

THE OMBUDSMAN AS PART OF A DISPUTE RESOLUTION SYSTEM

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Contemporary 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. Twenty years of experience suggests that an ombudsman office is one desirable and cost-effective element for an efficient system (and ombudsman offices are proliferating quite rapidly). This article discusses the ombudsman as part of an intra-institutional system. Much of the discussion is equally appropriate for ombudsmen¹ who serve clients such as citizens, students, newspaper readers, patients, vendors, taxpayers, etc.

¹ There are many kinds of dispute resolution practitioners in North American who are called ombudsmen. These include the "pure" ombudsman 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 hundreds of "internal" ombudsmen, who serve employees and managers within companies, universities, government agencies, foundations, etc. For a discussion of different kinds of ombudsmen, see Rowe, 1988. 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

In this article I define an internal ombudsman, lay out functions and characteristics of an effective internal dispute resolution system, outline how the ombudsman fits into a dispute resolution system, discuss the sources of power of an ombudsman, and suggest some reasons why an ombudsman office is cost-effective.

DEFINITION OF AN (INTERNAL) OMBUDSMAN²

I define an internal ombudsman 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 counselor, informal go-between and facilitator, formal mediator, fact-finder, upward-feedback mechanism, consultant, dispute 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 reason and of persuasion."* Ombudsmen thus have all the functions of any complaint-handler except that of judge or arbitrator.³ Ombudsmen do not "deliver due process" in the sense of a court system.⁴ 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).

2 There is no commonly accepted version of the word ombudsman. Many people say ombudsperson, ombud, ombuds practitioner, etc. (Jokes also abound: Dear Ombuddy, Dear Omnibusman, Hey, Bud, "Om!" etc....) I use many forms of the term ombudsman.

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." An ombudsman will work, if asked, to see that people get the rights that are due them in formal grievance processes, but it is the second meaning of due process that better characterizes ombuds practitioners.

FUNCTIONS AND CHARACTERISTICS OF DISPUTE RESOLUTION SYSTEMS

An effective dispute resolution 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 the parent of productive work relations, and because humiliation is the parent of destructive behavior. In my experience, this is the function most likely to fail in a dispute resolution system.
- **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**: counseling 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.); 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, back and forth among those with a problem, to resolve the matter at hand (sometimes called “conciliation” or “caucusing,” as a form of “mediation”). Shuttle diplomacy and mediation both may include offering advice as to what may happen if informal problem-solving fails, including advisory arbitration.
- **Mediation**: having a third party bring together the people or groups with a problem, so they reach their own settlement or are

helped by a third party to reach their own settlement. The settlements of mediation may be formal or informal and on file or off-the-record.

- **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:** where 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 have pointed out, it is often useful to consider a variety of mechanisms to provide rights-based and power-based decisions.⁵
- **Upward feedback, dispute prevention, and systems change:** 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 as a result of evaluating the handling of a previous dispute; 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, 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

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

reversal of some management decisions), as a result of complaints and disputes.

- **Policies against retaliation are taken seriously by all.** Managers 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 multiple options for pursuing most complaints,** and as much choice as possible for disputants, rather than requiring that a given problem may be pursued in only one way.
- **The system provides *loopback*, from adjudicative options to problem-solving options, and also *loopsforward*,** so that people with problems can at any stage choose investigation and adjudication of their complaints, so long as they do so in good faith.⁶
- **The system is available to everyone,** managers and employees alike, for every type of problem.
- **The system provides in-house, designated neutrals or impartial persons,** to help people to deal with the system, to legitimate the asking of questions and raising of concerns, to minimize retaliation against those who complain, to provide consultation on options, to review how conflicts have been handled in the past (especially patterns of conflict), to be alert for new problems, to be available for bizarre, delicate, distasteful or frightening problems, to provide individualized coaching on negotiations

⁶ Ury, Brett and Goldberg 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.

skills, and where appropriate, to keep disputants focused on interests and on cost-effective modes of disputing.

- **The system provides, if possible, more than one available neutral,⁷** so that people with problems have a choice. Ideally, people should have the choice of dealing with an impartial complaint-handler or mediator of the same gender and race as themselves. 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, counseling, and mediation), except in the rare case where there is a duty to protect. The practice and perception of absolute confidentiality is utterly essential to building trust in a system that is going to handle delicate and difficult disputes.⁸

THE ROLE OF THE OMBUDSMAN 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

7 This principle, like the principle of multiple options, is called **redundancy**, at MIT. To an engineer the concept of redundancy in systems is vital, to provide fail-safe, back-up, checks and balances.

8 My research over the past 18 years indicates that an employer must choose between: 1) guaranteeing 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).

except that of formal investigator or arbitrator (and research indicates that internal ombudspeople do in fact perform all their allotted functions⁹). 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 very difficult problems within a given workplace. In these cases the ombuds office is 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.¹⁰ 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 counselors. 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 with problems.

Ombudspeople also intervene as third parties. Ombudsmen 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, and outside consultants. Ombuds people make and accept referrals to and from these other helping resources.

Informal investigation is a very 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 inquiry. Thereafter the ombudsman may make informal recommendations to a decision-maker and/or lobby quite stubbornly for change. It is, however, quite rare for an om-

9 Ziegenfuss, Rowe, and Munzenrider, 1989.

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

budsman to be asked to do a formal investigation in a formal grievance process. (The common belief that ombudspeople are formal investigators applies perhaps more appropriately to classic public ombudsmen than to internal practitioners.)

Informal and formal investigation are of course functions also shared with labor-relations, and other human resource personnel, active supervisors, and some other specialized personnel such as safety, equal opportunity, security and audit professionals. As noted above, 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 other staff offices to see the matter properly investigated by 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. Ombudsmen also may serve as non-voting 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.¹¹ This may occur in many ways. Sometimes the only 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.¹² Sometimes the ombudsman will suggest new policies or changes in policies and procedures. 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.

11 Ziegenfuss, Rowe and Munzenrider, 1989.

12 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).

SOURCES OF POWER OF THE OMBUDSMAN

Because ombudspeople have no line authority, people often presume that they "have no power." This is, of course, a misunderstanding of the sources of power in human negotiation. Here I discuss 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. (Some ombudspeople, for this reason, do not even provide recommendations for future action if they do a formal finding of fact in a grievance process).
- **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. Ombuds people commend as well as criticize; commendations are often seen as "rewards," and provide considerable power as well as entree.
- **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 their personal charisma and reputation.
- **Commitment:** Stubbornness, and a resolve never to give up on a problem until it is resolved, are qualities required by practitioners. These qualities are 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

particularly available to an ombudsman, who typically has access to any data base in the organization, and who knows as well as anyone how to make something work in the given workplace.

- **Elegant solutions:** This source of power is particularly available to an ombudsman, since the practitioner is personally disinterested, committed to integrative solutions, has a great deal of information as to the interests on all sides of a dispute, has the luxury of concentrating on dispute resolution, and is not likely to lose interest (or lose composure).
- **Fallback position or BATNA¹³:** 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, 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 much worse than dealing with the ombudsman.
- **Relationships:** The professional relationships of the ombudsman are typically a very important source of power. In particular, most ombudspeople work for the CEO or other very senior manager, and many practitioners are old friends of the 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 absolute confidence, is in fact neutral and personally disinterested, they are usually gracious and respectful to their unusual colleague).

13 BATNA means the Best Alternative to Negotiated Agreement.

COST-EFFECTIVENESS OF THE OMBUDS OFFICE

Corporate Ombudsman Association research, based on information provided by practitioners, indicates that internal ombudsman offices may be quite cost-effective.¹⁴ Preliminary estimates indicate cost-effectiveness ratios in corporate workplaces between 1:4 and 1:6. The cost savings estimated by practitioners include such items as providing alternatives to some litigation (for example wrongful termination suits); averting some harassment, fraud, theft, and other unethical behavior; preventing or dealing early with some threats, 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 to contacting an ombudsman, people with questions and problems often come in early, when disputes are more easily resolved. Ombuds offices are especially useful with respect to whistleblowing. Since ombudspople typically do not identify a caller without permission, and since they are often in a position to act as an intermediary for a legitimate whistleblower, and can talk with the whistleblower to ask pertinent details, ombuds offices can be quite effective in surfacing unethical behavior (and in reassuring callers whose concerns turn out not to be serious).
- 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 takes 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

14 Rowe and Perneski, 1990. Ziegenfuss, Rowe, Perneski and Lux are also writing a longer article on cost-effectiveness in health care, state government, academe and the corporate world.

dispute resolution element that is failing. In particular, the ombuds practitioner can sometimes alleviate the damage done when someone feels humiliated, enraged or afraid.¹⁵ The practitioner also may be in a position to provide just the crucial bit of information, or infusion of problem-solving skills, to help dissolve a dispute. In addition the ombudsman may fill in where an established complaint procedure is not helpful, as with union worker-to-worker problems.

- Ombudsman offices can help disputants choose an option which is right (and therefore relatively efficient) for them. My research indicates that people with difficult problems often have very firmly held – and disparate – ideas about dispute resolution.¹⁶ Thus the chance to choose or custom-tailor an option is likely to be both appealing to a potential disputant, and cost-effective. In addition, if there is any chance to support disputants to choose an interest-based, or low-cost, rights or power-based approach, the ombuds practitioner is likely to find it. 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.
- Ombuds offices are quite widely sought out.¹⁷ As is the case with most forms of mediation, most people who see an ombudsman are likely 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 an ever-widening pool of people who practice and teach others their new negotiations and problem-solving skills. It is also quite

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

16 See Rowe, 1990a and Rowe, 1990c.

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

common for people to seek consultation on dispute prevention (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.¹⁸ 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 and difficult people.¹⁹ In particular they 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 dispute and problem prevention is hard to evaluate in economic terms, but is thought by ombudsmen themselves to be an important element of effectiveness.

In 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, and to help disputants to loop backward or loop forward, where such actions are appropriate. In the language of Total

18 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.

19 Examples include the disputes of family members in family-owned businesses, people who smell bad or behave bizarrely, people who scare others through temper tirades, etc.

Quality Management, this work 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.

BIBLIOGRAPHY

Anderson, David R. and Diane M. Stockton. *Ombudsmen in Federal Agencies: The Theory and the Practice*. The Administrative Conference of the United States, 1990.

Ewing, David. *Justice on the Job.*, Harvard Business School Press, 1989.

McCabe, Douglas. *Corporate Non-Union Complaint Procedures and Systems*. Praeger, 1988.

Rowe, Mary. "Ombuds Jobs Are Proliferating and Characterized by Diversity," 2 *Alternative Dispute Resolution News* (May 1988), pp. 198-199.

Rowe, Mary. "People Who Feel Harassed Need a Complaint System with both Formal and Informal Options," 6 *Negotiation Journal* 2 (April, 1990a).

Rowe, Mary. "Options and Choice for Conflict Resolution in the Workplace," accepted for publication in *Changing Tactics*, by Lavinia Hall, et al, 1990c.

Rowe, Mary and Tony Perneski, "Cost-Effectiveness of Ombudsman Offices," in the *Corporate Ombudsman Newsletter*, May, 1990.

Rowe, Mary, Mary Simon and Ann Bensinger. "Ombudsman Dilemmas: Confidentiality, Neutrality, Testifying, Record-Keeping," *Proceedings of the Annual Conference of SPIDR*, 1989. Washington, D.C.: SPIDR, 1990. pp. 282-293.

Ury, William L., Jeanne M. Brett, and Stephen B. Goldberg. *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*. Jossey-Bass, 1988.

Westin, Alan F. and Alfred G. Feliu. *Resolving Employment Disputes Without Litigation*. Washington, D.C.: BNA, 1988.

Ziegenfuss, James T. *Organizational Troubleshooters: Resolving Problems with Customers and Employees*. Jossey-Bass, 1988.

Ziegenfuss, James T. *Patient/Client/Employee Complaint Programs: An Organizational Systems Model*. Thomas, 1985.

Ziegenfuss, James T., Mary Rowe and Robert F. Munzenrider. "The Corporate Ombudsman: A Survey of Work Activities, Approaches and Outcomes." Working Paper, 1989.