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# Columns

## The Ombudsman's Role in a Dispute Resolution System

Mary P. Rowe

Contemporary negotiation theory and practice suggest that organizations should design and build dispute resolution systems—rather than just one or another dispute resolution structure—in circumstances where people will be working together or dealing with each other over time. Review of the success of (proliferating) ombuds offices<sup>1</sup> suggests that this kind of office is both a desirable and cost-effective element in an efficient dispute resolution system. This column focuses on the ombudsman who works within an organization. Much of the discussion, however, is equally appropriate for ombudsmen who serve clients such as citizens, students, newspaper readers, patients, vendors, taxpayers, etc.

I define an internal ombudsman<sup>2</sup> as a neutral or impartial manager within an organization, who may provide informal and confidential assistance to managers and employees in resolving work-related concerns; who may serve as a counsellor, informal go-between and facilitator, formal medi-

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*Editor's Note:* In alternating issues, *Negotiation Journal* features a regular column on the subject of "dispute systems design," a concept initially proposed by William L. Ury, Jeanne M. Brett, and Stephen B. Goldberg in their 1988 book, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (San Francisco: Jossey Bass). Brett and Ury are serving as coordinators of this column, which is aimed at serving as a forum for the ongoing exchange of ideas about dispute systems design.

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ator, informal fact-finder, upward-feedback mechanism, consultant, problem prevention device and change agent; and whose office is located outside ordinary line management structures.

An often-quoted sentence about ombudsmen states that "ombudsmen may not make or change or set aside a law or policy; theirs is the power of

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reason and of persuasion.” Ombudsmen thus have all the functions of any complaint-handler except that of formal fact-finder, judge or arbitrator.<sup>3</sup> Ombudsmen do not “deliver due process” in the sense of a court system.<sup>4</sup> They encourage practices that are fair and just and respectful. They work to foster whatever responsible process is “due under the circumstances”; (in the ideal situation, this process is one chosen, or at least agreed to, by the parties).

### **Functions and Characteristics of Dispute Resolution Systems**

An effective dispute system includes all of the following functions:

- *Expressing respect for feelings* (especially rage, fear of retaliation and grief). Helping people deal with their feelings—so they will be able to make responsible decisions and be able to deal effectively with their problems or complaints—may be the most cost-effective element of a dispute resolution system. This is true in part because providing respect and dealing with feelings cost very little. It is also because respect is a parent of productive work relations, and because humiliation is a parent of destructive behavior. In my experience, this is the function most likely to fail in a dispute resolution system; in the language of Total Quality Management (TQM), the system fails where “customers” have been ignored.
- *Giving and receiving information on a one-to-one basis* (making referrals, telling people how the system works, receiving whistleblowing complaints, etc.). Many people overestimate how much information disputants have. Nearly everyone overestimates how much information top managers have, especially when things are going wrong.
- *Consultation to help people help themselves.* This can involve such practices as counselling with employees and managers; inventing new options; listing all possible options for the choice of the person(s) with a problem; consulting and coaching on how a person or group may deal with the problem directly (problem solving, role-playing, teaching negotiations skills, anticipating possible outcomes, etc.); or helping review the strengths and weaknesses of previous dispute resolution efforts. This is the function that helps to define what process is “due under the circumstances.”
- *Shuttle diplomacy by a third party.* In this process, the third party “shuttles” back and forth among those with a problem, to resolve the matter at hand (sometimes called “conciliation” or “caucusing”). Shuttle diplomacy and mediation both may include offering advice as to what may happen if informal problem solving fails, including advisory arbitration;
- *Mediation.* The settlements of mediation may be formal or informal, and on file or off-the-record. The key element of this function is a neutral third party who brings together the people or groups with a problem, so they reach their own settlement or are helped by the third party to reach their own settlement.
- *Fact-finding or investigation.* This may be done either formally or informally. Reports may be made either with or without recommendations from the fact-finder to one or more decision makers.

- *Decision making, arbitration or adjudication.* In this process, a person or body with power and/or formal authority decides a dispute. This may be structured as part of a formal complaint-and-appeals channel or formal grievance procedure. As Ury, Brett and Goldberg (1988) have pointed out, it is often useful to consider a variety of mechanisms to provide rights-based and power-based decisions.<sup>5</sup>
- *Upward feedback, problem prevention, and systems change.* This can involve designing a generic address to a problem, or a single complaint, or a pattern of dispute; fostering change in policies, procedures, or structures as a result of inquiry, suggestion, complaint or dispute, or an evaluation of the handling of a previous dispute; or providing group training in dispute resolution skills.

An effective internal dispute resolution system also has the following characteristics:

- *The system is taken seriously.* It has strong support from top management. It is widely publicized. Managers and employees hear discussion and receive some training in conflict resolution. The system reports back aggregate statistics about problems and disputes to top management and the community, as an integral part of the organization's management information system.
- *The system provides significant evidence of change* (including reversal of some management decisions) as a result of complaints and disputes.
- *Policies against retaliation are taken seriously by all.* Managers typically are not punished for reversals of decisions they made in

good faith; employees are not punished for raising questions or for responsible disputing.

- *The system provides options—and choice—for pursuing most complaints.* The system allows disputants to have as much choice as possible, rather than requiring that a given problem may be pursued in only one way. This respect for the "customers," now immortalized by TQM, is particularly likely to be ignored by people who think they know best what disputants need.
- *The system provides loopsback, from adjudicative options to problem-solving options, and also loopsforward, so that most people with problems can at any stage choose investigation and adjudication of their complaints, so long as they do so in good faith.*<sup>6</sup>
- *The system is available to everyone, managers and employees alike, for every type of problem.*
- *The system provides in-house, designated neutrals, who:* help people deal with the system; legitimate the asking of questions and raising of concerns; minimize retaliation against those who complain; provide consultation on options; review how conflicts have been handled in the past (especially patterns of conflict); are alert for new problems, as well as available for bizarre, delicate, distasteful or frightening problems; provide individualized coaching on negotiation skills, and (where appropriate) keep disputants focused on interests and on cost-effective modes of disputing.
- *The system provides, if possible, more than one available neutral, so that people with problems have a choice. Ideally, people should*

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have the choice of dealing with an impartial complaint-handler or mediator of the same gender and race, as this makes it much more likely that different kinds of people will feel welcomed and respectfully treated by the dispute resolution system. Providing more than one neutral or impartial person also helps in cases where the first such person is no longer appropriate or available, and where there is a wide variety of disputes requiring a variety of skills.

- *The system guarantees confidentiality* to all who approach an in-house, designated neutral off the record (e.g., for consultation and counselling), except in the rare case where there is a duty to protect (i.e., a danger to self or others). The practice and perception of near absolute confidentiality is essential to building trust in a system that is going to handle delicate and difficult disputes.<sup>7</sup>

### **Where the Ombudsman Fits in a Dispute Resolution System**

An ombuds office may be seen by itself as a mini-system, since the internal ombuds practitioner has all the functions of any complaint handler except that of formal decision maker, investigator or arbitrator. In addition, the ombuds practitioner typically works closely with supervisors and with other dispute resolution structures within an organization.

An internal ombudsperson is often the first person approached for difficult problems within a given workplace. In these cases, the ombuds office may be the point of entry into the system rather than the only person of contact. However, many managers and employees who seek out an ombudsperson come in just to

blow off steam, or find out a fact or two, or to learn how to help themselves.<sup>8</sup> In these common cases, the ombudsperson may be the only complaint-handler, and also does not intervene.

Many workplaces also have other offices where people may go to express or sort out their feelings off the record, give or receive information on a confidential basis, or develop and choose effective options. These include sensitive supervisors, employee assistance, equal opportunity officers, human resources personnel, the appropriate medical department, religious counsellors, student affairs deans, etc. Ombudspeople quite regularly refer visitors to such offices and receive referrals from these colleagues, as all these practitioners seek to build an effective support network for those who are raising concerns.

Ombudspeople may also intervene as third parties. They are sometimes asked to pursue shuttle diplomacy between peers, and it is common for an ombuds practitioner to be asked to go back and forth between the person with a concern and his or her supervisor. Many ombudspeople are mediators. (Formal mediation is more common between peers than between supervisor and supervisee within a workplace.) Here again, most workplaces also have other people who serve these functions: skilled supervisors, human resource managers, deans in academic settings, and outside consultants. Ombudspeople make and accept referrals to and from these other helping resources.

Informal investigation is a common function for an ombudsman. Frequently the practitioner will get permission from a visitor to look into and pursue a concern. This often entails an informal inquiry. Thereafter the ombudsman may make informal

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recommendations to a decision maker and or lobby quite stubbornly for change in policy. It is, however, rare for an ombudsman to be asked to do a formal investigation in a formal grievance process, and many ombudspeople will not do so. (The common belief that ombudspeople are formal investigators applies more appropriately to classic public ombudsmen than to internal practitioners.)

Informal and formal investigation are functions also shared with labor-relations, human resource personnel, student affairs administrators, active supervisors, and some other specialized personnel such as safety, equal opportunity, security and audit professionals. As noted earlier, it is common for referrals to come to the ombuds office and be made from the ombuds office to these colleagues. In particular, an ombudsman who is the recipient of a whistleblowing report will likely be working with line managers and/or other staff offices to see the matter properly referred to appropriate persons.

In some workplaces, ombudsmen are so much a symbol of "interest-based" dispute resolution that some people presume that these practitioners function mainly as a *loopback* process from adjudication to problem solving. Looping back is, in fact, common. However, most ombudsmen also facilitate and support *looping forward* (to rights-based, formal investigation and adjudication) on important (if uncommon) occasions where this is the option responsibly chosen by a visitor. (Some conflicts need a win/lose response.) Ombudsmen also may serve as nonvoting managers of a peer review process and in other ways support formal complaint and appeals channels.

Research indicates that internal ombudsmen typically spend a quarter to a third of their time as internal

management consultants, trainers, and change agents. This may occur in many ways. Sometimes the best way to deal with a specific problem is through a generic response, where the ombuds practitioner will be working with the relevant line manager or personnel specialist.<sup>9</sup> Sometimes the ombudsman will be called to conduct training programs on conflict management or negotiation skills, for people or groups that will be working together.

### **The Ombudsman's Sources of Power**

Because ombudspeople have no line authority, people often presume that they "have no power." This assertion, however, reflects a misunderstanding of the sources of power in negotiation. Following are some commonly recognized sources of power and the extent to which they are helpful to the ombudsperson:

- *Legitimate authority.* Most internal ombudsmen do not have line management power. Those few who are empowered to make binding decisions typically choose not to do so very often, choosing rather to affirm the responsibility and rights of line authority and of disputants. (The rare ombudspeople who occasionally do formal findings of fact often do not provide formal recommendations for future action for just this reason.)
- *Rewards.* While internal ombudspeople do not set raises or promotions, their affirmations of good management and productive behavior often serve to illuminate excellence in the workplace. Ombudspeople commend as well as criticize; commendations are often seen as "rewards," and provide considerable power as well as entrée.

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- *Sanctions.* Ombudspeople obviously illuminate bad behavior as well as good, raising the concern of sanctions from authorities. The fear of sanctions is a potent source of ombudsman influence.
  - *Force.* The fact that other people may use force (sabotage, violence, work stoppages, etc.) provides power to alternative dispute resolvers, including ombudspeople.
  - *Moral authority, charisma.* Obviously the idea of an ombuds office is to affirm that which is just and fair; the office therefore has strong moral authority. In addition, most ombudspeople are chosen in part for charisma and/or reputation.
  - *Commitment.* Stubbornness, and a resolve never to give up on a problem until it appears to be resolved, are qualities much needed by practitioners. These qualities can be a major source of power, in continuing to raise questions with recalcitrant managers, in seeking systems change, and in “staying power” with disputants in mediation.
  - *Information and expertise.* These classic sources of power are usually available to an ombudsman, who typically has access to every database in the organization, and who knows as well as anyone “how to make something work” in the given workplace.
  - *Elegant solutions.* Since the ombuds practitioner is personally disinterested, committed wherever appropriate to integrative solutions, has information about interests on all sides of a dispute, has the luxury of concentrating on dispute resolution, and is unlikely to lose interest (or composure), he or she can sometimes find a reasonably elegant solution.
  - *Fallback position or BATNA.*<sup>10</sup> The BATNA of an ombudsman is usually to turn over the dispute, or let it devolve into, the next possible mode of resolution: line supervisors, formal grievance mechanisms, the courts, letting the disputants quit the workplace, etc. This is often a very useful source of power since frequently disputants think that all alternatives are worse than dealing with the ombudsman.
  - *Relationships.* The professional relationships of the ombudsman are typically an important source of power. In particular, most ombudspeople work for the CEO or other very senior manager, and many practitioners are old friends of senior managers. These intangible points are widely considered, by ombudsmen themselves, to be major sources of power for practitioners. (In addition, it is perhaps easier to be an ombudsman than to be in other areas of senior management, in terms of not making enemies. Although many people think that it must be hard not to make enemies as an ombudsman, in fact most people in a given workplace appear to understand the peculiar charge given to the practitioner. If people come to learn that the practitioner keeps near absolute confidence, is in fact neutral and personally disinterested, they are usually gracious and respectful to their unusual colleague.)

### **Cost-Effectiveness**

Corporate Ombudsman Association research, based on information provided by practitioners, indicates that internal ombudsman offices may be quite cost-effective (Rowe and Perneski, 1990). Preliminary estimates

indicate cost-effectiveness ratios in corporate workplaces between 1:2 and 1:6. The cost savings estimated by practitioners include such items as providing alternatives to some litigation (for example wrongful termination suits); averting or dealing promptly with some harassment, fraud, theft, and other unethical behavior; preventing or dealing early with some threats, safety problems, sabotage, and potential violence; retention of some highly valued professionals who would otherwise leave.

Here are some hypotheses as to why ombuds offices may be effective:

- Because the existence of an ombuds office legitimates the idea that it is acceptable to raise questions (even small questions) and because there is almost no cost<sup>11</sup> to contacting an ombudsman, people with questions and problems often come in early, when most disputes are more easily resolved. Ombuds offices are especially useful with respect to whistleblowing. In the course of informal problem solving, ombudspersons almost never identify a visitor or caller without permission. They are, therefore, often in a position to act as a buffer for a legitimate whistleblower, and can talk with that person to ask details useful to management in addressing the complaint. Ombuds offices thus can be effective in surfacing unethical behavior (and in reassuring callers whose concerns turn out not to be serious).
  - In addition, if it is appropriate to support disputants to choose an interest-based or low-cost rights or power-based approach, the ombuds practitioner will usually try to do so.
  - Many suggestions that come to an ombudsperson directly make or
- save money for the employer (in addition to the increases in productivity that one hopes take place when disputes are resolved).
- Ombudsmen often fill in for parts of a dispute resolution system that are not functioning well, as fail-safe, back-up, check and balance. Moreover, these practitioners can focus precisely on the dispute resolution element that is failing. In particular, the ombuds practitioner can sometimes alleviate the damage done when someone feels humiliated, enraged or afraid.<sup>12</sup> The practitioner also may be in a position to provide a crucial bit of information, or infusion of problem-solving skills, to help dissolve a dispute. In addition, the ombudsman sometimes fills in where an established complaint procedure may not be helpful, as with union worker-to-worker problems.
  - Ombudsman offices can help disputants choose an option which is "right" for them. My research (Rowe, 1990a and forthcoming) indicates that people with difficult problems often have very firmly held—and disparate—ideas about dispute resolution. Thus the chance to choose or custom-tailor an option is likely to be appealing to a complainant. Moreover, an ombudsman may be able to help fashion unusual remedies (even if sometimes quite small remedies) which exactly fit unusual circumstances and therefore are relatively pleasing to one or more party. In my experience, finding the "right" option for a complainant makes it less likely that a complainant will reject a solution in a costly fashion.
  - Ombuds offices are widely sought out.<sup>13</sup> As is the case with most

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forms of mediation, many people who see an ombudsman appear to be reasonably satisfied by the chance to get a problem examined or resolved, and to learn new skills. These former “customers” send in new people. There is then a widening pool of people who practice and teach others their new negotiations and problem-solving skills. It is also quite common for people to seek consultation on problems (before a dispute has taken place), after working with an ombudsman.

- Ombudsmen provide low-cost data collection, by tracking their caseloads and running surveys. A particularly important data collection function is that of identifying and reporting problems that are new to the organization, for which appropriate policies and procedures do not yet exist.<sup>14</sup> Another is the ability to collect and put together little pieces of data from many sources, or complaints from disparate areas, about the same person or service.
- Ombudsmen help to deal with peculiar, delicate questions, with people whom others find to be difficult, and with cross-cultural issues.<sup>15</sup> Practitioners often become reasonably adept at understanding and surfacing hidden agendas, especially from “chronic complainers.” Ombuds offices are one useful path for making appropriate referrals—for example, to get

managers and employees to employee assistance or medical help, for people who have not yet quite agreed to go to seek support and help.

- Ombuds practitioners work in a low-key, usually evolutionary fashion, for steady systems change to meet changing needs. (In fact, a few ombudsmen deal solely with systems problems.) This element of legitimating disputes and problem prevention is hard to evaluate in economic terms, but is thought by ombudsmen themselves to be an important element of effectiveness.

### **Conclusion**

In the terms of Ury, Brett, and Goldberg, ombuds practitioners can help to provide “motivation, resources, and skills” for continuous problem solving in times of change, within a dispute resolution system. Ombuds offices help to foster interest-based solutions. They can help disputants to loop backward or loop forward, where such actions are appropriate. In the language of Total Quality Management, ombudsmanry is focused on the needs of the “customers” (that is, the persons involved in dispute), in particular by providing respect and by providing options. In human terms, ombuds offices appear to be widely used where they have appeared, thus indicating some effectiveness of response to the needs of people in conflict.



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## NOTES

1. There are many kinds of dispute resolution practitioners in North America who are called ombudsmen. These include the "pure" ombudsmen who are appointed and paid outside the arena over which they have oversight. In the classical case, they are appointed by a legislative body to have oversight over actions of the executive branch of government. There are also many other kinds of "client" ombudsmen, for example, those who serve newspaper readers, hospital and nursing home patients, students in educational settings, defense department vendors, bank and insurance company clients. There are, in addition, some thousands of "internal" ombudsmen, who serve employees and managers within companies, universities, government agencies, foundations, etc. Ziegenfuss has written two books on ombudsmen, cast in somewhat different terms but along the same lines as this article (Ziegenfuss, 1985 and 1988). See also Anderson and Stockton, 1990 for the Administrative Conference report recommending ombuds offices in the Federal Government.

2. There is no commonly accepted version of the word ombudsman. Many people say ombuds-person, ombud, ombuds practitioner, etc.

3. There is probably no rule about internal ombudspeople that is true for all such practitioners and this statement is an example of a rule with exceptions. For instance, a few internal ombudspeople are empowered to undertake occasional formal investigations and/or make occasional management decisions if problem solving fails.

4. There are two common meanings for the concept of "due process." The first is a set of elements of proper process in formal investigation and adjudication, such as rights to timeliness of procedures, to know and be able to respond to the charges made against oneself, to representation by counsel. The other common meaning is simply "the process that is due under the circumstances." Many ombudsmen will work, if asked, to see that people get the rights that are due them in formal internal grievance processes; however, it is the second meaning of due process that better characterizes ombuds practitioners.

5. This list of functions includes several important points made by Ury, Brett and Goldberg (1988). Among them is the importance of providing low-cost alternatives to strikes, court action, sabotage and the like. Ury et al. suggest alternatives most relevant to collective bargaining situations. I would add to their list, for nonunion adjudication, peer review and other similar mechanisms. Three, fine, recent books that discuss such internal grievance procedures are: Ewing, 1989; McCabe, 1988; and Westin and Feliu, 1988.

6. Ury, Brett and Goldberg (1988) have given the name *loopback* to the process whereby a dispute can be taken from a rights-based, adjudicative, "distributive" process, to an interests-based, problem-solving, more "integrative" process. My own research indicates that a small proportion of the population is only comfortable with and satisfied by adjudicative processes, especially for problems like harassment and discrimination (see Rowe 1990a). I therefore argue that *loopsforward* are also an important characteristic of an effective internal dispute resolution system, and that people with problems should not necessarily be required to go through all the steps of a grievance procedure for every type of problem.

7. My research over the past 19 years indicates that an employer must choose between: (1) guaranteeing near-absolute confidentiality [and the choice of the complainant about whether and how to pursue a complaint], which will produce a relatively high reporting rate of complaints and concerns; and (2) no effective confidentiality [and therefore no reliable choice for complainants about what will happen], and a much lower rate of reports. This is especially true for very costly and difficult problems such as safety, ethics, harassment, misconduct, etc. (Rowe, 1990a). Whether an ombudsman can be subpoenaed and *forced* to testify, and thus break confidentiality, is a topic now being tested in various ways, but there is an emerging professional consensus that ombuds practitioners must not break confidentiality. A few courts have upheld this principle for ombudsmen as they have for other kinds of mediators (Rowe, Simon and Bensinger, 1990), and the Administrative Dispute Resolution Act of 1990 also provides strong protection for neutrals in federal agencies.

8. Please see Rowe, 1990b for a discussion on helping people help themselves as an ADR technique.

9. As an example, if a person who complains of racial or sexual harassment does not want to come forward personally but asks that the alleged offender be trained and/or warned about harassment, an ombudsperson may go to a department head or personnel manager to arrange for generic responses to the complaint (for example, a training program in the department and a letter from the head to every member of the department).

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10. BATNA an acronym for Best Alternative to a Negotiated Agreement, is a concept illuminated by Fisher and Ury (1981).

11. As mentioned earlier, most ombudsmen now refuse to testify in formal grievance processes, thus underscoring the near-absolute confidentiality of the office.

12. In addition to alleviating some great emotional anguish, in my opinion this is the function of an ombudsman that is most likely to reduce the costs of lawsuits, sabotage, public attacks, etc.

13. Many full-time ombudsmen have contact with hundreds or even thousands of people a year.

14. Examples from the past include dealing with fear of AIDS; the need for policies on harassment, fraud and misconduct, dependent care; unusual safety problems. Current examples include dealing with threats, genetic testing, intra-minority group harassment, discrimination on the basis of sexual orientation.

15. Examples of delicate issues include the disputes of family members in family-owned businesses, people who smell bad, or behave bizarrely. Common examples of difficult people are those who scare others through temper tirades. Cross-cultural misunderstandings and tensions are becoming much more common in recent years. An ombudsman of the same background as the complainant may be helpful. Moreover, employers are increasingly providing the option of two or more designated neutrals who can work together with sometimes especially helpful where each neutral is similar in gender and ethnic background to each disputant.

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