

CHAPTER 700: LEGAL ISSUES

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701: Legal Advice and Consultation

- A. Ombudsmen shall have access to adequate legal counsel to support Program activities.
- B. The Department shall assure:
 - 1. The provision of adequate legal counsel without conflict of interest to all designated Ombudsmen to provide needed legal services, including:
 - a. advice and consultation to the State Ombudsman and Ombudsmen in the performance of their official duties; and
 - b. representation in an actual or threatened legal action against any Ombudsman and the State Ombudsman brought in connection with the performance of their official duties.
 - 2. The Office pursues administrative, legal, and other appropriate remedies on behalf of residents.
- C. An Ombudsman may contact either the Older Americans Act funded legal services provider or the Office directly to seek legal advice or consultation regarding issues, problems or complaints raised by or on behalf of residents. The request for advice or consultation may be made to the Office.
- D. The Office will respond to the request within five (5) working days by:
 - 1. providing the requested legal advice or consultation to the Regional Program;
 - 2. requesting additional information from the Regional Program;
 - 3. providing an update to the Regional Program on the progress in obtaining the necessary information and an anticipated time frame for providing the requested legal advice or consultation; or
 - 4. Indicating to the Regional Program that the request submitted is inappropriate and why the Office will take no further action.
- E. For the Office to obtain advice and consultation, the State Ombudsman may:
 - 1. confer with the Legal Service Developer;

2. contact the Department's General Counsel for guidance on Department policy or procedure; and/or
 3. contact the Department's General Counsel for assistance from the State of Illinois Office of the Attorney General by following Department procedures for such requests.
- F. The Regional Ombudsman may consult with an established multi-disciplinary team. The multidisciplinary team shall:
1. act in an advisory role for the purpose of providing professional knowledge and expertise in handling complex cases.
 2. consist of one or more volunteer representatives from any combination of at least 7 members of the following professions:
 - a. banking or finance;
 - b. disability care;
 - c. health care;
 - d. pharmacology;
 - e. law enforcement
 - f. emergency responder
 - g. mental health care;
 - h. clergy
 - i. coroner or medical examiner;
 - j. substance abuse;
 - k. domestic violence;
 - l. sexual assault; or
 - m. other related field.
 3. receive records as requested on particular cases from law enforcement agencies and coroners or medical examiners.

702: Representation for Civil Legal Action

- A. For a Regional Program or an Ombudsman to obtain legal representation:
1. an Ombudsman shall immediately notify the Regional Ombudsman who shall notify the Office upon receipt of any complaint, summons, subpoena, lawsuit, injunction, court order, or notice of any other legal action taken against the Regional Program or any Ombudsman in connection with the performance of official duties. The notice shall be provided within 24 hours, in writing, and shall include a copy of the legal documents along with a brief case summary. Copies of the case notes and records shall be forwarded to the Office, upon request;
 2. the Office may consult with the Department General Counsel of about the legal action or threatened legal action against the Program or any of its representatives, and
 3. when appropriate, the State Ombudsman will submit a written request to the Office of the Attorney General for legal representation of the Regional Program or Ombudsman, in accordance with the State Employee Indemnification Act. (5 ILCS 350/1 *et seq.*)
- B. Legal Representation
1. Should the Attorney General's office agree to represent the Program or Ombudsman, the Ombudsman or Regional Program, by acceptance of this representation, agrees to fully cooperate with the Attorney General's office.
 2. Should the Attorney General's office decline to represent the Program or Ombudsman subject to the legal action or identifies a conflict, the Regional Program, Provider Agency, or Ombudsman may choose to obtain private counsel. The services of the private legal counsel:
 - a. will be reimbursed at reasonable rates approved by the Attorney General, as provided by the State Employee Indemnification Act, if the refusal by the Attorney General's office to represent the Regional Program, Provider Agency or Ombudsman is based on a conflict of interest between the Attorney General's office and the Regional Program; and
 - b. may be reimbursed at reasonable rates approved by the Attorney General if the refusal is based on a determination

that the actions, decisions, or conduct which constitute the basis for the legal action were not taken in good faith and within the scope of official duties as defined in Chapter 200 of this Manual and if the actions, decisions, or conduct are determined in a final judgment by the court to have been undertaken in good faith and were within the scope of official duties.

3. No federal or state funds may be expended by a Regional Program, Provider Agency or Ombudsman for the reimbursement of private legal counsel where it is the final judgment of the court that the actions, decisions, or conduct which are the basis for the legal action for which the private legal counsel was employed were not undertaken in good faith or were outside the scope of official duties.

C. Indemnification

1. If the Court determines the Regional Program or Ombudsman subject to the legal action is liable for damages for actions, decisions or conduct undertaken in good faith and within the scope of official duties, then the State of Illinois will indemnify the Regional Program and Ombudsman pursuant to the State Employee Indemnification Act. Further, if the Attorney General's Office did not provide representation of this matter on the grounds that the action, decisions, or conduct at issue were not in good faith or within the scope of official conduct, and the court has determined that such actions, while creating a liability for the Regional Program or Ombudsman, were within the scope of official duties and in good faith, the Regional Program or Ombudsman may apply to the Department for reimbursement of legal expenses, at a reasonable rate approved by the Attorney General.
2. If the Regional Program, Provider Agency or Ombudsman subject to the legal action is determined to have a liability for action, decisions, or conduct not taken in good faith or within the scope of official duties, the Department will not approve the expenditure of public funds, either State or federal, for the indemnification of the Regional Program, Provider Agency, or Ombudsman subject of the legal action.

703: Willful Interference

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

704: Retaliation and Reprisals

- A. The Ombudsman statute provides that no person shall intentionally discriminate, retaliate, or effect reprisals in any manner against any participant, resident, relative or guardian of a resident, any employee of a long-term care facility, waiver services or managed care organization or provider of services, or any other person due to filing a complaint with, providing information to, or otherwise cooperating in good faith with any Ombudsman [20 ILCS 105/4.04(f)]. Violation of this provision is a business offense subject to a fine.
- B. The Office shall investigate any report of intentional acts of discrimination, retaliation, or reprisal.
- C. When an Ombudsman believes that intentional acts of retaliation, discrimination or reprisal are occurring, have occurred or have been attempted, the Ombudsman should take such steps as are feasible to prevent the retaliation, discrimination or reprisal from continuing. Whenever possible, The Ombudsman shall warn the perpetrator of the sanctions provided by the law. The Ombudsman shall document the intentional acts of retaliation, discrimination or reprisal.
- D. The Ombudsman shall immediately notify the Office about the intentional acts of retaliation, discrimination, or reprisal and submit supporting documentation of the act or acts. The Office shall review the information provided, and conduct further investigation if necessary, to confirm the occurrence of the interference or retaliation.
- E. The prosecution of any intentional acts of retaliation, discrimination or reprisal as a business offense may involve a criminal trial, and accordingly any corroborating evidence should be carefully collected, preserved, and safeguarded for delivery to the appropriate law enforcement official.
- F. If the Office, based on such review, determines that enforcement action is warranted, the Office shall pursue the following course of action:
 - 1. the Office shall inform the Director, and recommend notification to the Office of Attorney General or the appropriate State's Attorney that an apparent violation of 20 ILCS 105/4.04 has occurred, and request prosecution of the individual or entity for a business offense; and
 - 2. when the perpetrator is a long-term care facility or home care services provider employee or agent, the Office shall file a complaint with the Department of Public Health or the Department of Healthcare and Family Services.

705: Guardianship

- A. The Program should always advocate for the wishes of a resident and participant as determined by the Ombudsman's best investigatory and counseling efforts. It is appropriate, for example, for an Ombudsman to advocate on behalf of a resident or participant who wishes to oppose a guardianship petition, who wishes to have his/her guardianship revoked or is being abused by the guardian.
- B. The Program encourages participants and residents and their families to execute and use Durable Powers of Attorney, Living Wills and obtain representative payees whenever possible to avoid unnecessary guardianships. Ombudsmen should regard guardianships only as a last resort and when no other alternatives are available.
- C. Ombudsmen may advocate on behalf of a participant or resident for the least restrictive or limited guardianship in proceedings to establish guardianship of the person. The Ombudsman may request that the court place specific limitations or instructions in the final guardianship order when the participant or resident has voiced such a desire; e.g., that the guardian may not remove the resident from the nursing home, limit the resident's ability to visit friends or relatives, or limit the resident's access to funds.
- D. No Regional Program or any Ombudsman shall serve as guardian of either the estate or the person, as a representative payee, or as an agent under a Durable Power of Attorney for any participant or resident of a long-term care facility, due to the potential conflict of interest or the appearance of a conflict of interest. This restriction does not apply to an Ombudsman acting as a guardian, a representative payee, or as an agent under a Durable Power of Attorney for his/her own family member. However, an Ombudsman should not be the Ombudsman, guardian, representative payee or agent of a durable power of attorney for his/her own family member. In such an instance an Ombudsman from another Regional Program should provide Ombudsman services to the Ombudsman's family member.
- E. Nothing in this standard is meant to diminish the responsibilities of the Program or individual Ombudsmen to provide information to participants, residents, their families or the community about the appropriate use of guardianship and its alternatives.
- F. An agency housing a Regional Program may offer guardianship and representative payee services through a Program other than the Regional Program; however, the Provider Agency must have written policies that are shared with all guardianship, representative payee, and Regional

Program staff. Such written policies must:

1. acknowledge the potential inherent conflicts of interest faced in housing Ombudsman and guardianship services in the same agency;
2. acknowledge that guardianship services are based on a “best interests” theory of service and that the Program is grounded in an “empowerment” and advocacy theory of service and that such difference in approach and philosophy are the basis for real, potential and perceived conflicts of interest;
3. assure that the Regional Program and all designated Ombudsman will provide services to participants and residents in accordance with the applicable state and federal law;
4. assure that no Ombudsman will be subjected to intimidation, harassment, force, interference, retaliation, undue influence, or any other negative action if the Ombudsman, on behalf of a client, in good faith and after appropriate investigation, takes and pursues an adverse or differing position to the division of the agency providing guardianship and/or representative payee services;
5. require any Ombudsman to notify the Office if the agency’s procedures are not being followed or if any Ombudsman is being subjected to intimidation, harassment, force, interference, retaliation, undue influence, or any other negative action while acting in good faith as an Ombudsman; and
6. assure that no designated Ombudsman will work for the Program within the Provider Agency which provides guardianship or representative payee services due to a potential conflict of interest or the appearance of a conflict of interest.