pursue a mission more like an Ombuds. Title IX Coordinators often express preferences for effectuating informal resolutions, for providing voice and empowering students, and for ensuring fair processes in line with a relational theory of authority. Ombuds and Title IX Coordinators end up pursuing similar goals in order to practically solve problems and to assist survivors and alleged perpetrators to handle personally devastating situations. They depart from their archetypal missions by using relational and legal-rational strategies in handling university sexual misconduct.

CHAPTER 5: CONFIDENTIALITY

The Ombuds and Title IX Coordinator archetypes differ in how each handles confidentiality and reporting. The model Ombuds is not an office of notice, meaning that any communications made to the Ombuds would constitute making the university officially aware of the complaint and thus responsible for remedying the misconduct. The principles of the Ombuds model require that these offices maintain the confidentiality of visitors' identity and any information that could lead to their identification. In contrast, the model Title IX Coordinator is an office of notice. As we will see in this chapter, for Title IX Coordinators confidentiality is a relative concept and is not given priority over the goal of identifying and resolving sexual misconduct on college campuses. This chapter examines each model's different approaches to confidentiality and reporting by first examining each archetype, and then how Title IX Coordinators and Ombuds adhere and depart from their respective models. These adherences and departures occur along a spectrum, as some Ombuds or Title IX Coordinators may aptly be described as "adherers" or "deviators." Additionally, adherence or departure is often situational and context-specific as a Coordinator or Ombuds who goes by the book in one instance departs from their archetype in another.

CONFIDENTIALITY AND THE OMBUDS ARCHETYPE

The archetypal Ombuds model specifies that providing confidentiality to visitors is necessary in order to allow students and employees to feel comfortable asking for help or making a complaint. Noted Ombuds Brian Bloch, David Miller, and Mary Rowe believe that promising confidentiality helps people come forward (Bloch, et al., 2009):

Our experience is that only a relatively small proportion of the population is comfortable with formal actions (although importantly, some in this group are satisfied only by formal investigations and formal action). But most people, most of the time, are quite reluctant to act on the spot, or report unacceptable behavior,

if they believe this will result in formal action. This is one of the reasons why options are needed in a complaint system. (p. 241)

Patterson (2012) describes the benefits of confidentiality, provided by informal options, for encouraging the reporting of medical errors within a hospital. She argues (2012) that “[f]ormal channels punish and lock out both the workers’ ownership—reducing accountability—and suppress reporting, thereby suppressing the data needed to make improvements for the patients’ good” (p. 18). By contrast, in her view informal processes support patient safety by eliciting reports of medical errors in order “to eradicate the systemic weaknesses that promote them” (Patterson, 2012, p. 18). The informal channel allows workers to “maintain something valuable and rare—the ability to be empowered and involved in creating solutions and making decisions about process changes” (Patterson, 2012, p. 18). The informal channel empowers visitors “to make up their own minds about how to proceed on some concern, once the options are explored” (Patterson, 2012, p. 19). This self-determination is supported, according to Patterson (2012) by “non-punitive dialogue” that allow for “professional and human growth” (pp. 19-20).

As described in earlier chapters, some research shows that many people will not file a complaint without being promised confidentiality. Recognizing these deterrents to coming forward, the archetypal Ombuds model favors adherence to a strict principle of confidentiality in all communications. The IOA Best Practices (2009) states that if issues cannot be raised in confidence, individuals may be unwilling to raise them, thereby “depriving the organization of an opportunity to address issues and rectify misconduct that has not yet surfaced through other channels” (p. 7). Howard (2011a) argues that organizations need confidential and anonymous channels of communication to resolve workplace conflict and help people report misconduct.

IOA Standard 3.1 requires that Ombuds hold communications in strict confidence by not revealing, nor being required to reveal (without express permission), the identity or information that could lead to identification of any visitors contacting the office. Further, the Ombuds only takes action with the individual's express permission. The visitor is incapable of forcing the Ombuds to reveal any information, and the discretion of whether to report is held by the Ombuds. Describing this confidentiality as a privilege, the standard provides an exception where there appears to be imminent risk of serious harm. This assessment is to be made by the Ombuds. IOA Standard 3.2 specifically states that communication between the Ombuds (while serving in that capacity) and others is privileged, with the privilege held by the Ombuds and the Ombuds office, not any other person. As a result, no one else can waive the privilege.

The IOA Best Practices (2009, p. 6) states that the Ombuds may negotiate with the organization to be exempt from mandatory reporting requirements, and imminent risk of serious harm should be construed as narrowly as possible. Further the IOA Best Practices (2009, p. 6) recommends that the Ombuds publicize its promise of confidentiality, be situated in a location designed to protect visitors' privacy, and that permission to reveal information should not be provided once the issue is being handled in a formal process. Often visitors will grant permission for an Ombuds to reveal their identity or other information as they work to help them resolve the issue. Once a visitor uses a formal process, an Ombuds should not agree to release any information learned while working with that visitor.

IOA Standard 3.3 extends the principle of confidentiality to prohibit Ombuds from testifying in any formal process within or outside the organization. This prohibition operates whether the individual provides permission or requests the Ombuds come forward. The Ombuds

may provide, in accordance with IOA Standard 3.3, “general, non-confidential information about the Ombudsman Office to the Ombudsman profession.”

Other IOA Standards regarding confidentiality include 3.4, requiring that the Ombuds safeguard individuals’ identities when providing general reports to the University administration; 3.5, requiring the Ombuds to keep no records on behalf of the organization containing identifying information; 3.6 requiring the Ombuds to maintain information such as notes, phone messages, calendars, in a secure location, protected from inspection, and to maintain a standard, consistent practice for destroying these records. The IOA Best Practices (2009, p. 7) suggests that record-keeping systems and databases should be separated from the organization’s technology system. Technology questions pose a particular challenge for the Ombuds archetype, given the dramatic increase in electronically stored information. Mousin (2011) recommends a re-evaluation of the model Ombuds’s confidentiality and exploration of “proportionality in terms of balancing access and working in partnership with one’s institution and [v]isitors to clearly express what can be kept fully confidential and what can be reasonably protected” (p. 26).

IOA Standard 3.7 requires the model Ombuds to prepare reports and data in a way that protects confidentiality. IOA Standard 3.8 addresses notice directly, stating that communications made to the Ombuds are not considered notice to the organization. IOA Standard 4.8 provides that the Ombuds shall not serve as the organization’s agent. Specifically, “notice to the Ombudsman is not notice to the organization.” Standard 4.6 specifies that if the Ombuds reports trends or issues about policies and procedures, this must be done without breaching confidentiality or anonymity.

The IOA Best Practices (2009, p. 8) specifies that even in situations in which the visitor provides permission to the Ombuds to discuss a concern with a manager, the model Ombuds

should only discuss the issue in general terms and should not specify names, dates, or events. If allegations of wrongdoing are communicated, the IOA Best Practices (2009, p. 8) recommends that the Ombuds emphasize that the allegations are not confirmed as accurate. Further, adverse action should not be taken by the organization on the basis of Ombuds-provided information. The IOA Best Practices (2009, p. 8) does state that the Ombuds may elect to place the organization on notice, but should waive confidentiality regarding the specific communication made for purposes of notice. Notice occurs via the conversation between the Ombuds and the organizational representative, not when the visitor communicates with the Ombuds. As a result, there are “no circumstances...[in which] the original communication to the Ombudsman [becomes] part of the notice communication” (IOA Best Practices, 2009, p. 8).

Many particular Ombuds offices emphasize the principle of confidentiality in their documents or statements of practice. For example, The University Senate Rules and Regulations at the University of Kansas specifically provide confidentiality as a power granted to the Ombuds Office: “All proceedings in individual cases shall be held confidential by the Ombudsman unless otherwise authorized by the complainant” (University of Kansas, USRR, “Ombuds Office Powers”). Notably, this contravenes IOA Standard 3.2, which specifically states that communication between the Ombuds (while serving in that capacity) and others is privileged, with the privilege held by the Ombuds and the Ombuds office, and not any other person. The 2008 Statement of Best Practices for the University of Kansas Ombuds Office provides that the office has no power to receive notice for the University, and “all communications with an Ombuds are made with the understanding that communication is confidential, off-the-record, and that no one will be called to testify in any formal or legal proceeding to reveal confidential communications, unless compelled by judicial subpoena or

court order” (University of Kansas, Ombuds Office, Statement of Best Practices, 2008).

Michigan State University’s Ombuds website echoes this view, and notes “Information concerning any visit will not be disclosed without the visitor’s permission, absent compelling reason (e.g. , a court order or potential risk to safety)” (MSU, Office of the University Ombudsperson). Regarding notice, the Michigan State University Ombuds’s website states:

The Office of the University Ombudsperson does not accept formal complaints, or notice, for the University. The University ombudsperson may assist in the informal resolution fo concerns regarding a variety of issues, including sexual harassment and discrimination. Talking to the University Ombudsperson does not constitute notice to the University, since the purpose of the Unviersity Ombudsperson’s Office is to provide a confidential forum where different options may be considered (MSU, Office of the University Ombudsperson).

Nonetheless, the legal basis for protecting the confidentiality of communications made by an Ombuds is far from settled. No U.S. State embraces the Ombudsman privilege as envisioned by the IOA (Van Soye, 2007, p. 128). Four states (Alaska, Arizona, Hawaii, and Nebraska) grant the Ombudsman a privilege not to testify, but no cases have been brought in any of these jurisdictions addressing the issue (Van Soye, 2007, p. 129). But these state statutes allow claimants or witnesses to testify if they choose. Thus the model Ombuds in these states can refuse to testify but is unable to stop anyone else from talking about their own communications (Van Soye, 2007, p. 129). Oser (2005, pp. 295-96) notes that the promise of confidentiality is a large problem for Ombuds, as there is little case law protecting the confidentiality of communications with Ombuds, and often the level of confidentiality is controlled by the organization itself. Further, the fact that the Ombuds archetype is employed by the organization and may be fired by it creates potential problems of conflicts of interests and potential breaches of confidentiality (Oser, 2005, p. 296).

Howard (2011b, pp. 289-309) provides a detailed explanation of what the archetypal Ombuds office must do to avoid legal challenges to confidentiality and notice. As described above, the courts in certain circumstances will recognize a common law privilege that must be raised and defended in each instance. In order to avoid imputed notice and affirmatively argue in favor of a confidentiality privilege, Ombuds programs must publicize certain facts, specifically:

- 1- Ombuds claim a confidentiality privilege, owned by the Ombuds, who is the only one who can waive it.
- 2- Ombuds do not serve as agents for purposes of receiving notice.
- 3- Communications with the Ombuds are confidential.
- 4- Ombuds will create and make available a chartering document that provides for and articulates the items in this list and more.
- 5- Ombuds practice to the IOA standards.
- 6- Ombuds are independent from the administrative structure.
- 7- Ombuds do not conduct formal investigations.
- 8- Ombuds have no decision-making power.
- 9- Ombuds will not participate, and cannot be called, in other proceedings, both administrative and judicial (pp. 252-253).

The office should be well publicized and state what the office does and does not do, using, for example, brochures, posters, the website, internal newsletters and magazine articles. There should be no ambiguity and all materials should be consistent, uniform, and clear (Howard, 2011b, pp. 252-253). Howard (2011b) argues that these publications may form the basis for an “implied contract” as a means of maintaining confidentiality (p. 252-253). While the visitor does not sign anything, it is “implied” that using an Ombuds program is conditioned on acceptance of the principles upon which the office was established (Howard, 2011b, p. 252-253).

Proponents of formal reporting mechanisms see the archetypal Ombuds model’s informality and confidentiality as a band-aid for the failures in formal processes and prefer to solve the problem at its source, by improving the formal process. For these critics, the ultimate weakness of the Ombuds archetype’s confidentiality system occurs when individuals decide not to pursue their complaints. While many conflicts do not involve allegations of legal wrongdoing,

other complaints (for example sexual harassment) involve activities that go beyond mere conflict and can involve organizational liability and the violation of individuals' rights. To what extent does the Ombuds archetype's principle against reporting such behaviors and lack of notice to the institution exacerbate efforts to elicit complaints of, and prevent, illegal behavior?

Noted Ombuds Mary Rowe observes (2011) that "there are options other than a) keeping silent or b) breaching confidentiality" (p. 40). These options include discussing the facts, laws and rules, and in doing so encouraging the visitor to decide to act responsibly to prevent future harm to others (Rowe, 2011, p. 41). Further, many visitors may be willing to come forward after time has passed and circumstances have changed (perhaps they have a different job). Other visitors may be willing to provide an anonymous note to a senior manager or a compliance manager. Another option is for the model Ombuds to be given permission to act in place of the visitor, as long as the visitor's anonymity can be maintained (Rowe, 2011, p. 42). Rowe also notes that with the visitor's information, the model Ombuds may be able to instigate a generic approach, like a routine safety audit and follow-up training, and catch the problem (2011, p. 42). Another option includes helping the visitor prepare for the conversations and aid them in learning the skills necessary for acting effectively. Further, understanding whistleblower protection laws and policies against retaliation, and finding an accompanying person who shares their concerns may make the visitor more likely to come forward (Rowe, 2011, p. 42).

Ombuds like Rowe, Wilcox, and Gadlin (2009, p. 57) believe that zero tolerance policies requiring everyone to report certain behaviors may actually discourage reporting. This is because many people do not wish to be tattletales and are expected by the manager to directly deal with problems. Not wanting to get other people fired or in trouble, and not trusting the employer to do a fair investigation, "zero tolerance policies may inhibit reporting" (Rowe,

Wilcox, & Gadlin, 2009, p. 57). They also note that fear of retaliation is a common reason to avoid reporting, but that forbidding retaliation is not very effective because “few people understand or trust such a policy” and retaliation is hard to prove and prevent where “delayed, indirect, diffuse, outside the workplace, or covert” (Rowe, Wilcox, and Gadlin, 2009, p. 47).

Archetypal Ombuds are thus offices of informal deliberation and confidentiality that use the principle of confidentiality to provide self-determination to visitors as they consider whether or how to invoke more formal organizational processes that typically promise much less—or no—confidentiality.

OMBUDS WHO ADHERE TO THE PRINCIPLE OF CONFIDENTIALITY

Ombuds who follow the archetype are not offices of “notice” or compliance, and maintain visitors’ confidentiality and the confidentiality of information that may lead to identifying a visitor. Adherence to these principles includes maintaining confidentiality in difficult environments in which others are violating confidentiality, maintaining the confidentiality of e-mail and phone communications, and reporting responsibly according to archetypal model. Ombuds practicing to the archetype also provide their visitors with control over whether and how to report allegations of sexual misconduct.

Ombuds who adhere to the archetype face a series of dilemmas in maintaining the confidentiality standard. Ombuds must subordinate other values in order to maintain their commitment to confidentiality, and Ombuds are very aware of the required tradeoff. For example, Ombuds who adhere to the confidentiality standard are unable to report a sexual misconduct violation, even when it is egregious and done by a repeat violator who is a professor and is preying on vulnerable students. One Ombuds described maintaining confidentiality, even at the expense of the Ombuds’s preference for reporting:

I would hope that I could be persuasive enough with one or more of the victims here that would put them in a place where they would be willing to speak to our Title IX coordinators or the police to go ahead and file reports ...or I'd request a release from [my] confidentiality promise so I could do something on their behalf. I really do, again, think that it is a critical part of the service that I offer that it is confidential and would really protect that value, even at the risk of some others... If someone were the victim of a sexual assault and came here, I assume they came here because I was obligated to keep that confidential. If they wanted [someone to be] more active in terms of a response [the visitor] would have gone to the police or they would have gone to the Title IX coordinator, neither of whom are obligated to keep that confidential and both of whom are obligated to be more active in investigating that claim. So I really would encourage...and work with [the visitor] in terms of what it is they're so afraid about to actually [report]. [I]f they're a victim of sexual assault I would say go to the police first. I'd be happy to support them in doing that, I would even go with them if they needed me to. I'd walk them over, I'd call for them, something. Same with the Title IX coordinator if that's the way they wanted to go. I would really encourage them as strongly as I could. [But] [a]t the end of the day, if they came here because of the protection of confidentiality, I would honor that. (O4A22:22-28)

Another Ombuds's example provides a comprehensive view of how Ombuds who adhere to the archetype must do as at the expense of other values. The Ombuds first described the situation:

[O]n any...research university campus there are a number of faculty who take advantage of their positions to...develop amorous relationships with their...graduate students. One [in particular had] a habit of inviting students to co-author [something] which...is going to look really great on their resume when they [are on the job market]. [This offer always came with an] invit[ation] to engage in sexual acts...[that created] the perception on the part of the graduate student, '[I]f I say no, I will lose this professional opportunity.' I have had any number of [this faculty member's] students come to me... (O10B56:16)

Next the Ombuds described their own preferences:

I would have loved...to [have any of them be] the first one to step forward, I would have loved to say if she says 'oh, no, I don't want to go through all that, I'll just find another job,' 'You realize that by doing that you are sealing the fate of somebody else that's going to be in here, and the next person he's going to proposition, you realize that, right?' ... I'd like to be able to say that, but I can't in my role. (O10B56:30)

Then the Ombuds explained when it is possible to raise the issue:

I have been to both the chair of [the] department and the dean and I have told them, not during the time that anyone that I'm aware of is actively being solicited, but I'll wait for the last person to see me to leave, and then I'll go [talk to the department chair and the dean]. (O10B56:31)

What the Ombuds communicated to the chair or dean is next described:

[L]ook, over the last [number of] years I've had [a number of] different people come to me and tell me this general kind of story about [this faculty member's] behavior...Now I don't do investigations, I don't apply lie detector tests, but [those numbers of people] telling me an almost identical pattern of behavior...? I am concerned and I hope that you are too...that sooner or later one of these people is going to take one of the formal options I'm [telling] them [about] and [that will result in] an investigation, embarrassment, and hassle that could be avoided if this...behavior were to be altered. So whether there's any truth to these allegations or not, and I'm not saying there is, I'm just saying that even if they're all made up, my job is to tell them that one of their options is to go to the [formal] office and file a charge and ultimately to the [government]...and [that will result in] federal investigators poking around...and I assume that you would prefer to avoid that. So I just thought you'd want to know. (O10B56:31)

Finally the Ombuds noted how they maintain confidentiality and also impartiality in the face of very difficult circumstances:

The hardest part of this job is knowing that in the next year or two there will be another one of [the faculty member's] victims in my office, and there's an innocent person out there who may not be in the program yet who's going to be victimized...if somebody doesn't stand up and stop it. The only people that have...[the] standing to do that is a victim. I will tell people, '[I]f you choose to leave...you'll be out from under this person's control, please consider writing down your experiences and sending them to the dean or appropriate individual so that some kind of record exists'...but frankly, that almost never happens...[T]hey want to start a new chapter in their life and put this behind them... But yeah, my preference is that these people stand up to these victimizers and call them out for what they are and put them and the people responsible for their behavior on notice so that we can reduce the chances of future innocent victims. Do I ever make a consultee aware that that's my preference? Absolutely not. That would not be being neutral on my part. (O10B56:22)

Ombuds who want to stop egregious sexual misconduct may only report under an exception for danger of imminent harm. One Ombuds who noted, "I would not be comfortable with [reporting while keeping the visitor's identity anonymous], unless there [is] imminent risk

of harm to somebody” (O11A57:33). Sexual misconduct in particular presents a significant challenge to Ombuds’ confidentiality and determining when there is imminent risk of harm. Again following the archetypal model, an Ombuds noted that risk of serious or imminent harm must be understood narrowly: it “can be harm to oneself or someone else [but] typically we are more concerned about...someone hurting themselves. [T]hey will mention they’ve thought about suicide and those sorts of things and you have to quickly coordinate [support for them]... I have [also] had someone make a terrorist threat in my office...” (O8A51:12).

When Ombuds maintain confidentiality they often also must sacrifice the goal of stopping misconduct. One Ombuds described educating his or her visitor about their options but secretly wanting the person to report the misconduct:

[W]hen a difficult case comes forward, and I would say that sexual harassment is to me the hardest, I want it to be reported. I want the behavior to stop and I do everything I can to educate my visitors about what their options are... That’s problematic in our field because if you take sexual harassment as an example, if we report it, or we come forward with the information or even part of the meeting where someone else talks about it, we’re part of putting the organization on notice. From a purist[‘s] point of view, Ombuds are not supposed to do that. (O14A63:42)

Ombuds who adhere to the confidentiality standard also must make a tradeoff in terms of providing access and in communicating efficiently. Given the tenuous ability to maintain the confidentiality of electronic communication, many Ombuds do not use e-mail or even communicate with visitors by phone, both common ways to have quick and effective communications. Here an Ombuds described the challenge of utilizing e-mail and adhering to the IOA Standards:

One of the great conundrums of our profession right now is the use of e-mail [and it is] underappreciated by many in our profession as a gross violation of confidentiality...[A]ny email that has ever gone through one of our servers on this campus still exists in its entirety and is available to any number of IT personnel who are conducting maintenance or otherwise have clearance to get at it, and

available to be subpoenaed by the court as evidence in any kind of [proceeding]. So every time we use email we can no longer ensure confidentiality. We certainly have an obligation, therefore, not only to discourage [the use of e-mail] but to inform our users...and I think we need to give some more thought very deeply as a profession to whether we [use e-mail] at all, because it is not consistent with one of the four main pillars of our code of ethics and standards of practice. (O10A55:18)

Another remarked:

[E]-mail [is] not confidential, if anybody wants to pull records later, if they go through a grievance later they can [access that information] so I discourage them from [e-mailing me] unless they're just going to shoot me an email to say '[W]hat's a good time we can meet?' But even then, [that creates] a record...that they [visited] my office. Even in my calendar I try to just put first names. (O8A51:24)

Ombuds who adhere to the archetype often develop special arrangements for handling e-mail:

We're part of the university email system, but our system is not backed up by the university...so our emails are not backed up, but our emails go through the campus system. We tell people all the time 'we can't guarantee the confidentiality' of [e-mail as] [w]e don't have control... people give us their private email addresses, but it doesn't matter. (O14A63:56)

I've eliminated the email address from all our communications because people start spilling their guts in writing electronically and then that record never dies. (O7A37:14)

Many Ombuds discussed the lack of confidentiality of e-mailed communications. One noted, "[A]most all the time, we'll say '[W]e need to talk by phone or meet in person.' We won't give any information by email" (O14A63:54).

Other Ombuds who adhere to the archetype will not speak by phone with individuals about their concerns. One noted, "There [is] absolutely no way for me to know [whether or not a conversation] is being recorded so the only exception I'll make [and speak by phone] is if someone [lives far away]...but I make it very clear that I'm making an exception" (O11A57:25). Ombuds adhering to the standards must preference confidentiality over the access and efficient communication that occurs through phone or e-mail.

Ombuds who resist organizational efforts to encourage reporting even must subordinate their professional reputations to their commitment to the Confidentiality standard. They also potentially endanger the perceived usefulness of their Ombuds offices. With increased pressure favoring a collaborative institutional approach to identifying and addressing sexual misconduct, protecting confidentiality is increasingly a challenging for Ombuds:

It's really rare that I feel that I can go to my colleagues around campus and allied offices and talk about a situation because, again, I would have only had one or two visitors and I just don't feel comfortable [being able to protect confidentiality], so it [does not identify anyone]... actually in one of our worst campus situations it was a specific department that was a problem. I heard one complaint about it. It turns out that my colleagues had also heard complaints. If we had sat around in a room and talked about it we would have all said 'yes, this department's a problem' But I don't feel comfortable initiating that. (O14A63:46)

Other Ombuds also described the difficulty of collaborating and protecting confidentiality:

Even if I don't use [the visitor's] name on the phone, the [visitor] is going to go right over [to that office] and engage in that procedure. [The personnel in that office will] assume it was that [visitor] that I called about...[and]...that compromises confidentiality. (O10A55:22)

Given the lack of certain protection for confidentiality, Ombuds are often dependent on their institutions' acting in good faith to uphold the promise of confidentiality: "[My] [u]niversity basically says '[Y]ou are not an office of notice and the University is allowing you to offer confidentiality to the extent permitted by law'" (O9A53:14). Often Ombuds practicing to the archetype must defend against being required or mandated to make specific reports that will put the institution on notice:

I was vehemently opposed to being a mandated reporter. In fact, my arguments were persuasive and the university has agreed that I can be a confidential [office], even in regard to [sexual misconduct]. (O4A22:31)

Because the...cornerstone of ombudsing is confidentiality...[i]f you don't have confidentiality and you're not off-the-record and informal there's no reason to

have an Ombud[s] Office...So I honestly would resign in protest if I had to [be a mandatory reporter on issues of sexual misconduct]. (O12A59:29-30)

Ombuds also subordinate their professional reputations to the confidentiality standard by not speaking publicly to counter incorrect statements or misperceptions. Ombuds described the challenge of not being able to speak publicly about cases:

[By] the very nature of the work...the only time you get [press] is when something goes wrong...because if things go well and you solve the problem most people don't hear about it. If you're in the middle of something and it blows up, then everybody hears about the bad stuff that blows up.... But I can't say to everybody on campus, '[T]hat's not what I [said]!' [If people] say, 'So and so told me that someone in particular has been to see you and [this is what you told that individual]...', I can only say 'I can't confirm or deny that I've talked to [anyone], but if somebody came to me with that problem, here's probably what I would say to that person.' (O9A53:15-42)

Further, because of Title IX requirements and the resulting institutional interest in reporting all known instances of sexual misconduct, Ombuds who refuse to report violations may be viewed by other administrators as an impediment to stopping sexual misconduct. Ombuds who adhere to the confidentiality standard and who do not serve as an office of notice often must sacrifice their professional reputations. One Ombuds described helping a visitor think through the confidentiality of a situation and how the administration might see the conversation:

[I will say to visitors] 'Is there a risk of retaliation? What might happen to you if he or she can put two and two together'... We're not an...office of notice [and] I think our [administrators] would say, 'Oh no, don't say anything that might discourage [visitors] from coming forward.' (O1B9:39)

Ombuds who adhere to the archetype do, however, make some reports to the university. The question of when and how an Ombuds may reveal communication is fundamental to the role itself. Ombuds who follow the archetype draft an annual report detailing numbers of cases falling into general categories specified by the International Ombuds Association. These reports may not provide any information that would identify a visitor, for example: "[Any]

things...specific to a particular procedure or particular office [are] not report[ed] publicly in my annual report... I do report the number of [cases by type] but I do not specify...what individuals or departments were involved” (O10A55:5). Another Ombuds noted “[Not using] any intake form for visitors to complete, and in terms of [personal] demographics it is visual, whatever I see [to avoid records and maintain anonymity]” (O7A37:43). Many Ombuds adhering to the archetype also provide periodic feedback to administrators on trends and potential process improvements. For example, an Ombuds described “meeting with [the president] quarterly to...talk about the state of the campus [but] [w]e don’t [provide] any information about our cases at all” (O14A63:31).

Ombuds who give priority to Confidentiality often must do so as a detriment to developing relationships. One Ombuds described being careful in conversations not to breach confidentiality as any communication from the Ombuds to university agents capable of receiving notice does put the institution on notice:

I think that an Ombuds always needs to be aware that unless they're talking to another Ombuds person, talk[ing] with [others] may [constitute] ... notice if they talk about certain things. (O12A59:25)

Another Ombuds noted the challenge of working at a big university in a small town:

I think I’m excellent at confidentiality, [but here it is] a situation where I have neighbors on my block who work at the university, everyone I meet is affiliated... there’s no one I [can] talk to about anything I’m doing other than [with] people [who work] in my office. I...get questions about it all the time...even[from] people who [understand] the [functions of an Ombuds] office [but still] say ‘Can you tell me about this case?’ Someone [will] read an article in the paper and say ‘Are you involved in this?’ Constantly people [are] asking me if I [know] something about [a] situation and I’ve got to figure out appropriate ways of responding. (O14A63:14)

This observation is echoed by another Ombuds who stated, “When they see [me] walking around...the[y] look [at me and seem to say]...‘I wonder what [he or she] knows.’ And if they

did something they know [was wrong]...they're wondering "I wonder if [he or she] knows about something that I don't want them to know" (O1A8:42).

While maintaining confidentiality requires tradeoffs, Ombuds who adhere to the confidentiality standard also protect impartiality and informality and support other values, such as trust, safety, reputation, and self-determination. An Ombuds described their informal process providing confidentiality and control as key to establishing trust with visitors:

I think...she felt like it was a place she could trust, that it was a place she could go, have a confidential, off the record discussion, and brainstorm with someone who knows the university policies and procedures and could advise her on the policy and what to expect and that type of thing. And I think it really helped her to be able to talk to someone without fear that it would not be confidential. I think she did fear [a lack of] confidentiality...[and] it meant a lot to her that she had a place to go...without giving up that control, and that that she had time to decide...to process and decide what she wanted to do.... It felt safe to her and she didn't have to feel like by coming to me it would automatically get reported...I do think the brainstorming process and just letting her have some time was beneficial. (O12B60:11)

Another Ombuds clearly articulated the same benefits, but by distinguishing the informal Ombuds practice from more formal processes:

You can't have it both ways. If you're not going to be an agent of notice, and you're going to participate in formal [processes]... you start crossing lines, you do not have the right to claim no notice and you are not really Ombudsing...Many of the people who come to me to talk about sexual harassment or racial discrimination come to me first and foremost for a reality check. "This happened to me. It feels like that. Does that make sense? Is that rational? Do you think someone else to whom this had occurred might feel that way?" Those are what draw people here, and if they have to compromise their confidentiality and provide notice and [be forced into] formal [processes], just to get those questions answered, they're not going to come. They want a safe place to come and discuss first, to use the words that some of them use: "Am I crazy, or is this sexual harassment?" And then a safe and trusted place to come to say, "Ok, if I wanted to do something about it, what are the kinds of things I might consider doing?" Without obligating themselves to do any of them. And those are two functions that we as ombudsmen can perform only because we are not agents of notice and we are confidential. (O10A55:31)

Many Ombuds described safety as the reason they would only report on an individual situation if the visitor provides them with permission:

[I]f someone came to me about a sexual harassment issue and didn't want to deal with it until they left the organization, either graduated as a student or got another job or something like that, and then they gave me permission to go forward, I would figure out a way to do that even if it's just one person. Sexual harassment, you don't peck at numbers, 'it's just one.' But if I [do not have permission, and I] have to maintain... anonymity, I'm never going to be able to go forward [because] the situations are too unique. It's really...99.9% of the time, all I can do is try to work with my visitor to try to see if there's a way that they're comfortable going forward themselves...I just feel like that person is very vulnerable and I can't do anything to endanger them. It really ties my hands... I don't think I've ever been in a situation where I felt I could provide enough anonymity for my visitors that I could go forward with those issues.
(O14A63:39-48-49)

Ombuds widely discussed their views on how and when they might share confidential communications, with many discussing the level of anonymity necessary in order to make a disclosure. One Ombuds commented, “[T]he only way we can [report], and I think it would almost never happen with racial discrimination or sexual harassment, is if we had enough complaints that we felt we could go forward with the report without identifying any individual visitor. It's extremely rare that that happens in my experience...because typically it's only one person who's being affected at a time” (O14A63:38). Another Ombuds who adheres to the archetype indicated only reporting on general trends:

[I would report] by provid[ing] upward feedback to the [administration] about trends and patterns...without revealing any information...about the visitors or a potential respondent” (O12A59:18). The same Ombuds further notes, “If it's an isolated incident, I won't report it. And I don't know where that line is honestly, but when I feel it's a trend, [and] I feel like I've heard enough of the complaints...I can say to the Dean, 'I've had several students come to me and here is the theme that I'm hearing. This...might constitute a pattern or trend, and...you might want to look into [the situation]. But know that I have not talked to the [unit director].’ And saying it in that way, there's no way that the Dean would know who came to see me, and who they came to see me about. Especially in a big unit, you know, that deals with students from all over the university.
(O12B60:36)

Reporting on general trends becomes even easier for the adhering-to-the-archetype Ombuds when the issue is one of policy or procedural irregularity:

I would certainly bring [a systemic issue] to the attention of the people I report to or to the unit... even if it's sexual harassment. If it is a problem with the policy and it's not a problem with a certain person...I would certainly bring [it] up to the person who deals with sexual harassment... (O12A59:26)

An Ombuds described confidentiality and the trust and safety it engenders as a motivating factor that leads people to seek out the office:

Well, I know why they came to me; they came to me because I'm trusted. They knew it was a safe place to come and that they wouldn't be outed and that their confidentiality would be honored here, and there [is nowhere else] on campus where that is the case. (O10B56:8)

I've said this to our Title IX Coordinator: There are issues out there that you're never going to find out about because people are afraid to come forward because they can't go someplace and just talk about it and feel safe about having that conversation. (O7A37:58)

Maintaining Confidentiality and building trust is also a way for Ombuds who adhere to the archetype to develop reputations as safe, reliable offices to bring concerns. This is especially important given misconceptions about confidentiality are commonplace, as indicated by an Ombuds who explained, "There are misconceptions about confidentiality. A lot of people think that we automatically call the supervisor involved or [other formal office] and we'll report things" (O14A63:75). Another Ombuds discussed the importance of building a reputation for maintaining confidentiality:

[I]f you're one step removed from the back channel that has a lot of control over information going upwards or not at all, then you're not compromised by it. But it's dangerous because this is where knowledge is power, and people want to know what you know, because if you maintain your confidentiality, your principles and your self-discipline, you don't divulge who comes to your office, what is said, [and] people know that's your function. And they know you're not one to talk. Using backchannels can risk all of it. (O1A8:41)

Maintaining confidentiality can also be a means of ensuring impartiality, as indicated by one Ombuds:

I explain [to visitors] that I don't keep records and if they want me to read something I will, but [afterwards] I'll either shred it or give it back to them. So I'm really clear about that. And I explain one of the reasons is because we are neutral and I don't want to have documents that could result in having to become a witness in [a formal process]. That would mean I'm not a neutral person. I would have to be on one side of a case or another. I don't want to do that. (O7A37:42)

Another Ombuds echoed the advantage to impartiality of maintaining confidentiality:

I would not report...without their permission, nor would I name the individual about whom a complaint has been made multiple times... I'd use...the generic option...[of] going to an administrator with responsibility over the alleged harasser, and suggest that some sort of training effort might be advantageous for the entire unit. But I think it's important that Ombuds remain neutral and not be in [a] leading the lynch mob kind of role. (O2A17:19-22)

Ombuds who adhere to the archetype provide the visitor with control over confidentiality and support the value of individual self-determination. Remaining impartial while providing the visitor with control is described by an Ombuds:

I [have] never...reported something [to send it through a] grievance procedure [because I have] never seen anybody win their case. I don't want to say that I deter people from [formal options], what I do is I'd recommend that they talk to the [formal personnel] confidentially to get a feel for what that process might be like, and then decide if that's something that they'll want to do or if it's something that I can help them out with. [Right now the formal process is]...a system of frustration for students and staff and faculty to utilize [as] I've never seen any[one] [win a case against a victimizer]. (O8A51:40)

Another Ombuds echoed providing the visitor with control over confidentiality:

[T]here are times when students feel like '[I] can't talk to my professor about this because of retaliation.' [I]t really depends on the circumstances as to how I respond... [m]any times...I might even suggest '[O]kay, can you live with it for the rest of the semester and then at the end of the semester if [you feel] you [were not treated] fairly, we can pursue [options] then.' If that's what[the visitor] feels more comfortable with...I'm not going to force anybody to do anything they don't want to do. (O3A21:42)

Helping visitors explore potential options without requiring them to pursue any particular avenue is a common activity of Ombuds who follow the archetype:

I'm really showing [the visitor] '[L]ook, I'm not...naïve, I understand [that the] politics and people...can get nasty. The institution can only protect you to a point. So I want to make sure that if you want me to go forward, and I'm more than happy to go forward, ... you're thinking about all the other angles that you may not have thought about. (O1B9:39)

Another Ombuds noted, "I just talk it through with the visitor to see if they have any other ideas about how [they might come forward in a way that is acceptable to them]...so I do hypotheticals [but] I do not have any kind of rules written down or anything like that" (O7A37:45). Ultimately the same Ombuds concluded: "I find that...a lot of people...are bothered by something but they [are not exactly sure what it is]. [Visitors] just [want] a place to figure [it] out... without worrying about having to [take the issue further] if they don't want it to" (O7B38:4).

For Ombuds who comply with the archetype, discussion about options includes both informal and formal methods. The following Ombuds described how confidentiality impacts the ability of Title IX Coordinators to provide informal coaching:

One distinction, one important distinction is that in the course of [a] conversation, if [you] say for example, '[H]e made a sexual gesture towards me,' [the Title IX Coordinator] may be obligated...to respond to that [and force you into a formal process]. Well, I can hear [those things] and have [a] conversation about options [but] leave [you] in control of how...to proceed. (O13B62:8)

For many visitors, deciding whether or not to use a formal process is not an easy decision. One Ombuds described having hypothetical conversations with the Title IX Coordinator about whether a situation might be handled through informal means. The visitor then agreed to meet with the Title IX Coordinator with the Ombuds present to talk about formal versus informal resolution options. The Ombuds described talking with the visitor prior to that meeting and the outcome of the situation:

I told [the visitor]... ‘[The Title IX Coordinator is] not guarantee[ing] an informal resolution. No one could do that and the best guess [of the Coordinator]...hearing my hypothetical about the situation was that...there is a reasonable chance that [the situation] could be handled informally.’ So [the visitor] knew there was a risk [and] we discussed this over the course of [a number of] weeks because [the visitor] was very, very leery about going forward... If someone can't move on from a bad experience then I feel like it [is an Ombuds's] role to help [the visitor] figure out what they need to do so they can move on, and [this visitor] couldn't let it go. You know, lots of tears and it was really affecting [the person's] health...to [the] point where [the visitor] was willing to take the risk of talking to people who could do something about the situation. [We met with the Title IX Coordinator and after hearing the situation] they forced [the visitor] into the formal [process]. It's really hard. (O14B64:10)

In sum, Ombuds who adhere to the archetype seem deeply committed to the principle of confidentiality, even though maintaining this commitment requires a tradeoff of other values like relationships, access, efficiency, reputation, and stopping egregious behavior. Maintaining confidentiality also protects other standards like impartiality and informality and supports values like trust, safety, reputation, and self-determination.

OMBUDS WHO DEPART FROM THE ARCHETYPE

Ombuds who depart from the archetype often serve as notice to the institution, both in their ability to receive notice and in reporting in ways that violate confidentiality and anonymity. Sometimes these departures arise from misconceptions about Ombuds' confidentiality obligations. For example, one Ombuds noted:

[A high level administrator] “walk[s] down...to my office with a student in hand, knock[s] on the door, and say[s] ‘[W]e have...a problem here, we need to resolve this.’ You [have] a problem then because you [have] a [confidentiality] violation. They are supposed to say ‘[H]ere’s [information about] the Ombuds...he or she may be able to assist you,’ and they should never know that the student has actually visited me or not. (O11A57:14)

One Title IX Coordinator, when asked if the Ombuds ever brings “hypothetical situations” to their attention noted, “No, I think they’re pretty experienced so they know when

they need to [bring something directly to our office]” (T4A24:24). Ombuds also described visitors’ expectations about confidentiality:

Most people think, almost invariably, when people come to me about discrimination, that they’re coming to get something on the record. In fact, about a third of the people that come through the office think they [are] putting something on the record, even if it’s not discrimination or harassment. They want me to make note, put it on the record, put it in [my] files because down the road when they are fired or something else happens [someone will know] what happened from their perspective. What I tell them is ‘[I] don’t keep records, and I’m not going to be able to corroborate your version of events, [but] if you want... this information on the record but not in the public domain, put it in a letter and send it to yourself certified mail, and don’t open it. And there you’ll have the events recorded and dated if you need documentation in the future. (O9B54:6)

Sometimes universities require Ombuds to report any instances of sexual harassment that they learn about. This policy directly violates the norm of confidentiality and places the Ombuds in a difficulty position:

[Mandatory reporting is] the nightmare for an Ombuds Office, and there are [many] Ombuds offices who have to deal with this... if a sexual harassment complaint is reported we have to report it [and] put the campus on [notice]. So basically the university is being put on notice...by the visitor coming to us. I am willing to live with [not having options for sexual misconduct because] we can still be helpful to someone who has experienced sexual harassment by giv[ing] them information...and support[ing] them in all sorts of ways...It does put limitations [on the office] but frankly given the alternative [of having no office at all], that’s fine...it’s not a perfect world here. (O14B64:37-44)

The Ombuds continued describing the situations in which the office may informally handle issues of sexual misconduct:

[W]e cannot [resolve sexual harassment issues informally] without asking permission from the Title IX Coordinator. We must call [the Title IX Coordinator] and [give]...a [hypothetical] description of [the] situation. We don’t have to give names or identifying information but we could just say, ‘Here is the situation, would you be comfortable if we try to resolve it informally?’ The last positive outcome...was several years ago before [these policy changes] because I wasn’t required to call [the Title IX Coordinator] at that point. (O14B64:29-30)

A policy requiring even the Ombuds to report all instances of sexual misconduct appears to be common. One Ombuds noted: “I know some Ombuds offices have to report sexual

harassment but to me that's against the standards of practice and what's the point of having an Ombuds office if it's going to be treated like a formal office” (O12A59:28). Another Ombuds described their general counsel as “not feel[ing] good at all about the privilege of the Ombudsperson, and of course most forms of harassment are not illegal...but you’ve got to go with [what] each organization and general counsel feels comfortable with” (O8A51:12). This observation is echoed by other Ombuds who have an organizational obligation to report issues of sexual misconduct. For example, a Title IX Coordinator explained when a visitor’s statements must be reported:

[I]f it’s something that I really do need to know about, [the Ombuds] will advise [the visitor] that they...speak to me or, depending upon the nature of it, there’s a duty for [the Ombuds] to report it if it [is] something...illegal or immoral or indecent the Ombuds [has] to report it. (T4A24:23)

Another Ombuds described telling visitors:

[I]f you tell me something that suggests risk of imminent harm to yourself or to another person I’ll have to...do something about that. If you told me something that triggered a legal obligation for me to report, I don’t use the words ‘agent of notice’...I have no other alternative and there’s no way I can surface the issue without identifying the person who disclosed it to me. [C]onfidentiality is really important to this office and I would do everything in my power not to reveal that information if I could. (O7A37:35)

An Ombuds added, “if there’s anything that comes to me that is sexual...or that is clearly reportable, I need to report [it and] I do contact our [Title IX Coordinator] to let them know (O6A34:14). Ombuds who are required by their universities to report instance of sexual misconduct often seek to limit this obligation:

I used the hierarchical arrangement as my justification for not reporting [sexual harassment]. I didn’t want to [report] unless I absolutely had to. If push came to shove and for some reason we ended up in litigation or something like that I would have taken the position that I didn’t tell anybody because I didn’t see it as... [involving a] power disparity. (O7B38:6)

Other Ombuds depart from the archetype by participating in informational meetings with other formal offices. A Title IX Coordinator described periodic meetings with general counsel, Title IX, other formal offices, and the Ombuds where everyone “[J]ust...[go]es around the room and talk[s] about what’s going on, cases in a general sense, just kind of bounce things off [one another] so we’re in the loop on what’s going on” (T13A49:15). Other Ombuds discussed working with formal offices “to direct each other to get the information that we need, if it’s something we feel we can’t technically share...how can we work together to say ‘[I]s this someone who you’ve made claims of before? [T]hat’s when the offices work best...when they work together” (O8A51:46). Another Ombuds noted:

I can go to [the formal office] and say ‘are you hearing from the staff in this department too? Is there anything we can do, maybe we can go talk to the director of that area. Which one of us has the best rapport with that person to give them a head’s up that there’s something brewing...that they might want to look at.’ (O10A55:29)

Some Ombuds report to an upper level administrator and have administrative functions, but yet do not see themselves as offices of notice. For example, one Ombuds, despite reporting directly to a member of the President’s Cabinet and having a “very close knit” relationship, stated that “[N]otice would have to go either through our Dean of Students office or through our legal counsel” (O6A34:25). The Ombuds then clarified that “[t]he privilege of confidentiality belongs to the office rather than the client or me. When I’m acting as the Ombuds, I have the privilege but it belongs [technically] to the office” (O11A57:35).

Many of the examples discussed above illustrate how Ombuds respond to pressure from superiors to give a report, thereby violating the archetype by breaching confidentiality or failing to protect the anonymity of their visitors. For example, one Ombuds noted formal offices “call me...and they ask me if somebody’s come to [my] office [and] I...let them know...which

completely goes against the standards of practice. If I would say ‘I can’t tell you, I’m not going to tell you,’ that would not go over very well” (O7A37:27). Another Ombuds explained, “If there’s something going on that looks like it’s going to escalate in a college or a department, [the president] likes a heads up... [i]f it doesn’t violate confidentiality, ‘Five people have come to us from [this] department” (O9A53:18). One Ombuds talked about situations in which a professor does inappropriate things in class, which creates an uncomfortable environment: “[W]hen that has happened, and it’s been reported to me by more than one student, or even [a] faculty member with very specific information, I’ve shared that with the chair of the department” (O3A21:23). For another example, a Title IX Coordinator reported hearing rumors from faculty members, but “I didn’t know who and I didn’t know what exactly...[T]hen the Ombuds came to me and gave me the who and the what and I took it...from there” (T11A45:60).

In many such situations the practical question is how many complaints constitute a trend so that an Ombuds may feel comfortable reporting the trend without compromising the identity of any particular visitor. As we have seen, Ombuds who follow the archetype often navigate this key question by utilizing non-specific hypotheticals when seeking information from formal offices. Ombuds who depart from the archetype give priority to stopping misconduct or adhering to organizational directives for reporting, rather than confidentiality and visitors’ anonymity. For example, Ombuds described providing hypotheticals: “[W]hen I have...conversation[s] with our [Title IX Coordinator], I’ll [provide] a list of three hypothetical offices, with one of them being the actual office... [The Coordinator] may have already heard which one it is, but either way [The Coordinator] tells me that it’s very helpful” (O13B62:20). Another Ombuds noted the point at which they value stopping misconduct over adhering to the archetype:

[W]hen multiple people have reported to me...when I see the same thing from a few different perspectives, I'll begin to believe that there might be something going on, and I might say to a department chair, '[Y]ou know, I don't know that this is really true, but you might want to sensitize yourself to this, there might be something out there. (O3A21:21)

Other Ombuds described wanting "to make sure it's a pattern first, not an individual incident"

(O8A51:18), and then telling [the Title IX Coordinator] "You've got to investigate" (O9A53:58).

Ombuds also talked about breaking confidentiality after the fact:

For the most part I have absolutely no idea how many of these things have [been] resolved, and from that angle I will occasionally follow up behind the scenes...to see whether there was some type of resolution... (O11A57:30)

Another noted breaking confidentiality to take credit for a successful outcome and thus build their professional worth:

[E]verything that I had recommended to the student, unbeknownst to me, the student followed through [with] in terms of...making [it] happen. I specifically [told] my boss, '[E]ven though there's no mention of the Ombudsman...this started in [my] office and I will unabashedly take credit for it.' (O11B58:9)

Perhaps paradoxically, examples indicate Ombuds often breach confidentiality in order to build relationships:

[L]istening to some of these things [and] not being able to share confidences... although I [have] follow[ed] up with the [Title IX Coordinator] to say, 'this student brought [an issue] to my attention that your office handled, [because the student was upset] that there was no response that was helpful.' I [try not to be critical because I] need them to want to send things to me. (O8B52:22)

What I find to be most effective is if there's certain issues that I see as a trend, instead of putting it in the report, I'll go to that person and say 'You know, Professor so-and-so or Dean so-and-so, over the last six months or so, these are the trends that I'm seeing that impacts your department.' You have a captive audience because you're speaking to them. And I just see the value of, it takes more time to do that, but gosh, it pays such huge dividends because you have a relationship and you took the time to say... '[T]hese kinds of things are coming out of your office.' And when you walk away...you kind of endear yourself...they feel like '[M]y God I have someone who's really going to give me some information that I might not have been aware of.' (O1A8:63-66)

The Title IX Coordinator is an attorney...[who] takes a very legalistic approach... [and] is not one of the people that I can go to and say ‘have you been hearing things about [this] department? What’s going on over there? Have we got a faculty member losing it over there? Do we need as an institution to think about stepping in and doing something over there? Would it help if I went and talked with the chair or you went and talked with the chair?’ [There are a few staff members in these offices] with whom I have a relationship like that...[but their bosses] don’t know it. [The staff] trust me and know that I won’t out them and need my input, because what’s happening in the classroom is very useful for [them], who then based on what I have heard from students about this faculty member [can take action]. (O10A55:28)

As the following quotation illustrates, Ombuds often wrestle with the boundaries of when it is appropriate to share confidential information in cases of sexual misconduct or discrimination:

All we can do is try to encourage the person to go forward to [the responsible] offices. We’re not [mandated to send cases there but] that’s a dilemma that I sometimes struggle with...if a name keeps coming up, then that’s when I...struggl[e] with do I go to the office that’s mandate to look into it? I hear [concerns about retaliation] a lot. And so...[I] wonder, should I say something? Should I do something? And I have to weigh it case by case. Most times we can get people to go to those offices, because they trust us. (O1A8:68)

Other Ombuds are clear about their confidentiality boundaries, “As far as sexual [misconduct], which I would consider a serious crime, I say I can’t guarantee confidentiality” (O8A51:52).

The lack of certainty regarding confidentiality and the lack of control provided to visitors was often cited as a reason for declining numbers of visitors. For example:

We’re not getting as many people coming to this office because we can’t provide them with a level of confidentiality that would ensure that if they don’t want the information disclosed if they were to report sexual harassment, for example, that we would be duty bound to respect that. I believe that’s one of the reasons...they don’t come to our office because we can’t offer them that blanket confidentiality that they’re looking for. (O7A37:22, O7B38:1)

Ombuds who depart from the archetype undermine visitors’ self-determination as to whether to use formal processes. Many Ombuds do not offer a choice and directly refer visitors to the Title IX Coordinator. Other Ombuds attempt to secure their visitors’ permission to report

or to report the information anonymously. Often in doing so this “anonymous” information makes it possible to identify the individuals involved. All of these activities breach confidentiality and do not adhere to the archetype.

For example, an Ombuds noted, “Any time I’ve dealt with [sexual misconduct] I’ve worked to get [the individual] to the [Title IX Coordinator] and file a complaint (O3A21:21). Another Ombuds explained, “[I]f it was a [sexual misconduct] case...I would direct them to the [Title IX Coordinator], but I would also say to them ‘[I]f you would like for me to contact them I will ...let them know you will be coming’” (O5A28:16). Ombuds also often expressed this view: “Certainly if I think [a case] should be going through the [Title IX Coordinator] I would send them over there...” (O8A51:34). This is echoed by another Ombuds: “We [can] explore the different ways to surface the issue, but ultimately I would make it clear [to visitors] that [sexual misconduct] did have to [be reported] for [everyone’s] benefit” (O7B38:11). Often Ombuds make decisions about when to report that fall outside of their reporting requirements:

[W]hat we can’t keep in confidence, there are three basic areas. One is any time somebody discloses bodily harm to self or others, we can’t keep that in confidence, or [Second is] any disclosures of child or elder abuse that can’t be kept in confidence, and then the third area is if someone was to disclose that they had knowledge of somebody’s life or health being at risk, then we would have to disclose that to the appropriate authorities. Sometimes I have to make an executive decision. If something doesn’t fall in those domains but if I think about it and over time it’s going to do significant damage to the institution I might decide to do something with that information. But I have to be careful, because people didn’t give me express permission to go forward, then if I did because I weighed it and I said [to the visitor] ‘[T]his [formal] office needs to be aware of this [because] it may cause significant damage to the institution and so part of my job as an Ombudsman is to give decision makers a head’s up. (O1A8:32-35)

Another Ombuds similarly described subordinating confidentiality to anything that would cause “massive disruption” to the institution:

[E]verything is confidential unless there is any sort of self harm that is reported or anything that would cause any massive disruption to the institution So those are

the things that I often say to a student, 'I won't go forward unless you give me permission to use your name, but if there is any talk of [those] particular things, then I do have to report it [regardless of your permission]. (O6A34:14)

Ombuds who want to take a visitor's information to a formal office handle it in various ways. As indicated above, many break confidentiality or describe confidentiality exceptions to their visitors. Other Ombuds described attempting to make anonymous reports:

Well, if I don't get permission then I will try to raise the problem in a way that protects their anonymity. If it's something that's been done that doesn't point to them individually, then I can try to raise it as "I understand that this is routinely being done and this rule is being violated, but I can't tell you who pointed this out to me. (O9A53:44)

Ombuds frequently described seeking the survivor's permission to take such an anonymous approach, but many expressed ultimately doing whatever is necessary to get the complaint filed:

[If I were unable to convince a potential victim of sexual misconduct to come forward] The [next step] would be [to say] '[O]kay, so you're not willing to do this, can you allow me to, in an indirect way, go to the department chair and say '[Y]ou need to go to the [Title IX Coordinator] and let them know that there are allegations that this faculty member is engaging in this kind of behavior.' Kind of going in an indirect way. Another Ombuds told me that we would never do nothing, we would keep moving forward until this thing got addressed. That would be my commitment. I would do whatever it would take. (O7A37:35)

Here an Ombuds explained their response to a student who said "I do not want to make a report":

I [told] the student I must report this to the campus police. I don't have to give [your] name, but I have to say a student came to my office saying [this about a sexual assault or sexual misconduct], particularly if it's a rape because of the Cleary situation. (O5A38:17)

Another Ombuds described trying to marshal multiple complaints, not for the purpose of protecting each individual's confidentiality, but to provide proof of what might be occurring:

[U]nless some other people come and tell me the same thing I'm not going to be able to go to [anyone] and have a lot of influence, because I'm going to be saying 'one person told me this and I can't tell you who it was, and I can't offer you any proof without identifying this one person.' [I tell the visitor], '[I]f you've got other [individuals who have experienced this], have them call me and tell me that they would like to be included as part of a class who are complaining about this,

then I can go to the [administration] and say ‘well, I’ve had [multiple] people tell me the same thing.’ (O9B54:9)

While many Ombuds may not be making a deliberate tradeoff, some Ombuds decide that keeping records or communicating by email or phone are sufficiently important that they outweigh the potential violation of confidentiality in these things. Either way, Ombuds depart from the confidentiality archetype by maintaining records that make communications susceptible to discovery or indicate who visited the office. This includes maintaining intake forms, communicating via e-mail, and requiring signed waivers for purposes of reporting information. Some Ombuds maintain detailed records of cases. This was made abundantly clear to me when I asked one Ombuds about prior cases and he replied, “Okay, I will go through my archives” (O6A34:48). The same Ombuds also noted that Ombuds should be good writers, “because you’re going to have to synthesize all of this information, you’re going to have to be able to...pretty much capture in a well-documented way this person’s experience” (O6A34:11). Another Ombuds described explaining to the general counsel’s office about why it is dangerous for an Ombuds to maintain records:

[A] lot of times I only hear one side of the story, and that side of the story is invariably not a good one for the university. Why in the world would you want me to keep those records? If anything it’s going to hurt you. (O7A37:25)

Ombuds who depart from the archetype also commonly use e-mail to communicate with visitors. Ombuds explained that most issues get to the office “by e-mail or telephone, [but] a lot of e-mail” (O9A53:31). E-mail is commonly used by Ombuds in their work, including handling the details of situations: “They...e-mail me and if we [can] handle it through e-mail I...do that” (O5A28:23).

When handling new cases, Ombuds often require visitors to fill out intake forms that create records that can be used to identify visitors. These forms sometimes employ online technologies, which are doubly susceptible to breach. An Ombuds explained the intake process:

Typically what happens is I ask them to do an intake form, like I said either that's done online or via paper, and then on that intake form I ask them for demographic information as well as their college, if they've spoken to anybody before about this situation, what has been the process that they've taken to resolve. I ask those questions because I want to have an idea of how many people know about the case, who can I contact, am I starting from scratch, have they already been told no and they're coming to me to try to find yes, that gives me that sort of information. (O6A34:31)

Another Ombuds described their intake as "formal":

There is a formal intake process. The student...comes to my office and [fills out] intake forms.... Basically their basic information. We...ask them what the [type] of complaint [it is], academic, judicial, which department, which faculty person, was it personal, was it a hostile evasion...we have many things for them to fill in. (O5A28:24)

Ombuds who depart from the archetype also often require visitors' sign written waivers of their confidentiality rights:

Sometimes students will waive their right to confidentiality, and I have them sign a specific waiver...that says [the visitor] allow[s] [and permits] me to speak to person X and Y, sometimes it's as specific as a name, [and] I can speak to that person and that person alone. Sometimes they don't know [who I should talk to], they just say 'anyone over in the department,' or 'anyone you need to [speak with] to fix this.' So I'm willing to sort of work with that if they do offer that kind of permission. If they do not offer that kind of permission, then the only cases in which I feel comfortable, not comfortable, but allowed to violate their confidentiality is the typical exceptions: homicide, suicide, child abuse, sexual misconduct, [or] imminent harm. (O4A22:21)

Ombuds who require visitors to sign a waiver of confidentiality often do so during the intake:

[W]hen a student [comes] in to see me I ask them to first sign a waiver ... and I would tell them 'based on whatever you tell me, based on your particular situation I may need to talk to people,' and I would ask them to sign off, giving me permission to talk to particular people or offices about their situation. (O5A28:16)

In sum, my interviews with Ombuds thus reveal a complex tug of war between competing impulses. On the one hand, the archetypal Ombuds model motivates many Ombuds to strictly honor their visitors' confidentiality and interest in self-determination, even when doing so seems deeply frustrating as abusive sexual predators seem to get away with misconduct again and again. On the other hand, many Ombuds find ways to get information to responsible authorities within their institutions—or are *required* by their institutions to do so—even though this sometimes exposes their visitors to the loss of confidentiality that they sought to avoid by coming to the Ombuds.

CONFIDENTIALITY AND THE TITLE IX COORDINATOR ARCHETYPE

There are distinct detriments to Ombuds' commitment to confidentiality. Confidentiality impedes the public's right to know (Kotkin, 2006, p. 947), contravenes the transparency of courts, keeps critical information from people who most need to know, and shields the institution from needing to provide oversight and accountability (Dore, 2006, pp. 466, 518-19). For these reasons, among others, Title IX Coordinators typically do not promise confidentiality to complainants. The archetypal Title IX Coordinator model ensures compliance with Title IX, and reflects a compliance regime that seeks to prevent, elicit reports of, and eliminate instances of sexual misconduct. All of this, in the view of the Title IX model, requires disclosing information about complaints to those who can act on this information.

As Title IX Coordinators are a key element of the formal mechanism for ensuring compliance with Title IX, the archetypal Title IX Coordinator model treats confidentiality very differently than the model Ombuds. Instead of utilizing confidentiality to encourage reporting, Title IX law and policy works to strengthen protections for complainants from retaliation and to educate potential complainants about where confidentiality can and cannot be maintained. As

opposed to the model Ombuds, who through confidentiality provide their visitors with control over the extent of the intervention, the Title IX Coordinator archetype must be informed of all reports raising Title IX issues, even if originally filed with or handled by another individual or office (OCR Q&A, 2014, pp. 10-11).

In order to ensure that no incident goes unattended, many colleges impose mandatory reporting requirements on all faculty, staff, and employees (ATIXA Training Manual, 2013, Title IX Mandates, p. 15). Title IX requires reporting from “responsible employees” or those with the authority to address and remedy gender based discrimination, those with responsibility to report sexual misconduct to a supervisor, or those a student would reasonably believe must do either of the above (ATIXA Training Manual, 2013, 2013 White Paper, p. 107). As an example of mandatory reporting requirements, the Discrimination Complaint Resolution Process at the University of Kansas specifies that all “unit heads and others who serve in leadership roles in the university” are required to report discriminatory actions (University of Kansas, Discrimination Complaint Resolution Process, Who Must Report). All Deans, Directors, administrators, supervisors, faculty members, graduate teaching assistants, and academic advisors are required to contact the Office of Institutional Opportunity and Access to initiate an investigation if “they know or have reason to believe that discriminatory practice(s) may have occurred” (University of Kansas, Discrimination Complaint Resolution Process, Who Must Report). Similarly, Pennsylvania State University requires that “[a]ll incidents involving sexual harassment, sexual misconduct, sexual violence, gender based discrimination and harassment, or any other alleged conduct which may violate Title IX... of which any University staff or faculty member becomes aware should be forwarded to the [Title IX Coordinator] for review (Pennsylvania State, Title IX Procedures). Harvard University notes that all “University officers, other than those who are

prohibited from reporting because of a legal confidentiality obligation or prohibition against reporting, must promptly notify the School or unit Title IX Coordinator about possible sexual or gender-based harassment, regardless of whether a complaint is filed” (Harvard, ODR, Procedures for Handling Complaints Involving Students Pursuant to the Sexual and Gender-Based Harassment Policy, 4).

Reporting requirements are waived for employees who are in a recognized counseling relationship with a potential complainant (OCR Q&A, 2014, p. 22). Mandatory reporting requirements put pressure on faculty members, resident advisors, and others lacking a privilege yet who promise privacy or confidentiality to students approaching them for assistance. The 2013 ATIXA Training Manual (2013 White Paper, p. 108) recommends that all employees report incidents of misconduct to the Title IX Coordinator within twenty-four hours. Some non-supervisory or non-responsible employees may be able to make anonymous (Jane/John Doe) reports initially but may need to provide details later at the direction of the Title IX Coordinator. OCR considers this category of reporter as “non-professional counselors or advocates,” and describes them as individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women’s centers, or health centers, including front desk staff and students (OCR Q&A, 2014, p. 23). These individuals are required to “report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student” (OCR Q&A, 2014, p. 24).

Notably, the 2013 ATIXA Training Manual (2013 White Paper) states:

[N]o employee should ever promise absolute confidentiality, though some (such as licensed counselors) are better able to protect information than others (though even licensed counselors,

etc. have some situations where they must report if they have a duty to warn). *Ombuds are not exempt from expectations of reporting.* (emphasis added) (pp. 108-109)

The 2013 White Paper further states that all employees should be trained that “reports are private, but not confidential (unless made to a confidential resource)” and how to “convey this to victims without chilling the victim’s willingness to report. It takes tact, but it can be done” (p. 109). As a result the model Title IX Coordinator is a private, but not necessarily confidential, office of notice and investigation. Complainants wishing to report but not participate in the ensuing investigation (or avoid an investigation altogether) may not have a choice to not participate. The 2013 ATIXA Training Manual (Bedrock Beliefs, 14) notes that colleges are required “at minimum [to conduct] an investigation in all cases, to determine the extent of the harassment, the acuity of the threat it represents to students, and what might be necessary to put an end to it.” Confidentiality is thus a secondary goal to following and complying with the law.

The ATIXA Statement of Ethics and Title IX Competencies (2012, §3) addresses confidentiality:

As the custodian of many types of sensitive information, including that which may be confidential and/or private, be responsible stewards of that information, be familiar with and comply with applicable laws, institutional policies, directives and agreements pertaining to access, use, protection and disclosure of such information including the electronic transmission of records and adherence to privacy laws. (p. 3)

This emphasis on being “responsible stewards” of information reflects the fact that Title IX Coordinator archetypes are offices of notice, which officially makes the institution they represent aware of, and thus responsible for, any complaints or reports of sexual misconduct. The ATIXA 2013 Training Manual (p. 15) describes these confidentiality responsibilities as a “conundrum” because “[i]nstitutional authorities who have notice of alleged sexual assaults/harassment are not likely to be able to keep those incidents completely confidential, as a result of the institution’s affirmative obligation to investigate and act to resolve the incident.” This tension between

protecting confidentiality and fulfilling the obligations of Title IX is evident in the ATIXA Training Manual. ATIXA 2013 Training Manual (p. 31-32) states, “[t]he privacy of all parties to a complaint of sexual misconduct must be respected, except insofar as it interferes with the university’s obligation to fully investigate allegations of sexual misconduct.”

The OCR 2014 Q&A document states, “OCR strongly supports a student’s interest in confidentiality in cases involving sexual violence...[but] [t]here are situations in which a school must override a student’s request for confidentiality in order to meet its Title IX obligations...” (pp. 18-19). Such instances should be “limited and the information should only be shared with individuals who are responsible for handling the school’s response to incidents of sexual violence” (OCR Q&A, 2014, p. 19). Schools are responsible for limiting any information shared even where a student does not specifically ask for confidentiality (OCR Q&A, 2014, p. 19). OCR mandates that universities “notify students of the information that will be disclosed, to whom it will be disclosed, and why... [in order] [t]o improve trust in the process for investigating sexual violence complaints” (p. 19). Recognizing the detrimental impact of breaching confidentiality, the OCR 2014 Q&A document notes, “A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence” (p. 19).

The 2014 OCR’s Q&A document provides guidance on how to balance these conflicting goals. First OCR directs universities to “make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees” (Q&A, 2014, p. 15). Second, the 2014 Q&A document requires responsible employees to provide an initial warning and “make every effort to ensure the student understands...[b]efore a student reveals information that he or she

may wish to keep confidential” (p. 16). Information that should be shared includes the employee’s reporting obligations (including the names of the survivor and perpetrator and relevant facts regarding the incident), where the employee must report, and the individual’s right to request confidentiality (OCR Q&A, 2014, p. 16). The responsible employee must specifically inform the student of their ability “to share the information confidentiality with counseling, advocacy, health, mental health, or sexual-assault related services (e.g., sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers)” (OCR Q&A, 2014, p. 16).

If a complainant insists that their identifiable information not be disclosed, “the school should inform the complainant that its ability to respond may be limited” (OCR Q&A, 2014, p. 19). The 2014 Q&A document (p. 19) instructs the school to inform the complainant of the Title IX prohibition against retaliation and that the school will take steps to prevent it and respond to it if it occurs. If the complainant still does not want their name or identifiable information revealed the 2014 Q&A document instructs the school to “evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students” (p. 17). Specifically, the school may weigh confidentiality requests against the seriousness of the allegations, the complainant’s age, other complaints about the same individual, among other factors (OCR Q&A, 2014, p. 21). Because the Title IX Coordinator must have knowledge of all complaints, OCR notes that this individual is in the best position “to evaluate a student’s request for confidentiality in the context of the school’s responsibility to provide a safe and nondiscriminatory environment for all students” (OCR Q&A 2014, 11).

ATIXA’s 2013 Training Manual also provides guidance to Title IX Coordinators on how to handle requests for confidentiality. Where survivors are reluctant to make formal complaints,

or withdraw a formal complaint, the 2013 ATIXA Training Manual, Investigation Protocol Checklist recommends honoring that request, but that the efforts be made “to persuade (not coerce) the alleged victim to reconsider” including reminding the person that 1) The institution will vigorously enforce its retaliation policy, 2) If he/she does not act, the perpetrator may harm someone else, 3) They can take time to consider and come back to make a decision, and 4) Interim accommodations can be used to make reporting easier (pp. 53-54). If a survivor refuses to file a formal complaint or will not allow their name to be revealed, the 2013 ATIXA Training Manual Investigation Protocol Checklist recommends sharing this information with the responsible administrator to make a decision “on whether sufficient threat is present to warrant an investigation independent of the cooperation of the alleged victim” (p. 54).

The 2011 Dear Colleague Letter directs schools to “inform the complainant if it cannot ensure confidentiality” (p. 5). A directive in the University of Kansas Discrimination Complaint Resolution Process echoes:

The Office of Institutional Opportunity and Access will handle all discrimination and harassment complaints discreetly but cannot guarantee confidentiality or anonymity because the University has an obligation to investigate complaints of discrimination and harassment and to maintain a safe environment, free from harassment and discrimination. Because of its obligations under the law, KU will not be able to honor all requests for confidentiality or all requests that a complaint not be pursued. (University of Kansas, Discrimination Complaint Resolution Process, Confidentiality)

The Pennsylvania State University Title IX reporting guidance similarly notes, “Information shared...are kept as confidential as possible, but some information will be shared with the Title IX [C]oordinator who is expected to be made aware of all reported Title IX violations” (PSU, How do I make a report?, 2014). Harvard’s Title IX procedures note “information will be disclosed...only to those at the University who, in the judgment of the Title IX Officer...have a

need to know (Harvard, ODR, Procedures for Handling Complaints Involving Students Pursuant to the Sexual and Gender-Based Harassment Policy, 4).

Confidentiality is related to the Title IX Coordinator archetype's Title IX reporting requirements. The ATIXA Statement on Ethics and Title IX Coordinator Competencies (Core Job Duties and Responsibilities, 2012, §4, p. 6) states that Coordinators are to “[o]rganize and maintain grievance files, disposition reports, and other records regarding Title IX compliance, including annual reports of the number and nature of filed complaints and the disposition of said complaints, data collection, climate assessment, pattern monitoring.” This compliance is echoed in job postings, such as the Santa Clara University EEO and Title IX job posting (Higherjobs.com, retrieved 6/12/14), which requires the Coordinator to “[o]rganize and maintain investigative files, disposition reports and other records regarding complaints of unlawful discrimination, harassment, and/or sexual misconduct as appropriate.” A posting for Director of Title IX and Equal Employment Opportunity Programs at the University of San Diego (Higherjobs.com, retrieved 6/12/14) notes that the position is responsible for “statistical and narrative reporting.” The Goucher College Title IX Coordinator job posting (Higherjobs.com, retrieved 6/12/14) states the position is responsible for “delivering appropriate notices of change and outcomes, and providing a repository for and source of institutional recordkeeping.” Further, the Coordinator will “organize and maintain complaint files; compile annual reports of the number and nature of filed complaints, and the disposition of said complaints; manage data collection, climate assessment, and pattern monitoring; and serve as principal contact for government inquiries pursuant to Title IX.”

This reporting and data collection requirement affects the confidentiality of shared information, and requires formal record keeping relating to confidentiality. For example, the

Investigation Protocol Checklist (ATIXA Training Manual, 2013, p. 53) notes that interviewers should not promise absolute confidentiality, that complainants should sign a statement that they understand the process, and should sign a consent statement acknowledging that the complaint may be revealed to the accused student and to witnesses as necessary. The Checklist notes that the person making the complaint should sign this consent, and “If s/he does not, s/he is not entitled to view the complaint” (p. 56). Further, the intake officers “should stress the need to get the complaint in writing, and can write the complaint, solicit the written complaint from the complainant, or assist the complainant in writing the complaint” (ATIXA Training Manual, 2013, Investigation Protocol Checklist, p. 52).

Where the individual’s privacy is not absolutely protected by the model Title IX Coordinator, it will be controlled on a “need-to-know” basis (ATIXA Training Manual, 2013, pp. 31-32). Report of an allegation that includes evidence that a felony has occurred must be reported to the local police (although this does not mean that charges will automatically be filed or that the survivor must speak with police)(ATIXA Training Manual, 2013, pp. 31-32). Where there is not conclusive evidence of a felony, the ATIXA 2013 Training Manual, Statement of Rights of the Alleged Victim states “[v]ictims have the right to be informed of available options to notify law enforcement but also the right not to report” (p. 46). This right not to report does not include the institutional requirement to report any incidents, without personally identifiable information, in its campus crime report (ATIXA Training Manual, 2013, pp. 31-32).

In situations where the survivor does not want the institution to pursue an investigation, the threat must be low enough to not require adjudication. Nonetheless, ATIXA guidance cautions: “college officials would be well advised to fully document their conclusion, supported by an appropriate investigation, and ask the victim to acknowledge that he/she concurs with the

college's conclusion, and asks that no further action be taken" (ATIXA Training Manual, 2013, Bedrock Beliefs, p. 14). Further, a letter to the survivor "should indicate that his/her refusal to cooperate with investigators and campus conduct personnel may prevent the college from pursuing the complaint to resolution" (ATIXA Training Manual, 2013, Bedrock beliefs, p. 14).

Recent changes in Title IX compliance are designed to reform formal complaint systems that are not seen as safe, accessible, and credible, or that ignore "ugly behavior that is not overtly illegal" (Rowe, Wilcox, & Gadlin, 2009, p. 56). This includes bullying, hazing, or any activities that may be seen as "traditional high jinks," "everyone does it," or "no harm was intended" (Rowe, Wilcox, & Gadlin, 2009, p. 56). Further, Title IX compliance efforts now seek to reform systems that require immediate and conclusive proof and by doing so may discourage people from making complaints. Common complaint system problems also include confidentiality violations, requiring written complaints, lengthy time periods to resolve complaints, officials with little understanding of the law or inadequate training on proper procedures, perceptions that important people are treated differently, or that the system itself is overseen by the people seen as the source of the problem (Rowe, Wilcox, & Gadlin, 2009, p. 57).

In contrast to the Ombuds archetype that uses informal, optional conversations as a chance to "problem solve," the Title IX Coordinator model uses formal, documented investigations per law and policy as a mechanism to draw out complaints and remedy issues of sexual misconduct. The Title IX Coordinator archetype does not promise absolute confidentiality because there is a responsibility to address known problems, requiring sharing information with others who can address the problem. The model Title IX Coordinator addresses complainants' interest in confidentiality by seeking as much as possible to respect complainants' wishes and to provide privacy—but where these interests conflict with addressing a known and

serious problem, the Title IX Coordinator archetype is to give priority to addressing the problem. Ultimately, the model Title IX Coordinator would agree with David Miller's (2011) claim that the Ombuds model's strict adherence to confidentiality is irresponsible:

Knowledge is responsibility, and those in the know must also be held responsible for not acting on what they know if not acting betrays the public trust... [F]or some, Ombudsman informality offers too much ambiguity, and confidentiality is seen as conspiracy to preserve the interests of such perpetrators against the exercise of justice... "Who could not want to see perpetrators of sexual violence (or any other kind of violence...exposed to the full consequence of their actions, along with those who knowingly abet their horrible behavior? (p. 6)

In sum, although both Ombuds and Title IX Coordinator models presumably share a preference for eliminating sexual misconduct, the archetypal offices reflect very different philosophies and mechanisms for handling complaints. Where Ombuds see absolute confidentiality and the self-determination it provides as a necessary condition for eliciting and handling complaints in the face of retaliation, Title IX Coordinators reflect a compliance regime that seeks to elicit formal complaints, and then discipline, prevent, and eliminate instances of sexual misconduct.

TITLE IX COORDINATORS WHO ADHERE TO THE PRINCIPLE OF REPORTING

Title IX Coordinators who adhere to the archetype act as offices of notice and investigation and require employees who are designated as mandatory reporters to provide the office with information. These Title IX Coordinators also prioritize compliance over confidentiality and maintain and use records necessary to ensure a quality investigation. First, these Title IX Coordinators emphasize their role as offices of notice:

I tell people '[T]his is not the office to come and vent. We have those offices. If you want to talk, you go there, because you're putting the university on notice when you come to me [and I need to do something about it]. So I make that distinction upfront. (T10A43:34)

As ‘notice’ to the institution, Title IX Coordinators following the archetype communicate with university counsel and administrators about complaints:

I work really closely with university counsel. We pretty much review all our final reports with them. They’re aware of all of our cases, obviously, because it could have liability implications for the university, but I don’t ever feel like they’re trying to impose upon us any sort of outcome. (T1A11:12)

Another Coordinator described reporting to the president and other administrators “[E]verything and anything that could be a potential embarrassment to the institution, that could be a headline tomorrow morning. I don’t want them being blindsided by anything. It’s what any good subordinate does for his boss” (T7A32:12). For example:

I am careful to keep legal [counsel] abreast of any situation in my office that may turn into a lawsuit or a legal battle. I always try to give them a head’s up. If I get a request for records, if I get wind that an attorney has been contacted by one of the folks I’m investigating, I always let legal affairs know so they are [aware]. And that has worked. (T11A45:40)

As an office of notice and investigation, the Title IX Coordinator oversees or conducts investigations. One Coordinator described providing information as a part of the process:

Once I get the information there’s a preliminary investigation [in which] I contact the folks that are involved. I contact the dean because I’m coming to his college, let him know what happened, but I don’t give them too much detail like names or anything like that, other than the name of the professor I need to talk to, and I ask them if the issue is something that is known, have they heard this complaint. (T11A45:47)

Heading an office of investigation, Title IX Coordinators’ goal in the interview is to determine whether there is a violation of law or policy, and not necessarily to provide voice:

[I]f [the person] starts to ramble I will then say ‘let’s get back on track, why are you here? What happened to make you come here.’...And during that time I ask ‘give me specific evidence that it is on the basis of your race, or give me specific evidence that you’re being sexually harassed.’ We really try to make sure we’re in the world of [compliance]. As a result of that, either I can tell right then or there or the person will admit ‘I really don’t think it’s [harassment or discrimination], I’m just not being treated well.’ Then we know it’s not [in the compliance] world. If they say something else, then we could say ‘it looks like

there's enough to at least do an investigation to prove or not prove your case.' Then I explain to them the investigation process: 'During an investigation we can conduct witness interviews from people that either know or may know about your situation. Please give me some names of people who I should talk to and give me names of people who you don't want me to talk to.' (T10A43:22)

Second, Title IX Coordinators who adhere to the archetype require other university employees to provide their office with information about violations. In order to comply with Title IX, Coordinators must actively seek to elicit reports about any and all incidents of sexual misconduct. This requires that all employees who are required to report information about sexual misconduct must be informed of this obligation. For example, a Coordinator described mandatory reporters as "Anybody with any information, including an Ombuds, on anything associated with discrimination [or] sexual misconduct, it's required [by law] that they report it" (T4A24:25). Title IX Coordinators described these reporting requirements as required for an effective institutional response:

If [a complainant] start[s] at the police department, [the police] have a connection and work very closely with us to make sure we get the information we need once that person makes contact with them...[A]nd my office does the same, [and the] dean of students does the same [for the police]. So we have a very good collaborative working relationship that all of us at some point will be notified of a concern so that we can all do what we need to do to resolve it. (T13A49:35)

Title IX Coordinators observed that there is growing interest and reporting on their campuses due to the increasing importance of the issue. Thus, one said:

Every time anybody says anything that just is remotely connected to some sort of Title IX issue, [administrators had] all read the Dear Colleague letter, [but now they] know what we [are] doing [and] it just put everyone in a tizzy...[I]t's sort of been interesting politically because some higher ups...you can feel a political tug there where they really want to be in charge of it. Kind of... because it's a new and scary frontier and that's a career maker if you're 35[years old] and have your PhD and you're looking to move up in the organization... But they have been respectful and worked with me well in spite of it, but I have just noticed... they

call me about the slightest thing that any young woman says...on any little thing they'll say, 'We just thought we should refer this you.' (T12A47:44)

Title IX Coordinators who adhere to the archetype do not exempt anyone from reporting unless it is required by law—and this includes Ombuds. For example, an Ombuds noted a requirement to call the Title IX Coordinator and say, “‘Here is the situation, would you be comfortable if we try to resolve it informally?’ And if [the Title IX Coordinator] thinks that it’s okay, we can do it and if [the Title IX Coordinator] doesn’t, we can’t...” (O14B64:30). Another Ombuds noted the lack of a good working relationship with the Title IX Coordinator because “[T]hey think we’re on their turf and they think they should be handling it all” (O9B54:29).

Coordinators following the archetype prefer anonymous complaints to not reporting. As one observed:

Technically, no one should make an anonymous complaint, because if [that happens] the only thing I can do is to check to see if there’s any veracity to the issue, but I can’t investigate and make a report to the complaining party because I have no idea who sent it. (T5A24:31)

Another Coordinator described creating a system that allows for anonymous reporting and how the Title IX office investigates anonymous complaints:

We’ll go as far as we can go [investigating anonymous complaints], and if we receive information and we think we have enough information to take some action in terms of looking into some of the concerns, we’ll definitely do that. And we’ll go as far as we can go. It’s very difficult not having the person [who complained], so, in terms of resolution there may not be very much that can be done, but certainly we’ll investigate it, we’ll look into it and we’ll see if there’s any evidence to suggest that what the person has claimed has validity. If so, we’ll maybe try to take some action [even if only] some education...[t]alking to some folks, making folks aware that there are concerns. (T13A49:24)

Other Coordinators who adhere to the archetype prefer detailed rather than general information.

For example, an Ombuds described the Title IX Coordinator’s preferences:

The Coordinator just wants the facts. I can’t single out three departments with one being the potential culprit. When the Coordinator asks me how come they

got singled out, what am I going to say? The Coordinator tells me, ‘[E]ither we give training to the whole campus or we don’t, and we don’t have the resources to do it for the whole campus so it ain’t gonna happen. Now, if you have a victim, I want to see them, you send them to me and we’ll start an investigation and we’ll follow the numbers, but in the absence of that I don’t want to hear about it. (O10B56:35)

As a part of the effort to gather any information relating to sexual misconduct, Title IX Coordinators often oversee periodic meetings, for example:

[T]he purpose is for us to make sure they have a record of all the allegations of sexual harassment misconduct that have arisen across campus. So we meet to discuss cases [of a very sensitive and often private nature]. (O7A37:38-39)

Third, Title IX Coordinators who adhere to the archetype give priority to compliance over confidentiality because they must, above all else, comply with Title IX law and policy. Compliance requires that they give priority to compliance over confidentiality. For example, a Coordinator said she tells visitors “What you say here is confidential to the extent allowable by law” (T10A43:20). Another Coordinator explained:

[It’s important to inform the person that you’re not a confidential resource and there are times when the institution has to act or chooses to act even if it’s not what he or she wants. I do my best to explain why and keep their concerns at the center of what our plan is so they can inform [our approach] as we move forward. (T8A39:16)

Another Coordinator echoed the above observations:

I tell people that I cannot guarantee confidentiality, but I can promise them discretion and that only those with a need to know will know, that we have confidential records, [and] that I take their privacy very seriously. But because there are some issues involved I cannot guarantee that I will not have to tell someone. (T12A47:36)

Many Coordinators attempt to provide a “warning” to visitors about the Coordinator’s obligation to conduct an investigation. Thus, one observed:

‘I do an investigation based upon the information you give me. My role is not to talk and give you options. Unless there is nothing in your conversation to suggest that you’re being subjected to discrimination, and it is just bad behavior that you

don't like and it doesn't rise to the level of protected activity, of course I won't do anything.' But, for students who come in and say 'I've been sexually harassed in the last month but I don't want you to say anything,' I stop them and say 'I can't. This isn't the place for you.' (T10A43:35)

Another Coordinator likewise reported:

We let them know that we have an obligation to the institution to conduct an investigation if we learn something that we think needs to be investigated, whether they want to file a complaint or not. It's very common for people for people to come here and say 'I want to tell you about something but I don't want an investigation done.' We stop them in their tracks and tell them '[L]ook, it's not up to you whether we conduct an investigation or not.' So it's very clear to them what the obligations [are] on our part. Sometimes people walk away. We try to have them not walk away, we want to investigate if something's wrong, but sometimes we have no choice. We give them whatever general information we may be able to give them and encourage them to talk to us, but it's their choice. (T7A32:31)

Title IX Coordinators who adhere to the archetype require participation in the investigation. As one observed:

We have in our policy that failure to cooperate with an investigation can be viewed as a disciplinary action. And that is in there for people who either falsify information and flat our refuse to cooperate with an investigation that is critical. So if someone with information... refuses to cooperate...and I have a way to prove that, then you're going to be disciplined for it. In other words look, this is a responsibility...I just want...you cooperating and giving me the information and giving me true and accurate information. Then you're done. We're going to protect your information as much as we can, but you're going to give me that information. If you don't give me the information, and you're just refusing to do that, I'm going to discipline you because you're not going to put a spoke in the wheel of this process. (T10A43:44)

This observation is echoed by other Coordinators. There are, of course, exceptions to the requirement to participate in the process, but these illustrate the general rule described by a Coordinator:

[I]f a person is named in any way in an investigation, yes, they are required to participate in the process...[although] sometimes we make exceptions for the complainant, it depends on the situation...[W]ith Title IX cases if we do an investigation, there is the possibility that the investigator can go to the hearing and testify based on their investigation and their findings, which would not force the

complainant to have to testify. So there are ways, depending on the situation...in which the complainant may not have to participate in the [formal]process if they do not wish to. Of course, if they don't want to pursue a case, then we are bound to support their wishes unless there's some threat to the campus why we must move forward. (T13A49:25)

Another Coordinator sums up the priority of investigation over confidentiality:

I never promise them confidentiality. But I still investigate as much as I possibly can, with or without their cooperation, because if they tell me, and I do nothing, then they can come back and say 'hey, she's the office of notice and I told her, and whether I participated or not, she's showing deliberate indifference to my complaint. She didn't check to see if I was telling the truth, she didn't check to see if there were other people,' so I'm not going down that road. I'm not going to jail for anybody. (T11A45:24)

Coordinators who adhere to the archetype find ways addressing the problem even when the complainant will not make an official complaint:

I'm dealing with one now where I've said to the chair of the department 'students have come forward, they have concerns, they're afraid to put their name on the complaint, but we need to address the situation.' So sometimes I can't deal with the person who is directly accused, but I can deal with their management...[and say] 'here's the way we can approach this, so to get what we need and not to disrupt things more than we need to. At the end of the day I'm going to need your help to make sure that we fix this.' Usually they will get on board. (T5A26:20)

This observation is echoed by another Coordinator who described moving forward without a complainant by confronting the respondent "about their behaviors in general...but not [in relation to the] complainant specifically...we try to make sure that there's education provided directly to the person" (T5A26:20).

Fourth, Title IX Coordinators who adhere to the archetype use and maintain records in order to ensure a documented investigation that provides for due process:

First hand written accounts [are] the best way. The [complainant then] understand[s] our process... [that they are] giving me the right to conduct an investigation, to talk with people. And [complainants] need to know 'this is what you have signed up for, there's no surprises, you're not going to be retaliated against, but it's going to be out there because that person that you're charging with this offense has the right to defend themselves. I have to tell [the

respondent] who filed it, what you're saying, so that they can defend themselves on those charges. So it's important that you know that's what I'm doing.' When we don't [have a first hand account and have an informed complainant, [we] put [ourselves] in a predicament, if I calls [a respondent] and say 'you know what, we've got a complaint against you by somebody' [they will say] 'Oh really, who?' [and I will answer] 'I can't really tell you that right now' [and they will say] 'Well, what did they say I did?' [The respondent] doesn't have to answer any questions because I'm basically violating [their right to] due process. (T10A43:19)

Another Title IX Coordinator described effective record keeping as necessary to ensuring correct information: “[W]e summarize [the complainants] statement and send them a summary of their allegations and ask them if they agree with them, if they have anything they want to add” (T13A49:31). A similar process is used by other Coordinators, who “write down the allegations, type it up, send it out, and ask the respondent to please make any corrections” (T10A43:25). Typically the name of the complainant and the summary of the complaint are then provided to the alleged offender, to make them “fully aware” of the situation (T10A43:23). Another reason for making extensive written reports is to ensure the accuracy and reliability of the information learned in investigative interviews. Several Coordinators expressed frustration at the gossip and breaches of confidentiality that make investigating difficult:

[E]ven though the campus is huge, it's still small [and] people hear everything. There is no confidentiality on this campus. Let me repeat that: None. None at all. As soon as a phone call is made, as soon as somebody makes a complaint, every-fricken-body on campus knows about it. It makes my investigation hard because I have to figure out what is it you know and what it is you were told and I have to separate opinion from fact. (T11A45:48-54)

In sum, Title IX Coordinators who adhere to the archetypal model give priority to the organizational interest in investigation and enforcement over the complainant's interest in influencing the course of the process and confidentiality. They may politely inform complaints of this priority and may even try to soften the harsh reality of it, but they do not waver in their commitment to this priority.

TITLE IX COORDINATORS WHO DEPART FROM THE ARCHETYPE

Some Title IX Coordinators respect the Ombuds commitment to confidentiality and do not insist that this office must provide the Coordinator with information about complaints. In doing so, this departs from the archetypal Title IX Coordinator model. For example, a Coordinator notes: “[I]f anyone contacts the Ombuds for assistance, that information is not...shared with our office, because [visitors] are going there for confidential counseling, so to speak” (T10A43:49). This observation is echoed by another Coordinator who noted, “Ombuds don’t have the legal [confidentiality] privilege, but they have that code and our campus completely respects that” (T12B48:10). Yet another Coordinator explained:

[W]e recognize [the Ombuds office] as being a place where employees or students can come and get things off their chests, share with someone, and maybe get some good advice where they will know that the information that they share doesn’t necessarily have to be acted upon. That’s important for individuals who are afraid to go through the process. The [formal] process can be very intimidating, depending on the circumstance, so again I think that’s a valuable outlet for employees and students. Years ago when we established [the Ombuds] office there was a ground swelling of support from staff and students to say ‘we need something like this on our campus’ so it was established. So I think it definitely serves a great purpose but I think those individuals have to be very knowledgeable [about] the campus in order to give people really good advice. (T13A49:16)

Some Title IX Coordinators both over- and under-protect confidentiality and, in doing so, depart from the archetype. Many Title IX Coordinators reveal more information to more officials than may be absolutely necessary to ensure effective enforcement. For example, an Ombuds critically described the university’s Title IX Coordinator:

Well, they don’t keep confidentiality. I mean, they always say “of course we keep confidentiality except on a need to know basis,” but their idea of who needs to know is wide and broad, so you can be fairly certain that if you go to [the Title IX Coordinator] that everybody will know that you went and what you said. If you go you can [also] be fairly certain that their bias will be for the University, no questions asked. (O9A53:26)

Another Ombuds criticized her institution's Title IX Coordinator for releasing a copy of the Coordinator's report on an incident to the complainant:

[T]hey were more upset by the report than the actual complaint they filed in the first place. [T]he problem is these reports are confidential but they get out [and] people share them. They are not supposed to [share them], it's very clear...[I]t was ironic because the investigation result was in their favor and it was still upsetting. (O14B64:46)

Such instances of breaches of confidentiality may lead to a negative reputation and a lack of trust in these Title IX compliance offices. However, over-protection of confidentiality also can lead to a lack of trust:

Only when asked will I tell a complainant that they may never know the full extent of the result of the investigation. If they say 'I just want to know,' we'll talk about why they can't know. (T10B44:18)

In another example, a department believed they followed the Title IX Coordinator's recommendations following an investigation, but "other staff members were unsatisfied because they were not able to know the exact steps taken, so it looked like nothing happened" (T3B20:2). Paradoxically, both those Title IX Coordinators who breach confidentiality and those who release too little information are, in fact, departing from the Title IX Coordinator archetype.

Title IX Coordinators understand that gaining complainants' trust will lead complainants to be more willing to participate in the formal process. Some of these Coordinators depart from Coordinator archetype in ways that are aimed at building complainants' trust. For example:

[I]f the information comes to us and they've not shared the name of the accused with the first responder, meaning if it happens on campus and they share that information with one of our resident assistants but they don't give a name...[and] they haven't told the police...they're not going to tell us. Sometimes they might [if we establish a relationship]. You want to see if you can build enough trust in the conversation or support in the conversation that the person will see this as a safe place to report, but it isn't easy to present it that way. (T2B14:8)

Often a Coordinator may truly want to provide the visitor with control. In the clearest example, a Title IX Coordinator described conversations with students but taking no notes:

[I] take no notes and make no record of the conversation. So in that way it's kind of like the Ombuds experience. I give people an opportunity to state their case. What is the problem, what do they think the problem is, how do they want to resolve it? I do not provide any initial statement before students start talking, I'm just letting [the student] get it off [their] chest and see where it takes them...Because a lot of times they just want to vent. They just want somebody else to hear what's going on and tell them whether or not they're crazy. If they are serious about it, I have a formal intake form to fill where they can file a complaint. It's pretty simple and straightforward. If it's sexual in nature there are some key things that a person will come in and tell me that will lead me to believe that something was not consensual and now we've got to do something. I tell them, 'I need to stop you. I need to review what I've heard, and I need you to know that this is no longer a 'what do I do conversation, this is a 'what are we going to do' conversation. There's just too much information, there's too many things going on making my skin crawl, and now we've got to address it. I don't care if they tell me they want to investigate it or not, if I've got evidence, I'm investigating, especially sexual harassment. There are no ifs, ands, or buts about it. If they have evidence to prove that something unseemly was going on and it wasn't consensual, I'm checking it out. (T11A45:14-23-42-43)

Other Coordinators also depart from the archetype by not documenting visitors' statements:

We have a complaint form, but...I am loathe to require that they complete it until we talk. And I'm also loathe to tape record, because it changes the tenor of a meeting when you put that thing between the two of you, and the general counsel's office disagrees with me on that. (T12A47:22)

Still other Title IX Coordinators provide complainants with control over whether the Title IX Coordinator will investigate, a clear departure from the archetypal model. For example, a Coordinator noted, "[T]he goal of the meeting is to give [visitors] their options and to help them make a decision about a complaint and what they want us to do with it. What do they want to have happen? (T8A39:52). Another Coordinator described the decision to go forward with a complaint as a "collaborative decision" in which anything said by the visitor could be used for their detriment (T8A39:55). Other Coordinators described telling visitors their options:

Do they want to use the Ombuds, Title IX Coordinator, deal with it on their own, or do they just want to drop it? They always have options. Once they tell me where they want to go with it, because some of them are adamant about ‘no, I want to nail him to the wall, so you’re the person I want to talk to.’ I tell them ‘here’s the form’ because I never want them to make a decision in the heat of the moment. ‘Here’s my complaint form, my intake form.’ And I ask them to write out or type up their complaint, which requires them to go away, think about what they’ve said, what they want to do, and come back. Sometimes I never see them again because once they put it in writing and they see it they change their minds. (T11A45:20)

Still other Title IX Coordinators depart from the archetype by making pre-conversation statements that provide basic information but not enough to educate visitors about their options:

[W]e try to explain this before we’ve heard the complainant’s entire story, so it allows the complainant to kind of decide how much they’re going to share with us and how detailed we’re going to get...that’s where we can give them some control. I say, “[W]e will [make decisions] about what to do depending on what you tell us...for example, if what you tell us on its face violates a policy, then we will do a full investigation, but otherwise we may not. (T1B12:56)

Another Coordinator noted:

In our office we generally don’t use a form. We just collect basic information, name, if the person was a student, faculty, or staff, the nature of their complaint, who the witnesses may have been, if there were any witnesses, what the complaint is in reference to. Usually we’ll have a conversation even before we get started, before the person starts talking we’ll talk to them a little bit about our office and what we do and let them know our obligations to move forward if we have enough information to indicate that something is potentially a violation of our policy we have an obligation to investigate. So if a person feels that they don’t want to engage in that we say you can give us a hypothetical. We try to advise them on the front end before they begin to share information and try to gain their confidence in our process and explain how our process works. We would still need to investigate the hypothetical. (T13A49:27)

A very different type of departure occurs when a Coordinator gives priority to the individual complainant’s wellbeing and preferences rather than to investigation and enforcement:

[P]eople that don’t want an investigation, we encourage them to talk in hypotheticals. A couple of times I’ve actually taken anonymous phone calls. What we can do with that is limited, but I’m willing to take them because if I can give somebody who’s in a bad situation some sort of useful information, that’s better than nothing. (T7A32:33)

We don't require them to have to fill out a form. Maybe it depends on how traumatized the person may be or how upset they may be. It may be that we don't want to get into what happened at that point. We might just want to give them some support. We might want them to go to the counseling center, that kind of thing. They may not be at a place where they want to formally complain or go through the complaint process. Certainly we want to get whatever information we can, but again, it would just depend on the state of the individual at that particular point in time, but certainly we would want to make sure that we follow up with that person to make sure that we get a statement at some point... (T13A49:31)

In sum, in sharp contrast to the Title IX Coordinators who strictly adhere to the archetypal model by giving top priority to investigation and enforcement, some Coordinators grant more—or less—confidentiality than the archetype demands, seek to build trust but only to entice complainants into divulging more information than they seem to be willing to provide, or provide complainants with control over whether to investigate that directly undermines the commitment to investigation and enforcement.

CONCLUSION

Although Ombuds and Title IX Coordinators presumably both share a preference for eliminating sexual misconduct, the archetypal offices reflect two very different philosophies and mechanisms for handling complaints. Where Ombuds see absolute confidentiality and the self-determination it provides as a prerequisite for encouraging people to bring them complaints and for handling complaints in the face of retaliation, Title IX Coordinators reflect a compliance regime that seeks to prevent, elicit reports of, and eliminate instances of sexual misconduct.

While some Ombuds and Title IX Coordinators adhere strictly to their respective archetypes on the matter of confidentiality, many depart considerably from these commitments. These Ombuds breach confidentiality in the interest of nabbing a perpetrator or reforming a departmental environment. The Title IX Coordinators naturally depart in the other direction. Some give priority to the individual complainant's wishes or feelings over the institutional

interest in investigation and enforcement. Others misleadingly give the impression of being prepared to maintain confidences, but only to draw the complainant into letting down her guard to reveal information that she might not otherwise divulge. As a result, confidentiality illustrates the tension between individual self-determination and broader organizational interests. The next chapter examines the impartiality and independence of Ombuds and Title IX Coordinators.

CHAPTER 6: IMPARTIALITY AND INDEPENDENCE

The archetypal Title IX Coordinator and Ombuds models view impartiality and independence very differently. In practice, however, many Coordinators and Ombuds depart from their respective models in ways that make them more alike than different. This chapter briefly describes how these different archetypal models treat the important values of impartiality and independence in very different ways. As we shall see, while some Coordinators and Ombuds try to remain faithful to these guiding principles, some Coordinators and Ombuds depart from them in ways that make them come to resemble one another. These adherences and departures occur along a spectrum, as some Ombuds or Title IX Coordinators may aptly be described as “adherers” or “deviators.” Additionally, adherence or departure is often situational and context-specific as a Coordinator or Ombuds who goes by the book in one instance departs from their archetype in another.

The Title IX Coordinator archetype is a model similar to a police investigator or prosecutor, but with a mission to enforce compliance with civil rights law. In doing so, they are to be impartial, but a Title IX Coordinator’s impartiality relates both to following prescribed procedure and to the quality of the investigation. A Title IX Coordinator’s investigation must be impartial, with the investigator unbiased towards either the complainant or the respondent. This also includes having no other job responsibilities, such as general counsel or a disciplinary hearing board member that may create a conflict of interest. While Title IX Coordinators must have no bias with regard to the facts or guilt in any particular investigation, they are expected to advocate for policies that prevent sexual misconduct.

Independence is closely related to impartiality. In order to maintain independence, Ombuds must operate outside of the official organizational structure in order to be able to avoid

undue influence and to access information throughout the organization. They do not represent the organization or serve to advance the organization's goals but instead are advocates for fair process generally. As opposed to Ombuds, Title IX Coordinators represent the organization. Title IX Coordinators, unlike Ombuds, use university general counsel as their counsel. While Ombuds operate independently of the organizational structure, Title IX Coordinators work within the organizational structure. Title IX Coordinators are representatives of the organization, and Ombuds serve the value of fair process more generally. For Title IX Coordinators, independence and impartiality are related concepts, as alignment with administrative interests can affect a Coordinator's impartiality. While technically not independent, Title IX Coordinators must have the freedom to advocate for compliance with Title IX law and policy in order to maintain their impartiality and ability to be effective.

Where the Title IX Coordinator is an advocate for compliance with law and policy similar to a prosecutor or police investigator, the Ombuds form of impartiality is more like that of a Rabbi or a Priest, a role that serves as an advocate for overarching principles, such as fair process. Neutrality and impartiality also requires that the Ombuds reports to the highest possible level within the organization rather than some subordinate unit, operates independent of ordinary organizational structures, and is not involved with any formal investigation or organizational compliance function (IOA Standard 2.3). IOA Standard 2.4 requires that the Ombuds serve no additional organizational role that may compromise the office's neutrality. This requirement includes not aligning with any formal or informal associations to create actual or perceived conflicts of interest, and having no personal interest or stake, and incurring no gain or loss from the outcome of any issue. Practically this stricture means the Ombuds may not conduct formal investigations, receive notice on behalf of the organization, serve as a voting member on any

search committees not related to the Ombuds office staff, handle formal appeals, keep case records for the organization, or have any authority to make, change, enforce, or rescind any policy, rule, or administrative decision (IOA Best Practices, 2009, p. 4). IOA Standard 2.1 requires Ombuds to be neutral, impartial and unaligned, while “striv[ing] for impartiality, fairness and objectivity in the treatment of people and the consideration of issues” (IOA Standard 2.2).

TITLE IX COORDINATORS: THE INVESTIGATOR/PROSECUTOR MODEL

A key responsibility of Title IX Coordinators is impartial investigation. The 2011 Dear Colleague Letter requires a school’s inquiry in each case to be “prompt, thorough, and impartial” (p. 5). But what does it mean to be impartial? The Title IX office at the University of Kansas provides a typical example of how these university offices attempt to achieve impartiality. The University of Kansas Office of Institutional Opportunity and Access states that it is a “neutral fact finder conducting investigations” (University of Kansas, OIOA, About IOA). This statement is followed by a list of complaints the office will investigate, including complaints of discrimination by race, color, ethnicity, religion, sex, national origin, ancestry, age, disability, status as a veteran, sexual orientation, marital and parental status, gender identify, gender expression, and genetic information. In this light, impartiality can be inferred to mean the investigator will not be biased towards either the complainant or the respondent. The Discrimination Complaint Resolution Process also declares that “investigators assigned to conduct an investigation will be impartial” (University of Kansas, Discrimination Complaint Resolution Process, Investigation). This view is echoed at Pennsylvania State University, where the Task Force on Sexual Assault and Sexual Harassment Report noted that an impartial

investigation required that “any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed” (2014, 12).

Impartiality is complicated for the Title IX Coordinator who, as opposed to Ombuds, must work within the organizational structure, represent the institution, and use university general counsel as their counsel. A South Dakota Title IX and Compliance Coordinator position describes the position “working in conjunction with the AVP of Human Resources and Office of the President to ensure compliance” (Title IX & Compliance Coordinator job at South Dakota State University, ATIXA, 2013). The Santa Clara University EEO and Title IX Coordinator job posting (Higheredjobs.com, retrieved 6/12/14) requires the person to “[s]erve as a consultant and partner with the Office of Diversity and Inclusion and with Human Resources with regard to federal and state laws that prohibit sex discrimination, sexual harassment and sexual misconduct.” Title IX Coordinators thus operate within and represent the organization in its responsibilities to enforce civil rights law and policy. In doing so, Title IX Coordinators must remain faithful to the dictates and requirements of Title IX law and the resulting institutional policies. Independence and impartiality are related concepts for the Title IX Coordinator archetype, as the appearance of serving administrative interests can erode the appearance of impartiality.

The 2011 Dear Colleague Letter clarifies that impartiality can be defined as avoiding conflicts of interest. Title IX coordinators “should not have other job responsibilities that may create a conflict of interest. For example, serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest” (p. 7). Other job positions whose job responsibilities may conflict with Title IX obligations “include Directors of Athletics, Deans of Students, and any employee who serves on the judicial/hearing board or to

whom an appeal might be made” (OCR Q&A, 2014, p. 12). The investigative/adjudicatory division of roles is not a requirement of Title IX or OCR, and Title IX Coordinators at many institutions make “judgments” regarding outcomes despite either conducting or directing the investigation. The OCR Q&A (2014) provides that the Title IX Coordinator does not necessarily have to be the person who conducts the investigation (p.25). If the Title IX Coordinator does conduct the investigation there must not be a conflict of interest in carrying out this investigation (OCR Q&A, 2014, p. 25). This conflict of interest definition suggests that Title IX does not bar the Coordinator from making the initial determination of guilt or innocence, as long as they do not oversee the appeal.

Administrative law provides additional guidance for Title IX Coordinators. Under Federal Law (Administrative Procedure Act, § 554(d)(2)):

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings...

As a result, under Federal law the functions of investigator or prosecutor and Administrative Law Judge or hearing officer must be kept strictly separate. When the procedure occurs under state law, however, the separation need not be so strict, but it still must be there. In *Withrow v. Larkin* (1975), the Court held that a combination of investigative and adjudicative functions in a state agency is not per se impermissible. The court did suggest, however, that the combination of these functions in a single individual official would raise more serious concerns. When the procedure is governed by state law, constitutionally protected property interests trigger the required separation.

Motivated by liability concerns, at least one major education insurer recommends that university officials who investigate student-perpetrated sexual assault should not include a

determination of guilt or innocence in their the investigators report, as these conclusions may be seen as a judgment that is not within the authority of investigators to make (United Educators Powerpoint, 2012). As a result, a minority of Title IX Coordinators in this study were limited to investigating and determining whether sufficient evidence (or probable cause) existed to trigger a hearing to determine Title IX violations and punishment. The remaining Coordinators were able to include recommendations and findings in their reports. Likewise, the 2011 Dear Colleague Letter notes a university's investigation and hearing process must be impartial in order to be equitable, thus "any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed" (p. 12).

Title IX Coordinators' impartiality obligation also requires objectivity. Similar to an investigator or prosecutor, Title IX Coordinators must objectively examine the facts to determine violation of civil rights law or policy. According to Brett Sokolow (ATIXA Training Manual, 2013, Civil Rights Investigation Model), "[S]tudent conduct administrators have to be cautious about wearing too many hats in the process so as to negatively impact this objectivity. You cannot be chief investigator, presenter of the complaint, custodian of the conduct process, and implementer of sanctions for the same complaint without an appearance of impropriety or potential compromise of objectivity" (p. 60).

Objectivity requirements are echoed in recent job postings. The Director and Title IX Coordinator position posting at Montana State University (Higherjobs.com, retrieved 6/12/14) requires a "[d]emonstrated ability to investigate, analyze and resolve complaints, while maintaining objectivity and fairness." Goucher College (Higherjobs.com, retrieved 6/12/14) is seeking a part-time Title IX Coordinator with "the ability to build relationships that balance the multiple, varying, and sometimes conflicting interests of diverse stakeholders around a

politically charged subject matter are essential.” In practice Title IX Coordinators do often carry dual roles, such as directors of offices of institutional equity, diversity, human resources, or student services.

In terms of goals, Title IX Coordinators are advocates for compliance with law and policy similar to a prosecutor or police investigator. The ATIXA Statement of Ethics and Title IX Coordinator Competencies (2012, §3) states that “No unlawful or unethical practice or any practice at odds with these standards can be justified ... if doing so would deprive a member of the community of civil rights which a reasonable administrator would have known were owed” (p. 3).

TITLE IX COORDINATORS WHO ADHERE TO THE ARCHETYPAL MODEL

Title IX Coordinators who follow the archetypal model see their role as a formal one of determining the facts and ensuring compliance with the law. One Coordinator described their office’s policies as “[F]air and unbiased” and their “role is to get to the truth, we are not advocates on this campus. [We want to know] what actually happened, so I don’t really see us advocating [for] one side or the other” (T1A11:36). This sentiment is echoed by another Coordinator who described the impact of only having one side’s cooperation:

[A] lot of time they’ll come in and say ‘I’m not going to cooperate, you can’t find me guilty of anything.’ The response to that is ‘yes, we can! We’re going to weigh the evidence that we have and we’re going to make a decision based on that evidence, so if you don’t cooperate we’re just not going to have your version of what happened.’ (T9A41:33)

In determining facts and ensuring legal compliance, the Title IX Coordinator following the archetype seeks to remain impartial to the interests of both the respondent and the complainant. One Title IX Coordinator reflects this impartiality goal in noting “[R]ecently there’s been a lot of stuff about ‘gosh, everybody’s taking the female’s word and who’s

protecting the respondents,’ [but] [w]e’re trying to do a very balanced approach here where we say ‘[W]e want to make sure both sides have resources and [be] very neutral in terms of what’s going on’” (T9B42:16). The same Coordinator described working with a complainant who “trusted us until we didn’t find in her favor...[but because] we are neutral fact finders...if its not sexual harassment, it’s just not” (T9B42:8). Another Coordinator echoed remaining impartial to both sides: “I’ve talked to the complainant, now I’m going to talk to the respondent and get their statement. All along the way I am assessing credibility. I’m trying to be as bias-free and judgment free as possible. Taking it seriously, but I’m not taking sides” (T11A45:49). Often Title IX Coordinators following the archetypal model must navigate others’ differing assumptions about their role:

[There is an] immediate conclusion that [the process is] going to be a heavy-handed, legalistic process and that all [I am] interested in [doing] is protecting the university... and so people don’t have a lot of trust coming into [the] process. This may be the first time they’ve had this experience, they’ve never had to visit your office before or have reason to enquire about your office. Then they find out you’re a lawyer and that adds a dimension to it ‘oh my gosh...’ I think it’s also the culture of an office and the culture that I try to create is to reassure both parties and witnesses that we’re objective and we’re not pre-judging, and that takes a lot of work to get people to understand. (T2B14:43)

Title IX Coordinators who follow the archetypal model do not see their role as one of advocacy, as indicated by one coordinator who noted, “It is not an advocacy role, it is more of a policy development or administrative role” (T10A43:3). Impartiality can be challenging when complainants and respondents are seeking advocacy, for example: “Some people do what I call ‘shopping.’ They’ll shop me, they’ll shop diversity, they’ll shop Ombuds, they’ll shop legal affairs, and they’ll shop around to see who’s going to give them the answer they want to hear” (T11A45:51). Another Coordinator explained, “We explain to people what we do and we explain to them what our obligations are and also that we’re not their representative. Sometimes

people come in here thinking that we're their lawyers or advocates or representatives, and we disabuse them of that right away" (T7A32:31).

Another Coordinator noted the challenge of remaining impartial in the face of expectations to the contrary by individuals with power:

[W]e're not advocates for anybody, but they expect us to behave as other people behave towards them in the bureaucracy. They have a place in the bureaucracy and goddammit, this office is not respecting it...I think the word is deference. Whether we respect them or not, they want us to defer to them...and then sometimes they'll complain to our bosses that an investigation was unfair...because we ask them questions that make them uncomfortable. [S]o when they come here and we don't back off that pisses them off...they want us to accept their first answer which is 'no, of course I didn't sexually harass anyone.' (T7B33:14, 21, 24)

Title IX Coordinator who follow the archetypal model do, however, advocate for the goals of law and policy:

[W]e try to blend this sense of reasonableness, some sense of advocacy for right, for the policy, with protection and due process for the alleged perpetrator, alleged defender. You have to have all that in front of you in making a decision. That's why I say it's not a pure advocacy role, because a pure advocacy role is different. And that's not what we do. We have that at the university, [but] that's not my role. (T10A43:7)

Likewise, another observed, "[W]e let [visitors] know that we have an obligation to the institution to conduct an investigation if we learn something that we think needs to be investigated, whether they want to file a complaint or not" (T7A32:31). In order to ensure that law and policy is correctly applied, impartiality for the Title IX Coordinator adhering to the archetype requires protecting each side's rights to fair process, as described by another Coordinator:

I take very seriously [both respondents' and complainants' right[s] of having a process that's fair and objective, but also giving them the same opportunity to be heard and feel that they've been heard without drawing conclusions. And that's a struggle because sometimes the story that you're being told by the complainant is so compelling and the circumstances that gave rise to them being here are very

difficult. And so it would be easy to jump to a conclusion that the person's that's the accused is a bad actor. (T2B14:42)

Title IX coordinators describe working closely with university legal counsel so as to interpret the law correctly. Title IX Coordinators, unlike Ombuds, use university general counsel as their counsel. One Coordinator noted the importance of examining each situation from multiple organizational perspectives: "Then you have to look at how things are being handled inside, from the standpoint of what if this goes outside, what will this do? How might this be viewed by opposing counsel? I'm not an attorney but I review everything I do with our general counsel's office" (T4A24:11). Another Coordinator described their relationship with legal counsel as "very close... [w]are probably in conversation at least once or twice on a daily basis. We're constantly working with them to tweak our policies and procedures. We'll get our protocols, obtain advice on cases that we might be working on, just to make sure that we're getting sound legal advice before we take action. So yeah, it's a pretty fluid working relationship" (T13A49:14). Other Coordinators echoed the close relationship with legal counsel:

It's rare, I can't think of one situation where either office disagreed with the findings. It may be a word or two or 'you need to amplify on this issue, talk more about the evidence that supports how you arrived at this conclusion,' that sort of thing. But that's the understanding that we have and what we've communicated both to the joint communities, faculty, is that our work is done in consultation with general counsel. (T2A13:19)

Another Coordinator likewise described having a close relationship with university counsel due to the liability implications, stating "We pretty much review all our final reports with them. They're aware of all of our case lists, obviously, because it could have liability implications for the university, but I don't ever feel like they're trying to impose upon us any sort of outcome" (T1A11:12).

In keeping with their reliance on legal advice from the office of general counsel, Title IX Coordinators who adhere to the archetypal model view their position as reporting to, and representing, the university's leadership. The posting for Chief Diversity Officer and Title IX Coordinator at Claremont McKenna College (Higheredjobs.com, retrieved 6/12/14) notes the position reports to the President with dotted-line reporting relationship to the General Counsel and Chief Compliance Officer. Yet another Coordinator described "report[ing] up through academic affairs, and...that's my loyalty, if you will, because it's my reporting line" (T11A45:37). Generally Coordinators describe sharing in the goals of the administration:

As it concerns my boss, the president, and maybe the provost, I will report to them everything and anything that could be a potential embarrassment to the institution, that could be a headline tomorrow morning. I don't want them being blindsided by anything. It's what any good subordinate does for his boss.
(T7A32:12)

In this organizational context, many Coordinators described the challenge of maintaining independence and remaining impartial but at the same time nurturing much needed relationships with the general counsel and top university officials. One Coordinator noted, "I have to be very, very, very careful [to protect my freedom]. So because I am proactive and because I am about relationships, I try to keep legal abreast of any situation in my office that may turn into a lawsuit or a legal battle. I always try to give them a head's up, but technically I don't need to. If I get a request for records, if I get wind that an attorney has been contacted by one of the folks I'm investigating, I always provide the courtesy of letting legal affairs know so that they're not blindsided" (T11A45:40).

Ultimately, although Title IX Coordinators report to the university leadership, those who adhere to the archetypal model give priority to doing what is required by Title IX, even when this might conflict with what is preferred by the organization. In this way impartiality and

independence are consistent in terms of application of law and policies required by Title IX.

One Coordinator noted that the office must “make sure that we respond in an appropriate way, that we follow our policy and that we’re in alignment with what our legal obligations are as an institution” (T8A39:17). Tension often results, as indicated by one Coordinator who described a conversation with the university president:

I got called to the president’s office and he asked me ‘do you have enough information and evidence that I can fire [the professor]?’ That was his question to me. And I tell him ‘I’ve got enough evidence that a lot of stuff can happen, but you can’t fire him with it. He’s a jerk, but there’s no law against being a jerk. He’s trampled on the student’s civil rights, but we can fix that.’ (T11A45:38)

Maintaining independence and impartiality requires effective communication with administrators regarding the shared interest in compliance with Title IX. For example:

I think one of the issues that you see when you really get into the nitty-gritty of this work is sometimes the outcome of our investigation is not in the interest of the university’s administration...[in terms of] the university’s liability interests. I do think at the end of the day it’s in the interest of the university, and I think being able to stand up and help them see that [it is important]. (T1A11:15)

In addition to navigating administrative preferences, the Title IX Coordinator who follows the archetypal model is able to retain independence from control by university legal counsel. For example, a Title IX Coordinator described their interest in advocating for policy versus the university’s interest in defending against potential lawsuits:

I think we have a lot of independence, pretty much total independence in how we do investigations and make determinations, and [general counsel is] appreciative of that and they can say ‘this office made a completely independent determination about the situation.’ Now naturally there’s going to be times where there’s a little bit of tension because they’re defending the university and we’re advocates for the policy and not necessarily thinking about defense all the time, but it naturally comes into your brain as a lawyer. I think sometimes we tend to be a little more proactive about the environment where they might be a little more defense oriented. Where we know we’ve made a finding of sexual harassment against someone who remains in the department...we consider that to be more problematic because it feels like we’re just waiting for the next complaint. I think they have more of a case-by-case view of it. (T3A19:45)

Another Coordinator noted, “I tend to say ‘gosh, I want to make sure I’m not causing more problems than I’m helping solve,’ so I tend to look at it very collaboratively and say ‘what do you think about this?’ We talk about it, sometimes we agree... But there are times that we haven’t agreed and I can do what I want to do and I’ll hear ‘hey, if you want to go out there on that limb, go for it!’” (T9A41:43).

The perception of independence is important, as one Coordinator noted, “I think some people perceive us as being an arm of the regent or an arm of the administration, and I don’t think that’s a fair perception at all. I think we are [here] to promote and enforce Title IX on the campus, but I think some people see us as we’re just keeping the campus safe from lawsuits” (T1A11:48).

Remaining impartial and independent is important for maintaining legitimacy and trust, as indicated by the below Title IX Coordinator describing an interaction with a parent. While the parent viewed the Coordinator’s remarks as a preference for a particular outcome, in reality it was a Title IX Coordinator’s view of reality based in experience and expertise:

We had a case early on where the mom was like ‘yeah, this guy is going to go to jail for being a rapist,’ and the fact of the matter was that wasn’t going to happen. So she initially was very angry at me because I told her that that probably wasn’t going to happen and that if there was a criminal prosecution, if the prosecutor didn’t decline the charges, it would probably be six months to a year before it was resolved, he would probably plead to a lesser included offense, and get probation. And she went ballistic on me. Ultimately all of that came true and she ended up recognizing that I had given her the straight story on everything and she’s become one of our greatest allies. (T9A41:32)

Title IX Coordinators who adhere to the archetypal model often describe managing expectations regarding their role as a fact finder: “We have to [manage expectations]. That’s why I always...let them know...they may not like [the truth] I find in the end, and therefore I know they may not like me either!” (T4A24:39).

The archetypal Title IX Coordinator must act impartially to the facts, to the potential outcomes, and to any one side, necessitating that the Coordinator play an impartial role within the investigative process. Investigative impartiality is clearly stated by one Coordinator in saying “[I]f there’s a higher level decision I need to be making it objectively and if I am too connected to each case I think...it compromises me a little bit...I am more interested in the process, the protocols, the rights, the responsibilities... if the university is not following the protocol that is best for us, that’s a problem for me” (T6B31:7). Note that the previous comment reflects an implicit belief in the Coordinator’s role as an advocate for the quality of the process. Likewise, another Coordinator observed:

I don’t think I can do [investigations] and the [punishment] piece and adequately have the confidence of my investigators or law enforcement... there’s just, there’s a natural... there’s suspicion between the different roles. I mean, a coordinated campus response is based on understanding what your roles are and where there’s inherent conflict in your roles. (T8A39:11)

Another Coordinator described holding an advocacy role at one point and then moving into the Title IX Coordinator position: “[T]he [early] assumption when I walk into the room is...that I’m going to be harsher on the accused or somehow biased, that I’m going to be harsher in recommending a sanction or somehow aggressive in my response. I’ve had to prove that I can be reasonable and an aggressive response or a biased response isn’t really going to help the complainant either” (T8A39:24).

In sum, while the archetypal Title IX Coordinator is a representative of the institution and reports to the administration (while collaborating to some extent with the general counsel), he or she must remain an advocate for compliance with and correct application of law and policy. As a result Title IX Coordinators who follow the archetypal model see their role not as advocacy for any one side but as advocacy for compliance with law and policy.

TITLE IX COORDINATORS WHO DEPART FROM THE ARCHETYPE

Title IX Coordinators adhere and depart from the archetypal model along a spectrum that depends on the Coordinator's preferences, the organizational interests, and alleged incident, and the complainant and respondent's preferences. Many Title IX Coordinators who depart from the archetype do so on the basis of understandable concerns about a real individual's pain, and they decide to help the person even if this does not yield institutional enforcement. In doing so, Title IX Coordinators depart from the archetypal model's impartiality requirements. Other Title IX Coordinators, needing to address and resolve sexual misconduct, depart in the opposite direction and favor organizational interests at the expense of impartiality. Some Coordinators depart from the archetype by holding multiple roles that undermine their ability to be impartial. Yet other Coordinators depart from the archetype do so because they are unable to establish enough independence to do the preventative work required by Title IX.

First, often Title IX Coordinators advocate for one side or another or express partiality. One Coordinator noted "end[ing] up in more of an advocacy role than I should be" by "help[ing] [the parents] make an appointment to see [medical professionals] and develop evidence...[and to a lesser degree by] recommend[ing] a local psychologist...but what do you do when they're in your office and everybody's weeping and dad's ready to punch someone out and put a whole in the wall?" (T12B48:18). Another Coordinator described attempting to manage expectations and maintain impartiality:

Reasonable outcomes I listen to. Irrational, I try to manage. When the professor, instructor says 'what's the big deal?' I try to explain to them what the big deal is, because a lot of it has to do with freedom of speech, the [rights held by] a student that they've [violated]. [I try to] [g]et them to understand [that if] they don't want [their own rights violated], why is it okay when they [violate a student's rights]? I'm trying to get them to understand the seriousness [of their offense]. I really don't try to nail people to the wall unless they really are being jerks about it. (T11A45:57)

For another example, consider a Coordinator who described asking the complainant what outcome they want: “We want to be able to make an outreach call to [the potential victim], [to] make sure they’ve got any resources like meeting with our office of victim’s assistance or any other advocacy groups on campus that could help them...we want to make sure they’ve got that support. Then we work with our complainant to figure out what outcome they’re looking for” (T1A11:18). Indeed the line between assisting individuals in accessing resources and advocating on their behalf can be a fine one. One Coordinator described situations in which the administration may want to go forward with an investigation without the potential survivor’s consent, in which case the Coordinator tells the person “to share [with the administration] why they don’t want to go forward or what their concerns are...” (T839:55). The Coordinator then explained to the potential survivor to “say what you want, but remember to say why and that anything you share could be used, so keep that in mind”—but then he/she immediately acknowledges “that’s the role of an advocate, [and] I can’t coach you” (T839:55).

Second, Title IX Coordinators who depart from the archetypal model often advocate for particular outcomes that may favor one person over another. One Coordinator reported a problematic pattern in which “We’re firing all our classified people who violate the policy but our tenured faculty...[are] getting [treated] a little bit different[ly] sometimes (T1B12:32). The Coordinator continued:

You won’t find many cases...[or] university campuses where a student can take an action that will result in that faculty member leaving the university...It’s extremely rare [and while] [s]exual harassment is one of those areas where you can get that outcome...[e]ven then...it’s pretty rare when you’re talking about a tenured faculty member. (T1B12:12)

Another Coordinator described an instance where a woman reported sexual misconduct but the Coordinator effectuated an informal resolution instead of an investigation: “[T]he [respondent]

said ‘I may have done that, but I in no way intended it to mean that.’ [Seeing] where we could resolve the matter through mediation, [t]he matter was positively resolved resulting in a beautiful card sent to me by the alleged perpetrator” (T4B25:3).

Coordinators often described their role as one of advocacy. For example, one said,

I would emphasize that in...my office...all we’ve done [is] pretty much...reacting to somebody telling [us] that something may be amiss and...open[ing] investigation[s] and look[ing] into it...but I think being a Title IX Coordinator goes beyond that and I [have] said ‘[With] me, you’re [getting] an advocate, and that means being more than reactive.’ If I’m an advocate in this kind of an institutional setting, I believe my job is to find the envelope and push it...I’m going to have to do much more affirmative advocating for [complainants]...[S]ometimes that pisses people off. (T7A32:5)

Third, Title IX Coordinators who depart from the archetype lack the independence necessary to craft policies that will lead to greater compliance with Title IX law and policy. Many Coordinators described efforts to craft the authority and independence necessary to enact much needed educational programming. One Coordinator described their efforts to get in front of students, but was told “sexual violence and sexual harassment [is] too negative, [and you] [cannot] be part of...orientation because that would just scare people away” (T9A41:13). Thus, a Coordinator described needing to act quickly to respond to pushback against implementing mandatory training:

When you start seeing patterns and trends, you want to nip that crap in the bud and address it, so that it doesn’t become a volcano that just explodes.... This campus was extremely reactive. When I suggested, as an example, that we do sexual harassment training for everyone, make it mandatory, including students...I was told that “if we did that, that I would get more sexual harassment complaints. Why on earth would I want to do that? (T11A45:31)

The same Coordinator then described frustration at not being able to work towards education and prevention:

[Initially] I was pissed off... in my prior role... I had more independence, I had more power, I reported directly to the president...so I had more support...when I

came into this role, I assumed that it was going to be the same situation... I had created policies before, I had done the [diversity] work before, that was part of my job...[and] I bring those talents [here only] to find out ...'oh no no no, we don't need all that stuff, we just need an adjudicated investigation officer on this campus because we have all these investigations going on. (T11A45:31)

Fourth, Coordinators who depart from the archetype often assume multiple roles in the investigative and adjudicative process. One Coordinator expressed concern about acting as a witness in hearings: “[H]ow am I supposed to be fair and thorough and impartial when I’m called by one side and not another [to testify]...I feel funny about that” (T12B48:15). Another Coordinator described playing a role past the investigation and recommendation phase: “[After the recommendation] [w]e become witnesses at the student conduct hearing and...testify, but we are not cross-examined by anybody” [T9A41:39). Coordinators also described hearing about Title IX Coordinators holding a dual role in the legal counsel’s office [T11A45:3]. Other Coordinators describe frustration at efforts to separate their roles in order to avoid liability:

I think [we are] passing the liability around. If we...do an investigation, get all of this information to do nothing...but pass it on to someone else who is going to make the decision...[u]ltimately I don’t know that it’s going to prevent anything. Anybody who doesn’t agree with the outcome will just go to the person who did the investigation and say either it was flawed or the person making the recommendation was wrong. So having one office that’s going to be on the hook for [an external complaint] for the investigation and [another for the] recommendation...how [does] that solve anything...[they will say] [o]kay, we’ll sue you both! (T10B44:27)

Fifth, Title IX Coordinators who depart from the archetype tend to care less about the quality of the process as it relates to impartiality. One, for example, observed,

[P]reviously [I was] advised not to go near the general counsel’s office...[our administration] didn’t like all the investigative reports we [authored] because whenever we had findings of discrimination or sexual harassment, those reports...became attachment A to the lawsuit against the institution. I’ve been given the green light to...identify cases that maybe can reach an informal resolution without having to go through a full investigation. [I]nformal resolution sometimes also means [we can more easily] bump somebody out of the institution...give them an opportunity to resign. (T7A32:44)

The same Coordinator noted ambushing respondents by speaking with the respondent last:

[T]hey often feel ambushed, and sometimes we do ambush them because we frequently ask questions that we already know the answer to...but they don't know that we know...so when we confront them with conflicting information they get pissed off because we ambushed them. (T7B33:22)

Finally, while the Title IX Coordinator archetype's office is located with formal administrative units such as human resources, legal counsel, or the executive administrative offices, Coordinators who depart from the archetype are located elsewhere as a means of implying that they are independent of the university administration. Thus, one noted, "we're in a little non-descript building, which I think is good. I don't think we should be in the main administrative building, I think that's just intimidating to students in accessing us" (T9A41:22). Another Coordinator stated, "we thought about putting the office in the student union but were concerned that it would be forever [perceived as aligned] as being [only] for student use" (T8A39:34). Similar to an Ombuds, another Coordinator described the importance of being in a high traffic area that also provided for privacy: "We thought it was important that we be in a location where there is a lot of traffic...but wouldn't be obvious necessarily that [visitors] are there coming to see us, but they could be coming to a professor about a class" (T13A49:19). One Coordinator reported specifically following the model of the Ombuds's independent location:

[T]he reason that we chose the building is we kind of looked at how the Ombuds was situated kind of in this neutral off the path kind of place, but a place where both students and employees could find you [in a] central [location]...An administrator saw the location and felt it was unacceptable and why? I said, 'I don't need to be in the president's suite.' That's going to impact whether people are comfortable walking in [and working with us]. (T8A39:36)

In sum, Title IX Coordinators often depart from the archetypal model in ways that violate the stated tenets of impartiality and independence.

OMBUDS: THE PRIEST OR RABBI OF FAIR PROCESS

If Title IX Coordinators are similar to a principled public prosecutor, Ombuds take a view of independence and impartiality that is akin to that of a religious leader. Ombuds serve as an advocate for fair process as an overarching principle, with fair process defined both as sociological conceptions of voice and as legal conceptions of due process. Like a religious leader, the Ombuds has no authority enforce decisions, is in principle completely committed to the confidentiality of those seeking his or her advice, and is bound by ethical or psychological conceptions of listening to people's "voice." Ombuds, like priests and rabbis, serve as practical mediators, but with very informal procedures. Ombuds, like priests and rabbis, have no authority other than their legitimacy to ensure compliance; they can only make recommendations. In some ways the analogy breaks down: Ombuds have no religious authority of any kind, and the people coming before them are not from a shared faith community (and so their moral authority may be more attenuated).

Impartiality first requires that the Ombuds maintain their independence. The International Ombuds Association Standards of Practice list Independence as Standard number one. Independence requires that the Ombuds and the Ombuds office are independent from other organizational entities (IOA Standard 1.1), the Ombuds holds no other organizational position that might compromise independence (IOA Standard 1.2), the Ombuds holds sole discretion with how to act regarding specific concerns or observed trends (IOA Standard 1.3), the Ombuds has access to all organizational information and individuals as permitted by law (IOA Standard 1.4), and the Ombuds has the authority to select their own staff and manage their budget and operations (IOA Standard 1.5). Independence also requires that the Ombuds report directly to the highest level of the organization, with an employment status indicating that they are not subordinate to other senior officials who report to this highest level. Functionally, independence

means operating independently from “control, limitation, or interference” (IOA Best Practices, 2009, p. 2).

IOA Standard 2.3 requires the Ombuds to report to the highest possible level, operate independent of ordinary organizational structures, and most importantly not to report to or be structurally affiliated with any organizational compliance function. Further, IOA Standard 2.4 requires that the Ombuds serve no additional organizational role compromising neutrality. IOA Standard 2.4 includes a prohibition on aligning with any formal or informal associations to create actual or perceived conflicts of interest, having no personal interest or stake, and incurring any gain or loss from the outcome of any issue.

While the Title IX Coordinator is advocating for specific policies, the Ombuds is more generally advocating for fair process. Obtaining the ability to act with impartiality and neutrality requires the Ombuds act with independence. According to Erbe and Sebok (2008, p. 30), leaders must be educated about the Ombuds’ standards of practice, specifically “how honoring them will serve the organization so that they will understand the reasons for not pressuring Ombudsmen into compromising activities or misperceive Ombudsmen as betraying the organization with their disclosures.” One 2007 International Ombuds Association Survey respondent noted, “This is difficult to do unless you have built up trust and confidence over time. It...requires exquisite interpersonal sensitivity and communications skill to say ‘No’ to those in power in a way that does not damage your reputation, and to give those in power critical feedback about their own negative contributions to a situation in a way that does not alienate them” (Erbe & Sebok 2008, p. 30).

For Ombuds, there is a tension between maintaining independence and the need to establish effective organizational relationships in order to protect that independence. Former

Ombuds Tim Griffin (2010) notes that while Ombuds strive to maintain formal independence from their organizations, “[O]ur interpersonal relationships with people within our organizations can significantly impact the accomplishment of our professional goals. The familiarity and trust that can be established through these relationships provides us with easier access to people and information than would be otherwise possible” (p. 66). Griffin (2010) also notes that the principle of independence is in tension with the practical need to develop relationships with university leaders so as “to ensure the continuation of Ombuds services despite economic and/or political conditions that may create pressure to reduce institutional budget” (p. 68). Former Ombuds Helen Hasenfeld describes the value of building organizational relationships with the Title IX Coordinator in her early experiences at Cal Tech (2011):

[When the] Equal Employment Opportunity Commission (EEOC) came on campus to investigate a sexual harassment complaint...[legal counsel] Sandi [Cooper] asked me what...I could share with her about sexual harassment on the campus...She knew of one case, I knew of six complaints. She was impressed. Rather, she was shocked ... From then on, all Ombuds were friends of Sandi's... (p. 16)

The IOA Best Practices supplement (2009, p. 4) also explains that the Ombuds should not participate in any formal management functions or serve in any role that creates the perception of, or any actual, conflicts of interest. This prohibition extends to any role requiring that the Ombuds conduct formal investigations, receive notice on behalf of the organization, serve as a voting member on any search committees not related to the Ombuds office staff, handle formal appeals, keep case records for the organization, or have any authority to make, change, enforce, or rescind any policy, rule, or administrative decision (IOA Best Practices, 2009, p. 4). In order to avoid serving as notice to the institution, this effectively eliminates the Ombuds from holding any organizational role that includes management responsibilities.

While Coordinators are committed to objectivity in judging the facts, Ombuds are to be committed to fairness and impartiality more generally. IOA Standard 2.1 requires Ombuds to “strive for impartiality, fairness and objectivity in the treatment of people and the consideration of issues.” Similar to a priest or a rabbi, an Ombuds is unaligned with either side and must not advocate on behalf of any individual within the organization, and instead must advocate for processes that are fair and equitably administered. The Statement of Best Practices of the University of Kansas Ombuds Office notes that an Ombuds “shall not act as an advocate for any party in a dispute, nor shall it represent management or visitors to the Ombuds Office” (University of Kansas, Ombuds Office, Statement of Best Practices, 2008). Michigan State University’s Ombuds office website notes “[t]he University Ombudsperson also assists all parties involved in academic grievance or disciplinary hearings or academic grievance hearings...” (MSU, Office of the University Ombudsperson). As Jan Morse clarifies (2010), “the Ombudsman does not serve as a ‘champion’ of a cause, but instead acts as a catalyst — serving as an equal member of a group of knowledgeable and committed stakeholders who worked collaboratively to develop and implement a cultural change effort” (p. 35). Tim Griffin (2010) agrees:

[I]f the Ombudsperson is not perceived as able to offer a neutral and independent perspective to issues, constituents will assume that the options offered by the Ombudsperson will instead reflect a particular bias. Consultees who perceive such a bias might suspect that the Ombudsperson’s suggestions are somehow designed to achieve some purpose other than the outcome desired by, and in the best interest of, the consultee. (p. 67)

It is for these reasons that the Ombuds’s office location should be chosen to as to symbolize independence and “must not give any impression that the Ombuds is somehow part of management” (Levine-Finley & Carter, 2010, p. 123). Ombuds Mary Rowe notes that when her

office was across the hall from the MIT president and chancellor it “inhibited many people” from visiting (Levine-Finley & Carter, 2010, p. 123). Likewise, independence requires that Ombuds offices have sufficient resources for space, equipment, staff, and materials, and be selected and evaluated by committees representative of various institutional constituencies (IOA Best Practices, 2009, p. 3). This is directly opposed to Title IX Coordinators who typically have one direct report for purposes of evaluation. To be independent, Ombuds must also be protected from retaliation by serving a defined renewable term, and may be terminated only for neglect, misconduct, or medical incapacity, and assurances of access to outside legal counsel (IOA Best Practices, 2009, p. 2).

Having legal counsel that is different from the university’s is especially important. Howard (2011a, p. 12) notes that the detrimental impact of not having independent counsel can be significant. He illustrates this point with an example of a situation in which university counsel filed for a protective order of confidentiality for the Ombuds office and the plaintiff opposed the motion on the grounds that the office was not truly independent of the defendant university if they were represented by the same attorney. In order for the court to grant the motion for a protective order, the court required separate counsel. Where there is a discovery request or a subpoena, Howard (2011a, p. 14) cautions Ombuds to “realize that there will be great pressure by lawyers and others in the organization ...[that] the Ombudsman must disclose all known facts so that the organization can defend the claims and the Ombudsman in a deposition.” Howard (2011a, p. 14) argues that such disclosures “seriously undermine... the chances for a successful defense of a claim of confidentiality.” Instead, the Ombuds office must reaffirm its commitment to the IOA Standards of Practice and must work with the larger

organization to oppose attempts to seek information or testimony from the Ombuds office (Howard, 2011a, p. 14).

The differences between Ombuds and Title IX Coordinators can also be seen in terms of goals. Where the Title IX Coordinator is an advocate for compliance with law and policy similar to a prosecutor or police investigator, the Ombuds is more like a priest or a rabbi in terms of serving as an advocate for fair process as an overarching principle. Effective impartiality requires “multi-partiality” or a commitment to fairness and everyone’s best interests (Erbe & Sebok, 2008, p. 31).

OMBUDS WHO ADHERE TO IMPARTIALITY IN PRACTICE

Ombuds who adhere or depart from the archetypal standards of impartiality and independence, like Title IX Coordinators, also do so along a spectrum. Ombuds who adhere to the archetypal image of an Ombuds do not participate in any formal process and advocate for fair process in general. They avoid advocating for the university or any particular person or outcome. In discussing whether impartiality can ever truly be achieved, one Ombuds noted, “I don’t think you can teach [the ability to be impartial]. I think you can make people become aware of it, and then once people are aware of their own biases they acknowledge it, they’re in a better position to put it on the shelf so they can be impartial as much as one can be. But they are also aware of the fact that they have their biases” (O1A8:5).

An Ombuds described how he came to realize that participating in formal processes violated the principle of impartiality:

I used to go to hearings as a neutral non-participating observer. People would say ‘[T]here are going to be three or four people on the other side of the table and I’m all alone[at the disciplinary hearing], will you come along just so I have someone there? I used to go, and say ‘As the Ombudsman I am a neutral party. My presence here should not be construed as support to any particular person or position in this matter.’ I was out at one such employee hearing and I stood up to

say my introduction and before I could even finish, the hearing officer told me to 'shut up and sit down, we know who you're here for!' I was stunned. I shut up and sat down, it was his hearing. But I never went to another hearing because it occurred to me, that what stunned me was of course, the assumption's going to be made that it was the employee who asked me to go there and that I am there in support, at least morally, of that employee. [First] that's not going to be perceived as neutral, [second] It was wrong...the perceptions engendered from such activities are very risky when it comes to the standards of practice...and I quit doing it. (O10A55:25)

Other Ombuds refuse to maintain documents, records, or notes of any kind for the same reason. An Ombuds observed, "because we are neutral... don't want to have documents that could result in having to become a witness to litigation if it ever [happened]...[t]hat would mean I'm not a neutral person, I would have to be on one side of a case or another [and] I don't want to do that" (O7A37:42). An Ombuds even views the mere act of contacting someone on behalf of another as to similar to an investigation:

I rarely, in less than one percent of cases, will contact someone, and here is why: The act of contacting someone on campus on behalf of a consultee...inevitably engenders a perception of advocacy and/or constitutes legally an investigation...[a]nd neither of those is consistent with the standards of practice of our profession. (O10A55:20)

Likewise, regarding the principle against advocating for anything other than fair process, an Ombuds explained, "[Y]ou don't identify with the institution, you identify with equity, fairness, [and] just asking practical questions" (O1A8:6). Another Ombuds noted, "I'm impartial, which means we're an advocate for any side but we are an advocate for fair process" (O14B64:48). The Ombuds explained:

[W]e need to maintain good relationships with everyone on campus because you never know –[whether] the person I call to get more information about a situation [today] the next week might be a visitor...[a]nd the next week might be an ally in a situation that we're all working out together...so I can't burn any bridges. (O14A63:79)

Another Ombuds noted, “[W]e can be advocates for fairness...if we see a policy or procedure has been violated, we can certainly become an advocate for fixing that” (O9B54:35). The Ombuds continued, “I explain...that my role is just ...to try to help them solve the problem and not to be their advocate, per se” (O9A53:33). Determining the line between support and advocacy is not always clear in practice. For example, an Ombuds observed:

What follow up I do...much more often looks like [what] I just did this morning, where I met with a student who’s appealing a judicial sanction who wanted me to look at his appeal letter. I don’t write them, but I will look at a draft of your letter and give you suggestions about things you might want to be more clear about or something you told me about that I think... you might want to consider including that point. (O10A55:24)

Likewise, another Ombuds noted, “I will arm them, I will say ‘in order to get the answer to that question you need to talk to so and so, here’s that person number, here’s the kind of approach that works best with that person, here’s how to frame the question’” (O10A55:21). Another Ombuds stated:

I figure if I’m doing more to resolve a problem than my visitor is, then that’s too much. I think that’s kind of a good measure, because sometimes you know that you can help them, but if they just won’t let you there’s a certain point at which you have to say ‘you’ve got a few options, but I can’t help you with anything else,’ or refer them to someone else for counseling if they’re willing to go. (O8B52:32)

Ombuds often hear from visitors who want and need advocacy. An Ombuds noted: “Honestly, I think they’re looking for advocacy and I feel as though they are disappointed when I say that we’re neutral. [Although] [s]ometimes they’ll...say ‘good, I’m glad to hear that’” (O7A37:46). Another Ombuds noted: “Typically when they say they want advice, they want you to tell them are they right or wrong. It’s hard to guide them, but I think not matter how neutral you try to be there’s always a few folks that will just assume that you have a stake in the outcome of what they’re doing or you have an opinion about it...” (O8A51:56). Another Ombuds echoed,

“Oftentimes what they want and what they get are two differed things. Oftentimes what they want is a magical solution where I’ll just wave a wand and fix it. They’re sometimes disappointed when I don’t leap into the effort to solve their problems but help them explore things that they can do to solve their own problems, with the understanding that this is part of what it means to take responsibility for your adult life” (O4A22:19, O4B23:6). Another observed: “There’s definitely a misconception about neutrality. Some people think that whoever gets to us first gets us on their side, it’s like hiring an attorney. So we are constantly explaining that” (O14A63:75).

Many Ombuds are careful to draw a sharp line between supporting an individual and advocating for them. Thus, an Ombuds observed,

I rarely, in less than one percent of cases, will contact someone, and here is why: The act of contacting someone on campus on behalf of a consultee...inevitably engenders a perception of advocacy and/or constitutes legally an investigation...[a]nd neither of those is consistent with the standards of practice of our profession. (O10A55:20)

Other Ombuds navigate these conversations by clearly stating the purpose for reaching out to an individual other than the initial visitor. An Ombuds observed:

If they have a good reason for not wanting to talk with the professor then we talk about [the option of me calling]...[W]hen that happens I call those secondary contacts [and] I give them the same spiel [that] I’m a neutral, confidential resource for that person as well as the person who came to see me...I make it clear that I’m not taking sides and that I’m calling to get their perspective. (O12A59:45)

The above quote places the Ombuds in a position of evaluating the visitor’s reasons, e.g. “If they have a good reason for not wanting to talk with the professor,” in order to determine the extend of the Ombuds’s role.

A fundamental question for many Ombuds is how to draw the line between advocating for fairness (as embodied in an individual’s situation) and advocating for a specific individual or

specific outcome. Many Ombuds practice in a way that adheres to the archetypal “ideal” that avoids indicating personal preferences to the visitor. Thus, an Ombuds noted, “I think it always empowers people to be educated of what their options are... [but] I don’t ever want to be deciding for anyone” (O8B57:27). Another Ombuds said, “I don't tell them what to do. Sometimes they want me to tell them what to do but I don't and, but we do discuss options [and] weigh pros and cons.” (O12A59:44). The same Ombuds explained, “I never tell anyone what to do because I think that impedes impartiality, but what we do is talk about options and then it's up to the individual to decide what options work best for that person” (O12A59:8). Perhaps the toughest situations to navigate are those described by the following Ombuds, who described maintaining confidentiality and thus impartiality and independence in a situation in which members of the community are being victimized by a sexual predator:

The hardest part of this job is knowing that in the next year or two there will be another one of his victims in my office, and there’s an innocent person out there who may not be [here yet] who’s going to be victimized by this guy if somebody doesn’t stand up and stop it. The only people that have...standing to do that [are the] victims. I will tell people, ‘if you choose to leave...you’ll be out from under this person’s control, please consider writing down your experiences and sending them to the dean or appropriate individual so that some kind of record exists’...but frankly, that almost never happens. They...want to start a new chapter in their life and put this behind them so they don’t do [tell anyone]. I would love to be able to say ‘You realize that by doing that you are sealing the fate of somebody else that’s going to be in here, and the next person he’s going to proposition, you realize that, right? That if nobody does anything and stand up to this guy he’s going to keep rolling on in his happy merry way just as he has and there’s going to be [someone] like yourself that’s going to be subjected to this in the future if you don’t do anything about it.’ [M]y preference is that these people stand up to these victimizers and call them out for what they are and put them and the people responsible for their behavior on notice so that we can reduce the chances of future innocent victims. Do I ever make a consultee aware that [this is] my preference? Absolutely not. That would not be...neutral on my part. I’d like to be able to say that, but I can’t in my role. (O10B56:22-30)

The same Ombuds also described avoiding partiality towards any one outcome when meeting with visitors:

[O]ne of the benefits of being neutral is you don't have to make good judgments and take a side on things, even in your mind, in cases...[b]ut I will admit that when I have had several individuals over time, unrelated and unknown to each other, come and tell me similar stories...it's hard for me internally not to assume, 'yeah, it's probably true' [but] that doesn't change my response, the options are the same and my demeanor is the same, but it is an important qualitative part of what happens within me. I have to be cognizant of, aware of, and make sure that [my bias] doesn't in any way out in the course of my dealings with the person...which isn't an insignificant thing. (O10B56:27)

Finally, following the archetypal model, many Ombuds strive to remain independent from and impartial to the goals of the institution. One Ombuds noted that Ombuds "can influence how a decision is made if they're asking the right questions and they're asking it from a place of non-identification with the organization. You're going to have a fresh perspective...[t]hat's our real power, our ability to be independent and...take it up to the highest office within the organization and there's no office inbetween" (O1A8:15). Another Ombuds described this independence as also providing for access, noting "I think access is what's most important [and] if I feel like I need to meet with [the president] then I do...[i]t's pretty rare, and I don't bother [the president] unless I absolutely have to..." (O12A59:15). Yet another Ombuds talked about access and independence working together at "quarterly meetings with the president to just kind of talk about the state of the campus...[w]e don't give him any information about our cases at all" (O14A63:31).

In practice there is considerable confusion regarding the independence of an Ombuds. Thus, an Ombuds observed: "People are confused about independence and say 'well, who pays your salary? How can you be independent if your salary gets paid through the university?' There's so many misconceptions I don't think I can put them in a hierarchy for you" (O14A63:75). Other Ombuds address note that independence relates to title: "You know, we all work for the University, so some people question how independent we can be. I guess I'm lucky

in that I'm a tenured professor. I've always felt very free to do what I need to do. I can imagine staff members wouldn't always feel as free" (O9A53:60).

One Ombuds described being questioned about his/her office's independence from the institution and whether the office was truly not biased in favor of the institution's goals. He/she said she responded, "[I]f this office had a reputation of being an agent for the institution [no one would utilize our services] because this community is small enough that word [would] get out that you can't go to that office because they are in bed with the administration..."

(O12A59:15). Often the reporting relationship aids in reducing this perception of being aligned, as indicated by the same Ombuds: "I just think [our structure] really helps the office maintain its independence... I report to two different entities and so I think that just helps with perception as well as...it also helps [everyone] realize that they don't have full control over us" (O12A59:15).

OMBUDS WHO DEPART FROM THE ARCHETYPE

Some Ombuds, however, depart from the archetypal model of impartiality. They do so for a variety of reasons, among them wanting to stop a perpetrator or address a departmental problem.

First, some Ombuds participate in formal processes. Thus, an Ombuds articulates a preference for working with the Title IX office, describing a process in which they ask the Title IX Coordinator, "[I]s this someone who [has] made claims before? Give me some very general information'... they do have some security with their files but I've always been able to...at least direct each other to get the information that we need, if it's something we feel we can't share directly...that's when the offices work best, is when they work together" (O8A51:46).

Another Ombuds described being subject to the Title IX Coordinator's approval for some activities: "[W]e used to have the option to resolve [issues of sexual harassment] informally,

which of course is what we do as an office. Now, we cannot do that without asking permission from the Title IX Coordinator” (O14B64:29). Asked about a positive outcome in a case of racial discrimination or sexual misconduct, the same Ombuds noted a situation “several years ago before all these [changes] happened because I wasn’t required to call[the Title IX Coordinator] about that one” (O14B64:30). Many Ombuds described required meetings with the general counsel, the Title IX Coordinator, and other formal offices. A Title IX Coordinator described meetings to “talk about what’s going on...just kind of bounce [situations] off [one another] so we’re in the loop on what’s going on. Of course, [the Ombuds] does not share a lot of information...they do share...if they think there’s some issues or some things that may be bubbling up that we need to pay attention to...” (T13A49:15).

Other Ombuds find creative ways of justifying their work with formal offices: “[I]f the Title IX Coordinator said to me, "I want, I'd like your help in dealing with this." I would do it because the Title IX Coordinator is a party to the situation” (O14B64:27). By seeing the Coordinator as an individual in conflict, like any other university stakeholder, an Ombuds justified working with them and maintaining independence.

More frequently, Ombuds express being required to report to the compliance offices like the university general counsel’s office:

[E]ven though we’re supposed to be independent, we’re not independent, because we are required to be involved with Title IX Compliance. I have to coexist with the offices with responsibility for compliance, and if I don’t [I am] out of here.’ (O7A37:25)

Some Ombuds violate IOA Standard 1.2, which prohibits Ombuds from holding another organizational position that might compromise independence. One Ombuds holding two positions was denied IOA certification due to sufficient ambiguity between roles. The Ombuds

appealed, noting, “look at what goes on [around the country], half of the ombuds out there are lawyers” (O11A57:22). Another Ombuds frankly disagreed with the principle::

[T]here’s a lot of discussion amongst Ombuds about who’s a true Ombuds or not and it’s kind of silly, but I think some of the perception among full time Ombuds is that it’s difficult to represent yourself as being an Ombuds if you’re doing it part time...I really strongly disagree with that. Ombuds who are faculty part time and ombuds part time are very conscious about making people understood the different role. They must say ‘Are you coming in to [see] me as an Ombuds or as an administrator, because they’re two very different things, with different reporting requirements’... There’s a lot of associate Ombuds that are half time faculty, half time Ombuds, and I think they’re very clear about separating their roles when someone comes in, they spend a little extra time explaining their role, letting them know what they can and can’t do. (O8A51:8)

In fact, three Ombuds interviewed held multiple roles. One served both as Ombuds and as an assistant to a high level administrator with whom s/he described having a “close-knit relationship” (O6A34:4-25). Another, as described in the following quotation, previously served as the Dean of Students:

Definitely [previously being Dean of Students provided legitimacy], and actually when I moved to this position, depending on where you look on the university’s website, I’m still listed as Dean of Students and a lot of people still call me the Dean of Students. In fact Student Affairs has said to me recently ‘in everybody’s mind you’re still the Dean of Students, so I think we’re going to start calling you that again, Dean of Students/Ombudsman.’ I think that would reinforce what a Dean of Students should be, which is the person who is there to help students succeed as opposed to what it has turned into- the one you get sent to when you’re in trouble. (O3A21:6-10)

A third Ombuds, as noted earlier, had previously served as the Dean of Students, and noted “[t]he problem I [have is that] faculty automatically assume when I call them [that] I am siding with the student, which isn’t true (O5A28:1). Title IX Coordinators also noted irregularities, including one institution where the “current Ombuds reports to the dean of students” (T4A24:23). In another instance mentioned by a Coordinator, the role of Ombuds and Dean of Students was held by the same person, with the Coordinator noting that person as responsible for

overseeing student sexual misconduct cases...”[I]t’s a direct report so you have all that communication already built into that relationship” (T6A30:35). An Ombuds job posting for Dartmouth College (Higheredjobs.com, retrieved 1/15/15) describes the Ombuds as holding a “secondary role working with the Office of General Counsel to ensure compliance with federal and state laws and college policies regarding minors on campus.” In those examples, the lack of independence undermines impartiality in both perception and reality.

Maintaining the support of the administration is not an easy task, as described by an Ombuds: “[Y]ou still have to keep finding support for your office, because when people leave that are in the administration and they’re replaced by people who may not have the understanding or appreciation for the office, you have to get in their good graces, so it’s kind of a constant process” (O1A8:106).

The perception of independence also relates to location, with Ombuds preferring to be located away from formal offices but in an accessible location. In reality, Ombuds are often located next to other administrators. For example, an Ombuds observed: “I’m [located] in the Administration Building, so it’s somewhat central. It’s not a high student traffic area, but they find their way here” (O6A34:29).

Another departure from the archetypal model is advocating for the organization’s interests. Thus, an Ombuds described how his/her office expanded its influence by achieving the desired goals of the administration:

[I]nitially [we] only handling student issues, but the administration expanded the scope, stating ‘[w]e have some faculty [and] staff issues and the fact that you’re an informal office, if you can minimize people filing grievances, going to the union, or wanting to retain an attorney, we’d like for you to also extend your success beyond just the student communities.’ (O1A8:84)

S/he went on, “My boss says to me...the more problems you can keep off my desk, the more I’m going to appreciate what you do for the organization” (O1A8:84). Another Ombuds described assisting a visitor with drafting a letter for an administrator and noted “if somebody sends a very vitriolic letter will [the administrator] look at it and [think], ‘this is kind of a waste of time...’ and reflect on the Ombuds office and think ‘aren’t you supposed to keep these kinds of disputes away for me, not necessarily bring them to me?’ (O2B18:9). In yet another example of this sort of compromising position, an Ombuds described how the university’s general counsel controlled the wording on some key matters in the Ombuds’ annual report:

At [a previous organization] I could not use the word ‘harassment’ [in my annual report] because from their perspective, if anything fell under ‘harassment’ then it would have been bumped to the [formal office] and it would have been illegal, not something that I could deal with... Of course you and I both know that in most cases the harassment was not illegal, and yes of course I did deal with them, but I didn’t mark them that way... They gave a little [and eventually were] just fine with me calling things whatever they are.. you’ve got to go with [what] each organization and general counsel feels comfortable with. (O8A51:17)

Other general counsel use the Ombuds office as a mechanism for avoiding litigation. Thus, an Ombuds expressed frustration at not resolving a case due to the university’s due process preferences:

I had a really interesting case in which our [general counsel] wanted me to deal with it because I could have conversations about what [the person] wanted out of all of this that legal couldn’t have... Our [general counsel] didn’t want to talk with the person’s lawyer and they thought it would be an easier route and wanted to resolve it informally and come to an amount and avoid litigation...I think we would have agreed on money, but they wanted something in the file and [the school] is overly protective of employees and claim it’s a due process thing, a ‘he said-she said’ thing and we’re not going to admit liability by putting something in the file... so it did not get resolved. (O9B54:32)

Some Ombuds come to frankly advocate for the institution’s interests. Thus, an Ombuds acknowledged violating confidentiality:

Sometimes I have to make an executive decision. If something [is] going to do significant damage to the institution I might decide to [go forward] with that information. But I have to be careful because people didn't give me express permission to go forward [and so] I [do it] because I weigh [the situation] and I [conclude] 'you know, this office needs to be aware of this, it may cause significant damage to the institution.' [P]art of my job as an Ombudsman is to give decision makers a head's up. (O1A8:32-35)

Ombuds also echoed the organization's preferences, as typified by the Ombuds who noted:

[My goal] is to resolve problems at the lowest level...[O]rganizations prefer that issues [are] resolved at the lowest possible level to minimize lawsuits or people going to the press and saying not so nice things about people within the organization. Prevention is something that's valued...they don't say it, but I think it's an expectation that [the administration] would like us to prevent problems that are sensitive from going outside the organization. Decision makers prefer that [issues like that] are contained and dealt with accordingly. (O1A8:23-25)

Beyond advocating for the organization's preferences, some Ombuds also advocate specific outcomes in particular cases. As one Ombuds noted, "For many offices [I resolve issues] because I know what their perspective is: '[J]ust let us know what you want us to do and that's what we'll do'" (O6B35:18).

An Ombuds acknowledged crossing the line in helping a visitor and, in the process, becoming "invested" in the outcome:

I felt like I then had an interest in having this communication be something the [administrator] can hear and understand and use. I did not want to see [the visitor] write [a] letter that was flaming and threatening and that kind of stuff...I am unneutral about the outcome of whatever happens here, [and] in the process I have now become, I think, somewhat invested in the process going well... (O2B18:9)

Like the Ombuds who offered the previous observation, Ombuds who depart from the archetypal model are partial toward their visitor and try to achieve the results articulated by the visitor.

Thus, an Ombuds stated, "Personally speaking, I feel very bad when I'm not able to give them the outcome they're looking for [and] I tell them upfront...we will try to help you resolve things in your best interests but sometimes that may not be the case" (O5B29:18). Other Ombuds who

depart from the archetypal model are advocates for settlement, regardless of the visitors' preferences. Thus, one said s/he tells visitors that "my role is to solve the problem [but] not to be [your] advocate, per se" (O9A53:33). Another acknowledged trying to "challenge" some people more than others in the interest of reaching an accommodation:

I was very idealistic. I thought if you can get people to talk then they would really try to work to work things out, and in some cases that was true, but I found out for the ones that are a little more crafty, the ones that wanted to not compromise and get everything that they wanted at the expense of someone else, that's when I realized 'you're really going to have to develop your game in order to, in a respectful way, to challenge those kinds of personalities.' So now I...[p]ut them on the ropes, don't let them off as the saying goes. (O1C10:28)

While the Ombuds archetype is an advocate for fairness, some Ombuds take this commitment too far, to the point where they sit in judgment, assessing what is a "legitimate" part of a complaint and what is not, as an Ombuds acknowledged:

I explain to them...'my job is to sift through what you share with me for what is a legitimate concern, a concern that really needs to be addressed and attended to,' and that gives me something to have a conversation about and around. I want them to know right out of the gate, 'I can't be your advocate, but I definitely can be an advocate for the elements of your story that [are] legitimate, that we need to explore deeper. [That] is where I can be an advocate.' (O1B9:25-29)

Likewise, another Ombuds observed:

I tell [faculty] '[I]f a student has a disagreement with your syllabus...they will come to me [and] I will contact you and ask you for some information to either help the student understand why you're making the decision, or I'll try to convince you that the student has a legitimate concern and try to get you to see their point and solve the issue satisfactorily their way.' (O5A28:6)

The goal of advocating for equity and fairness assumes the Ombuds is qualified to determine when these standards are not met. An Ombuds who struggled with this issue noted "The trick is often in finding what reasonable means in terms of reasonable accommodations [and after I made the third try for the visitor] I decided it was not in the realm of reasonable" (O4B23:14).

Another Ombuds explained: “I tell the visitor ‘[I]f your concern has legitimacy and something was done where it wasn’t fair or it wasn’t equitable, and we have...concrete proof, we’re going to be an advocate for fairness and equity.’ That’s not saying we’re going to be their advocate, we’re going to be an advocate for...fairness...we’re going to be very fierce [about] being an advocate for those principles” (O1A8:19). At the same time the same Ombuds described managing visitors’ expectations regarding justice and the Ombuds responsibility to press for equity in every situation:

Sometimes as an Ombudsman...you have to ask yourself ‘[I]f I’m going to be pursuing justice for justice’s sake, and it’s barbed with so many politics, [should I] pursue it or [should I] wait for the [correct] timing?’ Like that old saying, ‘fools rush in’ I think sometimes you have to be smart about how you fight for fairness and justice. Sometimes I’ll tell [visitors] wanting fairness and equity, ‘[L]et’s look at the landscape...at the players...at the politics...at what can change, what might change, and what’s not going to change.’ And they say, ‘but you advocate for fairness and equity’ and I say ‘absolutely, and the reality is what it is, the justice you’re seeking, in the form...in the timing of the justice...may not happen [and] it goes back to being realistic and not idealistic...’ [As an Ombuds] you don’t want to throw yourself on the sword seeking justice. (O1A8:55)

It is true that there is a fine line between advocating for specific outcomes because that is consistent with the principle of fairness and advocating for specific individuals who desire specific outcomes. Thus, an Ombuds noted “[W]e can be an advocate for those principles without compromising our impartiality. Impartiality is tricky because...people...have their own [definition] of fairness and equity and if your [definition] and theirs don’t align, and you’re still fighting for the fairness, then [the other side will] say ‘[Y]ou’re being their advocate because you’re not letting this go’” (O1C10:25).

According to one Ombuds, the most frequent misconception that people have about the work of an Ombuds is “that we’re advocates for them personally” (O9A53:28). Ombuds who depart from the archetypal model are often partial toward specific individuals, particular those

with power in the organization. For instance, an Ombuds told me s/he provides administrators with information so as to be seen as helpful and valuable:

[I]f there's [a] certain issues that I see...instead of putting it in the report, I'll go to that person and say 'You know...Dean ... over the last six months or so, these kinds of things are coming out of your office.' You have a captive audience because you're speaking to them. And when you walk away...you kind of endear yourself...they feel like "oh my God, I have someone who's really going to give me some information that I might not have been aware of.' (O1A8:63-66)

Other Ombuds show partiality toward faculty when in routine disputes with students. Thus, an Ombuds reported: "No, we don't get involved in grade disputes [because] [w]e're not going to interject ourselves into...second guessing a faculty member... who are above reproach here, as they are at many institutions" (O7A37:59). Ombuds also often show partiality towards the individual visitor seeking their assistance. For example, an Ombuds noted:

It is amazing how many students come in and I'll role-play with them [and I will say] 'You need to talk to your professor about this. What are you going to say?' And they come out with something that is so adversarial that it's like '[O]kay, what do you think that's going to do?' Twice this week at least I went online when a student was sitting here, went to a website listing elements of a good apology – and printed it off for them and said 'here, read this.' I'll try to work with them on how to ask and who to ask and how likely it is that they will get the response they want. (O3A21:37)

The same Ombuds noted that "if I have somebody here that needs it I might even outline it for them on a piece of paper and say 'here it is, this is what you need to do' (O3A21:34-38).

In fact, many Ombuds engage in direct advocacy. For instance, an Ombuds described saying to a visitor: "[Following our discussion] I will have to speak with [the administrator]. It's still up to them to make the final decision, however I will share your concerns and hopefully have a discussion that will allow them to understand your side. Then it's...up to them to determine what the decision will be" (O6B35:13). Although the Ombuds just quoted seemed oblivious to the

fact that he had compromised his independence by engaging in advocacy, others are aware of doing so but believed it was justified. Thus,

I always ask the student first ‘[O]kay, can I talk to this person about this? While you’re sitting here can I make this phone call on your behalf?’ They have the right to say ‘No, I’ll do it myself’ but [rarely do they object] then I’ll [call the other office and] say ‘okay, I’m going to send the student over to you, here’s the situation, see what you can do for them.’ And maybe in that case I am acting as an advocate...But I have about four or five students a semester walking in who when you get into it [the issue is] really because of an issue at home, their parents have thrown them out, their mother’s a drug addict, their father’s abusive, something like that. (O3A21:39)

Another Ombuds described a situation involving multiple instances of advocacy:

I spoke on [the visitors’] behalf and then said [to them] “[L]ook, I can go back and talk to the again, but I can’t change his mind... and the Dean is not interested in removing him as chair so you really don’t have any options’ The visitors were very unhappy and so I said ‘I’ll talk with them again, but I don’t think it will change anything.’ I think that led them to complain about me but there was nothing else I could do. (O9B54:18)

The Ombuds just quoted described hearing about a situation in which a faculty member and student were in a dispute and another Ombuds went with the student to meet with faculty member. S/he said: “[To do so] was entirely inappropriate [and] totally goes against the neutrality [principle]. I think [Ombuds] have often been thought of as more of a consumer advocate and that might be the problem, [we need to] refine people’s understanding of what [an ombuds] should be” (O7A37:47).

Other Ombuds draw distinctions about when they will contact someone on a visitor’s behalf and when they will not. Thus, an Ombuds noted:

I would be more likely to get involved if the person has made legitimate, good faith efforts to solve the problem on their own. If the first two or three steps I would suggest are steps that they’ve already taken, then I might be more likely to take the fourth and fifth step to move this along. I also think I would be more likely to try if they were just so completely beaten by the experience and it would be somehow cruel to send them back out to try again without giving them something to work with, to work from. (O4B23:34)

Contacting someone on a visitor's behalf is often seen as advocacy for the visitor:

A visitor will come to us [and] say 'I have a problem with this person, will you contact them,' and a very common misconception when we make the call is for that person to feel that we're calling because they're in trouble...[for them] it feels like we are coming out of the blue. We've been likened to being the principal's office and they're getting called to the principal's office and we have to say to them '[W]e're not making a judgment about what's happened here. We don't know. We're telling you that we've been given permission to talk to you to get information from you to see if we can better understand what can help resolve the problem.' So that's a very common misconception. (O14A63:74)

In sum, many Ombuds expressed concern regarding perceptions of partiality and remaining independent. Some scrupulously adhere to the archetypal model's prescriptions. Others, as we have seen, cross the line in many ways, large and small. Perhaps the best way to punctuate the importance of this line to many Ombuds is to close with an observation of one who agonized over having lunch with old friends: "I actually do have friends on campus on the faculty, staff, whatever, that I [will] have lunch with...once in a while. I know that kind of violates the rule..." (O7A37:56).

CONCLUSION

The archetypal Title IX Coordinator and Ombuds models view impartiality and independence very differently. The Title IX Coordinator archetype holds a role similar to a police investigator or prosecutor, but with a mission to enforce compliance with civil rights law. In doing so, they are to be impartial to both sides. The Ombuds archetypal model is closer to a religious leader and maintains independence by not participating in any formal process, and by being an impartial advocate for fairness and not any one person, outcome, or the organization.

While some officials in each office adhere to their respective models, many depart from it by holding multiple roles, and advocating in ways that show bias towards organizational goals, specific individuals, or particular outcomes. On its face, impartiality and independence appear to

relatively straightforward concepts. In reality, it is not always easy to determine when Ombuds or Title IX Coordinators are advocating for fair process (Ombuds) or compliance with Title IX (Coordinators) versus advocating for outcomes or individuals unconnected to the goals of each role. Further, both roles require a determination of what is “compliance” or “fairness.”

In reality, navigating impartiality and independence are complicated, given the conflicting interests of survivors, alleged perpetrators, and the organization itself. Both roles are torn between helping survivors, ensuring fairness for alleged perpetrators, and establishing professional worth and influence in organizations pressuring them to ensure protection from liability. One role seeks to stop a perpetrator and address a widespread culture of sexual misconduct. The other is concerned about easing and addressing an individual’s pain, often at the expense of institutional enforcement. What is striking is that sometimes the Title IX Coordinator is in practice playing a role more like the archetypal Ombuds, and vice versa.

CHAPTER 7: TITLE IX COORDINATORS AND FORMALITY

The Ombuds and Title IX Coordinator archetypes operate using very different processes: while Ombuds operate *informally* Title IX Coordinators act *formally*. The ideal Title IX Coordinator directs formal and timely investigations that provide for notice, due process, and other features common of formal processes. The model Ombuds uses flexible, informal processes that empower visitors in achieving their goals. This chapter describes the Title IX Coordinator archetype's preference for formality and examines Coordinators who depart and adhere to the model. These adherences and departures occur along a spectrum, as some Ombuds or Title IX Coordinators may aptly be described as "adherers" or "deviators." Additionally, adherence or departure is often situational and context-specific as a Coordinator or Ombuds who goes by the book in one instance departs from their archetype in another.

FORMALITY AND THE TITLE IX COORDINATOR ARCHETYPE

The Title IX Coordinator archetype operates a formal office for handling disputes that in many respects is similar to a police or prosecutor. Like the police or a prosecutor, the Title IX Coordinator archetype uses a formal process designed to identify, via formal investigation, whether the facts indicate compliance with Title IX law. The Coordinator must be impartial to following prescribed procedure and to the quality of the investigation. The process described below is a "hybrid" of the Investigation and Hearing Models outlined by the Association for Student Conduct Administration (ASCA, 2014, p. 15). Regardless of model, Title IX Coordinator archetypes operate a formal office akin to a police or prosecutor.

The ATIXA Statement of Ethics and Title IX Coordinator Competencies (2012, Core Job Duties and Responsibilities, §4) states that Coordinators are to "[o]versee prompt, effective, and equitable intake, investigation, processing, issuing of findings of fact, and timely resolution of all

instances of sex/gender discrimination made known to responsible employees and/or reported or filed by students, faculty, employees, third parties, or by members of the broader community” (p. 5). Chapter two outlines the process requirements outlined by OCR. This section reviews many of those requirements but focuses on the formal and informal models articulated by the 2013 ATIXA Training Manual. It then describes the hybrid process used at the University of Kansas.

In a nutshell, the ATIXA 2013 Training Manual (p. 39) describes a Model Investigation Process that places the Title IX Coordinator archetype as the centralized receptacle for complaints and also the locus of complaint handling, whether formal or informal. The Model requires the Coordinator or their investigator to conduct an immediate initial investigation to determine if there is reasonable cause to charge the accused individual, meet with the complainant to finalize the complaint, and prepare the notice of charges.

Unlike an archetypal Ombuds process, the ATIXA 2013 Training Manual, NCHERM 2010 White Paper argues that every sexual misconduct complaint should be investigated without exception (p. 139). There is a preference for official complaints. For example, where survivors are reluctant to make formal complaints or seek to withdraw a formal complaint, the 2013 ATIXA Training Manual, Investigation Protocol Checklist recommends honoring that request, but trying “to persuade (not coerce) the alleged victim to reconsider” (pp. 53-54).

After finalizing the complaint and the notice of charges, the Title IX Coordinator or their staff will then “commence a thorough, reliable and impartial investigation by developing a strategic investigation plan, including a witness list, evidence list, intended timeframe, and order of interviews for all witnesses and the accused individual, who may be given notice prior to or at the time of the interview” (ATIXA Training Manual, 2013, p. 39). Brett Sokolow describes notice as one area in which this investigation model provides an advantage over a hearing model.

In a hearing model a complaint is received and then the accused is promptly given notice of the complaint. Sokolow notes:

“[The accused] then have time to fabricate a story and find friends to swear to it before they respond. This does not allow notice to be strategic. It should be. In an investigation model, we often interview the accused person last. We don’t want any party to taint the witness pool by playing on loyalties. It is not just the parties who lie to us, but their partisans as well. Getting statements from witnesses in advance of interviewing the accused student minimizes the potential for coordination of stories, and also gives us the ability to share conflicting accounts with the accused person once we have collected them” (ATIXA Training Manual, 2013, Civil Rights Investigation Model, p. 64).

The ATIXA 2013 Training Manual, Investigation Protocol Checklist, notes that in some circumstances it may be best to notify the accused immediately after receiving a formal complaint, but in others “interviewing witnesses and accumulating evidence first may be the best practice” (p. 55). The checklist recommends that investigators “strategize notifying the accused student of the complaint” by “[o]nly inform[ing] the accused student of the purpose of the meeting in advance if doing so will support your strategy, or if asked” (p. 55). Specifically the checklist notes “Sometimes, unanticipated interviews can be unfair. In other cases, unanticipated interviews could be an important advantage. They should be used with discretion. If your goal is to build rapport and trust with the accused student, unanticipated interviews may undermine that. Unanticipated interviews can be used when appropriate for interviewing witnesses, or for follow-ups with the complainant to test veracity or accuracy of descriptions” (p. 55). Notice is thus a strategic tool the Title IX investigator archetype has as they proceed with an investigation.

In terms of investigation techniques, Daniel Swinton (ATIXA Tip of the Week, 8/15/13) notes that the goals of questioning the parties and any witnesses goes beyond “to learn the truth of what happened” to also include learning background information, establishing a timeline, understanding each party’s perceptions, gathering sufficient information to determine facts and

their relative importance, trying to determine what happened, ascertaining appropriate remedies, and learning whether there are other, related events requiring investigation. OCR's 2014 Q&A document (2014) notes that "[I]n all cases, a school's Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence" (p. 25).

Without unreasonable delay, the Title IX investigation must be completed and the Title IX Coordinator will make a finding of a policy violation if the preponderance of the evidence supports such a finding. The 2013 ATIXA Training Manual, Investigation Tips, suggests the investigator "[s]tate a conclusion resulting from [the] investigation, if possible" (p. 51).

According to ATIXA Advisory Board member Belinda Guthrie, The investigation report is one of the most important aspects of your Title IX investigation (Guthrie, ATIXA Tip of the Week, 1/9/14). A comprehensive investigative report should summarize the nature of the complaint, the investigation, interviews with the parties and relevant witnesses, information collected, a timeline of events, and the investigator's assessment of credibility, the weight of the evidence and conclusions and findings (Guthrie, ATIXA Tip of the Week, 1/9/14). The 2013 ATIXA Training Manual (Investigation Protocol Checklist) recommends the investigator's statement of findings "1) List the evidence and what it shows; 2) Assess credibility; 3) Make a determination as to whether the evidence (facts, opinions, circumstances) establishes a violation of policy is more likely than not to have occurred, and 4) Cite concretely the reasons for this conclusion in a written report" (p. 57).

These findings are then presented to the accused, who may accept the findings in total, accept the findings in part, or reject all findings. Finally, the Title IX Coordinator or their staff shares the findings and updates the complainant on the status and outcome of the investigation

(ATIXA Training Manual, 2013, Model Investigation Process, p. 39). If the accused accepts the finding of a policy violation, “[a student conduct office for students, or an administrative or human resources office for faculty or staff] will impose appropriate sanctions for the violation, after consultation with the Title IX Coordinator” (ATIXA Training Manual, 2013, Model Investigation Process, p. 39).

If the accused rejects the findings (in whole or in part), it is typical in universities using the hybrid model described here to offer a hearing to determine whether it was more likely or not that the accused individual is in violation. The findings of the investigation will be admitted at the hearing, and the investigator may give evidence, but neither is binding on the deciders of fact (ATIXA Training Manual, 2013, Model Investigation Process, p. 40). Colleges are strongly discouraged from allowing parties to cross-examine or question one another during the hearing to avoid perpetuating a hostile environment (DCL, 2011, p. 12; OCR Q&A, 2014, p. 31). The Office of Civil Rights does not require that schools allow parties to include their lawyers in this process, but if they do permit legal representation, both sides must have the same opportunity and their counsel shall be equally constrained or allowed to participate (DCL, 2011, p. 12; OCR Q&A, 2014, p. 26). The ATIXA 2013 Training Manual, Statement of Rights, states that survivors and accused students have “[t]he right to have the university compel the presence of student, faculty and staff witnesses, and the opportunity (if desired) to ask questions, directly or indirectly, of witnesses (including the accused student), and the right to challenge documentary evidence” (pp. 47, 49).

Accused students or complainants may appeal the hearing outcome in writing. If the accused engages in an appeal, his or her appeal will then be shared with the other party to provide an opportunity for response. These “appeals and responses are then forwarded to the

appeals officer/committee for initial review to determine if the appeal meets the limited grounds and is timely” (ATIXA Training Manual, 2013, Model Investigation Process, p. 41). According to the model (ATIXA Training Manual, 2013, p. 41), the appealing party must demonstrate either 1) A procedural or substantive error significantly impacting the hearing’s outcome; 2) New evidence, unavailable during the original hearing or investigation, that could substantially impact the finding or sanction, or 3) Sanctions disproportionate to the severity of the violation. The decision of the appeals committee or officer is final (ATIXA Training Manual, 2013, Model Investigation Process, p. 42). Following the process, a prompt and effective remedy must be instituted to “end the discrimination, prevent its recurrence and address its effects” (p. 37).

In addition to overseeing all formal processes used for handling sexual misconduct complaints, The Title IX Coordinator archetype also is responsible for overseeing any informal processes. This is echoed in a Wake Forest University Title IX Coordinator job posting (Higheredjobs.com, retrieved 6/12/14), which states that the person oversees “the University’s response to and investigation of alleged violations of Title IX, including implementation of formal and informal resolution procedures...” Additionally, The Swarthmore Title IX Coordinator job posting requires that the individual “be available to advise any individual, including a complainant, a respondent or a third party, about the courses of action available at the College, both informally and formally” (Title IX Coordinator Job at Swarthmore College, ATIXA, 2013).

Despite the ability to use informal processes, the Title IX preference for formal procedures extends to discouraging the use of mediation to resolve complaints. Although the 2011 Dear Colleague Letter does allow for including voluntary informal mechanisms like mediation for resolving some types of sexual harassment complaints, the use of mediation is to

be limited and carefully overseen. The Letter notes that it is improper for complainants to be required to work out problems directly with the alleged perpetrator, “certainly not without appropriate involvement by the school” (DCL, 2011, p. 8). Complainants must understand that they have a right to end the informal process at any time and begin a formal complaint process. OCR notes that mediation is never appropriate, even on a voluntary basis, for cases involving allegations of sexual assault, and that schools should state in their grievance procedures that mediation will not be used in such cases (DCL, 2011, p. 8).

There are arguments both for and against using mediation in cases involving sexual assault. In university settings, Chanda (2001) concludes that mediation is an appropriate dispute resolution process from the assault survivor’s perspective. Analyzing various processes in terms of their ability to meet the goals of 1) deterrence, 2) education, 3) encouraging reporting, and 4) avoiding re-victimizing survivors, Chanda (2001) argues that it is superior in many ways to the current available processes and thus should be one of the available processes from which survivors can choose (p. 270).

Chanda’s conclusion is not shared by either Oser (2005), Hippensteele (2006), or Conley and O’Barr (1998). Relating mediation to relational versus rules-based frames, Conley and O’Barr (1998) note “it should come as no surprise that women should at once like mediation and fare badly in it” (p. 132) because women are socialized to seek relational strategies instead of rights-based strategies for resolving disputes. Oser (2005) argues that the use of informal alternatives in sexual harassment claims may inhibit the development of an evolved body of sexual harassment case law. Specifically companies responding to sexual harassment complaints with informal mechanisms circumvents the legal system and avoids precedent, deprives the public of pertinent information, and empowers more powerful institutional players. Hippensteele

(2006, p. 68) argues that mediation, under the guise of protecting women, enables sexual harassment to go unpunished by regulating sexual harassment rather than correcting it. The use of mediation is one way in which Ombuds and Title IX Coordinators attempt to navigate the tension between formal and informal processes.

The ATIXA 2013 Training Manual, Statement of Rights of the Alleged Victim, p. 46, states that survivors have “[t]he right not to have any complaint of sexual assault mediated (as opposed to adjudicated)” The 2013 ATIXA Training Manual, NCHERM 2011 Whitepaper notes, “Campuses can offer victims mediation (or even better--restorative justice) opportunities subsequent to and in addition to the normal resolution processes to which the complaint should be subjected, but not as a substitute for them” (p. 150).

Despite Title IX Coordinators’ authority regarding formal and informal resolution of sexual misconduct, the Ombuds archetype may hear sexual harassment complaints, placing the two roles in opposition. The ATIXA Training Manual acknowledges this tension and attempts to address it from the Title IX Coordinator’s perspective by utilizing a coordination and referral system designed to keep the Title IX Coordinator informed. It states, “Where grievances are handled separately by separate bodies, a coordination and referral system should be put in place. This would allow, for example, an Ombuds person who has investigated what was brought forward as a sexual harassment complaint, to refer that complaint and investigation to the college’s conduct office, for more appropriate resolution as a sexual assault” (ATIXA Training Manual, 2013, Bedrock beliefs, p. 13).

This coordination and referral system is consistent with the OCR requirement that “Title IX coordinator[s] must be informed of all reports [subject to the counseling exception] and complaints raising Title IX issues, even if the report or complaint was initially filed with another

individual or office (OCR Q&A, 2014, pp. 10-11). This obligation is also echoed in the ATIXA Formal Grievance Process requirement that the grievant provide documentation of all informal efforts pursued to resolve the issue. “This includes names, dates and times of attempted or actual contact along with a description of the discussion and the manner of communication made in the course of each effort” (ATIXA Training Manual, 2013, Formal Grievance Process, pp. 38-39). The model Title IX Coordinator views their office as the only correct place for issues of sexual misconduct, and any informal resolution must correctly originate with their office.

The process described above is modeled on a police-prosecutor model in which an investigator investigates and determines the existence of violations of law and policy and makes a recommendation as to the appropriate sanction. The archetypal Title IX process often then includes the ability to accept the findings or to seek a hearing, followed by a potential appeal to an upper level administrator. The formal processes used by the Title IX Coordinator archetype can be contrasted with the informal Ombuds model which provides for considerably greater flexibility and informality.

TITLE IX COORDINATORS WHO ADHERE TO THE FORMAL MODEL

Title IX Coordinators who adhere or depart from the archetype do so along a spectrum from complete adherence to complete departure. Coordinators adhering to the archetype use a formal process in which they enforce mandatory reporting requirements and compel certain individuals’ participation, conduct at least an initial investigation of every complaint, and issue an investigative report. Coordinators adhering to the archetype are consistent in their policy for providing notice to respondents and for ensuring appropriate hearing protocols are followed.

First, Coordinators who adhere to the archetype are wholly committed to its formality and see considerable benefits in this formality. Several Title IX Coordinators celebrated the benefits of formal processes. For example:

The more formal the more you have a very, very clearly defined investigative process, the more you've figured out exactly what your intro to anybody you meet with is about confidentiality, outcomes, what you will be able to share, what you won't, the more you set all that up and have frankly a very legally sound final written report on the back end, the more I think people at least know what to expect when they come to your office and that it's not going to be all over the board. I do think, so in that sense having a very clearly defined formal process resulting in a formal report at the end does set you up for less legal challenges, less procedural challenges, etc., on the back end. Which, frankly, all goes to your reputation of the office on the campus. It all comes back to that. (T1B12:33)

Other Coordinators indicated a lack of interest in handling informal resolutions:

I've built a relationship with the Ombuds, for them to understand that I'm not handling informal, people who come to me and they don't want me to go for the jugular, so to speak, I don't deal with them as much. I send them [to the Title IX Coordinator immediately] when I ascertain at what level they want some sort of intervention. I try to tell them 'Ombuds is the soft touch, they'll try to communicate and mediate and work it out, but when you come to me, that means you want the hammer on the nail.' (T11A45:13)

Title IX Coordinators who adhere to the archetype claim a monopoly on addressing sexual misconduct complaints, even informal resolutions of these complaints. In their view, the role of the Ombuds is limited to complaints in which there clearly is no violation of Title IX law or policy. For example, a Coordinator noted:

[M]y view of the Ombudsman office is that they're dealing with non-civil rights/discrimination issues. They're dealing with... 'I've got a bad boss, I'm not being treated fairly, but it's not necessarily because of my status...' [We refer cases to them when someone] isn't happy, and it really isn't because of any kind of discrimination issue... (T9A41:46)

Other Ombuds indicated that the Title IX Coordinator preferred to handle things themselves, using a formal mechanism. One Ombuds stated, "Our [formal offices are] just not helpful to people, and they see us as interlopers on their turf, that they're

supposed to solve [people's] problems" (O9A53:26). Coordinators who adhere to the archetype see their office as a mechanism for investigating and preventing sexual misconduct, not necessarily to provide options or maintain confidential communications.

For example, a Coordinator says he tells visitors:

I usually always say 'this is my role. I do an investigation based upon the information you give me. My role is not to talk and give you options.' Unless there is nothing in your conversation to suggest that you're being subjected to discrimination, and it is just bad behavior that you don't like and it doesn't rise to the level of protected activity, of course I won't do anything. But, for students who come in and say 'I've been sexually harassed in the last month but I don't want you to say anything,' I stop them and say 'I can't. This isn't the place for you.' (T10A43:35)

Second, Coordinators who adhere to the archetype enforce mandatory reporting requirements and encourage all university employees to notify the Title IX office of any suspected sexual improprieties. For example:

We've got a student counseling center where there are psychologists. One of the things they do is encourage them to bring it forward to my office for official processing so that... I don't know what they tell them, but I assume they tell them 'protect other women as well.' (T12A47:19)

This assumption extends to the Ombuds office, as indicate by another Title IX Coordinator:

Well, no [I do not interact with the Ombuds]. That office pretty consistently will and should refer any complaints that they get that are about discrimination or harassment to us, so in that sense we interact. (T3A19:23)

Survivors are never required to participate, but witnesses and other individuals may be compelled to provide information. In sharp contrast with Ombuds who never require cooperation, policies requiring participation are often used by Title IX Coordinators to gain cooperation, as indicated by a Coordinator:

We have in our policy that failure to cooperate with an investigation can [result in] disciplinary action. And that is in there for people who either falsify information [or] flat our refuse to cooperate with an investigation.... So if someone [has] information, [and] I know they have information, [and] they refuse

to cooperate or come in and don't provide full cooperation and I [can] prove [it], then you're going to be disciplined for it. In other words...this is a responsibility...it is to make sure the process works. So if you're not going to be part of the process, then we're going to have to deal with that. I don't want to have to deal with...discipline, I just want...you cooperating and giving me the information and giving me true and accurate information. Then you're done. I'm giving you the word that no one is going to know what you told me until and unless it is subpoenaed. I rarely [have that happen as]...most attorneys...want to do their own depositions and everything... We're going to protect your information, but you're going to give me that information. If you don't give me the information, and you're just refusing to do that, I'm going to discipline you because you're not going to put a spoke in the wheel of this process.
(T10A43:44)

Another Coordinator echoed, “[I]f a person is named in any way in an investigation, yes, they are required to participate in the process [at least in terms of providing information], yes”

(T13A49:25). Where an attorney advises their client not to share information, Coordinators do their best to gain their cooperation. Coordinators adhering to the archetype do not need to allow attorneys to be present for interviews, as long as the policy is consistent for both respondent and complainant. Thus:

[T]he attorney was basically told ‘this person either cooperates in the investigation or I go on the basis of what I have. My advice is allow your client to talk to me. Oh, by the way, you’re not entitled to be in the interview.’ (T2B14:36)

Multiple Title IX Coordinators, adhering to the archetype, described the complainant’s participation in a hearing as voluntary:

The Complainant and Respondent have the opportunity to appear... If they don't want to... they don't have to but if [the complainant] doesn't come and we don't have any other way of getting the evidence in, that case might fall apart.
(T9A41:39)

[S]ometimes we make exceptions for the complainant, it depends on the situation, particularly with Title IX cases if we do an investigation, there is the possibility that the investigator can go to the hearing and testify based on their investigation and their findings, which would not force the complainant to have to [participate]. So...depending on the situation, there are ways in which the complainant may not have to participate in the process if they do not wish to. Of course, if they don't want to pursue a case, then we are bound to support their wishes unless there's

some threat to the campus, some other reason why we must move forward.
(T13A49:25)

We never require participation. I couldn't... we have never required participation and I can't imagine where we would. We might impose an accommodation or an interim sanction where parties might not be in agreement, but we do go forward without participation and we would tell the alleged victim what we're going to do and to the greatest extent why and hear what their concerns are and again invite them to participate. (T8A39:51)

To avoid the complications when a complainant does not want to appear, Title IX Coordinators who adhere to the archetype prefer written complaints from individuals who understand the process and the implications of making a complaint:

First hand written accounts are the best way. You are understanding our process, you're understanding what you're giving me the right to do, to conduct an investigation, to talk with people. And people need to know that, you need to know 'this is what you have signed up for, there's no surprises, you're not going to be retaliated against, but it's going to be out there because that person that you're charging with this offense has the right to defend themselves.' So I have to tell them who filed it, what you're saying, so that they can defend themselves on those charges. So it's important that you know that's what I'm doing.
(T10A43:19).

Title IX Coordinators' formal processes are clearly defined to allow survivors and alleged perpetrators to clearly know what to expect. For example:

If we're interviewing the complainant...we make sure it's done in the context of they have full notice of what to expect, because it is true that once we know who the respondent is and what happened, we're going to have to move forward. I think that's absolutely critical. And we revisit it all the time, we tweak it when we see something that didn't go well. It's really, I think it's very critical to being fair to the complainant who often doesn't want to tell their story, doesn't want to be brought into a length[y] process, so we make sure they know what they're getting into before they talk to us. I actually think it goes to our credibility on campus. It would be hard to do this job if you didn't... I think that's what builds the trust.
(T1A11:25)

This is echoed by another Title IX Coordinator:

[W]e've got a checklist that we use that covers all of this, and that checklist, we go through the process with them, we make sure that they understand that if it is a sexual assault or a rape that they have the option to pursue both the administrative

process and the criminal process. We explain to them the difference, which is a big thing. I think that's probably been the biggest area that we've made some difference in terms of the educational knowledge of our students and faculty, but if you're raped you can, there is a university process that can do things on campus that the police, the criminal prosecution can't do...[W]e tell them the names of all the resources that there are [available, including counseling]...We talk to them about our complaint resolution process, what it looks like. Make sure that they understand what their rights are...We have a [similar] checklist that we go through with the respondent. (T9A41:28)

Third, Title IX Coordinators who adhere to the archetype use a police/prosecutor model in which every complaint, without exception, must receive an initial investigation to determine if further steps are needed. For example,

You really need to know the law...because the Title IX coordinator role falls right in line with the way the law is read, the way that the law is interpreted, the way the law is applied, as well as the way investigations are done. Title IX investigations are done just like a civil rights investigation. They're not a willy-nilly let me talk to a couple people and see what comes up, it's a very formalized process. (T11A45:8)

This initial investigation begins within the initial interview as Coordinators interview the complainants to determine whether further action is needed. For example,

Then if [the visitor] starts to ramble I will then say 'let's get back on track, why are you here? What happened to make you come here.' And then they will explain 'well, I was not selected to go to a conference that I've always gone to, and this person, I heard it was because of the color of my skin or I believe it was.' 'Okay, why do you believe it was?' And during that time I ask 'give me specific evidence that it is on the basis of your race, or give me specific evidence that you're being sexually harassed.' We really try to make sure we're in the world of [compliance]. As a result of that, either I can tell right then or there or the person will admit 'I really don't think it's discrimination, I'm just not being treated well.' Then we know it's not the [compliance] world. If they say 'it's because my counterpart is a white female, she did the same thing I did but she's being treated better, she was being treated better in this regard, this regard, this regard...' then we could say 'it looks like there's enough to at least do an investigation to prove or not prove your case.' Then I explain to them the investigation process... (T10A43:22)

Fourth, Coordinators who follow the archetype always provide notice to the respondent after receiving the initial complaint. However, Coordinators select the timing of that notice on a

case-by-case basis. For example, a Coordinator described typically interviewing the respondent immediately after the complainant:

So I usually, not always, but usually interview the alleged harasser or discriminator next. Give them a copy of the policy, explain to them that we are impartial and have not reached any conclusions, but this person has come forward and made a complaint about you. We want to get your side of the story. I try not to give away too much at first because I really would like to hear what they had to say before I drill down to the nuts and bolts of 'here's what she said you did.' I get there eventually, but I start with 'tell me how it is you came to know X. What happened on such and such or when you all were at such and such restaurant or this event' or something like that and get them to sort of ramble (T12A47:33)

Other Coordinators described why and when they will not immediately notify the respondent:

Sometimes I will immediately notify the respondent that there is a complaint. Sometimes I don't immediately notify the respondent, sometimes I talk to some of the persons who may have witnessed what took place before I approach the respondent. We certainly won't take any action until the respondent receives notification of the complaint. Sometimes getting information from other witnesses helps to inform how we approach the respondent. So, and I know some investigators say we need to notify the respondent early on in this process, let them know that they have a complaint, and then we start talking to the witnesses. I do that sometimes, sometimes I don't. Because sometimes gathering that information helps me in terms of how I approach the respondent to get some truthful answers...if I have enough information then maybe I can know what questions to ask to make sure I get the right, the truthful response. (T13A49:36)

Yet other Coordinators described a norm of talking to the respondent within a few days of receiving the complaint:

Usually [I discuss the situation with the respondent] within the first few days of getting the complaint in. [I'm not gathering information ahead of that]...what we typically do is we talk to the complainant and respondent first, we give them both the opportunity to get whatever documentary evidence they think we should look at, and we also tell them 'please let us know what other witnesses we need to talk to.' (T9A41:37)

Some Coordinators even go line by line through the complaint with the Respondent:

Once we get [confirmation that the written complaint we sent is correct] back [from the complainant] we talk with the alleged offender and we go through the same thing. 'Here's my name, this is what we do, we've received a complaint.' We usually send it to them in writing, they make an appointment to come see us.

And then we talk about it. 'Here's what we have, let's go point by point,' and we get their response. If they respond in a way with evidence to show that either A, recently: 'yeah, I said it.' That ends the investigation. If they're defending it and we need to have more information to determine whether or not it's more reasonable or not to think the probably did it or didn't do it, we then ask them for witnesses to talk with and then we have our witness list. (T10A43:26)

Coordinators described the reasons for treating the complainant and respondent equally:

[Respondents] want to have their day and they want to be heard and you've got to treat them respectfully, you can't just go in the door and say 'you did this,' no, you've got to give people the respect and listen to them and work through that. (T6A30:48)

I think that respondents deserve the same kind of, I think it helps keep everybody safer if we were able to give notice to a respondent or share the outcome in the same way we do with a complainant. (T8A39:64)

Another Coordinator described the danger of waiting to provide notice:

[Respondents] often feel ambushed, and sometimes we do ambush them because we frequently ask questions that we already know the answers to and how they answer the question is important. We may already know the facts, but they don't know that we know that, so when we confront them with conflicting information they get pissed off because we ambushed them...in many instances... people who are not accustomed to having their authority challenged. (T7B33:22)

The impact of this tactic is then described by the same Coordinator:

Well, people file complaints on us. They allege that they were mistreated in the investigation, they allege that we were biased, they allege that we spoke to them harshly, they allege that we harassed them, all kinds of things. And then sometimes short of that they'll complain to our bosses that an investigation was unfair or that we individually spoke to them harshly or something was unfair. We ask them questions that make them uncomfortable. (T7B33:14)

Coordinators described needing the complainant to make a direct report in order to appropriately provide respondents with notice, as indicated by a Coordinator who observed:

It saves a step. If I get [a complaint] through a third person I have to go back to the [alleged victim] and say 'we got this complaint, talk to me.' We have to then make them comfortable to do that before I can even get out the gate to go and talk to the alleged offender. When we don't do it that way and you put yourself in this predicament [where I am calling a respondent to say] 'you know what, we got a complaint by somebody' [and they will respond] 'Oh really, who?' [and all I can

say is] ‘I can’t really tell you that right now.’ [They will want to know] ‘Well, what did they say I did?’ [Respondents] don’t have to answer any questions because I’m basically violating...due process. (T10A43:19)

Fifth, Coordinators who adhere to the archetype use the correct “preponderance of the evidence” standard of proof, not the more stringent “beyond a reasonable doubt” or “clear and convincing” standards. Title IX Coordinators described attempting to educate campus members regarding the correct standard. Thus,

I deal with a lot of deans and they try to tell me what the law is all the time, and how I need to do my investigations all the time, and I always have to bring them back to ‘everything you see on TV on Law and Order and on CSI, I get that, but that’s a criminal investigation, and that’s not what we’re doing here. ‘It’s a civil rights or civil investigation, and using the word civil means that we’re going to build relationships and we’re going to be civil to each other and figure out what happened. I am not trying to nail anybody to the wall, I’m not calling the police unless I uncover some criminal activity, but we need to look at this a little bit different.’ I don’t use proof beyond a reasonable doubt, I’m about preponderance of evidence. Now in the faculty side, they want me to use clear and convincing, which I refuse to do because for me, clear and convincing weights it in the professor’s favor. It’s not a balance. (T11A45:11)

Following an investigation, Title IX Coordinators who adhere to the archetype issue a formal report akin to an indictment, but one that goes further in describing policy violations and making recommendations. As noted in chapters one and two, there is considerable debate regarding what due process requires and what constitutes a “hearing” under Title IX law. While OCR recommends an appeal in certain situations, the “hearing” requirement is satisfied by the Coordinator’s investigation and by providing both sides with the opportunity to provide information, evidence, and suggest witnesses (OCR Q&A, p. 24-26). These requirements must be read consistently with federal due process rights (OCR Q&A, p. 13) and potentially also administrative law requirements.

As education is not deemed a fundamental right, there is no requirement to use an elevated burden of proof in student cases, such as clear and convincing evidence, or to provide a

right to cross-examine witnesses (*Goss v. Lopez*, 1975, p. 583). Faculty and staff with contractual rights do have constitutionally protected property interests that trigger higher due process standards (*Perry v. Sindermann*, 1972). Administrative law, however, requires keeping the functions of investigator or prosecutor and judge or hearing officer separate (Administrative Procedure Act, § 554(d)(2)). If the Title IX Coordinator does conduct the investigation, OCR requires taking steps to guard against a conflict of interest in this role (OCR Q&A, 2013, p. 25). Specific examples of a conflict of interests include where the Title IX Coordinator is also the Athletic Director, Dean of Students, or “serves on the judicial/hearing board or to whom an appeal might be made” (OCR Q&A, 2014, p. 12). This conflict of interest definition suggests that Title IX does not bar the Coordinator from making the initial determination of guilt or innocence, as long as they do not oversee the appeal. In some instances the Title IX Coordinator does not personally investigate but it is done by a staff member in the Title IX compliance or other office, providing some separation between the investigative and adjudicatory functions.

At a minimum, Title IX Coordinators’ reports include a recommendation regarding guilt and potential sanctions. In some situations the report goes to a panel or to an administrator who makes the ultimate determination regarding guilt and sanctions. This arrangement is described by one Coordinator: “[A] final report is drafted for my review or for my boss’s review if I’m doing the investigation, and then recommendations are sent out with the findings” (T10A43:29).

In other situations, the Title IX Coordinator’s report determines whether there is a Title IX violation and a panel or administrator determines the appropriate sanctions. A Coordinator described that situation:

For students the hearing board determines [punishment]. Again, it’s all about consistency. We just want to make sure for certain violations we’re consistent in terms of how we implement those. (T13A49:51)

Alternatively, the Title IX Coordinator's report serves as an indictment, stating probable cause to proceed with charges, with the case then proceeding to a more formal hearing. For example:

[S]o what we wind up doing is writing a summary of the investigation and providing findings of fact to the student conduct office with a recommendation, and it's only a recommendation, as to whether further proceedings are warranted or not. And then that office decides whether they will engage their disciplinary proceedings or not. But we do an initial set of findings, of fact, without a conclusion as to whether a policy has been violated or not. [S]o we become the investigative arm of [another office]... Yeah, but we work together with the [administrators in the other office] because we basically attend the same interviews and we produce a memo. They're actually free to disregard it, but that doesn't usually happen. (T7A32:23)

Another Coordinator noted: "Beyond our [report], we [then] become witnesses at the student conduct hearing" (T9A41:39). At the hearings, Title IX Coordinators adhering to the archetype also ensure that the complainant is not subjected to direct cross-examination. For example, a Coordinator noted that questions can be asked to the panel, but "our process does not provide for cross-examination" (T9A41:39).

This question of what constitutes a "hearing" is evident in the student and faculty processes used at the University of Kansas. For students, The Title IX Coordinator conducts an initial evaluation to determine if a more complete investigation is necessary (University of Kansas, Discrimination Complaint Resolution Process, Evaluation). Written notice of the complaint is provided to the respondent and an opportunity to meet with the investigators in person or to respond in writing (University of Kansas, Discrimination Complaint Resolution Process, Procedure). Both the complainant and respondent have the opportunity to identify witnesses, present witness statements, and offer any other evidence, but the investigator(s) have the discretion to determine which individuals will be interviewed (University of Kansas, Discrimination Complaint Resolution Process, Procedure). Following the investigation, the complainant,

respondent, and appropriate administrators are to be given a written summary of findings and recommendations. The appropriate administrators will then determine an appropriate resolution. (University of Kansas, Discrimination Complaint Resolution Process, Procedure).

If there is a finding of discrimination or retaliation and discipline is imposed, the respondent may request a hearing (University of Kansas, Discrimination Complaint Resolution Process, Procedure) “conducted with more formal procedures” including the chance to present evidence, and ask questions of any witnesses or the other students involved (University of Kansas, Informal v. Formal Hearings). An appeal from the panel’s determination is possible on the grounds of 1) Failure to follow procedures, 2) Inconsistency with applicable provisions of other rules or state or federal law, 3) Factual determinations not supported by the record, and 4) Arbitrary and capricious decisions (University of Kansas, Appeal Process). The appeal policy notes that “[a]ppel requests may be denied in cases not having sufficient grounds in one or more of these areas” (University of Kansas, Appeal Process). The process just described comports with the Hybrid Model in which an investigation occurs, followed by the ability to have a hearing to appeal the findings.

The process is the same if the accused is a member of the faculty, only the step between the administrative determination and the appeal is omitted. Faculty may appeal an initial determination that involves a suspension to a Faculty Rights Board (University of Kansas, Governance Procedure, Jurisdiction). The grounds for appeal are limited to “allegations that action by an administrative authority violated established University procedures and adversely affected faculty rights” (University of Kansas, Governance Procedures, Procedures of the Faculty Rights Board, III.A). The rules note that “On review

of the written information filed in the appeal, the Board may decide that it possesses sufficient information in the written record to make a decision without a hearing (University of Kansas, Governance Procedures, Procedures of the Faculty Rights Board, V.C.). If the Board initiates a hearing, it “shall serve as a fair opportunity for the appellant and opposing parties to present their cases and arguments before the Board (University of Kansas, Governance Procedures, Procedures of the Faculty Rights Board, VI.A.). As a result, for faculty the University of Kansas follows the Investigation Model in which there is no right to a hearing. As previously described, most Universities use a Hybrid Model in which a hearing is utilized if findings are contested.

These procedures at the University of Kansas are a matter of dispute. In *Zamir Bavel v. The University of Kansas*, (No. 14-111404-A), Bavel asserts that the university failed to follow its prescribed procedures to provide a hearing on the merits when his request for an appeal against the initial administrative determination was denied. In their response brief, the University of Kansas argues “‘hearing’ does not mean a formal adversarial evidentiary proceeding” (p. 13) Effectively, the position of the University of Kansas is that the sexual harassment investigator and the employee’s supervisor (who determines punishment) become “hearing” officers for the purposes of satisfying the legal requirements of a due process hearing. Any “appeal” from those determinations is limited to an appeal on grounds of procedural error. The question of what the law requires for a “hearing” remains unsettled and is further addressed below, but the relevant point here is that universities face ongoing legal pressure to increase the formality of their investigation and hearing procedures..

Regardless of the process used to determine guilt and sanctions, Title IX Coordinators who conform to the archetype use a formal investigative procedure that begins with

mandatory reporting, continues with formal investigative techniques that mirror those of police and prosecutor, and conclude with an investigative report that is similar to an indictment (along with recommendations for resolution of the complaint). Where the analogy to the criminal justice process breaks down is in the character of the hearing process, which is clearly based on the model of a trial in court but is considerably less formal than an actual trial.

TITLE IX COORDINATORS WHO DEPART FROM THE ARCHETYPE

Title IX Coordinators who depart from the archetype use or prefer more informal mechanisms for resolving sexual misconduct. Departures occur primarily to address the needs of survivors or alleged perpetrators, out of frustration with the inefficiencies of excessive formalism, or to address the organization's interest in resolving disputes and avoiding liability. These departures from the archetypal model often do not meet standards of legal compliance or risk exposing the university community to further sexual misconduct.

First, many coordinators use informal mechanisms in order to serve organizational interests in preventing litigation. One Coordinator, for example, observed, “[W]hat I do is not advocate, I look at the interests of the university as a whole, so we want to get issues resolved, taken care of, redressed at the lowest level possible” (T4A24:49). Another, describing a change in university policy regarding Title IX, echoed:

I had previously been advised not to go near that by [the general counsel's] office. We had a change of president here who didn't like all the investigative reports we were turning out because whenever we had findings of discrimination or sexual harassment, those reports, they always become attachment A to the lawsuit against the institution. Now I've been given the green light to sort of identify cases that maybe can reach an informal resolution without having to go through a full investigation. Now that informal resolution sometimes also means can we bump somebody out of the institution on the base of which you already know without having to go through a full investigation. That's usually what that means,

because we're not looking to coerce anybody, [but just] give them an opportunity to resign. (T7A32:44)

S/he continued, "Especially if we discover early on that there is serious evidence of serious misconduct, [the administration] may not want us to go to a full report because maybe they're going to negotiate a departure of somebody, and it will not be necessary to produce a full blown report. That happens and that's why it's necessary to be in touch with supervisors and the like" (T7A32:11).

Many Coordinators described examples of their use of informal mechanisms. In one situation, an apology was unsuccessful but was seen as a means of resolving the issue:

[And now instructor became] determined that he was also going to sue the student for defamation of character. [Everyone] got lawyers. All of this could have been avoided had he said 'I'm Sorry' but I couldn't make that happen... (T11B46:17)

Other Coordinators expressed frustration at what they saw as efforts to avoid institutional liability in ways that benefited respondents (the alleged perpetrators). For example:

[T]he point that was also negative and very frustrating to me was that this student conduct board makes a recommendation to [the vice president], who issues a decision. Then that decision can be appealed by either party to the president. So what happened was it took the [VP]... twenty plus days to review it [and we were mid semester]. I believe he was dragging his feet on purpose to let the [respondent] finish the semester. Close to the end of the semester he concurred with the panel, [and then there is an appeal to the president]. The president is on vacation, and did not leave it with somebody else to handle. So this guy got to finish the semester, go back home to another state and enroll in another university without ever having a record on his transcript that he had any issues. It was too late to notify them. He was already in another place and taking classes when [the] decision [was made in January]. The registrar told me she didn't know if we could notify the other school. When they took him he was a student in good standing. I honestly believe that the VP and president conspired to kill time to allow him to do that. I really do. Because the students only have 15 days from an event to file a student conduct report, but that vice president took 20+ days to make a decision. Is that fair? (T12B48:17)

Alternatively, many Coordinators depart in the other direction by failing to consistently provide notice to respondents in an effort to gain better information and serve organizational interests in compliance. To be sure, under their police/prosecutor model, the Title IX Coordinator archetype has some discretion, in exceptional cases, to determine whether more accurate information can be obtained from the respondent if part of the investigation is completed before the respondent is questioned. Coordinators depart from the archetype when they fail to provide notice routinely. For example:

We typically start with the complainant. Then we allow that person to tell their story, identify any evidence and witnesses. We will then interview their witnesses ...and then we'll notify the respondent. (T2A13:25)

Second, many Coordinators use less formal processes than what is required by Title IX out of frustration with what they see as excessive formalism. For example, a Coordinator noted:

I've had a real trouble dovetailing my process with the [formal office] because they are very rigid, very process-driven, to the point of dotting the I's and crossing the T's.... You know what I'm saying? And it's primarily staff with young, ambitious professionals who are really more interested in making a name for themselves [than in] cur[ing] students, in my personal opinion. (T12B48:7)

Another Coordinator noted preferring situations where everyone wins: "I like win/win. I just do. I prefer win/win situations. I think there always should be dignity in the process" (T11B46:26).

Coordinators expressed strong dissatisfaction with the formal process, for example: "Knowing what our adjudication process is like... when they first come [in], I just dread it. Because I know what's coming. I just think 'oh my God, how can I do this to this person?'" (T12B48:23). Other

Coordinators expressed understanding the value of having informal, confidential conversations:

There are times...I have to admit, where stuff is just so dumb and crazy that I go into [the Ombuds] office and I shut the door and I say 'okay, I just need to spill my guts and then I'm going to go away. I don't need you to say anything, I don't need you to do anything, but just hear what I'm saying, nod in the appropriate spots, and then I'm going to go away.' I proceed to then throw up on [the Ombuds] shoes, [the Ombuds] will laugh because nine times out of ten [the

person] thinks that everything I [say] is funny, because it is because it's so dumb, and then I walk away. (T11A45:66)

As a result, often Coordinators relax their commitment to formality in order to encourage people to share information and cooperate. For example:

Often they [give] us...resistance at first, but through careful conversation with them and offering the resources we have on campus and trying to work with them... one of the first conversations we have is 'what outcome are you looking for? What do you want to see happen here?' So that they get to play a role and have some control about how we proceed. It's through that gentle process that we often can [convince them to] go forward. I don't think it's because the students have heard of [our reputation], I think it's more that we sort of have to coax them along. (T1B12:19)

Coordinators also depart from the archetype to avoid the formal requirement of investigating and reporting within 60 days. For example, a Coordinator expressed "sometimes the handling of some [cases] takes longer than others, so you try to handle them within 60 days or less, and I don't look at the 60 days, I just want to handle them" (T4A24:49). Many Coordinators indicated an incorrect understanding of the time limitations to complete an investigation and issue findings: "[W]e allow ourselves now 120 days to complete all of this. So it's 90 days for the investigation, 30 days for the report" (T2B14:24). Other Coordinators do not seem to understand or ensure the use of the proper legal standard for guilt. For example, a Coordinator described a hearing in which the wrong standard was used:

The investigat[ion] found that the more likely than not the policy was violated and recommended a hearing. [A]n adjudicator [is appointed]...and the victim's very anxious, does not want to go forward, does not like the process, just wants it to be over.. and in the end the adjudicator finds the respondent not responsible. The adjudicator failed to understand the [appropriate] standard... (T8B40:27)

Title IX Coordinators also depart from the archetype's formality by relaxing the formality of reporting requirements. Specifically, departure occurs when Coordinators do not ask for specific information about a complaint, do not require other offices to have the Title IX

Coordinator's permission before handling complaints, or do not have or enforce a policy requiring others to report incidents. For example, one Coordinator described their relationship with the Ombuds:

I think it's a close relationship and [the Ombuds] will call and say 'can I run something by you without any identifying information,' and then they'll go back to their visitors and share information. (T8A39:32)

Another Coordinator described the Ombuds office as a good place for determining whether an issue needed to be reported. For example:

[The Ombuds office is a] good place for students to go and get information about the various options available on campus, but also the process, how it works, and to talk through their issue, to make sure and determine that the issue is a real issue. (T10A43:51)

The Coordinator continued:

I think [the Ombuds office is] a great advisory [function], I think that's what, it may not have the teeth that we have, but it's critical for students to have that first place to go. Students don't sign up to be infused in the formalized process of a grievance structure, that's not why they're here. They're here to study and to learn and to have the greatest four years of their life, so it's important to have those touch points that can redirect them if they need to be redirected and make sure that they understand what's important and what's not important and let these other processes that [investigate], let us handle that. I think once you're into a process such as a Title IX process, it's so formal at that particular point, and the requirements are so different that it's hard to maintain that sense of safety and security of why you came to university. I'm always hesitant...I really try to make it as non-intrusive as I can when we're doing complaints with students. That's not what they really signed up for, so we try to get through them quicker than the employees, let's get in there, let's find out the facts and get out so that they can finish their studies. (T10A43:51)

Coordinators noted having discretion, much like a prosecutor, and engaging in informal conversations that contravene the requirements of the formal role. For example:

[D]epending on the facts they provide, because clearly, if this is something that smells like sexual harassment, we're going to investigate, but if it's feeling like 'well, someone is telling some off-color jokes, they seem to be targeting, they're just kind of that equal-opportunity tell a bad joke'...it's one of those situations

like that, then we can either talk with the supervisor, we can say ‘you know what, we’ve caught wind of... you need to get that person under control.’ I don’t have to tell them a name. And there are times when I will say ‘I’m not going to share the name with you at this point, I don’t think that’s as important as it is you stepping in and dealing with what’s going on here.’ Then I’ll ask ‘are you aware of this.’ Some will say ‘I wasn’t aware of this, but I’ll take care of it.’ (T2A13:34)

Nowhere is frustration with excessive formalism more evident than in growing limits on the Title IX Coordinator’s authority to make judgments and recommendations. As detailed in chapter one, in order to more clearly separate the investigation and adjudication functions, many universities now prohibit Coordinators from making recommendations about or determine whether or not there was a violation of university policy. Coordinators expressed frustration at this lack of authority and the requirement of additional formal hearings. For example:

What we used to do, and we still do with employees, is that this office had the authority to make the decision about whether or not the policy had been violated. In the wake of the Dear Colleague letter, our attorneys had decided that we can’t make that decision [or even a recommendation], we can only decide if it’s worthy of a hearing...[I]t’s insulting...[it goes] in front of a hearing panel [of students and faculty], who ironically can’t serve on those panels until they’ve had two hours of training on Title IX from me, [and I’ve had]...years of training. (T12B48:5)

The same Coordinator continued to describe the rationale for not allowing the Coordinator to make recommendations, arguing it contravenes OCR’s intent:

General Counsel said that they have a due process right to an adjudicated hearing. Don’t know if that’s true or not. In every other way and in every other situation, we are allowed to make decisions and recommendations. If they’re harassed by an employee, if they’re harassed by a third party, all of those scenarios, we conclude, we make decisions, we make recommendations for action. But it’s in this situation, and I think it’s a liability thing. We went from a two page, non-discrimination policy for all protected groups for students to... we have drafted now a ten page...sexual harassment policy for students, and we’re carving that out of the non-harassment policy that’s more general for all the other protected classes. And it’s procedure and... the good part is it has definitions in it too,

which are consistent with the Dear Colleague letter like consent, those kinds of things. ATIXA just did a webinar and it says ‘recommendations: do not let the Title IX office make the decision. Put it in front of an adjudicator.’ But it is... we have just legalized this thing to death and it is not what OCR meant, in my opinion. (T12B48:12, 48:8)

The above Coordinator is correct that OCR guidance does not require the Coordinator to limit their report to findings of fact and not conclusions about potential violations. OCR requirements must be read consistently with federal due process rights (OCR Q&A, p. 13) and potentially also administrative law requirements.

Third, Title IX Coordinators who do not follow the archetype do so out of a desire to serve and address the needs of survivors or alleged perpetrators. As a result, departing Title IX Coordinators favor informal resolution in ways that hurt their impartiality. Often that means giving priority to providing voice to visitors’ over learning relevant information about misconduct. Sounding very much like an Ombuds, a Coordinator described the challenge of keeping conversations focused:

But usually my first meeting is lots of real thick wrinkles right above my eyebrows because I do a lot of empathetic looking and face-making. I don’t mean that I don’t feel, I do feel, but I just try to let them feel safe and secure in telling their story and I listen and write and ask questions where I feel I need to. Then when they sort of wind down and I’m not good at letting people stop, keeping people brief. I’m very not good at that at all. I believe they need to get it out. (T12A47:26)

Another Coordinator noted the same phenomenon:

I am the complaint department. People hear that I’m here or what I do, what they think I do, and they immediately say ‘oh, I’ve got a problem, I need to go talk to her.’ So I try to explain to them ‘my job is to ensure that your rights haven’t been trampled on, understand what it is you want out of your complaint, and/or direct you to the right person to hear your complaint.’ Sometimes people come and talk to me and it has nothing to do with what I do. (T11A45:12)

Title IX Coordinators who depart from the archetype often described using informal means of resolution to help survivors. For example:

[I]f we've got an especially fragile complainant, let's say, rather than proceeding through our formal, full investigative process, we might figure out a way to handle it informally. We have a couple of options in terms of handling it informally. Typically...we sit down with the respondent, we explain how they've impacted the complainant, we hear their side of the story, but we're not making findings, we're really trying to educate the respondent on how their behavior was coming across and making sure they understand that the behavior has to stop. (T1A11:28)

Other Coordinator described using informal mechanisms to help alleged perpetrators. One cited an example in which there was an investigation, evidence of clear misconduct, but with an end result where "the [respondent] wrote a letter of apology and it was accepted." The Coordinator continued:

The [respondent] wanted to write the letter, so the alleged victim, if you will, the complainant agreed. I think [the respondent understood] needing to do something. It was definitely needing to do something. [a realization that] 'oh my gosh, I've got to do something to show that I'm not like this by any stretch of the imagination.' [The same person] has actually come in and conducted a workshop [for us]. (T4B25:15)

For survivors who do not want to use a formal process or are not willing to participate, Title IX Coordinators who depart from the archetype often provide the complainant with control in ways that may undermine protections for the broader community. One Coordinator described an example of relaxing the commitment to formality:

[T]he complainant came to us...with some pretty strong concerns about retaliation...[so] we wrote a letter to the department...communicating her concerns and telling them, '[We] reserve the right to investigate at any point, but we think at this time it would make more sense for them to think of strategies to address her concerns internally. (T3A19:30)

One Ombuds noted referrals from the Title IX Coordinator in order to satisfy a complainant's wishes: "They realize that when things go to their office and they can't file the grievance completely the way that a [complainant] would need, sometimes it comes as a problem [and they refer the case to me]" (O8A51:46). Another Coordinator put it frankly:

The goal of the meeting is to give them their options and to hear if they made a decision about a complaint. What do they want to have happen? What views do they have at that moment? (T8A39:52)

Coordinators described providing complainants with control very similar to that provided by an Ombuds. For example:

Once I hear their story and I tell them what their options are... Ombuds or me, or if they want to deal with it on their own, because that's always an option, or do they just want to drop it? They always have options. Once they tell me where they want to go with it, because some of them are adamant about 'no, I want to nail him to the wall, so you're the person I want to talk to.' I tell them 'here's the form' because I never want them to make a decision in the heat of the moment. 'Here's my...complaint form, my intake form.' It has some basic questions: who are you and what's your complaint. And I ask them to write out or type up their complaint, which requires them to go away, think about what they've said, what they want to do, and come back. Sometimes I never see them again because once they put it in writing and they see it they change their minds. I also tell them '[I]t needs to be the truth. If I find out in my investigation or in the course of having a conversation with them that things are not quite right, that I reserve the right to report them back to student code of conduct for an illegal complaint. (T11A45:20)

Granting the complainant this degree of control often comes at the expense of the university community, as the result is a failure to effectively document violations. One Coordinator described not utilizing an intake form or recording the conversation, to the dismay of the general counsel:

We have a complaint form, but I am... loathe to require that they complete it until we talk. And so because I'm also loathe to tape record, because it changes the tenor of a meeting when you put that thing between the two of you, and the general counsel and I have gone round and round on that issue. (T12A47:22)

The same Coordinator described why it is important not to require the complainant to complete an intake form:

I was trained differently. If you have a potential victim, you don't know their state. You make the process as easy for them as you can without cheating. Still, I do it for the other side too. I interviewed the young man or whoever it is, I take notes, we assume that they're telling the truth until we hear otherwise. The same kind of thing. I just was not trained that way. People like doing that. They really

enjoy the process and it's very cathartic for them and all that. Or they're just sort of Type A kind of people who like that sort of [formality, they] want this to be [an] official thing. That's fine! But we don't ever require it. (T12B48:21)

Other Coordinators, like Ombuds, engage in informal conversations that help complainants think through their options. For example:

[We might say] 'you know, this probably doesn't rise to the level of sexual harassment or violation of gender discrimination or anything like that,' but we can go through this process and we can investigate, but even assuming everything [is true]...it probably won't be [a violation]. So let's talk about what might be other interventions. Sometimes people want to talk about that. Sometimes people will just say 'look, I just want this person stopped. I think I can handle it. What ways can I do that?' They want to talk about strategies. (T2A13:32)

Another observed:

A lot of times we'll work [with] a complainant to say 'your case is right on the line.' Some are so egregious that we have to do a formal [investigation], but there are a lot of cases that are kind of right in the middle and then we'll try to give the complainant some say. 'Do you want to go through the formal process which is going to be lengthy and difficult or would you just as soon try to solve this informally, which will be much more quickly handled, but it's not likely going to result in a policy violation.' (T1B12:54)

Yet another Coordinator sounds very much like an Ombuds:

[M]y office I open to anybody, I'll talk to anybody...very open, very informal in the first meeting trying to help guide people where they need to go. I'm a proactive person, I don't respond well to having to react to stuff. I'd rather know what's going on or suspect what's going on, nip it in the bud, give people some tools they can use to help themselves and recognize when they should report and what they should report, than be caught unawares all the time. (T11B46:24)

An Ombuds noted the danger to survivors of engaging with formal offices in informal conversations:

I suspect, I happen to believe that our [Title IX Coordinator] does a lot of that informal coaching when somebody doesn't want to file something. One distinction, one important distinction is that in the course of that conversation [is] if the visitor would say to me, 'here's what he said to me.' [The Title IX Coordinator] may be obligated...to respond to that...[T]hose are the sorts of behaviors that I [can] informally approach. Well, I...hear [what is going on there]

and leave [the Title IX Coordinator] in control of how...to proceed but [Title IX Coordinators] ...[h]aving heard [certain things], may have to act... (O13B62:8)

Further, Some Title IX Coordinators depart from the archetype because they see the formal process as too confrontational and thus harmful to survivors. For example:

You don't know how it's burdened [me]. I often see them right after, the day after. They're traumatized. They cry...they [are often] furious at the panel. Furious. [They say] everyone over there was incompetent, unfeeling... our process is so victim unfriendly. (T12B48:13, 23, 19)

The same Coordinator continued:

[T]he part that makes [it] really difficult is that the...conduct hearing is very formal [and] the victim is expected to mount her own defense. She must call her own witnesses, she must question her own witnesses, she must answer questions from the panel. It's very problematic, and I will tell you... [The conduct panel gives the complainant] X number of days to get their documentation in while [a complainant may be] grieving over the loss of her virginity and feeling frightened for her physical safety and all these things are going on. The dad [is] trying to help get the paperwork together and gather the names of the witnesses and get witness statements. There's all these requirements... Here, we don't even make you fill out a form. You come in, we take notes...I struggled when you said positive outcome because there's not a young woman that's been through this process that has not said to me 'the process was worse than what happened to me.' It is re-victimization. The one that went [to the next step] said 'I don't want money, I just don't want another girl to have to go through this.' (T12B48:5, 8, 20)

Title IX Coordinators who depart from formal processes often use mediation and further blur the line between formal and informal. The decision to use mediation is motivated by a combination of the factors described above: To best serve the institution, to help individual survivors or alleged perpetrators, and out of frustration with excessive formalism. Thus, one Coordinator who described using mediation in "situations where both parties actually met because they wanted to go into full-fledged mediation, [and] that worked wonderfully well on a couple of occasions" (T4A24:33). Another Coordinator described allowing "the complainant and respondent to choose to mediate their differences. We have definitely used that mechanism

at times” (T1A11:41). While these examples illustrate how deviations from formality are done in order to help the survivor, other Coordinators described early settlement options as beneficial to the organization: “[Our process] has a remediation piece built into it as well, so that prior to even going into the full-fledged investigation, there’s an opportunity to resolve it at a preliminary stage” (T11A45:8). Another Coordinator described a similar situation:

So in the particular instance [there was touching but] the [respondent] said ‘I may have done that, but I in no way intended it to mean that.’ After questioning both parties I saw where we could resolve the matter through mediation. The matter was very positively resolved, resulting in a beautiful card being sent to me by the alleged perpetrator. (T4B25:3)

Other Coordinators described sometimes using mediation because their university had no Ombuds to offer a less-formal option. For example, “At [a prior university] I would mediate, here I don’t... because we have an Ombuds here, [but] we didn’t [there]” (T11A45:58).

Another reason for choosing mediation is to allow the Title IX Coordinator to gain control over the outcome or monitor the agreement. For example:

[W]e don’t [use mediation for Title IX] cases... but just recently I had a race case where I think it was more or less personality styles and things of that nature, so we didn’t find discrimination, but the person needed to work with this person to move forward, there was nobody else that they could effectively work with, they had to work together. And [the mediation] went well, they ended up shaking hands and we worked out a plan, we put it in writing, put it in both of their hands and said ‘okay, this is the road map that we’re going to use. If anybody departs from that you talk to me, give me a call’...[O]ne of the things I think oftentimes is when a third party’s involved, that person in the power position knows that they just can’t do anything, because somebody’s watching, [they think] ‘I’ve got to watch myself.’ (T13A49:47)

In sum, Title IX Coordinators who depart from the archetype do so for a variety of reasons: to better serve survivors and alleged perpetrators, as a result of pressure to serve organizational interests in avoiding liability, and out of frustration with what they see as

excessive formalism. In deviating from the formal model, Title IX Coordinators become more akin to Ombuds, whose archetype's preference for informality is examined in the next chapter.

CHAPTER 8: OMBUDS AND INFORMALITY

Where the Title IX Coordinators' archetype prescribes formalized processes, the Ombuds' model is highly informal and flexible. This chapter describes the Ombuds archetype's preference for informality and examines Ombuds who depart and adhere to the model. These adherences and departures occur along a spectrum, as some Ombuds or Title IX Coordinators may aptly be described as "adherers" or "deviators." Additionally, adherence or departure is often situational and context-specific as a Coordinator or Ombuds who goes by the book in one instance departs from their archetype in another.

INFORMALITY AND THE OMBUDS ARCHETYPE

The Ombuds archetype uses a process that is much less regimented than that used by the model Title IX Coordinator. IOA Standard 4.1 describes the informal basis in which the Ombuds functions, including "listening, providing and receiving information, identifying and reframing issues, developing a range of responsible options, and – with permission and at the Ombudsman discretion—engaging in informal third-party intervention." The IOA Best Practices (2009, p. 9) further expands on the ways that options may be individually tailored, with Ombuds options including third-party interventions like shuttle diplomacy, facilitating communication, and informal mediation. Mediation is described as voluntary; it may or may not produce a written document. Even if used, these written agreements should not be maintained by or within the Ombuds office.

The Ombuds archetype celebrates the value of informal resolution that is separate from the university's formal processes and draws a sharp boundary between the two types of process. IOA Standard 4.2 states that the Ombuds is an informal and off-the-record resource for pursuing resolution of concerns, examining procedural irregularities and identifying broader systemic

problems. Informality relates closely with the impartiality and neutrality standard, as indicated by IOA Standard 4.3, which notes that the Ombuds does not mandate policies, formally adjudicate issues, or make binding decisions for the organization. Illustrative of most Ombuds offices, The University of Kansas Ombuds Office's Statement of Best Practices (2008) declares that the Ombuds "shall not have authority to adjudicate, impose remedies or sanctions, or to enforce or change policies or rules." The Charter of the Office of the Ombudsperson at Michigan State University notes the University Ombudsperson does not make policy, participate in the formal grievance process, or compel any individual to implement the University Ombudsperson's recommendations (MSU, Charter, 2014). IOA Standard 4.4 indicates that the Ombuds is a supplemental channel that does not replace formal channels. The use of the office is voluntary and is not a required step in any policy or process. IOA Standard 4.5 articulates the idea that the Ombuds does not participate in any adjudication or formal investigation, which should be conducted by others and to which the Ombuds will refer visitors when requested.

Rowe (2012, p. 8) describes informality as the fourth pillar of Ombuds practice in addition to the standard emphases on independence, confidentiality, and impartiality. Although the importance of informality was recognized belatedly only long after the others, Rowe (2012) asserts that it is just as essential. Without it, an Ombuds practice "could not function in today's legal climate...[as] many managers would find [Ombuds] to be interfering with their authority" (p. 8).

So, what is informality? Rowe (2012, p. 11) discusses several meanings for informality, including not putting complaints in writing, conflict management without a written record, and having no management decision-making power. Rowe also mentions the principle against the Ombuds serving as a witness or conducting investigations for the purpose of administrative

decision-making (2012, p. 11). Sebok (2012) operationalizes the IOA Standard on Informality by explaining to visitors that he does not give legal advice nor does he:

1) accept formal notice for the organization about a problem...2) arbitrate, adjudicate, or formally investigate complaints; 3) make official determinations for the organization about violations of rights, performance failures, or who was right or wrong in a given situation; 4) maintain written records on behalf of the organization; 5) participate in—let alone administer—formal procedures such as grievances, hearings, or disciplinary proceedings, or appeals; 6) sanction anyone; or 7) meet with people who do not want to meet with me. (p. 38)

The commitment to informality is inevitably in tension with the university's more formal processes, and defenders of the Ombuds model try to defend its role in this increasingly formalized context. Referring specifically to sexual misconduct, Rowe (2012) notes that “managers may feel that they must immediately take control of the disputes that come to them...[and] [i]t has become harder for ordinary line and staff managers to permit employees with concerns to have a voice in deciding how to handle the concern” (p. 13). Interest-based options are thus often formally structured “by and around the General Counsel’s office, HR, and other compliance offices” (Rowe, 2012, p. 13). Rowe (2012) argues for a spectrum of conflict management options as not all people are alike in how they pursue issues, and therefore “people need options—and organizations need options—for managing conflict” (p. 12). Rowe (2012) points out that “there are employees and managers who heartily dislike formal channels,” cannot be persuaded to use them, and will not use them “even in the presence of illegal behavior” (p. 13). As a result, “if these people are to come forward timely with their concerns, and if their conflict is to be managed effectively within an organization, it will help to have a near-zero-barrier office within the system” (Rowe 2012, p. 13). In this way, Rowe argues that the Ombuds archetype can support the entire conflict management system by offering informal and formal

rights-based options and often helping the visitor determine whether or not they would benefit from a formal option (2012, p. 15).

As the legal environment has changed, it increased the pressure in favor of formal versus informal mechanisms for resolution. Effectively the question becomes, how do universities address the potential tension between these two mechanisms' overlapping and potentially competing jurisdictions? Where Ombuds view the informal channels of reporting as more likely to draw out complaints and thus are beneficial to the system as a whole, Title IX Coordinators view formal, mandatory and direct reporting requirements as necessary for discovering and then addressing sexual misconduct. The standard Title IX Coordinator thus believes having informal processes alongside formal ones will expose the organization to liability and erode the legitimacy of the formal mechanisms.

The archetypal Ombuds's informal process differs considerably from a Title IX investigation. First, the Ombuds model attempts to defuse situations before they become larger problems by informally helping individuals to think through their options, clarify their goals, and improve their communication. The Ombuds archetype is not to tell people what to do but to endeavor to listen without judgment. The Ombuds archetype recommends providing information about the organization's formal and informal processes but not getting involved in the formal process and instead are only working to informally resolve disputes. Under the "ideal" model, an Ombuds should not duplicate any of the formal services provided by the university but should provide a place for people to turn if they don't know where to go.

Second, the archetypal Ombuds' standards require Ombuds to be impartial and not advocate for any individual or organization. While impartiality for Title IX Coordinators is an ancillary value requiring compliance with Title IX law and avoiding conflicts of interest, for

Ombuds this concept is more fundamental. For Ombuds, impartiality requires treating all visitors equally and not preferencing the organization's objectives or any one person's goals.

While Ombuds are employed by the university and required to report to the president, they sit outside the formal administrative structure. As a result they are impartial and not vested in the outcome of any issue. This impartiality relates to informality as it requires sharp limits on their authority. Ombuds may not have administrative power and are unable to change grades, sanction, punish, change policies, etc.

Third, informality is related to confidentiality as the model Ombuds must provide confidentiality and anonymity to visitors, and must remain informal in not keeping records for use in formal processes. The model Ombuds is thus a confidential resource for anyone with an issue both with and within the organization, including staff, faculty, or students. The University Senate Rules and Regulations (USRR) at the University of Kansas specifically provide confidentiality as a power granted to the Ombuds Office: "All proceedings in individual cases shall be held confidential by the Ombudsman unless otherwise authorized by the complainant" (University of Kansas, USRR, "Ombuds Office Powers"). While the majority of Ombuds follow the IOA standards on the matter of confidentiality, not all universities have formal rules granting Ombuds offices the right to confidentiality. Ombuds must provide confidentiality to individuals in order to retain the office's informality and thus protect their institutions from legal notice.

Fourth, in sharp contrast with Title IX Coordinators' formal reporting requirements, the Ombuds archetype provides informal feedback to the organization on general trends or generic information about the types of issues brought to their attention. No specific information about any case is to be reported and any information shared must be done anonymously in order to

protect confidentiality. Through feedback, improvements can be instituted, but any changes are not administered by the model Ombuds. The University of Kansas Ombuds Office, as is typical for most Ombuds, is required to be available “to recommend procedural changes within the University...” (University of Kansas, USRR, “University Ombuds Office”) and to “at least annually make reports to the University community at large” (University of Kansas, USRR, “Ombuds Office Reports”). Michigan State University’s Ombuds is also charged “with identifying MSU policies that might need revision” (MSU, Office of the University Ombudsperson). The limited, informal feedback function of an Ombuds stands in sharp contrast with the formal reporting requirements of Title IX Coordinators.

Howard (2011b) sees the Ombuds archetype as having many roles, including as “an institutional response to curb wrongdoing or unethical behavior, a facilitator of appropriate conduct by both individuals and the organization itself, and an agent for promoting systemic change where necessary” (pp. 80-81). Long-time Columbia University Ombuds Marsha Wagner argues (2000, pp. 101-103) that Ombuds can best be described as change agents, and through their caseloads they effectively identify opportunities for preventive improvements. Wagner notes “[i]t is not surprising that some Ombuds spend one-third or one-half of their time working on system change” (2000, p. 108). Wagner also argues (2000, pp. 103-105) that Ombuds also serve an educational or a training function, educating individuals about policies and building capacity through conflict resolution trainings.

Notably the University of Kansas Ombuds website, as is typical of most Ombuds offices, provides a list of things that an Ombuds does not do, including to advocate for specific outcomes, breach confidentiality, determine guilt or innocence, make binding or administrative

decisions, participate in formal grievance procedures, make university policy, maintain official records, or give legal advice (University of Kansas, Ombuds Office, Not do).

Where the ideal Title IX Coordinator directs formal and timely investigations that provide for notice, due process, and other features common of formal processes, the model Ombuds uses flexible, informal processes that empower visitors in achieving their goals. Thus the sharpest area of distinction between the two models is that Ombuds operate informally and Title IX Coordinators operate formally.

OMBUDS WHO ADHERE TO INFORMALITY IN PRACTICE

Some Ombuds work hard to adhere to the archetype. Ombuds often described their preference for informal resolution. For example:

I've never seen anybody win their case. I don't want to say that I deter people from that, what I do is I usually recommend that they talk to the [Title IX Coordinator] confidentially to get a feel for what that process might be like, and then decide if that's something that they'll want to do or if it's something that I can help them out with. So [formal dispute resolution mechanisms are] just kind of a system of frustration for students and staff and faculty to go through that, [and] I've never seen anything [be resolved to the visitor's satisfaction]. [T]here's a saying that in order for a tenured faculty member to have any kind of consequences for their behavior they have to not just be sleeping with a student, but the student has to be dead at the time. It's a horrible saying, but [at some organizations] it's true. Something has to be that bad and that documented and that obvious for something to go through the processes for the claimant to see a positive outcome, an outcome in their favor. (O8A51:40-53)

S/he continued:

At this school [the Title IX office has] a very black and white approach with the law...they [are] very thoughtful on the initial intake and ask all the right questions, and I believe [they]...tell people up front that you can put in a complaint, but we don't know what the outcome will be. But I don't think the [visitor] understands, they feel so strongly that they're in the right, that they've been harmed in some way, that they feel willing to take the chance, but [they are not ready for] the consequence of getting one of those letters that says, we did our investigation[and we found against you]. In my experience...[the outcome is] always in favor of whoever was in a position of power, and their job was to protect the organization. I think there's a little of a bias there. You can't say that

about every campus, in other places...they would refer things over to an Ombuds [if it wasn't right for the formal process]. (O8B52:26)

Other Ombuds expressed a preference for informal resolution because it provides visitors with control:

We want to give you the power to decide how you want to resolve this without it being given to someone outside of you and the other party like a formalized process or a legal process, we can create the environment to have that conversation that you haven't had and you need to have. (O1A8:16)

Many Ombuds described informal resolution as a way of avoiding the negative effects of retaliation. For example:

I think if people can handle things at the lowest possible level, that's great. And usually relationships can be enhanced or at least protected and issues can get resolved and people [can] move on. But sometimes especially when there is power involved in the differences between party A and party B there is always that risk of retaliation. (O2B18:52)

Another Ombuds echoed this view:

[R]acial [or] sexual harassment [disputes are] so hard to prove, and if they do go through the [formal] process it's so adversarial, it's such a predicament. Especially if it's a student or an entry level staff member where there's a bit power difference between them and the person who might be giving them a grade or being their supervisor. There's so many indirect ways to retaliate, it just sets them up for failure. So I think other means are better. (O8A51:44)

Other Ombuds described informal options as a way to handle more complex issues, for example:

You know, it's really rare that cases come in that just have one narrowly defined issue, and I think that's why people choose an Ombuds office over just going directly to [a formal office] because there's many things going on [that may have]... a larger cultural and organizational component to it. (O8B52:10)

Another benefit of informal options noted by Ombuds was the greater likelihood of people coming forward. Thus, one observed,

[O]f course we always want informal options and one of the roles of this place is advocating for informal options and policies. We want that to happen because we know from experience the people are more likely to address their situations if they know there is an informal option. (O14B64:44)

Another Ombuds echoed this view:

Many of the people who come to me to talk about sexual harassment or racial discrimination come to me first and foremost for a reality check. “This happened to me. It feels like that. Does that make sense? Is that rational? Do you think someone else to whom this had occurred might feel that way?” Those are what draw people here, and if they have to compromise their confidentiality and provide notice and kick in all those formal things, just to get those questions answered, they’re not going to come. They want a safe place to come and discuss first, to use the words that some of them use: “Am I crazy, or is this sexual harassment?” And then a safe and trusted place to come to say “Ok, if I wanted to do something about it, what are the kinds of things I might consider doing?” Without obligating themselves to do any of them. And those are two functions that we as ombudsmen can perform only because we are not agents of notice and we are confidential. (O10A55:31)

In providing an informal mechanism for resolution, Ombuds who adhere to the archetype say they value providing their visitors with an opportunity for voice and expression. Thus, one noted:

I want for [visitors] to feel safe, first and foremost...I let them drive the course of the conversation and the pace. I provide them with a little information about the office and just listen. [I] [a]sk some questions, I don’t take notes. I just listen. (O8A51:26)

Ombuds who adhere to the archetype also assist visitors by providing or facilitating access to information. Thus, one noted:

I will, while the person is here, sometimes call to clarify a policy or procedure if I’m unclear about it and can’t find it on paper or online. I might call a department secretary and say “is it your office that people need to go to start this particular process?” But that would be the extent of the kind of follow up I typically would engage in... (O10A55:20-23)

Another Ombuds distinguished their information gathering from investigation:

It might sound like it's investigation work but it's very informal inquiries that are really pre-emptive types of information. In other words, someone's not, someone might decide to file a formal complaint if they knew such and such was the case and “I suspect such and such is the case but I don't want to file a complaint if I might be wrong about that but is these are a way you could look into that. It'd be real easy for an Ombudsman to walk into this office and figure out whether if this

grant got submitted because it was plagiarized, if it was and if it is then I'm going to file a formal complaint, if you could find out that information for me. (O13A61:38)

Another observed:

[Visitors] come to me also because they know I tell them the truth, and the perception on campus is that formal offices won't tell anyone what their rights are... and I don't think, unfortunately, this is unique among campuses or workplaces. So there aren't a whole lot of places to come. (O10B56:9)

In addition to providing information, Ombuds who adhere to the archetype also help visitors think through their options. Thus, one explained:

Sometimes people come in for coaching, They want to have a difficult conversation with someone 'well, how do I do that?' So we look at what their conflict resolution strategies are, I give them some tips on how to communicate differently, do some reframing. We talk about how time and place are important to where they meet. Sometimes things are more educational. (O8A51:37)

Ombuds who adhere to the archetype provide visitors with both formal and informal options, as indicated by an Ombuds:

[W]e do listen to sexual harassment complaints, but we always try, if we think there is any legitimacy to them, even if we don't think there is, we offer the option of walking those people to the [formal] office. (O9A53:16)

Another Ombuds echoed this view:

[W]hen people come to see me, as is the case with most, in my opinion, good Ombuds... they are given their full range of options from informal to more formal. They are encouraged to begin with the least formal options and progress to the more formal options only as the less formal options fail to resolve their concerns. (O10B56:12)

She/he went on:

I always start with the less formal ones. We talk about ways...[to] respond...and try to work it out in a way that minimized the chances of retaliation and see if that might work. I've even role-played with people where I've played the other party and given them words to use and approaches to make and to attempt to see if they can work it out directly with the individual to some amenable and acceptable end. Another option would be...to talk with [someone]...who might intervene on [the person's] behalf...[and] perhaps...help protect [the person] against retaliation.

Another option would be to go to the program head or department chair to discuss concerns and request intervention, another option would be to go to [a] dean to request intervention and discuss other options. Another [option] would be to go to a person outside [the] academic chain of command, [in a student advocacy role] who might be willing to go with her or on her behalf, [these are] other kinds of informal options that we discussed before we talk about more formal options. (O10B56:21)

Another observed:

[T]he process is not nearly as linear as one might think...[F]irst I listen and then we talk about options, or we identify their goals and then we talk about options. And yes, that is the ground I'm trying to cover but it's not necessarily in [a] linear fashion. As a matter of fact, once we get into talking about options, sometimes we then sort of circle back to what are really your goals? Sometimes when we start talking about options, it becomes apparent that things they had presented or at least my impression of what their goals were [are] incomplete or sometimes even inaccurate. And other times we could just proceed ahead that way because it's very clear. So just the conversation does cover that ground and sometimes in a somewhat linear fashion, sometimes in a [way that it] kind of circles back. (O2A17:34)

Other Ombuds who adhere to the archetype help visitors to see all sides of the situation, as discussed by an Ombuds:

During these meetings I'm listening usually for what it is they really want. What they really think happened. I'm looking for hidden agendas. I'm thinking about what might have happened that's different from what they perceived happened. I'm thinking how I can ask questions that might help them entertain the possibility that what they think happened and why they think it happened might not be the only explanation. (O9A53:34)

Ultimately Ombuds who follow the archetype help visitors to make decisions about what they want to do. An Ombuds explained:

[T]here are times when students say 'I can't talk to my professor about this because of retaliation.' Similarly I've had faculty members say 'I don't want to address this issue with another faculty member or with my department chair or with a student' for that same reason. Many times if it's a student saying 'I think the faculty member will retaliate against me if I bring this issue up' I might ask the student 'If it is possible to live with it for the rest of the semester and then at the end of the semester if there's some perception that they didn't treat you fairly, we can pursue the remedies then.' It's all about what they feel most comfortable

with...I'm not going to force anybody to do anything they don't want to do.
(O3A21:42)

Ombuds who follow the standards of practice strictly avoid participating in formal processes:

[D]espite what we say to people when they come in to see us and what we put in our literature, our website, our brochure and all that about not having the power to make changes, people don't expect that. They come in thinking that we're more like a judge than an Ombuds and we're going to determine who's right or wrong, we're going to do an investigation and we're going to make a finding.
(O14B64:54)

An Ombuds explained why participation in formal processes is inappropriate:

I used to go to hearings as a neutral non-participating observer. People would say '[T]here are going to be three or four people on the other side of the table and I'm all alone[at the disciplinary hearing], will you come along just so I have someone there? I used to go, and say 'As the Ombudsman I am a neutral party. My presence here should not be construed as support to any particular person or position in this matter.' I was out at one such employee hearing and I stood up to say my introduction and before I could even finish, the hearing officer told me to 'shut up and sit down, we know who you're here for!' I was stunned. I shut up and sat down, it was his hearing. But I never went to another hearing because it occurred to me, that what stunned me was of course, the assumption's going to be made that it was the employee who asked me to go there and that I am there in support, at least morally, of that employee. [First] that's not going to be perceived as neutral, [second] It was wrong...the perceptions engendered from such activities are very risky when it comes to the standards of practice...and I quit doing it.
(O10A55:25)

Another Ombuds described the range of activities in which an Ombuds will not participate:

If let's say, a student does file a formal grievance against someone but wants me to sit in on a meeting. I would not do sit with the person or go to any office if the formal procedures are already taking place or involve a formal disciplinary process. Anything like that. Or if a visitor has an attorney, anything like that I would not get involved in nor would I want to be a witness to any of those communications. I just play it safe.
(O12A59:14)

Still, some Ombuds are willing to speak with the individual who is involved in a formal process, as indicated by one Ombuds's conversation with a visitor: "Although I'll talk to you anytime

about, you know, how to manage your end of what you're going through, I can't really intervene or anything like that or help with any type of negotiation, as you're already in this formal process" (O13B62:45).

Ombuds who adhere to the archetype do not collect or keep records for the institution.

Here an Ombuds described how they handle paperwork:

It does no good when somebody comes in and prepares to hand you a half inch stack of papers. And occasionally, not as much for documentation [purposes], but because I want to hear it more out of their mouth than I do on a piece of paper, occasionally I will take the paper, do a quick once over, in terms of affirming them as this does have meaning for them, and yes this may have meaning for others, when in reality it has very little meaning for me. And so I don't like spending time paperwork and on that kind of stuff because for the purpose of resolving it, it's not going to get us where we need to go. (O11B58:3)

Nor do Ombuds who adhere to the archetype maintain records about their visitors. For example, an Ombuds noted, "We actually do have an intake form. We destroy it after the case is over"

(O2A17:29). Another Ombuds described a similar practice:

[O]ne of the reasons behind my practices around record keeping is that I don't want to become a witness in litigation, so I don't keep the names of people, I don't keep any documentation, I'll keep it as long as I'm working on a matter but as soon as it ends I shred anything. And I tell people I'm not going to keep records. There are places around the university that are repositories of records, we're not one of them, there's no reason for us to duplicate things. (O7A37:25)

Ombuds who adhere to the archetype argue Ombuds help potential visitors understand the benefits of invoking the more formal Title IX process. This view is best expressed by an Ombuds:

[A]t first she wasn't going to report it at all, ever. And I think, had it not been for us discussing it, I think she ended up bringing that sexual harassment complaint forward, and would not have otherwise had she not talked to me. So, I think that's a good example of how the Ombuds office can also encourage people to come forward because it's confidential, but at the same time, a lot of times that gives them enough time to think about it and sort out their thoughts and make a decision for themselves, and so it eventually does get reported. So I do think the Ombuds

office plays a role even though we're an informal office, that eventually it often does lead people to report things to a formal channel. (O12B60:8)

One of the major questions for practicing Ombuds is what constitutes acceptable interventions on behalf of a visitor? At what point does an intervention take on more formal attributes of advocacy? An Ombuds noted the risk of contacting individuals on a visitor's case:

I rarely, in less than one percent of cases, will contact someone, and here is why: the act of contacting someone on campus on behalf on a consultee, it inevitably engenders a perception of advocacy, and/or constitutes legally an investigation. And neither of those is consistent with the standards of practice of our profession (O10A55:20-23)

Other Ombuds see each person they speak with as another "visitor," for example:

If they feel they can approach the professor, we'll talk about that, we'll talk about strategies, like I said I do coaching. If they have a good reason for not wanting to talk with the professor then we talk about that option. And let's say I do get permission and the student wants me to call the professor. Okay, when that happens I call those secondary contacts, okay. They're not the first contact, they're not the visitor who came to see me. So they're secondary, they're the person I've been given permission to speak with. When I call that person up, I give them the same spiel because I'm a neutral, confidential resource for that person as well as the person who came to see me. So I will say something like 'I have permission from the student to talk with you, I'm calling' and I then I give my spiel and I'll say, 'Because we are impartial, I'm calling to get your perspective' and then towards the end I'll say 'Is there anything about this conversation that you do not want me to relay back to the student.' So, then I make it clear that I'm not taking sides and that I'm calling to get their perspective. (O12A59:45)

Many Ombuds have significant mediation skills, and Ombuds who follow the archetype often use those skills to informally facilitate such conversations as long as the discussion is voluntary and no record is created. An Ombuds observed:

I have had situations when [visitors] come to talk and I'm there to just facilitate. Both parties have to agree... I reiterate that it's voluntary and that if one party doesn't want to do it then we won't do it. I try not to be a witness to certain kinds of communications, so [it] kind of depends on the issue. But if it is a plausible thing to do and if I think it would be beneficial to the parties and the parties agree then certainly I will facilitate the conversation. (O12A59:13)

Another Ombuds described formal mediation:

From my perspective it is the perception of the members of my community that mediation is a formal process. Any mediation that occurs without the uncoerced participation of all parties is unethical. So for a judge to mandate mediation is grossly unethical, and for the mediator to mediate [a mandated mediation] is grossly unethical from my professional organization's viewpoint. Because the parties did not come to the mediation without being coerced and intimidated into participating. Furthermore, their participation style and [the] content [of the discussion], once they get there, will be necessarily influenced by that coercion. The general public, I believe, in our society and certainly in my institutional community, believe that a mediator will not be only facilitative or transformative, but will essentially border on arbitration. [They] [w]ill further administrate the settlement by developing and signing with the participants a legally binding formal document at the end of the session and every single thing I'm listing is unethical for an Ombuds...I will be glad to facilitate conversations among people, but I will not do formal mediation in which a written agreement is an outcome and in which I might be called upon later to be a witness as to what occurred in that agreement. (O10A55:30-15)

He/she continued:

[I]f you want formal mediation on our campus [you can go other places]. But if what you really want is to have a meaningful and facilitative conversation with someone so that you can come to some common ground, then sure, we'll be glad to provide that service for you. And I make that distinction very carefully and very definitively on my campus and in my literature. (O10A55:16)

An Ombuds echoed:

To someone else, it might look like...mediation, but I usually use another term like a "facilitated conversation," although the process may very much look like a mediation. So to give you – maybe a visitor comes to the office and it's like "Hey, I'm having this conflict with a peer, would you be willing to mediate between us?" and my practice in that would be, talk about other options, a way of addressing the problem too. And if it looks like, "Yeah, it'd really be helpful if you kind of served as a mediator" then I would want to contact the other person or have that person contact the other person, but ultimately I'd want to have a private conversation with the other party and make sure that's voluntary. I wouldn't refer to it as mediation. I'd refer that as a facilitated conversation that may or may not lead to an agreement of some kind between the parties. (O13A61:39)

Another observed:

I don't know if you hear this from other Ombuds but my campus is not very friendly to mediation...People don't like the word mediation. Hardly ever do we have someone call to say 'I really want a mediation with someone.' I don't know if this is typical...but I've been really surprised by it. And I tried in many ways...very few people have taken up on my offer in my [time] here. It's really

strange! I don't even use the word mediation much anymore. I call it a "facilitated conversation." [I'm] just sanitizing the word. It's very odd. (O14A63:66)

Regarding records of a mediation, an Ombuds observed:

Yeah. I do some mediation. I know Ombuds have different feelings on this. I call them very informal mediations. I don't keep any records here, but I do follow a similar format. What I do if I'm going to take some kind of agreement notes for them is write them up on a big white board or a giant sticky on the wall that they can then take with them, because I don't keep any records here. I let them know that at the beginning. I keep notepads on the table for them so if they want to take notes for themselves, they take them as well. (O8A51:50)

Some Ombuds will even facilitate conversations using themselves as the go-between, as an Ombuds observed: "I have on a number of occasions, mediated, and I will shuttle back and forth if they don't want to meet together but give me permission to do it" (O3A21:44).

In sum, although Ombuds face considerable pressures to relax their commitment to informal processes many Ombuds remain principled in their commitment to informality.

OMBUDS WHO DEPART FROM INFORMALITY

Ombuds who depart from the archetype do so along a spectrum and slide toward formality in various ways. Ombuds first depart from the archetype by mimicking more formal processes such as conducting investigations and enforcing policies in ways that are much more akin to formal process. For example, an Ombuds described their initial conversation with a visitor:

I explain my role at the institution and what is the process that I take. I also tell them, they have the ability to say "use my name, don't use my name" and "I want you to investigate this case for me. (O6A34:32)

Another described pursuing a quasi-formal escalation of steps:

I will try to get the person's permission to take it forward and if I get that permission we'll try to talk to the offending person and see if there was a mistake made and if they want to correct [it]. And if they don't want to correct that and we think that it was a violation of policy and we give them an opportunity to make it right and they don't, then we'll probably go onto their supervisor and [we] will work our way up the chain. (O9A53:43)

Ombuds also violated the archetype by utilizing formal mediation processes. For example, an

Ombuds differentiated formal from informal mediations:

If [visitors] want to have a conversation we'll try to get the parties around the table and talk about it. Sometimes we do it very informally and other times I'll try to make it more formal if I think we're going to need a written agreement...[Those are for] problem[s] that could blow up bigger down the road [where] I might make it a more formal mediation. (O9A53:45)

In addition to resulting in a written agreement or other documentation requiring enforcement, formal mediations were also described by Ombuds as not being entirely voluntary and being a part of a disciplinary process:

[I]f I get a referral from the [student disciplinary office] and as part of their sanctions [the students are] asked to come over and consider mediation. I can't require them once they get here because it's voluntary, but if [it is] part of their sanction they say 'yes, we're willing to have a mediated discussion' then I'll have them find a confidentiality agreement and put their resolutions on a mediation form, and then they send that back to whoever sent them over saying that the sanction was fulfilled. [B]ut I don't keep those records here. (O8A51:50)

Other Ombuds described utilizing formal mediation processes that caused conflicts with other formal offices. For example:

I mediated several faculty/student disputes and I would have the department head, the faculty person, and the student and myself, sometimes we would have an additional advocate there. We would conduct a mediation session. Now the faculty, several times when I did that the faculty got very irritated and called their faculty issued rep on me...[but] I stuck to my guns...because I hadn't don't anything outside of my purview. (O5A28:39)

In other instances, the growing legalization of formal processes increases the pressure to use more informal processes. In some universities, the top administration or the Title IX Coordinator use the Ombuds to avoid litigation or liability, placing additional pressure on Ombuds' informality. An Ombuds described such a situation:

And legal wanted me to deal with [the individual] because I could have conversations about what it is [the person] wanted out of all of this that legal

couldn't have. Our lawyer...didn't want to have to talk to [the other person's] lawyer, and if they could resolve it informally and come to an amount that would be an easier route. [After going back and forth] I think we would have agreed on the money...but [the school] was not going to admit liability...[and] eventually the situation went back to the lawyers. (O9B54:32)

In such situations, mediation effectively becomes a part of a formal process. For example, an Ombuds described mediating at the Title IX Coordinator's request:

The Title IX Coordinator referred them to the Ombuds Office for help in mediating a resolution. They understood that our role was a confidential one, that we would not be the keeper of any mediation agreement, we certainly would not be the enforcer of one. But they also set things up in such a way that, and I confirmed this with both parties, if they were able to reach some agreement in the Ombuds Office about how they were going to deal with each other in the future, that agreement would be given to the Title IX office in addition to [being a document held by each of] the individual parties. Although, if there was an agreement in writing and signed and dated between the two parties [where] either of them later perceived [there] to be [a] violat[ation], [the Title IX Coordinator would be] in a better position to [use the agreement] and call them in and investigate. (O2B18:28)

An Ombuds described visitors who have recognized this relationship between the formal and informal, and have threatened filing formal actions as a mechanism for "getting to the table."

For example:

[R]arely...will [visitors] come and say to you, 'I've been discriminated against and I want to talk about...what options I have available to me to stop this harassment.' It's rarely like that. It's usually far more subtle in my experience... where someone [says] "Hey, I don't like the treatment. I don't like the scene, kind of my work environment and I suspect it might have something to do with the fact of my race or my gender or my age or whatever it might be. I could file a complaint, I'd consider filing a complaint.' [M]any times it seems that [formally complaining] would be a means to get the flashlight put on [the] situation, but would it get [the visitor] what [they] want? What [they] want is [the] behavior to stop or [to] be treated more respectfully or be treated with more autonomy... and ...sometimes, not always, ...the filing of the complaint is a way to get the venue. Does that make sense, a way to get to the table. (O13B62:8)

Ombuds also described how the informal mechanism often leads to the formal process. For example:

[O]mbuds offices...encourage people to come forward because it's confidential, but at the same time, a lot of times that gives them enough time to think about it and sort out their thoughts and make a decision for themselves, and so it eventually does get reported. So I do think the Ombuds office plays a role even though we're an informal office, that eventually it does lead people to report things to a formal channel. (O12B60:8)

In these examples the informal mechanism shades towards formalism and may even become an extension of the formal process.

Ombuds also depart from the informal archetype by violating confidentiality in ways that make the Ombuds a part of the formal process. As indicated in chapter five, Ombuds who depart from the archetype maintain or create records that can be used in formal processes. Ombuds tend to do so by formalizing their processes with waivers and intake forms and by using e-mail to communicate with visitors. For example:

Sometimes students will waive their right to confidentiality, and I have them sign a specific waiver for that that says they allow me and permit to speak to person X and Y, sometimes it's as specific as a name, I can speak to that person and that person alone. Sometimes they don't know, they just say 'anyone over in the department,' or 'anyone you need to [in order] to fix this.' So I'm willing to sort of work with that if they do offer that kind of permission. (O4A22:21)

Another Ombuds stated:

There is a formal intake process. The student...comes to my office and [fills out] intake forms.... Basically their basic information. We...ask them what the [type] of complaint [it is], academic, judicial, which department, which faculty person, was it personal, was it a hostile evasion...we have many things for them to fill in (O5A28:24)

Another Ombuds described a system of keeping records of problems that are identified and then resolved:

There's no pressure on me [to take something to a formal office if it smells of harassment or discrimination], however there's simply the traditional internal motivation that if I see a trend, if I see more than a couple people coming forward regarding the same person and/or concern, then at that point in time that's where I need... in fact, on my Access form on my computer I've got two check-off points. One's called system's identified, and the second one is systems actioned. And so

this gets back to your original question about do you ever do reports, and my answer is I don't necessarily do reports as opposed to alerts, and so occasionally when more than one student comes in to me with the same issue, that's where the systems identified thing gets checked off on the Access form, and when there's been some types of action on my part, that's when we move to the second check off. (O11A57:37)

Ombuds also deviate from the archetypal model's informality in violating confidentiality by serving as notice to the institution. Ombuds currently or previously holding a second organizational role may receive notice on the organization's behalf:

[W]hen I became the Ombuds...some of the roles that I had as [D]ean of students...carried over to the Ombuds role...[and so] the biggest misconception is that the Ombuds is the dean of students. (O5A28:39-42-43)

Other offices either serve as mandatory reporters and do not have the authority to informally help visitors with issues of sexual misconduct, or do have the authority, but nonetheless funnel visitors into the formal process:

We're not [mandated to send cases there...[but] as sexual harassment or discrimination [is one of the] protected categories, we can't do anything but just listen because we have two specific offices that are mandated to look into those matters once it's brought to their attention.... What we will tell them is if it's happening, it needs to be corrected. Unfortunately, our office is not set up to be an advocate or supporter of this matter being looked into and corrected. So now what we can do is we can listen and be empathetic to validate how you're feeling. Beyond that, in order for the problem to be looked into and/or changed and corrected, we can't do anything. So we have to refer them, that's a major function of our office, is to refer them to the appropriate office once we're clear on what the issue is. (O1A8:68; O1B9:57)

In fact, there is growing pressure on Ombuds to act as mandatory reporters to the university, something that fundamentally violates the archetypal model. An Ombuds observed:

[T]here are offices that have been told that they have to report. That's the nightmare. I am willing to live with [it]. If this is an area that there is no informal option, we can still be helpful to someone who's experienced sexual harassment. We can give them all the information...we can support them in all sorts of different ways. We just can't [go beyond that]...without asking permission from the [Title IX Coordinator]...[W]e have to give [the Title IX Coordinator] a description of [the] situation. We don't have to give names or identifying

information but we [can] just say, 'Here is the situation, would you be comfortable if we try to resolve it informally?' It does put limitations [on the office] but frankly given the alternatives, that's fine. (O14B64:37-29-30)

I asked the Ombuds who made this observation whether asking permission from the Title IX Coordinator puts that official on notice of a potential violation, which may trigger an investigation. S/he responded:

No, no. Because I would not call with any detailed information, I would make, that's one of the functions of our office is to make these hypothetical calls. So I would call, I would have called [the Coordinator] up to say, "What would you think about a situation like this?" And I would sanitize the description sufficiently so that there would be no way of...knowing who had come to my office and then [the Coordinator] would give the answer, then I would say, "Thanks" and I would talk to my visitor and say, "This is not a situation that I can help resolve informally, here are your other options. (O14B64:35-36)

The Ombuds then described having hypothetical conversations with the Title IX Coordinator about whether a situation might be handled through informal means. The visitor agreed to meet with the Title IX Coordinator with the Ombuds present to talk about formal versus informal resolution options. The Ombuds described talking with the visitor prior to that meeting and the outcome of the situation:

I told [the visitor]... '[The Title IX Coordinator is] not guarantee[ing] an informal resolution. No one could do that and the best guess [of the Coordinator]...hearing my hypothetical about the situation was that...there is a reasonable chance that [the situation] could be handled informally.' So [the visitor] knew there was a risk [and] we discussed this over the course of [a number of] weeks because [the visitor] was very, very leery about going forward... If someone can't move on from a bad experience then I feel like it [is an Ombuds's] role to help [the visitor] figure out what they need to do so they can move on, and [this visitor] couldn't let it go. You know, lots of tears and it was really affecting [the person's] health...to [the] point where [the visitor] was willing to take the risk of talking to people who could do something about the situation. [We met with the Title IX Coordinator and after hearing the situation] they told the visitor that a formal process would be required, because of the severity of the situation. It's really hard. (O14B64:10)

Often Title IX Coordinators create standard mechanisms for routinely sharing information about cases. These mechanisms require Ombuds to violate the archetype's

confidentiality and to thus take part in formal processes. For example, a Coordinator described meetings with campus officials, including the Ombuds, to discuss cases:

We do [interact with the Ombuds]. We try to keep them informed and in the loop with many of the initiatives that we're doing on campus. Their role is very unique in that they see themselves as kind of a sounding board for individuals that are having concerns. Generally they will direct them in the appropriate direction in terms of where they may seek support or health or file a complaint or what have you, so we have a very good working relationship. We have periodic meetings with general counsel, [Diversity], my office, human resources, Ombuds ... just to go around the room and talk about what's going on, cases in a general sense, just kind of bounce things off just so we're in the loop on what's going on. They do share some information if they think there's some issues or some things that may be bubbling up that we may need to pay attention to, they certainly share that kind of information... (T13A49:15)

As another Ombuds noted, mandatory reporting represents a violation of the archetypal model:

I know some Ombuds offices have to report sexual harassment but to me that's against the standards of practice and what's the point of having an Ombuds office if it's going to be treated like a formal office...so I honestly would resign in protest if I had to do something like that. (O12A59:28-29)

Third, Ombuds depart from the archetype by collaborating with Title IX Coordinators in ways that make the Ombuds part of the formal process. For example, an Ombuds observed,

[I]f you work with [formal] offices early on, they can [call it] informal fact finding and it doesn't look like it fits into their process, [but] how can we work together to say 'is this someone who you've made claims of before? Give me some very general information.' [The Title IX C Coordinator] do[es] have some security [to maintain], but I've always been able to... work back and forth...[and] find ways to direct each other to get the information that we need, if it's something we feel we can't share. That's when the offices work best, is when they work together (O8A51:46)

Another Ombuds likewise described how formal and informal offices can work together:

If one office keeps records and one doesn't, sometimes me sharing what is happening on a case and linking it to earlier cases will not have an effect. It's important for them to keep the records, but it's important for us to piece things together for them sometimes. (O8B52:23)

Another Ombuds echoed:

[I see it as a] triangulation, when multiple people have reported to me... I [start to] see the same thing from a few different perspectives, I'll begin to believe that there might be something going on, and I might say to a department chair, '[Y]ou know, I don't know that this is really true, but you might want to sensitize yourself to this, there might be something out there... Any time I've dealt with [sexual misconduct] I've worked to get [the individual] to the [Title IX Coordinator] and file a complaint. (O3A21:21)

Yet another Ombuds described working collaboratively with the Title IX Coordinator:

The Title IX Coordinator is an attorney...[who] takes a very legalistic approach... [and] is not one of the people that I can go to and say 'have you been hearing things about [this] department? What's going on over there? Have we got a faculty member losing it over there? Do we need as an institution to think about stepping in and doing something over there? Would it help if I went and talked with the chair or you went and talked with the chair?' [There are a few staff members in these offices] with whom I have a relationship like that...[but their bosses] don't know it. [The staff] trust me and know that I won't out them and need my input, because what's happening in the classroom is very useful for [them], who then based on what I have heard from students about this faculty member [can take action]. (O10A55:28)

Often the lines between formal and informal processes are blurred. An Ombuds described expectations regarding resolving cases and frustration at not having the cooperation of formal offices.

I talked to the president [and said] I wanted to file a complaint [against the formal office] because...the president was really concerned about the length of time it took our office to resolve an issue...it would take sometimes two or three weeks to have a situation come to closure and [the president] thought that was an awful[ly] long time. Well, I told [the president] that sometimes people don't want to cooperate, and this was a classic example, for me, about resistance from another office in terms of [my office accessing records and] resolving issues. So that's why I said I wanted to file a complaint against this particular department. (O5B29:13)

This view, of course, conflicts with an Ombuds's preference to only provide anonymous information that will maintain confidentiality. Consider an Ombuds's reaction to precisely this expectation:

The Director of our [Title IX] office is an attorney [and]...wants just the facts, [and tells me] 'I can't single out...three departments. If they ask me how come

they got singled out, what am I going to say? 'Either we give training to the whole campus or we don't, and we don't have the resources to do it for the whole campus so it ain't gonna happen. Now, if you have a victim, I want to see them, you send them to me and we'll start an investigation and we'll follow the numbers, but in the absence of that I don't want to hear about it.' (O10B56:35)

Fourth, Ombuds depart from the archetype by violating impartiality and blurring the line between being an advocate for a visitor and for fair process. Advocating on behalf of fair process often requires an Ombuds to determine the legitimacy of a visitor's concerns. This increases the formality of an Ombuds role as it places the Ombuds in a position of fact-finding and determining valid violations of Title IX law or university policy. One Ombuds indicated, "I explain to them that my job is to sift through what you share with me for what is a legitimate concern" (O1B9:25). Determining what is a legitimate concern is difficult, as one Ombuds noted:

[S]ometimes you figure out how far do I dig, and when do I stop? You know...where I have enough information to know what really happened and proceed without making the student feel uncomfortable... (O6B35:39)

The perception of advocacy for specific individuals or judgment about the situation increases the perception of the Ombuds formality. This was described by many Ombuds, as illustrated by these comments:

A visitor will come to us [and] say 'I have a problem with this person, will you contact them,' and a very common misconception when we make the call is for that person to feel that we're calling because they're in trouble...[for them] it feels like we are coming out of the blue. We've been likened to being the principal's office and they're getting called to the principal's office... (O14A63:74)

In sum, many Ombuds slide toward formality in many ways. These departures can be conceptualized as evidence of an Ombuds' frustration at not being able to effectuate needed changes. Alternatively, departures may indicate an Ombuds desire to help survivors, stop perpetrators, and address organizational problems. These departures seem driven especially by

pressures from changing legal norms and concerns about liability. Liability pressures encourage Ombuds to shade towards formality in an effort to demonstrate adherence to the formal requirements of Title IX. Further, the normative power of the due process model is subtly changing how sexual misconduct is handled, even informally. This pressure is evidenced by the following Ombuds:

Whenever we get into something that looks like sexual harassment or borderline sexual harassment...I always involve [the Title IX Coordinator]. I try to get the person in my office to walk over to [that office] and file a complaint with them, because as much as I'm willing to entertain people's complaints and promise them confidentiality if they really insist on it, I really think that everybody's better served by going on the record with all that. (O9B54:2)

The same Ombuds continued to describe why they believe in the formal process:

[W]ithout a formal investigation you've got kind of a "he said-he said" situation, and in those situations the [Title IX Coordinator] should handle it. [T]he problem, which the complainant always has trouble with, is that we can't just assume that [the complainant] is telling the truth, and even if we think they're telling the truth we can't just [discipline the respondent] without due process. So the need to protect...the alleged perpetrator's due process rights is something that's really hard for the victim to understand, but the university doesn't want to be sued on either side... (O9B54:5)

Another Ombuds described the challenge in the current environment of utilizing informal processes for sexual harassment versus the less scrutinized topic of racial discrimination.

I think we're much more likely be able to [utilize informal processes] in cases that don't involve sexual harassment. That is such a loaded topic for our campus and so there is very little room to move on that, but we do have ways that we can [do that such as]... racial discrimination, where we might be able to do something informally there because it's just not as loaded. (O14B64:45)

The statement provides evidence of pressure to depart from the informality of their model due to changing legal norms and concerns about liability.

Ombuds confidentiality departures can also be seen as a response to organizational pressure to address things in any way that avoids a formal record and publicity. For example, one Ombuds described the organizational interest in avoiding formal processes:

To resolve problems at the lowest possible level, and that's really key there, because organizations prefer that an issue, if appropriate, gets resolved at the lowest possible level to minimize formal processes, or lawsuits for that matter, or people going to the press and saying not so nice things about people within the organization. (O1A8:23)

CONCLUSION

In sum, both Title IX Coordinators and Ombuds depart from their respective archetypes of formality and informality. These departures by Title IX Coordinators result from pressure to serve organizational interests in avoiding liability and out of frustration with what they see as excessive formalism. Departures from the Ombuds model appear especially motivated by changing legal norms and liability pressures. Departures also occur as both Ombuds and Title IX Coordinators seek to help survivors and alleged perpetrators navigate organizational dispute processes. For both Ombuds and Coordinators, these departures lead these officials increasingly to resemble each other, albeit not entirely.

CHAPTER 9: CONCLUSION

Since beginning this research in 2011, sexual misconduct has reached a new level of heightened awareness in our society. Today there is widespread awareness of the allegations facing Bill Cosby, the NFL's struggles with domestic violence, and the fact that universities are grappling with how to responsibly stop the epidemic of campus sexual misconduct. Rarely has a week passed in the past three years without an article in the Chronicle of Higher Education addressing sexual misconduct and its related causes, effects, legal implications, and the universities' responses.

Originally, this research was formulated in the spring of 2011 to examine how university Ombuds dispute-processing systems differed in practice from more formalized systems of internal alternative dispute resolution by investigating grading disputes, racial discrimination, and sexual misconduct. While that would have been a fine research study, the release of the Dear Colleague Letter on April 4, 2011 refocused this research on Title IX and the impact of changing legal norms on the handling of campus sexual misconduct. One conclusion from this research is that in designing research studies, it may be better to be lucky than good. Truly a fortuitous time frame for research, interviewing subjects between the 2011 Dear Colleague Letter and the creation of the White House Task Force provide timely insight as to how universities have and continue to struggle with the changing definition of Title IX compliance. A watershed moment redefining Title IX compliance, Universities during this time scrambled to update grievances policies and processes, attempting to determine how to respond to sexual misconduct in a way that protects alleged victims, the accused students, and institutional interests.

On university campuses, complaints of sexual misconduct are addressed by formal offices led by Title IX Coordinators and informal offices led by Ombuds. Title IX Coordinators

partake of a formal legal structure and ideology that emphasizes notice, law-like due process, and punishment. Ombuds use an informal structure and ideology that emphasizes confidentiality, psychological values of truly hearing the perspectives of affected parties in all of their complexity, and use of this knowledge to inform systemic change. The purpose of this study was to examine how these formal and informal dispute mechanisms, under intense pressure from external activists, internal legal counsel, and changing legal norms, interact in the handling of sexual misconduct disputes on university campuses across the United States. Ombuds and Title IX Coordinators are each, in somewhat different but somewhat similar ways, struggling to address complex issues of abuse, individual responsibility, organizational liability, and fair procedures.

The lens I have used for studying how universities respond to the dilemma of university sexual misconduct is the literature on non-law forms of ordering, neo-institutional theories of the construction of legal compliance, and theories of street-level bureaucratic discretion. Conley and O'Barr's (1991) framework of rules versus relationships highlights the essential difference between the archetypal Title IX Coordinator (with a formal, rule-based orientation based on compliance with and enforcement of Title IX law and policy) and the archetypal Ombuds (with an informal, relational orientation based on the core principals of impartiality, independence, confidentiality, and informality). Another lens used here is the large body of neo-institutional research demonstrating how people create non-law dispute resolution systems to avoid the strictures and proceduralism of the formal legal system, and how comparisons to the legal model push these non-law systems increasingly toward adopting more law-like procedures (Auerbach 1983, Dobbin & Kelly, 2007; Epp 2009). These theories help us to see how organizational actors seek to define and manage both compliance with law and its very definition. Although

Title IX Coordinators and Ombuds start from very different institutional premises, these theories suggest *both* to be pulled somewhat toward legal formality and somewhat toward informality.

How they respond in practice to these cross-cutting pressures was the question of this dissertation.

BROADER SIGNIFICANCE OF THE RESEARCH

This research articulates a new theory of procedural convergence: Formal and informal non-law organizational dispute mechanisms, needing to use both rules and relational-based strategies, converge over time and begin to resemble one another. Coordinators and Ombuds converge on confidentiality, impartiality, and procedural formalism. In attempting to navigate the legal mandates and realities of handling sexual misconduct, both roles offer complainants less confidentiality than promised by the principled Ombuds model, but more than offered by the enforcement-oriented Coordinator model. Ombuds and Coordinators offer complainants less procedural formalism than a court of law, but considerably more than the wholly informal Ombuds model allows. Both roles offer less impartiality than either the strict independence and non-partiality of the Ombuds model or the clear separation of investigative and adjudicatory roles mandated by administrative law.

The archetypal models are more or less clear in their requirements, but prove hard to follow in practice. As we have seen, Title IX Coordinators slide toward informality and Ombuds move towards formality under pressure from liability and the desire to produce substantive justice (good outcomes) in individual cases as opposed to strictly following a principled model. Ombuds and Coordinators often powerfully feel the need to do the right thing in the cases that come before them. This desire for substantive justice pushes these officials to relax their respective commitments to informality and formality. Both Ombuds and Coordinators hear

painfully difficult cases, like freshman women who have been raped, and then they must try to figure out how to help them and deal justly with the alleged perpetrators. Coordinators and Ombuds converge as they abandon strict adherence to their respective model's principles, in the interest of accomplishing substantive justice for individuals.

Likewise, liability concerns push both Coordinators and Ombuds to relax their commitments to their respective models. Both are buffeted by powerful pressures from university administrators concerned with ensuring correct institutional responses to comply with the law and avoid negative publicity and liability. The present study illustrates the complicated ways in which liability pressures affect organizational disputing processes. This includes not only ways in which organizations seek to create managerial solutions illustrated by Edelman's (2010) theory of legal endogeneity but also more generally the organizational responses to external law and liability pressures illustrated by the theory of legalized accountability (Epp, 2009). Universities are struggling to ensure their processes satisfy the law while at the same time trying to avoid instituting formal, legal processes within the educational setting. That tension is illustrated by Ombuds and Title IX Coordinators who deviate from their archetypal models.

Related to these liability concerns, both Title IX Coordinators and Ombuds converge as they depart from their norms in order to establish professional worth with the institution. Dobbin's *Inventing Equal Opportunity* (2011) illustrates how personnel administrators used demands for equal opportunity to expand the reach and influence of their professions. As one Ombuds noted, "My boss says to me...the more problems you can keep off my desk, the more I'm going to appreciate what you do for the organization" (O1A8:84). With liability and the legal requirements of Title IX acting as the driving force, Title IX Coordinators face fewer

challenges to their legitimacy than do Ombuds, but they must navigate the often conflicting interests expressed by university legal counsel, administrators, students, and activists. Ombuds face greater threats to institutional legitimacy than Title IX Coordinators due to the attention and pressure on universities to discover, investigate, and eradicate sexual misconduct. This places significant pressure on organizational actors like Ombuds who provide absolute confidentiality. Operating outside traditional operating procedures, and without an ability to evidence results, Ombuds are experiencing pressure to relax their stated principles and act as an additional compliance mechanism.

Finally, adherence or departure appears to be a function of the individual official, as some Coordinators and Ombuds are “adherers” and others are “deviators.” More commonly, departure and adherence was seen to operate along a spectrum, with some Coordinators or Ombuds more or less likely to adhere or depart than others. Coordinators who favor win-win situations and Ombuds who prefer formal reporting illustrate how personal preferences can lead to convergence. While personal preferences of individual officials may explain convergence in some situations, much of the convergence is due to the other two explanations: the strongly felt need to produce substantive justice and to avoid legal liability.

How these officials respond to a felt need to produce substantive justice may be best understood through the lens of street-level bureaucracy theory. This theory posits that individuals on the front lines of administration vary in the extent to which they enforce the rules and laws assigned to them, and that they do so specifically in order to produce outcomes in individual cases that seem to them more just and appropriate than the outcome demanded by strict application of the rules (Lipsky, 1983; Maynard-Moody & Musheno, 2003). Ombuds and Title IX Coordinators must navigate the unresolvable tension between the demands of rules,

procedures, and policies and the needs and character of the individuals served. In navigating these tensions, they sometimes depart from the strict requirement of the rules so as to protect a vulnerable individual from further harm, or to protect other people from harm by a serial abuser. Sometimes, at least in the view of Ombuds and Title IX Coordinators, the goal of producing justice seems to require departure from the rules, whether these be the rule requiring strict confidentiality (in the case of an Ombuds) or the rule requiring an investigation of every complaint of abuse (in the case of a Title IX Coordinator).

In sum, convergence of the formal and informal mechanisms is a result of a desire to help survivors and alleged perpetrators navigate organizational processes and a felt need to protect the university from liability. More fundamentally, convergence occurs due to complex tradeoffs that require Ombuds and Title IX Coordinators to maintain or relax their standards in the face of significant pressure to protect the university community from harm.

The theory of procedural convergence can be contrasted with Edelman's (1992) concept of symbolic mimicry and her claim that organizational grievance procedures mimic law but in reality are far from law-like. Symbolic mimicry can be considered procedural divergence as organizational due process is pulled toward managerial values by organizational pressures. The present study has suggested that even as university processes mimic the law, they are drawn into carrying it out more than the theory of symbolic mimicry might seem to imply. When universities wrestle with how to address sexual misconduct they are influenced by the powerful pull of the law and pressure to comply with its requirements.

In fact, in university responses to sexual misconduct, it is the lawyers who are increasing their reach and influence. Many universities, including Swarthmore and Florida State, have utilized retired judges to overhear sexual misconduct hearings (Wilson, 2015, p. A4). Lawyers

have opened legal practices designed to guide colleges through sexual-assault cases (Wilson, 2015, p. A4). Title IX job postings now commonly list a Juris Doctorate degree as a “preferred” or “highly desired” qualification. Examples include, but are not limited to, recent job postings at Wake Forest University, University of San Diego, Montana State University, Sacred Heart University, and Eastern Illinois University (Higherjobs.com, retrieved 6/12/14). In sum, the law is strongly influencing universities’ reactions to campus sexual misconduct.

As opposed to symbolic mimicry, procedural convergence occurs when formal and informal organizational dispute mechanisms, facing external and internal liability pressures, depart from their respective models. They converge toward a hybrid style of management *and* law that incorporates some elements of each. Thus, Ombuds, the quintessentially *non*-formal dispute-processing entities, are drawn toward more law-like processes. These general observations are found in particular form in the study’s key observations, to be examined next.

KEY OBSERVATIONS

In keeping with the rules-relationships distinction suggested by Conley and O’Barr (1991), Ombuds and Title IX Coordinators tend to articulate archetypes that are either primarily formal (utilizing rules) or primarily informal (using relational strategies) in nature. Still, both have evolved in practice and “cheat” towards their opposite: the formal Title IX Coordinator role becomes more informal, and the informal Ombuds becomes more formal. As a result, over time formal and informal non-law dispute mechanisms tend to converge and resemble one another, although not entirely.

1. *Both Ombuds and Title IX Coordinators use both relational and rules-based forms of influence.*

While Title IX Coordinators are framed towards a court-like ideal, their offices tend toward more informality in practice. Coordinators seem unable to effectively apply the rules and

prevent sexual misconduct without establishing and maintaining relationships with stakeholders. As a result, the relationship-building aspect of a Title IX Coordinator's work is an important determinant of the authority and legitimacy necessary for effectuating rules-based compliance with law and policy. For example, a Coordinator described needing both rules and relationship building strategies:

[I]t's really hard to do the case work without the authority because when you [have] a [sexual misconduct] report you realize sometimes that you've got to go forward even though the complainant doesn't want to. You have the authority to say to someone 'issue the notice,' but if people are really worried, if it's been a faculty member, a high profile athlete, you've got to have the confidence...of the athletic director or the Provost's office...[They need to trust and believe that] I know what I'm talking about and to go forward... (T8A39:76)

While Ombuds are framed towards an informal counselor-like ideal, their offices tend toward more formality in practice. Ombuds expressed utilizing more formal means when relational strategies are ineffective:

[If a policy has been violated] I will try to get the person's permission to take it forward and if I get that permission we'll try to talk to the offending person and see if there was a mistake made and if they want to correct. And if they don't want to correct that and we think that it was a violation of policy and we give them an opportunity to make it right and they don't, then we'll probably go onto their supervisor and work our way up the chain. (O9A53:43)

Ombuds often directly or indirectly referenced their reporting relationship to top administrators as a means of encouraging compliance with rules or policies. The ambiguity and lack of understanding of the limitations placed on the role allow Ombuds to use rules as a source of authority to press for specific outcomes.

Instead of relying exclusively on either formal or informal strategies for navigating organizational disputes, organizational actors utilize both formal and informal strategies in order to achieve their goals. Relying heavily on relationships is an unexpected strategy for formal offices designed to either effectuate or mimic compliance with the law. Retreating from uniform

and consistent rule application will not project an institution from liability, and creates a host of issues for formal actors designed to operate by rule and policy. When informal mechanisms and relationships are utilized, it is often because alleged perpetrators and victims may prefer more informal approaches and this may result in fewer formal complaints. Similarly, Ombuds who utilize formal rules and authority contravene the ethos of empowerment espoused by the field and embody a radical departure from the standards of organizational Ombuds. As the next observation indicates, both Ombuds and Title IX Coordinators must alter their core missions as they blur the lines between formal and informal and dilute the core attribute of each model.

2. *Using the rules-based strategies require Ombuds to formalize their missions, and using relational influence require Title IX Coordinators to informalize their missions.*

Needing relational or rules-based bases for establishing authority, the practical missions of the Title IX Coordinator and Ombuds reflect converging strategies. Specifically, both mechanisms elicit trust and gain authority by increasing the formalism and informality of their respective processes. Thus, in order to encourage reporting, minimize liability, and maintain a culture in which people want to share their complaints, Title IX Coordinators often seek to provide opportunities for voice and to use informal means of resolving conflicts. Ombuds, meanwhile, often express a preference for formal mechanisms and rules. This may be due to a lack of authority to make or enforce decisions. Ombuds often interpret and provide informal determinations of policy or legal violations, for example: “A lot of times we have to check the policies and get information on what policies are and try to make sure whether anything has actually been violated” (O9A53:16, 32). By utilizing strategies running counter to their archetypes, both Title IX coordinators and Ombuds shade towards a combination of formalism and informality. The resulting options for assistance available to victims and alleged perpetrators become variations on the same theme or distinctions without real difference. When

the Ombuds and Title IX Coordinators hedge towards their opposite, the individuals served by both offices are left with a menu of options that become variations on the same theme and distinctions without real differences.

3. *Confidentiality illustrates the tensions between rules and relationships, and between formality and informality.*

Ombuds and Title IX Coordinators often violate the confidentiality expectations of each role, illustrating the challenge of combining rules and relationship-based approaches.

Confidentiality is an essential aspect of an Ombuds' work, as it allows individuals to feel comfortable asking for help or making a complaint. Ombuds often experience pressure to share information about sexual misconduct with formal offices, making it difficult to protect anonymity. Ombuds who adhere to the archetype provide their visitor with control over confidentiality, and thus over whether they want to make a formal complaint. Many Ombuds, however, do provide notice to the institution either by specifically being required to report all instances of sexual misconduct or by functioning as notice by violating confidentiality or anonymity. Ombuds often complained to me of this erosion of confidentiality, and they gave this as an explanation for why the number of visitors to many Ombuds offices has declined over time. For example:

We're not getting as many people coming to this office because we can't provide them with a level of confidentiality that would ensure that if they don't want the information disclosed if they were to report sexual harassment, for example, that we would be duty bound to respect that. I believe that's one of the reasons...they don't come to our office because we can't offer them that blanket confidentiality that they're looking for. (O7A37:22, O7B38:1)

Many Ombuds depart from the archetype by not providing visitors with self-determination regarding reporting. They directly refer visitors to the Title IX Coordinator, or report the information without protecting anonymity.

Title IX Coordinators operate in a compliance regime that seeks to elicit reports of, and over time, works to prevent sexual misconduct. Title IX Coordinators thus rely on mandatory reporters (technically, all employees) to provide the office with information and so compliance is prioritized over confidentiality. Title IX Coordinators deviate from the archetype by allowing Ombuds to not serve as mandatory reporters, by not informing visitors of their confidentiality obligations, and by providing visitors with control over the process in ways that run counter to compliance. For example:

I do not provide any initial statement before students start talking, I'm just letting [the student] get it off [their] chest and see where it takes them...If it's sexual in nature there are some key things that a person will come in and tell me that will lead me to believe that something was not consensual and now we've got to do something. I tell them, 'I need to stop you. I need to review what I've heard, and I need you to know that this is no longer a 'what do I do conversation, this is a 'what are we going to do' conversation. There's just too much information, there's too many things going on making my skin crawl, and now we've got to address it. I don't care if they tell me they want to investigate it or not, if I've got evidence, I'm investigating, especially sexual harassment. (T11A45:14-23-42-43)

Instead of providing clear alternatives regarding confidential versus non-confidential but private places of reporting, Ombuds and Title IX Coordinators who do not operate according to the archetypal standard eliminate the predictability and thus the confidence that individuals can and should come forward with complaints. This also provides ammunition to alleged perpetrators already wary of the true motivations behind organizational dispute processes. On campuses with only a Title IX Coordinator or only an Ombuds, a combined approach in theory may provide the best of both worlds. As illustrated here, it is impossible in practice to fully protect an individual's confidentiality wishes, provide them with complete control over information, and ensure that the organization can know of, and effectively combat sexual misconduct. These goals conflict, and compromise among them is inevitable.

4. *Both Title IX Coordinators and Ombuds deviate from their respective archetypes and as a result also converge in the area of impartiality.*

By design, Title IX Coordinators and Ombuds play opposing roles in university sexual misconduct processes. Deviating from their respective archetypes risks undermining their impartiality and thus weakens the legitimacy of the process. Title IX Coordinators are to be impartial to any specific outcome while being partial to the correct application of the law to the facts. Ombuds meanwhile are to be impartial to any specific outcome or individual but partial to the overarching value of fair process. In practice, Title IX Coordinators and Ombuds often give preference to informal settlement and outcomes that avoid institutional liability or negative publicity. To achieve this, Title IX Coordinators often act with partiality toward one side or another, advocate in favor of particular outcomes, or hold multiple roles within the process. Questions remain about whether Title IX Coordinators are prohibited from doing the investigation and making findings and recommendations. Many Title IX Coordinators continue to make findings and recommendations in their post-investigation reports.

In order to advocate for procedural fairness, Ombuds must necessarily determine if a process has been unfair, and this affects their impartiality as it requires an Ombuds to determine the facts and evaluate the details of a situation. What is fairness can be subjective, and so Ombuds further implicate their impartiality when advocating for specific outcomes, individuals, or for institutional goals. Further, many Ombuds advocate for settlement outside of the formal process, and this may erode their impartiality in situations in which the institution, a survivor, or an alleged perpetrator may prefer a specific outcome.

Deviating from their respective archetypes results in Ombuds and Title IX Coordinators converging in the area of impartiality. Title IX Coordinators who exhibit partiality and do not carefully guard the integrity of the process leave the outcome of investigations open to legal

challenges. Ombuds who act on behalf of the university's actors or enforce rules without regard for the principle of impartiality risk being deemed capable of receiving legal notice. Ombuds who act on behalf of individuals instead of advocating for fair processes risk alienating organizational actors and limiting their overall effectiveness. Given these risks, why do Ombuds and Title IX Coordinators violate their roles' archetypes? The next observation addresses this question.

5. *The use of rules-based (formal) and relational (informal) strategies is motivated by a desire to serve individuals and avoid liability.*

The law is a powerful force that paradoxically pushes Title IX Coordinators and Ombuds to utilize each other's core strategy. By becoming more formal or informal, each role seeks to serve both the institution and the individuals involved. The Title IX Coordinator's model uses an investigative process designed to ensure compliance with Title IX law and policy. Departing from the archetype, Title IX Coordinators often do allow informal mechanisms to be used, with some Coordinators first requiring that they be informed of the complaint in order to ensure there are no law or policy violations. Other Title IX Coordinators use informal processes without notice, and even without a reliable investigation. Title IX Coordinators' slide towards informality is motivated by organizational interests in protecting against liability. There are Title IX Coordinators who prefer and use mediation, a relatively more informal alternative to the formal process, as it avoids litigation. For example:

I've been given the green light to sort of identify cases that maybe can reach an informal resolution without having to go through a full investigation. Now that informal resolution sometimes also means can we bump somebody out of the institution on the base of which you already know without having to go through a full investigation. (T7A32:44)

Coordinators also choose informal options due to frustration with what they see as excessive formalism. Finally, Title IX Coordinators become more informal under pressure to serve and address the needs of survivors or alleged perpetrators.

Ombuds by contrast face considerable pressure to formalize their processes due to liability concerns. One Ombuds noted, for example:

[E]ven though we're supposed to be independent, we're not independent, because we are required to be involved with Title IX Compliance. I have to coexist with the offices with responsibility for compliance, and if I don't [I am] out of here.' (O7A37:25)

Ombuds depart from the archetype and formalize their processes in order to help survivors or alleged perpetrators, and in response to liability pressures. Further evidenced by liability pressures, Ombuds mimic more formal processes such as conducting investigations and enforcing policies in ways that are much more akin to formal process. Ombuds also depart from the archetype by violating confidentiality in ways that make the Ombuds part of the formal system. This includes using intake forms and other records that can become part of formal processes, and by holding a secondary role that may receive notice on the organizations behalf.

Finally, Ombuds formalize their processes by directing visitors which actions to take, or taking those actions themselves. There are also Ombuds who engage in more formal versions of mediation. While many Ombuds use mediation-like communication techniques, formal mediation occurs when the parties are required or influenced to attend and the mediator is directive or imposes an agreement.

In sum, both Ombuds and Title IX Coordinators shade towards one another, with Ombuds becoming more formal and Coordinators becoming more informal. Title IX Coordinators' and Ombuds' practices converge more often than they diverge and it is often not always easy to determine which mechanism is which. Despite very different forms, functions,

and missions, Ombuds and Title IX Coordinators are often more alike than different. The result is organizational processes that mimic formal legal processes in many ways, while at times neglecting legal mandates and responsibilities. Both roles face pressure from liability to formalize their processes, but for several reasons sexual misconduct disputes are often not easily or best addressed via highly formal processes. First, adversarial processes often put the victim on trial for their sexual history, or drug or alcohol use when the incident took place. Second, the victim may not want to have to confront and again see the alleged perpetrator. Third, the public interest in university sexual misconduct creates unwanted publicity for victims and alleged perpetrators. Finally, incidents of sexual misconduct may fuel a misperception that certain campuses have sexual misconduct problems while others do not. The reality is that all campuses are impacted by sexual misconduct. By utilizing formal policies and actors who do not ensure consistent and uniform application of the rules, the positive attributes of formal processes are outweighed by the negative repercussions listed above. Formal processes are designed to ensure the due process rights of everyone involved while examining the evidence in order to apply the correct legal standard to carefully determined facts.

RECOMMENDATIONS

On college campuses there remains considerable ambiguity regarding 1) what constitutes due process and fair procedures; 2) where the balance lies between individual self-determination and settlement on one hand and collective and organizational prerogatives relating to safety, liability, and precedent on the other. These tensions are especially acute in the area of confidentiality, where significant questions remain, including: 1) Who on campus are mandatory reporters; 2) What information must they report; 3) How are victims informed of confidential

versus non-confidential places to have these discussions and 4) Depending on where the discussion occurs, what control do victims have regarding next steps and on what level must they participate in formal processes?

Confidentiality encourages and supports victims in coming forward, but it also masks problems and may inhibit an institution's ability to address serious issues. Inherently the question of Ombuds' confidentiality is one of whether it simply becomes a mechanism by which universities may insulate themselves from liability. The ultimate question is how can institutions encourage victims to come forward? This research indicates that both formal and informal mechanisms are valuable for encouraging reporting but no one mechanism can provide for confidentiality and at the same time bring forward complaints for appropriate disposition. The question of what constitutes a "hearing" and the separation of investigative and judicial functions is another area that remains unresolved. Presently, liability concerns are pushing universities to adopt increasingly formal processes and structures, particularly by separating the investigation and judicial functions.

In regard to these issues, I recommend:

1. *Ombuds should not be mandatory reporters and specific guidelines for Ombuds' reports regarding sexual misconduct should be developed.*

Allowing people to make anonymous reports of incidents of sexual misconduct may fulfill both Coordinators' and Ombuds' core goals, as long as the reports do not identify, nor can lead to the identification of, any specific person or department. Anonymous reporting may enable Ombuds to collect otherwise unreported incidents of sexual misconduct. Title IX Coordinators will then gain important feedback about weaknesses in policy, procedures, or where improvements can be made to better educate the campus about sexual misconduct. Ombuds' ability to help visitors think through their informal and formal resolution options may lead more

visitors to make formal reports. Coordinators and Ombuds must work together to define the contours of these requirements and to determine when issues should be referred to Ombuds.

2. The IOA should provide Ombuds with additional practical guidance

Given evidence that Ombuds are not conforming to the IOA Standards, more specific guidance on how to operationalize the standards is needed. The pressure placed on Ombuds to conform to organizational goals and the resulting formality required to work towards realizing those organizational goals places Ombuds outside of their stated mandates. Given the convergence between Ombuds and Title IX Coordinators, Ombuds risk serving mainly to insulate the institution from liability or to ineffectively mimic formal structures. Failing to adhere to the informal, confidential, impartial, and independent standards will harm efforts to provide alternatives to formal reporting mechanisms. Often these departures are motivated by a desire to demonstrate professional worth and effectiveness, but the result is to do just the opposite.

Ombuds often seem to prefer getting to resolution and settlement, and this tendency contributes to the view that Ombuds are a mechanism by which institutions may avoid liability. Either the impartiality standard must be more specifically defined, or a new standard providing for visitor self-determination is necessary. Ombuds often must determine what constitutes fair procedures in the absence of any professional guidance from the IOA. A standard of justice (Shelton, 2010) or fairness may help Ombuds to better navigate these questions. Finally, creating differentiating standards for classical Ombuds (who conduct formal investigations) and organizational Ombuds (who do not) will assist the field in developing and solidifying the public's understanding of the role. It will also provide practitioners with guidance and understanding of the boundaries and limitations of each respective role.

3. *Title IX Coordinators must take a more active role in establishing professional norms*

Title IX Coordinators often expressed ambivalence or negative perceptions of the Association for Title IX Administrators (ATIXA) as a professional association. Much of this may be due to the fact that ATIXA was developed and exists as a project of the National Center for Higher Education Risk Management (NCHERM),⁴ creating the perception of a financial conflict of interests. NCHERM is a law and consulting practice that provides consulting and risk management services for universities and colleges. NCHERM's partners are all lawyers with significant experience in higher education risk management, but none has ever served as a Title IX Coordinator. Brett Sokolow holds a dual role as the Executive Director of ATIXA and the President and CEO of NCHERM. ATIXA provides model policies and guidance that are developed specifically by the members of NCHERM, who are then available to provide consulting services to institutions of higher education. While ATIXA provides considerable practical advice to the Title IX compliance field, it would serve the Title IX Coordinator field well for Title IX Coordinators to make the association their own and to take an active role in the development of the field.

4. *Title IX Coordinators must develop specific, uniform standards of practice.*

While the ATIXA Training Manual (2013) provides bedrock beliefs and guidelines from which standards can be inferred, specific standards are needed to guide and inform Title IX Compliance work. Specifically, Title IX Coordinators need additional guidance regarding when confidentiality should be strictly maintained and when it may be subordinated to other values. Coordinators also need guidance on how to operationalize the impartiality required under Title IX. In conjunction with the previous recommendation, active and broad participation by Title IX

⁴ <https://www.ncherm.org/>, last accessed November 17, 2014.

Coordinators doing the work on campus will help to ensure that the standards address both the legal and non-legal aspects of the work.

5. *Colleges and Universities need both Ombuds and Title IX Coordinators to effectively manage sexual misconduct disputes.*

As both relational and rules-based strategies are necessary for effective organizational complaint handling, Ombuds and Title IX Coordinators play unique and important roles in Title IX work. Ombuds function to assist individuals in thinking through options, to create a safe environment for having difficult conversations, and to provide visitors with control and self-determination over the direction of the conflict. Even in keeping with their commitment to confidentiality, Ombuds can provide valuable information to their institutions regarding general trends in problems and complaints, and, drawing on this information, they can provide helpful recommendations for improvements in institutional policies and procedures. Effectively, Ombuds provide a safety net catching complaints that might otherwise not be brought forward. Title IX Coordinators function to educate the campus about Title IX's responsibilities and to ensure that complaints of sexual misconduct are investigated, adjudicated, punished, and deterred. Both relational and rules-based strategies are necessary for effective organizational complaint handling, and neither Ombuds nor Title IX Coordinators can effectively implement those strategies alone without the other. As the tensions illustrated by confidentiality, impartiality, and formality indicate, universities need both formal and informal dispute mechanisms to effectively handle sexual misconduct disputes.

I have been a mediator for years, and I teach mediation. I have also provided consultation to organizations. In conducting the interviews for this study I felt great sympathy for the dilemmas facing Ombuds and Coordinators. Sometimes I would have done things differently than they described. But I am also certain that there is no sure recipe for handling the difficult

dilemmas facing these officials. I do, however, believe that how universities address the problem of sexual misconduct could be improved by more forthright discussion among Coordinators and Ombuds on these difficult issues. In the course of my interviews and my analysis for this study, I have come to firmly conclude that both approaches—formal and informal—are key elements of an appropriate institutional response.

LIMITATIONS

There are three primary limitations to this study. First, the interviews were between 2011 and 2013 in the context of growing political pressure to address campus sexual misconduct. Longstanding issues with campus sexual misconduct resulted in dramatic changes to Title IX legal requirements with the Dear Colleague Letter released in 2011. The DCL's release resulted in the formation of the Association for Title IX Administrators (ATIXA) and universities scrambled to define compliance. Both the VAWA reauthorization and the White House Task Force provided further guidance. During this period, the Ombuds and Title IX coordinators faced unusually intense pressures and were struggling to determine their roles in an uncertain and new era of compliance. Interviews conducted during this period thus may not provide a window into how these two offices operated in less tumultuous times. Still, this time frame provides an opportunity to examine the change as it was occurring, with some actors remaining true to their archetype and others redefining their roles.

A second limitation of this study is that while the officials interviewed for the study were understandably unwilling to divulge confidential details of particular cases of sexual misconduct, the heightened controversy over the issue may have encouraged them to err on the side of not telling me things even when there was no true risk to confidentiality. Confidentiality became a barrier to hearing the participants' stories. In order to encourage participation I agreed to provide

the participants with complete control over the content of their stories, and as a result I was unable to publish almost any of the specific details shared in any specific instance. This limited my ability to fully illuminate the participants' statements with concrete examples.

Finally, the sensitive nature of the topic restricted the sample size. Despite contacting hundreds of Ombuds and Title IX Coordinators, only fourteen Ombuds and thirteen Title IX coordinators agreed to participate in the study. This raises some concerns about the representativeness of my interview sample. Still, while it is possible that the twenty-seven officials who agreed to be interviewed were somehow systematically different from others who declined, I suspect that they were more typical than unique. The participants were from a wide range of geographic areas, with participants primarily from large doctoral degree granting public and private research institutions, but several master's level institutions were also included. Participants described working to address a wide range of complaints of sexual misconduct, including some cases of what can only be described as egregious abuse by high-level university employees, and so those who agreed to be interviewed were not limited to officials who had faced only low-level, uncontroversial cases. Nor were the participants limited to people new in their role; they included a number of seasoned veterans. In all of these ways, the participants, while relatively small in number, do not appear to be systematically skewed in any obvious way. In sum, this research's limitations are framed by confidentiality concerns and the timeliness of the subject matter.

FUTURE RESEARCH

This work has several implications for future research. First, even in this detailed study of Ombuds and Title IX Coordinators some aspects of procedural convergence were beyond the scope of the study. Is it possible to discern specific types of "adherers" or "deviators"? To what

extent does institutional context or the nature of the dispute shape officials' willingness to depart from their respective models? These questions may be examined with a more focused study designed to address them.

Second, and more broadly, the theory of procedural convergence merits further study in other compliance areas and in other institutional forms. These may include governments, businesses, and non-profits that use both Ombuds and formal non-law compliance mechanisms. How do institutional complaint handlers in more established areas of law navigate these issues? To what degree is the unsettled nature of the law responsible for the convergence? Do other factors contribute to the convergence of institutional complaint mechanisms?

These questions may be pursued in a wide variety of areas where elements of procedural convergence seem manifest. In the formal justice system, a significant body of legal research suggests that as mediation is incorporated into the formal legal system, it becomes legalized and formalized in various ways (Nolan-Haley, 2012); yet at the same time, formal adjudication processes increasingly engage in informal "problem solving" (Portillo et al., 2013). Pressures towards convergence also occur when informal Alternative Dispute Resolution (ADR) mechanisms like mediation are combined with more formal ADR processes like arbitration, in a process known as "med-arb" (Pappas, 2015). When the mediator in a case becomes the arbitrator, this formalizes the neutral's role as the person who will make a decision if the case does not settle during the mediation. The neutral's role during arbitration has also gained greater informality, however, as the record of the mediation stage is often used as the arbitral record and the neutral was privy to private conversations during the mediation (Pappas, 2015). In each of these examples, efforts to gain the flexibility and efficiency of informal processes depart from the due process and justice model of the formal justice system; at the same time, these shifts

toward informality are often checked by a countervailing pressure not to depart too far from the formal system's due process model. In sum, again and again systems of justice in the shadow of the formal law are neither entirely formal nor entirely informal: they converge toward a hybrid of these strains.

To the extent that procedural convergence is found in other settings, a host of possible research questions arise. As legal norms and definitions of compliance become clearer, do organizational forms of non-law complaint handling tend towards greater formality? Do formal and informal organizational forms of non-law compliance both shade towards formalism? How do non-law alternatives change when used directly, as a complement to, or within formal, legal processes? Specifically, how does the use of facilitative forms of mediation change when incorporated or mandated into steps that precede litigation? How do these non-law alternatives impact the formal process? What are the advantages and disadvantages of formalizing these alternatives? These questions merit empirical study and have important implications for access to justice efforts and how individual rights are resolved organizationally and in our justice system.

CONCLUSION

Sexual misconduct is an ongoing problem on college campuses. Universities are increasingly under pressure from the White House, Congress, and Victims'-rights advocates to find ways to reduce sexual misconduct. Universities are scrambling to update grievance policies and processes and to determine how to respond to sexual misconduct in a way that protects alleged victims, the accused students, and institutional interests. How universities balance these interests makes it possible to examine an age-old debate in American law and socio-legal studies between those who favor legal formality and those who favor informal alternatives. Utilizing

neo-institutional theories, theories of how non-law norms are developed, and the dichotomy between rights and relationship-based means of complaint handling, this dissertation has examined the current state of Title IX compliance on university campuses. Given the intense focus on university sexual misconduct, this research has important implications for the work of organizational complaint handlers, university legal counsel, government administrators, and policy-makers.

Overall, the story of sexual misconduct dispute handling on university campuses is complex, shaped by institutional pressures and sincere desires to bring healing and justice. Ombuds and Title IX Coordinators, needing to address and resolve sexual misconduct, seek to both help survivors and to ensure fairness for alleged perpetrators. Ombuds who depart from their standards are motivated by changing legal and liability pressures and want to stop a perpetrator or address a departmental problem. Title IX Coordinators who depart are often concerned, in a normal human way, about a real individual's pain and they decide to help the person even if this does not yield institutional enforcement. As a result, Title IX Coordinators often depart out of frustration with what they see as excessive formalism. Put another way, in both instances these are understandable responses to real moral dilemmas, occurring while each role attempts to establish professional worth and influence in organizations pressuring them to ensure protection from liability. In sum, navigating these individual and organizational pressures results in both mechanisms departing from their professional norms and becoming more formal (Ombuds) or more informal (Title IX Coordinators). The resulting picture of university sexual misconduct dispute handling is one in which the practices of Title IX Coordinators and Ombuds converge, although not entirely.

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