

Managing Conflicts and Disputes as an Ombud: The Place of Mediation

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The emergence of mediators and ombuds in the workplace

- Mediation and ombudsmanship developed as separate, but related, movements in the US in the labour-management field the 1960s.
- They grew in popularity during a period of social turmoil amidst growing demands for the protection of civil rights.

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Various definitions of the role of an ombud include mediation. For example a corporate ombud has been defined as:

- A neutral or impartial manager within a corporation, who may provide confidential or informal assistance to managers and employees in relation to work-related concerns, who may serve as a counsellor, go-between, mediator, fact-finder or upward-feedback mechanism, and whose office is located outside ordinary line-management structures (Rowe, 1987, p.118)

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NADRAC's definition of mediation

The National Alternative Dispute Resolution Advisory Council's (NADRAC – www.nadrac.gov.au) glossary of terms defines mediation as:

- a process in which the parties to a dispute, with the assistance of a mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

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Due process & the rules of natural justice

Both ombuds and mediators must be seen to uphold the elements of due process, which means respecting the Rules of Natural Justice as they apply in the organizational setting. This includes fundamentals such as:

- providing both sides to a dispute a full and fair opportunity to be heard
- ensuring that no one in the organization is sitting in a third party capacity over a matter where he or she has a direct interest
- providing an opportunity to fully respond to the case made by the "other side"

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Due process & the rules of natural justice

and for ombuds:

- providing reasonable notice of any investigation or hearing to individuals affected by the controversy and allowing a fair length of time for parties to prepare and make submissions
- wherever possible providing reasons for decisions that affect people.

A good conflict management system will offer interest-based, consensus building processes like mediation or negotiation along with low cost, quick rights based processes like arbitration or peer review.

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The desired qualities of ombuds and mediators

- Effective ombuds and mediators employed by an organisation, such as a University, need to be knowledgeable about how their organization works, and must have an awareness of how their role fits into the organization's culture and mission.
- As much as possible, ombuds and mediators need to be autonomous and have an arms length relationship with the organization they serve. They must operate independently and within the clearly defined parameters or constraints of confidentiality.

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Similarities

- In common with mediators, competent ombuds need to be excellent communicators and be seen to have the maturity, wisdom and experience to be able to respond to issues wisely where it is necessary to do so.
- In common with mediators, ombuds should be perceived by all parties to a conflict or dispute as being *impartial* in their relationship to both parties and to the issue(s) and the outcome. This is crucial if ombuds are to use mediation or other third party roles as one of the tools in their toolbox.

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Similarities

- Ombuds and mediators should have an open, yet skeptical mind and an alertness and sensitivity that not all persons possess. They need to be positive and optimistic – see the bottle as half full rather than half empty.
- Ombuds and mediators must have an integrated value system that helps them identify ethical issues early wherever possible, and a philosophical view that offers some understanding of when it is appropriate and inappropriate to intervene in conflicts or disputes by using mediation.

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Similarities

- Ombuds and mediators are typically constrained in their actions by policies that impose both an obligation of confidentiality (toward the users of the service) and a standard of impartiality as between the complainant and the respondent. These constraints can, however, separately or together, place the ombud, mediator and their employers in a difficult moral and legal position. This is particularly so if a complaint is received that the organization is legally bound to act upon, such as an allegation of sexual abuse or harassment. Therefore the limits to confidentiality should be clearly spelled out in advance of intervention.

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Similarities

- Equal and open access to all relevant information is also needed for fair mediation outcomes. The ombuds will also find that without far reaching access to all necessary information parties to a dispute will be hampered from coming up with sound and fair decisions.
- Ombuds and mediators need to be clear and rigorous thinkers.

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Differences

- Ombuds often have to make decisions or make recommendations, the role sometimes places reliance upon the 'good judgment' of the ombud, often in private and without recourse to appeal, which can be seen as both a weakness and a strength. Mediators on the other hand do not ever give advice or make recommendations or decisions.

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Differences

- Where investigations are required, an ombuds' effectiveness is determined by the quality of their investigations and an ability to conduct demonstrably thorough, fair and balanced investigations followed up by a well reasoned reports. Mediators do not investigate, instead they send the parties themselves to professionals and others to gather information necessary to the conduct of a fair negotiation.

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Differences

- Ombuds need to be able to balance various competing roles, such as those of fixer, administrative auditor, agent of change and responsible office holder that the ombuds model combines. It may not be possible, for example, for ombuds to adopt the role of mediator, given all of the functions the office combines. Mediation requires that third parties must be, or be perceived to be, impartial to all parties in a conflict and as neutral to the organisation, the parties, the content of discussions and the outcome. Ombuds may believe that they are all these things but the perception of others may negate their ability to take on the mediation role.

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Differences

- Effective ombuds in a University system may need to be prepared to champion unpopular and in some instances unsympathetic causes. This requires courage, as they can expect to become less and less popular with peers as time progresses. They must have the energy, stamina and strength of conviction to "buck the system" where change is necessary while not losing either their objectivity or empathy for those involved in running the system. This role may also militate against them being perceived as impartial by some parties to a potential mediation.

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The issue of power

- It is generally agreed that for mediation to work participation must be voluntary, there needs to be roughly equal balance of power between the parties and the parties must be competent to negotiate for themselves. It is not an appropriate process to choose if someone is mentally unstable or ill, on drugs, or where there are extreme imbalances of power such as where there is fear or where there has been violence or abuse. To a certain extent knowledgeable and skilled mediators can use strategies to realign imbalances of power, for example by ensuring that parties have equal access to information and equal participation, enforcing agreed up ground rules, linking less powerful parties to advocates or support persons, seeing parties separately or by using shuttle mediation.

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Keys Young research 1996

- Research in the family mediation field has indicated that even where screening has occurred many women did not tell mediators about the presence of domestic violence. However, this same research also indicated that these women stated that they received assistance in situation where mediators:
- asked specific questions about violence and abuse, including non-physical types;
- offered women specific guidance in considering the possible impact of violence and abuse on the mediation process;
- offered women separate time with the mediator before, during and after sessions;
- worked as a gender-balanced co-mediation team;
- demonstrated that they understood the women's concerns both within and outside the mediation session by implementing specific strategies to deal with these concerns;
- demonstrated they could control abusive behaviour within the session; and
- assisted women to deal with any harassment and intimidation which occurred outside the actual mediation sessions itself (ibid, p. 3).

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The place of mediation in the ombud's repertoire?

- Is there a roughly equal balance of power between the parties or are the balance of power issues able to be addressed by the third party in the mediation process (for example by using advocates or support people, or by using shuttle mediation) without jeopardising the safety or rights of one of the parties?
- Can an ombud who is employed by an organisation and located in the premises owned and controlled by the organisation really be perceived as 'neutral' where the complaint is against an employee of the organisation? Would it be preferable to use a mediator from outside of the organisation, located on neutral territory?

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Perceived impartiality

- Do all parties to the dispute perceive the ombud as impartial? For example is it possible where ombuds spend most of their time responding to complaints from students against staff? Because of the structure of a complaint driven process, complainants usually get to tell their story first which brings certain advantages. From then on in their story can become the dominant story. Conversely, those persons who more frequently respond to complaints are faced with an initial approach by an ombuds office which is working on the assumption that there is a problem, based upon the story of the complainant. Understandably therefore, there is frequently a perception that ombuds are biased in favour of the complainants, which could make it difficult for them to adopt the role of mediator.
- There is a view within some University systems, for example, that the jurisdiction of the ombuds should extend beyond student initiated complaints to include complaints initiated by staff as this wider jurisdiction would enhance the credibility and perceived impartiality of the ombuds.

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Ombuds as mediators?

- What restrictions are there on ombuds in terms of the requirement that mediation be a confidential process (within clearly defined parameters) and what action will be taken if the parameters of confidentiality are transgressed, for example if one party reports illegal behaviour during the mediation process?
- If mediation does not work and another approach is needed, would it be unethical for the ombud who has been the mediator to continue with the case in another role, given that parties in mediation shared information under a specified set of parameters?
- Do ombuds need specialised education and training to mediate cases, or is it possible that some people are 'natural' mediators?

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Referrals to mediation

- Referral is a complex process and requires:
 - that the ombud first of all understands what mediation is in order to be able to accurately explain the process to the parties;
 - that the parties be offered a range of possible referral options so they can select the appropriate process and a mutually acceptable mediator(s);
 - that parties are all comfortable with the mediation process and the selection of the mediator(s);
 - that the parties know where to go and how to arrange an appointment and/or
 - the parties can return to the ombud if the referral is not successful
 - the mediator is fully informed of the requirements of the Ombud's Office in advance.

Criteria and referral to ADR

- ***The capacity of the parties to participate safely and effectively on their own behalf***
- ***Current fear of violence by a party***
- ***An unmanaged mental illness or intellectual disability without appropriate advocacy***

Criteria and referral to ADR

- ***The existence and nature of any power imbalance, and the extent to which any power imbalance can be redressed***
- ***Any relevant court orders which make ADR difficult (eg: a restraining order)***

Criteria and referral to ADR

- ***The relative costs of ADR and litigation, compared with the benefits of each***
- ***Cultural factors***
- ***The need for or possibility of more flexible resolutions***

Criteria and referral to ADR

- **Public interest may require a formal public binding determinations, perhaps with an authoritative application of statute or case law**
- **A matter which is primarily a dispute of fact - or needs expertise or authoritative fact finding**

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Criteria and referral to ADR

- **Multiple/complex issues**
- **Multiple parties**
- **Social characteristics (eg gender, race)**

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Criteria and referral to ADR

- **The participation of a party or representative with authority to settle or to be bound by any outcome**
- **Major, non-negotiable value differences**
- **Intensity of conflict**
- **Legal representation of the parties**

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Practitioner skill

Reviews of studies of court-connected programs which addressed mediator or ADR practitioner behaviour show some consensus about the qualities that produce settlements and satisfaction:

- Effectiveness at facilitating communication, and listening
- Active in structuring the process
- A focus on feelings, relationship concerns, interests
- An emphasis on problem solving, creativity at generating options and solutions
- A greater number and variety of interventions (Carnevale, Lim and McLaughlin, 1989: 207; Henderson, 1996: 143)

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