chapter
FOUR

The Alternative Dispute Resolution Process Continuum

Learning Objectives

- Demonstrate an understanding of the differences among alternative dispute resolution (ADR) processes such as facilitation, mediation, case evaluation, arbitration, and others.
- Analyze dispute characteristics in order to match the dispute with the appropriate ADR process.
- Demonstrate an understanding of the benefits of active listening and list the behaviors of an active listener.
- Describe the duties, qualifications, and benefits of an organizational ombudsman.
- Describe the purpose and techniques used in performance coaching.

JOHN AT THE BUREAU OF RECLAMATION

Today has been a frustrating day. John spent much of last week interviewing internal applicants for an open position in mid-level management. He feels he chose the best person for the position but there were at least three other applicants who were also well qualified and would likely have done well in the position. Now, one of those applicants (Dorys) has filed a complaint with the EEOC, claiming discrimination based on race and gender. The organizational ombudsman has approached John to see if it is possible to resolve the dispute through a less costly, less adversarial process. John is open to any and all ideas because he has

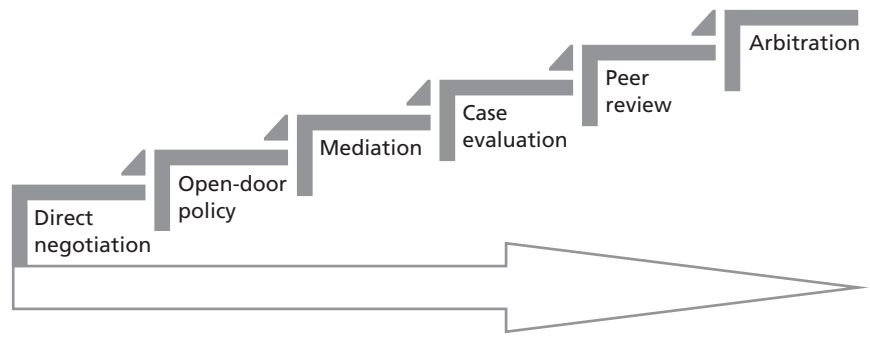
learned that these EEOC complaints can take years to reach resolution. The ombudsman recommends . . . [you will be able to fill in the blank after you read this chapter].

The purpose of this chapter is to introduce a variety of processes used to solve problems without resorting to the courts and the process of adversarial litigation. These processes have the potential to reduce costs and the time necessary to resolve disputes. They also have the potential to address legal and nonlegal disputes and improve rather than worsen the relationships between the parties. After introducing these processes of alternative dispute resolution (ADR) we will undertake a discussion of communication skills and listening, which is especially foundational to conflict prevention and management. Each of the ADR processes covered in this chapter requires the use of communication skills but most especially mediation, coaching, and the work of organizational ombudsmen. For this reason, listening skills are covered in this chapter although arguably they could be included elsewhere in the book and will be frequently referred to in subsequent chapters.

THE ADR CONTINUUM

Figure 4.1 shows the ADR processes commonly used in internal workplace disputes. Typically, these are conflicts between employees holding different

Figure 4.1
The ADR Continuum for Workplace Disputes



positions within the hierarchical structure of an organization, such as between a supervisor and a rank-and-file employee. However, they could also occur between peers. On the continuum pictured in Figure 4.1, the amount of control that a third party has in the outcome increases as the dispute moves up the steps. The first step, direct negotiation, leaves all the control over the outcome of the dispute with the parties themselves. The last step on the continuum, arbitration, takes control of the outcome away from the parties and places it entirely with the arbitrator. Adjudication is not included on this continuum because ADR is meant to be the alternative to going to court but it is similar to arbitration in many ways. The lower the step on the ADR continuum, the fewer expenses will be incurred during the dispute resolution process for most cases.

Direct Negotiations

The first step in resolving nearly any workplace dispute is to encourage direct discussions between the disputants themselves. If an employee has a complaint with her supervisor, then she should first go to that supervisor and attempt to have a productive discussion about her concerns and explore the possibility of an informal resolution to the problem. Employee training can be useful to develop the needed framing and communication skills that will increase the likelihood of a successful interaction when these difficult conversations occur.

Open-Door Policy

An **open-door policy** means that any employee with a problem can go to any manager in the organization for help in solving that problem. Although there is usually a preference to start low on the chain of command and work upward as **needed**, ultimately an open-door policy means the employee can choose which manager to approach for help with a problem.

In our continuum, if the direct negotiation did not succeed, then the next step is to use the open-door policy by speaking to the supervisor of the party involved in the conflict. All supervisory employees should be trained in the basic skills of listening, framing comments constructively, giving and receiving feedback, and so on. An open-door policy can mean anything or nothing, depending on the organization's culture. Some organizations claim to have a policy of open communication, but when employees come to their supervisors with a problem, the supervisor claims to be too busy to listen to them or clearly displays a conflict-avoidant disposition. For an open-door policy to work, all supervisors

and managers must be trained and acculturated to take it seriously and gain the skills they need to truly be open to hearing about the needs and concerns of their own employees as well as employees from other units. Employees must believe there will be no reprisals if they seek out the help of a manager to help solve a workplace problem or problems with a customer.

Mediation

If an employee has tried to speak to his or her boss as well as use the open-door policy, yet the problem remains unresolved, the next step on the continuum is mediation. **Mediation** is a process of facilitated negotiation in which the mediator does not act as a judge but instead assists the parties as they strive to engage in a civil, productive conversation about how to resolve the dispute and rebuild relationships if a continuing relationship is to exist. Mediators typically allow each party to state his or her view of the dispute, they draw out information about the parties' needs as they relate to the dispute process and outcome, they jointly engage in the brainstorming for resolution options, and they work with the parties to enforce ground rules and overcome obstacles to settlement. If the parties reach an agreement, the mediator generally drafts a memo outlining the terms of the agreement. Sometimes the agreements reached in mediation deal with nonlegal matters. For example, "the parties agree to speak directly to each other when a problem exists instead of sharing their complaints with others at work." More commonly the terms of the agreement can form the basis of a binding contract that is enforceable in the courts. If the mediation is related to ongoing litigation then the agreement will usually be filed with the court to be reviewed by a judge and, once signed by the judge, it becomes an order of the court. For example, if the employer agrees to reinstate the employee immediately and pay $40,000 in back pay no later than November 1, then these terms form the basis of a binding contract or an out-of-court settlement.

Mediation is a problem-solving process rather than an adversarial process. In court (also known as *adjudication*), each side argues to the judge about why their side is right and the other is wrong. In mediation, the parties work together to try to craft solutions to the problem(s) that brought them to the table. In mediation the parties work *with* one another instead of *against* one another in order to find a solution that is acceptable to both.

There are many approaches to mediation (Moore, 2003). The traditional model of mediation is one in which mediators play a facilitative role; they encourage the

parties to come up with the solutions to their dispute themselves, they do not tell them what a judge would likely do in their case or evaluate who has the stronger legal arguments. Mediators guide parties through the mediation process, help them create and enforce ground rules related to civility, and assist them with the drafting of the resulting agreement. In this style of mediation, the mediator truly has no impact on the outcome of the case. Mediators do not pressure the parties to settle when they prefer not to do so, nor do they impose or recommend particular settlement terms. The parties retain full power over the outcome of their dispute.

Evaluative or directive mediation is a style more akin to case evaluation or nonbinding arbitration (to be discussed soon). In this model of mediation, mediators tell parties what a judge or jury might decide in their case. They evaluate the strengths and weaknesses of their arguments or evidence and render nonbinding decisions. The parties use this information to inform their settlement negotiations either inside or outside of mediation. Additionally, mediators work to persuade the parties to step away from unrealistic demands and apply gentle or moderate pressure on them to compromise and reach a resolution. Party satisfaction with this style of mediation tends to be lower than for facilitative mediation, but in some types of cases settlement rates may be higher with this style of mediation, particularly those cases in which the parties will not have an ongoing relationship.

In the transformative model of mediation mediators seek to enhance the parties' abilities to maintain or improve their relationship. Mediators seek to capitalize on moments of empowerment and recognition. They work to empower the parties to come up with their own resolution to the dispute while also striving to enhance their dispute resolution skills through the modeling of those skills. Mediators seek to create and highlight opportunities for the parties to recognize the validity of the others' interests and viewpoints, which allows parties to rehumanize each other in the conflict rather than tear each other down. By recognizing the humanity and inherent value of the other person in the conflict, parties are able to have a genuinely open and productive dialogue, with settlement being only one resulting benefit. Because of the emphasis on relationship building and improved communication skills inherent in the transformative mediation model, the United States Postal Service (USPS) and the United States Transportation Safety Administration (USTSA) have adopted the transformative style of mediation for their workplace mediation programs.

Satisfaction with mediation programs tends to be significantly higher than with other forms of dispute resolution such as arbitration and adjudication. In a study of court-connected general civil case mediation in nine Ohio courts, Wissler (2002) found that "litigants had highly favorable assessments of the mediation session and the mediator" (p. 5). The majority thought that the mediation process was very fair (72 percent) and would recommend mediation (79 percent). In the USPS mediation program, 90 percent of the complainants (the case filers) were either highly or somewhat satisfied with the mediation process, with respondents (the supervisors and managers) having a 93 percent satisfaction rate (Bingham, Kim, & Raines, 2002). Similarly, 91 percent of EEOC complainants say they would participate in mediation again if faced with another complaint and 96 percent of respondents concurred (McDermott, Obar, Jose, & Bowers, 2000). As an interesting side note, those complainants who brought attorneys with them to USPS mediations were significantly less satisfied than those who brought no representative with them (Bingham, Kim, & Raines, 2002). Although various explanations for this exist, the strongest explanation is that parties are allowed to speak for themselves and tell their own story when they come to mediation without a representative. This is an important element of procedural justice (see Chapter Two) that should be part of any dispute resolution process. Being heard during the dispute resolution process is directly tied to participant satisfaction rates in all processes, including arbitration, peer review, and adjudication. In voluntary processes such as mediation, coaching, or working with an ombudsman, when disputants feel their voice is not being heard, they are more likely to terminate their participation in the process or to negotiate less productively (Duffy, 2010).

In addition to mediation using an externally contracted neutral professional, many managers conduct informal managerial mediation as part of their regular duties. **Informal managerial mediation** occurs when a manager acts as an informal mediator between two or more employees, supervisors, or managers in dispute. As informal mediators, managers listen to each party and encourage both to listen to each other. They engage the parties in a problem-solving discussion with the goal of reaching an agreement that meets the needs of all parties and is superior to continuing the dispute via more formal channels.

Case Evaluation

The next step on the continuum is the case evaluation step. **Case evaluation** is a process in which a neutral expert is hired to evaluate the strengths and weaknesses

of each side's case and predict for the parties what would happen in court. In this way it is similar to evaluative mediation, except the case evaluator does not then work with the parties to try to negotiate agreement in the case. A case evaluator is usually someone with substantive expertise in the issue of the dispute (such as medical malpractice, personal injury, sexual harassment charges, and so forth) and is usually either a retired judge or a lawyer. Case evaluation can be more costly than mediation because each side must have fully researched its case, prepared documents to support its claims, and because case evaluators charge more than mediators. Case evaluation is a settlement tool because it gives each side more information on which to make or accept an offer of settlement. Sometimes a party is hesitant to take his or her attorney's advice about a settlement offer but hearing the same thing from a neutral expert can help break the impasse and get one or both sides moving toward needed compromise.

Peer Review

Peer review is a process most commonly used within organizational settings to deal with internal employment disputes such as claims of discrimination, wrongful termination, demotions, claims of favoritism or nepotism, or employee appeals of other disciplinary actions. Peer review processes are generally not used to address decisions made through downsizing, workers' compensation claims, unemployment or Social Security benefit claims, health insurance claims or other employee benefits, severance package agreements, or company policies and business decisions related to corporate strategies.

Although many variations exist, at its core the peer review process is designed to allow employees to decide whether their peers are being treated fairly by the organization and its managers or supervisors. One example of the peer review process comes from the United Parcel Service (UPS). In this process, the employee chooses two members of the panel from a roster of employees and the company chooses the third member of the panel. Peer reviewers cannot work in the same unit as the employee under review or be part of that employee's chain of command. Peer reviewers are generally employees from a similar job type but in a different location or department so as to avoid bias. Some organizations may prefer to have a five-member review panel. Any size will work as long as there is an odd number. The larger the panel, the higher the costs because employees are taken away from their primary tasks to sit as panel members.

Peer reviewers are briefly trained about the process prior to engaging in the peer review session. The training teaches them to maintain neutrality, develops their questioning skills, and demonstrates how to review written statements by the parties. During the peer review process, the reviewers ask both sides any questions they may have about the issue or behavior that forms the heart of the complaint. After the process, the panel meets to discuss the session and reach a decision about the panel's findings. The panel then drafts a written finding that is shared with both sides in the case. In some organizations, the findings of the peer review panel are binding on both the company and the employee. In others, the findings are nonbinding on both parties but are advisory. Peer review panels generally can offer the same remedies that would occur through other processes such as arbitration or EEOC adjudication such as reinstatement, back pay, compensation for harm including pain and suffering, and so forth. Although some companies may hesitate to place this much power in the hands of their employees, it is a sign of confidence that the organization believes that it treats its employees fairly and wants to address any potential errors fairly. Organizations with peer review panels have generally found them to be a useful way to communicate a positive organizational culture; peer employees are no more likely to reward shirking or negative behaviors than are managers because these behaviors place a heavy toll on hard-working employees.

Arbitration

Arbitration is an ADR process in which the parties hire a neutral, expert third-party decision maker to act as a private judge in their dispute. Arbitration is commonly used to resolve disputes in unionized workplaces, and arbitration decisions can serve as precedents for future similar cases within a union contract. Arbitration rulings do not set a legal precedent in the courts and cannot generally be appealed there except in cases of arbitrator misconduct. An arbitrator is simply a private judge. So why hire a judge when it costs relatively little to file your case in court? First, the parties can jointly select an arbitrator with subject-matter experience to decide their case. In court, a judge may hear a divorce case, a commercial dispute, and a probate matter all on the same day. By contrast, parties wanting an expert decision maker can hire an arbitrator who has years of experience in labor law, environmental policy, special education, or other fields. Second, parties can get to an arbitrator faster than they can get on the court docket. With court dockets often crowded and slow, arbitrations can usually be scheduled

within two weeks if necessary. Third, the outcome of arbitration as well as the arbitration proceedings can be private. Organizations and individual parties often do not want to air their private matters in a public setting for fear of attracting negative attention from the media. Fourth, parties have much more control over the process itself. Parties can agree to a one- or two-day arbitration or longer. They can reach agreements about what kind of evidence will be allowed. For example, will there be live witnesses or only depositions? These decisions can affect the cost of the arbitration and also the strategies of the attorneys and parties involved. Finally, arbitration rulings are generally not subject to an appeal. If a party wins in court, the other side can appeal to a higher court, thereby lengthening the dispute's lifespan and increasing costs and uncertainty. The US Supreme Court has been extremely supportive of mandatory arbitration clauses in consumer and employment contracts. Grounds for appealing an arbitrator's decision are generally limited to claims of arbitrator bias or malpractice, with few exceptions.

The main form of arbitration is binding arbitration, which means that all parties agree to be bound to the arbitrator's findings. A less-common form of arbitration is nonbinding arbitration. This process is exactly the same, except the arbitrator's ruling is advisory rather than binding. Parties use the ruling as a settlement tool to promote further dialogue and negotiation rather than as a final decision. In these ways it is similar to case evaluation except that the arbitrator's decision may include less information about why the arbitrator decided as he or she did.

Adjudication or Court Action

The purpose of ADR is to avoid the costs, delay, and publicity of going through costly litigation that ends in a trial or hearing before a judge. An added benefit of many ADR processes is that they involve collaborative rather than adversarial methods for resolution, which can be helpful if the parties will continue to interact with one another. In order to understand the attractiveness of ADR processes it is helpful to review the costs and benefits of using the courts to solve problems.

Litigation is the process of filing a court case and taking the necessary procedural steps to prepare that case for adjudication. **Adjudication** is the formal process through which a judge renders a decision in a case before the court. Adjudication is the most costly option but remains the best choice when one seeks to set a legal precedent or bring media scrutiny to a serious injustice that affects a large group or the public at large. Employment cases that reach the level of a civil suit, with a judge adjudicating the dispute or a hearing with an

administrative law judge adjudicating for the EEOC or other body, are incredibly costly in terms of money, time, and emotional energy for all involved—especially for the employee. Although the company continues on with its mission, the employee in litigation may remain unemployed, may be paying unaffordable sums to an attorney, and is the most harmed by a case that drags on indefinitely. For workers currently employed while they proceed with a discrimination or harassment complaint, tensions can be high, resulting in increased use of sick leave and health benefits, with lower overall productivity. To reiterate, litigation and adjudication are not ADR processes on the continuum because they are the default processes when parties fail to resolve their problems using ADR.

Most employees cannot navigate the litigation process on their own and need an attorney to represent them. Many of these employees are fighting to reverse what they believe to be a wrongful termination, meaning they are unemployed and have no income. This is a bad time to try to hire and pay a lawyer. Howard (1995) reports that the results of a survey of 321 National Employment Lawyers Association members indicate that nineteen out of twenty employees (95 percent) seeking to hire legal counsel cannot get an attorney to take their case. Attorneys know these cases are difficult to prove and they are usually paid on a contingency fee—if they do not win, they do not collect their fee. Therefore, only the most egregious cases, those with lots of evidence to support the complainant's case, are likely to be represented by counsel.

Adjudication may not be a viable option for many employment complaints. For example, the EEOC only brings about .005 percent of the cases filed to trial because discrimination charges are patently difficult to prove at the level required to stand a chance of winning (Hippensteele, 2009). In addition to the difficulty of finding and paying for an attorney, if employees hope to get relief through the EEOC process, they had better be patient. Staff shortages have led to excruciatingly long waits for a case to be processed and eventually dismissed, settled, or adjudicated. The Center for Public Integrity (2008) reports that the EEOC had 2,158 employees at the end of 2007, which means there has been a 22 percent decrease since 2002. The backlog of cases increased 38 percent between 2005 and 2007. The average case takes approximately one year to get through the investigation stage with the EEOC. Illinois Legal Aid (2010) warns charging parties about the likely timeline for litigation:

> Going to court may take at least two and possible five or more years. This is a lengthy and costly process for many people. Even if you win at the end,

> the amount may seem like too little, too late. In other words, just because a settlement is not perfect is no reason to think that a court will necessarily provide you any better remedy. (p. 2)

In employment discrimination suits that use the court system instead of the EEOC process, the median case-processing time (filing to disposition) varies between eleven and thirteen months (Kyckelhahn & Cohen, 2008). It is highly likely that the case will be dismissed. The percentage of civil rights cases (employment cases usually fall under this category) dismissed from US district courts in 2006 was 72 percent (Kyckelhahn & Cohen, 2008). Only about one-third of these cases that made it to trial were found in favor of the plaintiff, with 42 percent reversed on appeal (Clermont & Schwab, 2003).

Unfortunately, the media tend to highlight those employment cases in which the employees win at trial much more frequently than those cases in which the employer wins. They also emphasize the large awards that are outliers, leading employees to have false beliefs about their chances of winning and winning big, called the *jackpot syndrome*. In their study of adjudicated cases followed by the media and in which a victor was announced, Nielson and Beim (2004) found that plaintiffs prevailed in 85 percent of the cases. This rate of plaintiff victory is dramatically higher than the actual 32 percent plaintiff win rate in US district court cases during the same time period.

Additionally, the average size of awards covered by the media was thirty times higher than the average actual awards. This skewed representation of case outcomes can cause employees to inflate their chances of winning and the size of any eventual award.

For all of these reasons, adjudication is simply not a good option for most employment cases. Resorting to an ADR process is much more likely to be done *pro se* (without an attorney) and on a shorter time horizon, with less expense for all involved.

Does resorting to an ADR process mean parties are losing their access to justice? This has been a hotly debated question. The good news is that satisfaction with most ADR processes is higher than satisfaction with court processes. With adjudication, even the "winner" often leaves feeling dissatisfied, unheard, and frustrated. Of all the possible ADR processes, mediation has been the most studied, and we can compare the costs of mediation versus court. Mediation is typically faster and less expensive than litigation and court action. For example, according to McEwen (1994), the average time from filing the charge to completing

mediation was 67 days as compared to 294 days to complete the traditional EEOC process. At the EEOC, from 1999 through 2008, almost 111,000 mediations were held and over 76,000 charges, or 69 percent, have been successfully resolved (Equal Employment Opportunity Commission, 2009). That means 69 percent of the plaintiffs agreed to some form of settlement in mediation. Considering the 32 percent of plaintiffs receiving a full or partial award, as mentioned previously, minus the one-third or more that most attorneys would require to take on an employment law case, it would seem that most employees have a better chance of receiving relief in mediation compared to proceeding with litigation. Discrimination and harassment charges are simply difficult to prove with the level of evidence needed to win. Yet for 69 percent of the defendants in mediation, settlement was preferable to continuing the long and costly EEOC process, even though they know their chance of winning at the hearing state is quite high.

All of these statistics regarding the EEOC and civil suit process leave one to wonder why employers settle these cases out of court rather than go all the way to trial. We know employers have a much better likelihood of (1) being represented by attorneys, (2) having the case dismissed with no finding of fault against the organization, and (3) employers usually winning if it goes to trial. So why should managers take part in an ADR process aimed at settling the case? Why aren't employers free to treat employees any way they want because employees will have great difficulty mounting, fighting, and winning a legal case against their employer?

First and foremost, organizations that treat their employees well are more likely to flourish in the marketplace—happy, satisfied employees are the first step to having happy, satisfied customers and clients. Second, who wants to work in or even lead an organization where people are treated poorly? At the root of many of the discrimination cases that get dismissed by the EEOC or the civil courts you will find an employee who has been genuinely mistreated. The employee may not be able to prove his or her case or the mistreatment might not be covered by law but that does not mean that the employee was not mistreated. Companies that develop a positive organizational culture designed to prevent avoidable disputes and fairly manage those disputes that do occur will have a more productive workforce with fewer complaints and lower employee turnover. If winning costs tens or even hundreds of thousands of dollars in legal fees, not to mention lost productivity for managers and others needed to testify during the process, then winning is actually losing. "A 1992 study, for instance, found that 21 federal departments paid $139 million simply to process the 6,883 [sexual harassment]

complaints filed with the EEOC the previous year" (Larson, 1996). Additionally, many victims of sexual harassment leave their jobs, call in sick, or experience reduced productivity, all of which affect the organization's productivity.

In spite of all this bad news, adjudication is certainly the right process for some disputes. Sometimes a legal precedent needs to be set or the glare of the media spotlight needs to find its way to corporate or individual wrongdoers. For example, *Brown* v. *Board of Education* was the case that led to school desegregation in the United States. If that case had gone to mediation, the parents of the children involved might have reached an agreement they found acceptable for their children but it would not have affected children in other school districts. Additionally, the courts are entrusted with protecting the rights of less-powerful groups in society. Sometimes, individuals or groups need to resort to the courts to have their rights established and protected. It is important to remember, however, that the vast majority of cases decided by the courts do not set any legal precedents. Instead, they involve individuals and organizations who cannot solve problems or collaborate successfully, so they seek the services of a third-party neutral decision maker to do so. The good news is that many ADR services will help parties to meet these needs at a lower cost and allow the limited resources of the courts to be focused on those cases that establish precedents, clarify or establish legal rights, and bring public scrutiny to bear on issue of public interest.

OTHER ADR PROCESSES

The ADR processes just discussed are the most commonly used for employment cases. However, there are other process options that fall off the ADR continuum that merit presentation as well.

Ombudsman (Ombuds)

An **ombudsman (ombuds)** is an organizational conflict management specialist who works to resolve either internal disputes with employees or external disputes with customers, clients, vendors, or business partners. The ombudsman is an organizational conflict management expert who works to help the organization prevent unproductive conflicts and efficiently manage those disputes that do occur. The term *ombudsman* is Swedish in origin and is gender neutral in that language. Unfortunately, when used in English it has a masculine connotation, so some in the United States have shortened it to the term *ombuds*, but they mean the same thing and either one is correct.

Ombudsmen are usually trained by the International Ombudsman Association. Ombudsmen work independently of other departments or functional units within the organization; they are not part of the legal department or HR or departments such as those. Some ombudsmen have investigatory functions but others do not in order to maintain confidentiality. They report directly to the organization's leadership, such as the director, board, or chief executive officer. This independence allows the ombudsman to maintain confidentiality and to avoid pressures that might come from hearing complaints from someone along his or her own chain of command. The ombudsman maintains confidentiality by not revealing the names of those who have used his or her service or any information about the substance of the dispute unless the party has agreed that it can be shared. The ombudsman's job is to see that unnecessary conflict is avoided and that inevitable conflicts are handled fairly and efficiently for all involved.

What do ombudsmen do? They are available to consult with employees (or customers, clients, and vendors) who have a problem or complaint. The ombudsman can provide information to individuals to help them solve their own problems, such as information on policies and procedures. The ombudsman can coach individuals by helping them practice negotiation or communication skills that they will then employ with the hope of resolving the dispute or improving their skills so that future disputes are less frequent or severe. The ombudsman can facilitate conversations between individuals in dispute or informally mediate between conflicting individuals or groups as long as the individuals agree to have the ombudsman do so. The ombudsman can refer parties to external mediators, arbitrators, or other dispute resolution processes that may be useful and appropriate. Ombudsmen can provide training in conflict management or any other specific skill that they deem helpful for the prevention of future disputes. They can design new ADR procedures and policies in conjunction with key stakeholders within and possibly outside of the organization. And crucially, ombudsmen can advise the organization's leadership about suggested changes that might be made in order to better handle the organization's conflicts. Those changes can include mandatory training, performance coaching, new or different policies and procedures, efforts to change organizational culture, and other suggestions. Basically, the ombudsman is the in-house specialist in handling conflict in an appropriate, constructive, and generally less costly manner.

Organizations using the services of an ombudsman often see a decrease in litigation costs, reduced employee turnover, and improved morale. For example, in

2000, Coca-Cola Enterprises reached an out-of-court settlement for $192.5 million dollars to settle claims of employment discrimination. Part of the terms of settlement required the company to create an ombudsman office in the hope that such claims and organizational culture problems could be better prevented and resolved more quickly in the future. Ombudsmen are tasked with helping build and maintain a corporate culture that values ethical, fair treatment of employees, clients, and customers. In addition to Coca-Cola, other large corporations with corporate ombudsmen include UPS, BP America, Dell, General Electric, Shell Oil, New York Life, Mars Inc., Halliburton, Eaton Corporation, American Express, Putnam Investments, Chevron, Bristol-Myers Squibb, Scotiabank, The Hartford, United Technologies, Tyco, National Public Radio (US), The World Bank, most United Nations organizations, and thousands of universities around the world.

Ombudsmen can be promoted and trained from within the organization or brought in from outside. Internally hired ombudsmen have the benefit of already understanding the organization's culture, norms, policies, and mission. The person needs to be someone whom others look up to and respect as well as someone deemed likely to keep confidences and deal fairly with others. Externally hired ombudsmen lack the organizational knowledge held by insiders but they may be seen as more objective and less likely to have preexisting alliances that will get in the way of their new duties. External ombudsmen are more common when an organization has a history of systematic discrimination or trust violations and only an outsider is likely to be an acceptable choice to all involved. Inside hires will need to be sent for special training and credentialing and may need more mentoring to get up to speed in their new role, whereas external ombuds can be hired with this training and experience already on their résumé.

Facilitation

Facilitation is a group process in which either an inside or outside person leads the discussions in a neutral manner in order to assist in promoting an efficient and civil process that stays on track. "A meeting without a facilitator is about as effective as a team trying to have a game without a referee" (Bens, 2005, p. 7). According to Ingrid Bens (2005), a facilitator is someone "who contributes structure and process to interactions so groups are able to function effectively and make high-quality decisions. A helper and enabler whose goal is to support others as they pursue their objectives" (p. 5). Unlike mediation, the goal of a facilitation process may or may not include reaching a written agreement. Instead,

many facilitations are designed solely to increase the group's understanding of a problem or improve intergroup relations. Facilitation may be used simply to lead contentious business meetings within an organization or work unit. Many organizations offer facilitation training, including the International Association of Facilitators.

Facilitation of focus groups is one way to gain feedback from external stakeholders regarding the quality of the organization's products or services. Internal focus group facilitation can be used to brainstorm solutions to problems, manage change, and gather information about newly implemented policies and procedures. Facilitation skills, including framing and questioning, are useful tools for all managers to master. Facilitators believe that people have the power to make good, fair decisions for themselves and that two heads (or more) are better than one when making complex decisions. By helping the parties to create an efficient and fair process, facilitators take leadership of the meeting and leave the parties to determine the content of any decision or discussion.

Frequently, managers will be called on to use their facilitation skills in those situations when group input, buy-in, or information sharing are called for. Facilitation is a way to help ensure a high-quality outcome through a fair process that gives everyone a chance to be heard. "Facilitation is a way to provide leadership without taking the reins" (Bens, 2005, p. 7). Sometimes employees or colleagues come to the manager to ask for advice or a decision. There are times when it makes more sense for the manager to facilitate a process through which these people reach their own conclusions rather than to make a decision for them. Manager facilitators might lead organization members when they engage in strategic planning, create goals and objectives, conduct program reviews or assessments, build relationships across or within teams, share feedback for performance improvements, or conduct focus group meetings to gather needed information to improve products or processes.

Facilitators have a number of tools and skills they use repeatedly: staying neutral, managing time, creating and developing an agenda, questioning skillfully, summarizing and paraphrasing, listening actively, convening the right players for each gathering, helping parties to test their assumptions and think creatively, playing devil's advocate when needed, brainstorming, helping parties think analytically, and prioritizing. Some of these specific skills are discussed in the following sections. The best managers and leaders are skilled facilitators who know when to use these skills.

Summary Jury Trials

Summary jury trials (SJTs) are when parties try the case in front of a judge and usually a mock jury. In advance of the mock trial, the attorneys and parties in the case reach agreements related to the types of evidence to be admitted, the length of the trial (usually one to three days), and whether the verdict will be binding or advisory. If the process is advisory, it is used as a settlement tool to enable both sides to see the weaknesses in their case and get the jury's objective perspective on the matter. SJTs are most useful for cases that are complex and would take weeks or months to try in court. This process allows both sides to pick the judge and hear how their case plays out with a jury. If both sides had agreed that the verdict would be binding, the jury is thanked (and generally paid) for their service and dismissed. If the process was advisory, after the jury renders its verdict both sides can pose questions to learn more about which elements of their argument were persuasive or unclear. Sometimes a twelve-person jury is divided into two groups. Each group deliberates separately and renders its own verdict. This method can provide useful information, and it is not uncommon for two juries to render opposite verdicts. Such is the nature of juries and it can be helpful for parties and their attorneys to get a preview of what could happen in court.

Summary jury trials remain an expensive dispute resolution option. Attorneys spend significant resources preparing their case, conducting depositions, selecting the judge, and composing the jury. Expert witnesses are sometimes hired and paid for their work on a case and for their testimony. So why would parties in dispute use a minitrial? Parties often want to avoid the publicity of a real trial and shorten the length of the trial.

Imagine the following scenario. A company accidentally spills chemicals that find their way into the local water supply. Experts disagree as to the level of toxicity of the chemicals that were spilled and disagree about the possible health effects. To make matters worse, the company tried to cover up the spill for forty-eight hours, making the locals suspicious and angry. The effected neighbors are suing via a class action in civil court, claiming wide-ranging health problems all the way from infertility to arthritis, insomnia, cancer, anxiety, and depression. The judge in the case fears that it will take up to three months to try this case, and others pile up on the already-crowded docket. Combined legal expenses for the two sides has already amount to more than $3 million. The judge has asked the parties to consider using a minitrial and they agree. After a two-day trial, with videotaped witness statements, the two juries, each with six participants, deliberate for about

three hours before returning opposite verdicts. One jury returned a verdict in favor of the plaintiffs for almost $12 million. The other jury returned a verdict in favor of the defense, giving nothing to the plaintiffs. The attorneys for both sides used their discussions with the jury to advance their settlement negotiations and reach an out-of-court settlement, thereby saving themselves and the public the cost of a long trial.

Public sector managers and companies facing class action or multimillion dollar claims might consider the benefits of a summary jury trial but only if less expensive options such as mediation or arbitration have failed or are unacceptable to the parties.

Coaching

We all know what coaches do. They help players improve their performance, thereby making the team better as a whole. Executive or performance coaching within a workplace is used for two main purposes: to improve the performance of managers who are underperforming or to maximize the performance of managers who are already doing well. The field of executive coaching is booming, with approximately two thousand full-time professional coaches working in the United States in 1996, at least ten thousand in 2002, and fifty thousand were estimated to be working by 2007 (Jones & Brinkert, 2008). Clearly, organizations and individual managers have realized the benefits of using coaches to improve managerial performance. Diedrich argued that executive coaches were best used to "modify an executive's style, assist executives in adjusting to change, help in developmental efforts, and provide assistance to derailed executives" (Jones & Brinkert, 2008, p. 6). In addition to executive coaching, other forms of coaching commonly used are life coaches and career coaches. The former assist individuals as they consider various life choices and critical decisions and the latter does the same during career changes or transitions.

Coaches use a host of diagnostic tools and communication skills to assist managers in assessing their own job performance and create paths to improvement. Jones and Brinkert (2008) define **conflict coaching** as "a process in which a coach and client communicate one-on-one for the purpose of developing the client's conflict-related understanding, interaction strategies, and interaction skills. Coaches help clients to make sense of conflicts they experience, help them learn to positively manage these conflicts, and help them master specific communication skills and behaviors" (pp. 4–5).

In addition to using a coach to improve their own performance, managers can also serve as coaches with their employees by helping them to see the areas in which they need to improve and working on the skills that will get them there. Coaching is a process focused on empowerment. Those being coached are encouraged to examine their assumptions, their desire for change, and the obstacles to improved outcomes, and then to develop paths forward. The coach asks questions, practices communication skills with clients, and supports clients as they work toward achieving the goals set during the coaching sessions. Coaches provide assessment tools to better discover the answer to these questions as well as to assess progress toward goals.

To be more specific, Tidwell (1997) developed a model of conflict coaching (called *problem-solving for one*) that involves six basic steps:

- *Preamble and introduction:* The coach describes the coaching process, discusses the confidential nature, shares information about the general costs and benefits, and asks for clarification of the participant's expectations.
- *Storytelling:* The participant shares the reasons why he or she is participating in the coaching process, shares information about any specific problem or conflict that has precipitated the desire to meet with a coach, and shares other relevant background information.
- *Conflict analysis:* The coach works with the participant to deeply examine the problem by specifying its origins, parties, issues, dynamics, and possibilities for resolution.
- *Alternative generation and costing:* The participant brainstorms possible solutions and the costs and benefits associated with each proposed solution. If more information is needed, the coaching session can recess while the participant researches this information.
- *Communication strategy development:* The coach works to help the participant identify and develop the communication skills and strategies necessary to implement the identified solution(s).
- *Restatement of the conflict-handling plan:* The facilitator and the client develop a plan for moving forward, with any new coaching sessions focused on tracking progress toward the goal or resolution.

Clearly, this type of coaching process has management applications. Managers are frequently faced with employees or colleagues needing help to navigate

conflicts at work or needing to improve their communication or collaboration skills. This basic process outline offers a path forward so managers can act as coaches and facilitators that empower people to solve their own problems and develop the skills necessary to do so independently in the future.

Coaches need to have good communication skills, including those covered in the following skills section. They also need to be able to train individuals in these skills as needed to help them overcome the communications-based obstacles to better performance. Explaining the five conflict styles (covered in Chapter Two) or working on active listening skills can be an important step to improved managerial performance. Coaches need to master conflict and communication skills and be able to teach them to their coaching clients, who are often their employees or colleagues.

ADDITIONAL PROBLEM-SOLVING TECHNIQUES

Timing is critical for good decision-making and problem-solving processes. If tempers are high, we know that individuals and groups have difficulty processing complex information and making good decisions. At the opposite end of the spectrum, if an issue is not considered important, those affected by the decision or problem will not want to get involved and contribute to its solution. So, ripeness is key.

Before participants can engage in problem solving it is important for all parties to use active listening skills in order to better understand each other, to understand the problem or issue, and to build rapport among those who must work together toward resolution. Although active listening is a necessary precursor to problem solving, these listening skills will be called on at various phases of the problem-solving process.

Brainstorming is an important part of a problem-solving process. During brainstorming all parties agree to think broadly about any and all possible solutions to the problem at hand. It is critical to the success of the brainstorming process that the participants agree to separate the process of generating options from the process of evaluating those options. Imagine that one employee proposes a creative solution to the problem and from across the table another person says, "That's the craziest idea I ever heard!" Who would want to throw out the next idea for slaughter? The brainstorming will quickly come to an end. Therefore, the manager as process facilitator can gently remind everyone about

the importance of separating the process of generating ideas from the process of evaluating them.

Backcasting is a problem-solving technique in which the facilitator, mediator, or manager asks the parties to envision a future in which the problem is solved or the relationship is repaired. The parties are asked to describe what that looks like or feels like. Then, the parties are asked to describe the steps that each of them would need to take in order to reach that ideal future state. The parties are asked to focus on the actions that they can take themselves rather than focusing on the actions they wish the others would take.

Through the choice of the appropriate ADR process, active listening, and problem solving, most managerial conflicts can be handled early, before they grow to threaten the health of the organization.

KEY SKILLS FOR MANAGING COLLABORATION AND CONFLICT

In addition to the ADR processes just covered, managers need to develop foundational conflict prevention and management skills such as active listening and questioning.

Listening

Few managerial skills are as neglected as listening skills. Listening skills are the foundation for most forms of collaboration, problem solving, and dispute resolution. Everyone can improve personal listening skills, and when you work on these, people notice. Most managers believe they already have good listening skills, but would their employees agree?

In a typical conversation in English-speaking countries, there is an overlap of one to two syllables that occurs when the speaker slows down and the listener jumps into the conversation, thereby becoming the next speaker (see Figure 4.2). Culture influences speech patterns; therefore not all English speakers will conform to this pattern, although it will apply to the majority of English speakers. Two problems arise when this listening pattern is used. First, there is an overlap during which time the person who is supposed to be listening starts to speak before the speaker has completed his statement. Second, instead of listening to understand, the listener listens to respond, especially in conflict situations. This means the listener is preparing a rebuttal, an evaluation, or a question of interest to the listener rather than focusing on what the speaker is

Figure 4.2
Common English Speaking–Listening Pattern

saying and any emotional needs that underlie his or her speech. The first step to solving problems is to understand the nature of the problem and the various parties' perspectives and views of the conflict. By **listening to respond**, people generally listen to figure out when they can jump into the conversation and get out their view, opinion, thoughts, and so on. Instead of listening to respond, the first step in a problem-solving conversation is listening to understand. **Listening to understand** requires listeners to suspend judgment and their own need to drive the conversation. Instead of listening for the moment to jump into the conversation, the goal of listening to understand is to allow the speaker to completely share his or her thoughts, concerns, or emotions with the listener, uninterrupted. This calls for active listening.

Active listening occurs when listeners give the speaker all of their attention, listen to understand the speaker's meaning, in content and in import, and confirm the meaning has been understood through summarizing back what has been said. Active listening serves multiple purposes: increased understanding on the listener's part, building rapport and relationship between the speaker and listener, and making space for speakers to share something they consider important. The term *active listening* is also called *reflective listening* in the literature on conflict management and communication. Although the terms are interchangeable, we will use the term *active listening* because it includes giving reflections back to the speaker as well as many other behaviors related to attentiveness, eye contact, avoiding distractions, and so on. Active listening is called for when the speaker has a high level of emotional energy, which can be positive energy such as excitement or joy or it can be negative energy such as frustration, sadness, or anger. The first step to problem solving is to allow speakers to vent, that is to say, to let them release some of the energy and calm down. If a problem exists that needs to be solved, that phase will come after active listening. Problem solving requires that each party has had a chance to release some energy by speaking to an active

listener. Sometimes speakers only need someone to listen to them; they are not trying to engage in a problem-solving process with you. They simply want you to listen so they can get something off their chest or so they can process their emotions themselves. Some people think through their problems by talking them out. Others simply need to know that you care about them and their problems. Giving someone our full attention as a listener is one of the best ways to show we care and helps build strong relationships.

When someone comes to you with high energy and she needs you to listen, the first step is to put down your smartphone! Really, the hardest thing to do sometimes is to stop paying attention to other important tasks, and take a few moments to focus solely on listening. You may be someone who is great at multitasking. You feel you can listen and check e-mail at the same time. You may be right but you cannot convey to someone that you care about them by checking your e-mail while you listen to them vent. If someone needs you to listen actively but you are in the middle of an activity that cannot wait, try saying something like, "I want to give you my full attention. Can I come down to your office in five minutes, after I make this urgent phone call?" Although the brief delay might be frustrating, the speaker will likely receive the message that his concern is important to the listener and the listener will make time to hear it very soon—free from distractions.

Keys to Active Listening

- Avoid distractions.
- Make eye contact (when culturally appropriate).
- Use open body language.
- Listen to understand.
- Use conversation starters and openings.
- Summarize what you've heard.
- Avoid judging what you hear (positively or negatively).
- Avoid trying to solve problems.
- Avoid statements that take the focus away from the speaker.

Once you are away from distractions and in a private setting, make sure you look the person in the eye and, when possible, sit or stand so that you are on a level plane. This assumes a Western context, where eye contact is a sign of respect. In many Asian and Latin American contexts, direct eye contact is inappropriate from a subordinate. This will also help you observe the speaker's body language and nonverbal emotional cues. Use positive or neutral body language by positioning your chair and body to face the speaker. Do not cross your arms, glance at your watch, tap your pen nervously, or otherwise send the signal that you are impatient.

When listening, try to avoid mental distractions, such as unrelated thoughts or mentally composing a response. Use conversation openers such as "What is going on?" or "Please tell me about your concern." It is important for the speaker to be able to tell his whole story without interruption. Some speakers will feel guilty about taking your time and you may need to give them a door opener. This door opener lets her know that you are still listening and she can continue as long as she needs. Try nodding your head or saying something like "uh huh." One recipe for a door opening is to briefly summarize back what you have heard, focusing on the emotional meaning or content: "Sounds like you are really frustrated." Be sure to avoid statements that convey empathy but derail the speaker or put the attention on the listener instead of the speaker. For example, "That happened to me once . . ." or "Why did she do that?" Also, seek to avoid making positive or negative judgments such as "You had every right to feel angry." Judgmental statements have four negative effects. Negative opinions may have a chilling impact on the speaker, making him or her afraid to fully share his or her story or concerns. Second, they can derail the conversation by taking it in a different direction than the speaker was headed. Third, they put emphasis on the listener's opinions rather than the speaker's story. Fourth, if the speaker is a manager or other potential problem solver, it leads to premature judgments before all parties have been heard. Instead, the listener may convey empathy with statements such as "I can tell this has been hard on you" or something similar that reflects back the emotions communicated by the speaker.

Why would a book on conflict management suggest that listeners avoid trying to solve problems? Good conflict managers have one fatal tendency in common. We tend to be fixers. We want to help others to fix their problems by imposing our solutions on them. Sometimes this is necessary and appropriate. Fixing the speaker's problem is rarely, if ever, appropriate at the active listening stage. If need be, the time for fixing the problem may come later, after deep listening has

occurred. Additionally, there will be times when it is most appropriate for parties to generate their own solutions to the problems they face. They will usually be more satisfied with solutions they generate themselves—even if it is the same exact solution you would have recommended or imposed (review the procedural justice discussion in Chapter Two). The time to worry about problem solving is after all parties have had an opportunity to listen actively to each other and to their manager or colleague.

Once the speaker is finished and has said all she needs to say, summarize back what you heard. Your summarization should include not only a brief summary of the facts conveyed but also the meaning that the facts or events have had for the speaker—the emotional content. For example, "If I understand you correctly, you're frustrated because Bob has been put on your project and the two of you have had problems working well together before. You're not sure how to make this project turn out better than it did last time you two worked together. Is that accurate?" If you have clarifying questions, this is the time to ask them. Be sure that your questions are not carefully disguised judgments or evaluations, such as "Did you know Mike would get angry when you did *x*?" Coming to a shared understanding of the problem is the first step in problem solving, *if* that is the next appropriate step in the conversation.

It is important to note that not all conversations need to involve active listening. If you and a friend are discussing the movie you just watched, active listening would be overkill. The purpose of such a conversation is intrinsic rather than instrumental. An intrinsically valuable conversation means that sometimes we talk mostly for the joy of having a pleasant conversation. We also are able to build up shared experiences and solidify positive relationships this way, but that is not the main purpose—the main purpose is just to have fun and share experiences. An instrumental conversation is one with a specific purpose such as venting, information sharing, or problem solving. Showing someone that you care about his or her feelings and needs is also an instrumental function of active listening. By eliminating distractions by silencing your phone or closing your door, you show someone that you care and that he or she is important to you. The following are some statements that do not necessarily lead to active listening:

"Bob, where did you put that report?"

"What date do you return from the training?"

"What are you doing this weekend?"

Because you are not actively listening does not imply that you are not listening at all but it means you are not inviting the speaker to get it all out by shutting off all distractions during the conversation and then **summarizing** back what you have heard. These are not particularly emotional conversations. At work or with customers, you might hear these statements, indicating a need for active listening:

"The product arrived but I am not satisfied with it."

"I can't believe how she talks to me!"

"I got a negative performance review. This is totally unfair!"

"I can't work with him. He drives me crazy."

"This deadline (or goal) is unattainable."

Opportunities for active listening occur regularly but we tend to miss them. Look for high emotional energy on the part of the speaker: excitement, frustration, anger, weariness, or anxiety. Try to identify these opportunities and you will see noticeable improvements in your relationships and problem-solving abilities.

Listening as a manager may indeed be somewhat different than listening to your peers or with friends outside of work. As a manager, people come to you to solve problems and make decisions. Yet before you have the information you need to do so, you need to listen fully to what the speaker has to say and reflect back what you have heard to ensure complete understanding and to build rapport with the speaker. Once these listening tasks have been accomplished, it makes sense to engage in a conversation about the best role for the manager in this issue: should you intervene in some way or simply coach the speaker so he can resolve the situation successfully himself? Is a unilateral decision needed from you as the manager or should you consult others on your team before making any decisions? Be sure that you and the speaker leave the conversation with the same understanding of your role so as to avoid any later confusion.

Questioning

Whether you are acting as a facilitator or an informal mediator or simply trying to better understand a problem or person, questioning skills are critical for good communication. The first step in selecting the appropriate question is to consider the question's purpose. Questions may be used to elicit information, to promote reflection or analysis, or to challenge the speaker. The next step is to select a

question type: "general (open-ended), opinion seeking, fact finding, direct-forced choice, or leading questions" (Hughes & Bennett, 2005, p. 95).

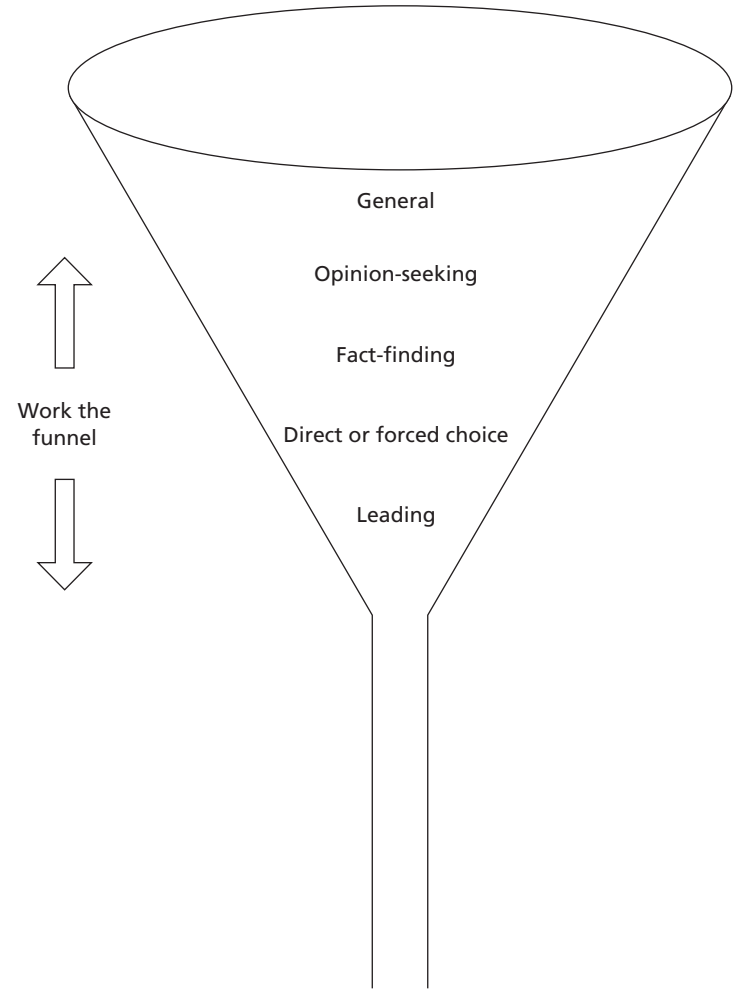
To elicit the most comprehensive information, general open-ended questions may be the most useful (see Figure 4.3). An open-ended question asks speakers to share any information they deem useful with which to answer the question, for example, "Please tell me how this problem started and evolved?" An example of an opinion-seeking variety of open-ended question might be "What kind of solutions would you like to see?"

When more specific information is needed, questioners may turn to fact finding (slightly more general) for forced-choice (more specific) questions. For example, a fact-finding question would be, "What kind of employment information did you include on your application?" A similar question posed as a forced choice would be, "Did you tell us of your previous termination on your employment application?" These questions provide precise information needed to better understand the problem. These tend to be relatively low-risk questions, but expect defensiveness to decrease as openness of the question increases.

Questions designed to promote reflection or analyses are used to get speakers to think through the consequences of potential solutions or to better understand their own role in the problem or solution. These are often phrased as opinion-seeking questions, such as "If we moved Bob to another team, would your team be short-handed?" or "Can you think of any options or changes that you can make which would lead to a better outcome than before?" Depending on how they are phrased, questions demanding reflection and analysis can be incredibly useful during a problem-solving or decision-making process. It is important for questioners to have developed rapport and trust with the speaker so that they do not become defensive during the use of these questions.

Questions that challenge the speaker are the most risky of all. They are not truly part of a problem-solving or decision-making process but are instead used to express frustration or judgment by the questioner. These are often leading questions that are an indirect way for the questioner to make a statement rather than ask a question. Such a question might be, "Don't you think you overreacted?" Or, the famous standby, "When did you stop beating your wife?" A leading question can be difficult to answer without sounding defensive or guilty. In general, leading questions are not commonly used in problem-solving processes.

Figure 4.3
The Question Funnel



Source: Hughes and Bennett (2005, p. 95). Reprinted with permission of the National Institute for Trial Advocacy.

Leading questions lead us to the important issue of framing and reframing. As Chapter Two described, the framing effect is a cognitive bias that occurs when the same option is presented in different formats or with different phrasing (i.e., it is framed differently) and the choice of format or phrasing unduly influences one's opinions or preferences on the matter (Druckman, 2001). Therefore, framing refers to the language used to put one's thoughts into words. During conflicts or tense decision-making processes it is important to choose your words carefully. The wrong word choice can lead parties to question the neutrality of the mediator or facilitator. The words used to describe a thought or situation can reveal implicit judgments or biases that influence the course of a conversation or conflict. Additionally, individuals generally seek to avoid losses more than they endeavor to seek out equivalent gains. People tend to avoid risk when a negative frame is presented but seek risks when a positive frame is presented (Tversky & Kahneman, 1981). For example, if the organization's leaders are seeking to solidify employee support for a proposed merger, they might focus on the risks to the company's survival if they remain small and less competitive in an increasingly globalized world. Framing also speaks to the procedural justice issues raised in Chapter Two. For example, a facilitator at a contentious zoning meeting might avoid this framing, "Where will the big-box stores be built?" and instead ask participants, "What is your vision for the economic future of our town?"

Reframing refers to the language used to summarize, paraphrase, and reflect back what a party has said but using a different frame than originally intended with the goal of altering the course of the communication between two or more parties. For example, if two employees come to their manager with complaints about how the other isn't doing her fair share of work on a joint project, the manager might begin to reframe the discussion to refocus on the importance of teamwork by saying, "I can tell that getting the work done well and on time is important to you both. What ideas do you have for improving your teamwork?" The manager is beginning her interaction by reframing the dispute as an opportunity for collaboration rather than competition. If taken to extremes, this technique runs the risk of being seen as manipulative or putting words into the mouths of others, so use caution when reframing the words of others.

Facilitators, mediators, and conflict managers often use reframing techniques when creating an agenda based on the expressed positions or concerns of the parties. For example, if a party says, "I'll agree to her demands over my dead body!" a neutral reframing might be, "I can tell you have strong feelings about

this. Please tell me more about why you feel this way." Reframing can be used to move parties from a past to a future focus, to depersonalize comments away from a personal attack to an attack on the problem, or to redirect parties from an adversarial to a collaborative focus. There are ethical implications of reframing because it can be used to manipulate a party's statements or to put words in their mouths. When used correctly, reframing helps refocus a conversation from a destructive to constructive focus.

CONCLUSION

This chapter has served as a brief introduction to the many ADR processes being used to address complaints within and sometimes external to organizations. In addition to explaining the differences between processes such as mediation, facilitation, and arbitration, we discussed the role of the organizational ombudsman and other neutrals such as performance coaches. Additional techniques for problem solving were examined such as brainstorming and backcasting. Finally, we delved into the communication skills necessary to make all of these processes work smoothly: active listening, questioning, framing, and reframing. In order to efficiently resolve disputes, managers need knowledge of these processes and the communication skills that make them work.

JOHN AT THE BUREAU OF RECLAMATION

The last thing John needed was to have to respond to an EEOC complaint. He had heard about the endless paperwork and lengthy delays that are common with this kind of process, plus he resented the accusation that he had discriminated against anyone during the hiring process.

After meeting with the organizational ombudsman, John decided to invite Dorys to take part in mediation, using an outside neutral mediator. Dorys agreed to give mediation a try after the ombudsman explained the process. At the mediation, John explained that he was not allowed to share private personnel information about the other applicants with anyone but he was able to share with her the criteria on which he based his decision. Dorys met the minimum qualifications for the position and had performed well while at the bureau but John explained he was looking for someone with more experience in dealing with budgets and overseeing staff. He explained to Dorys the way in which he assigned

point values to various elements he was looking for, such as education, specific types of experience, and seniority. He also asked Dorys to share her concerns with him. Why did she believe she had been discriminated against? John learned Dorys was concerned because there were no mid- or upper-level managers within the bureau who were Hispanic and there were very few women at the highest level of the organization. John agreed this was a problem that needed further examination.

As a result of the mediation the following agreement was reached: John would recruit a diverse set of employees from different levels within the organization to develop proposals for increasing diversity at the middle- and upper-management levels. Dorys would meet with the human resource manager for one-on-one coaching about how to be more competitive for any future promotions. Dorys would drop the EEOC action.

KEY TERMS

Active listening
Adjudication
Arbitration
Backcasting
Brainstorming
Case evaluation
Conflict coaching
Facilitation
Informal managerial mediation
Listening to respond
Listening to understand
Litigation
Mediation
Ombudsman (ombuds)
Open-door policy
Peer review
Reframing
Summarizing
Summary jury trials (SJTs)

SUGGESTED SUPPLEMENTAL READING

Kent, J. C. (2005). Getting the best of both worlds: Making partnerships between court and community ADR programs exemplary. *Conflict Resolution Quarterly*, *23*, 71–85.

Kuttner, R. (2011). Conflict specialists as leaders: Revisiting the role of the conflict specialist from a leadership perspective. *Conflict Resolution Quarterly*, *29*, 103–126.

Szmania, S. J., Johnson, A. M., & Mulligan, M. (2008). Alternative dispute resolution in medical malpractice: A survey of emerging trends and practices. *Conflict Resolution Quarterly*, *26*, 71–96.

DISCUSSION QUESTIONS

1. Who is the best listener you know and what makes them so skilled?
2. Share any experiences you have had with alternative dispute resolution. What worked or didn't work well?
3. Think of a conflict in your work environment or in the news. Which ADR process would have been best to address this conflict and why?

EXERCISES

1. In groups of three, practice being the speaker, the listener, and the observer. Have the speaker tell a short story about some problem or concern he or she has had in a past or present work environment. The listener should use the skills described in this chapter, including the use of a summary statement at the end. The observer will provide feedback about the listener's eye contact, body language, use of door openers, ability to refrain from judging or evaluating, and the summarization at the end. Rotate roles every five to seven minutes. Discuss these debriefing questions: how did it feel to be the listener? How did it feel to be the speaker? Which skills do you need to practice more?
2. Sometime this week, find an opportunity to engage in active listening at work, at home, or in your civic life. After the listening episode, analyze your performance using Figure 4.2. Which of these skills were you able to employ well? With which skills do you need more practice? Did the speaker notice your active listening? What was the impact of this listening episode on your relationship with the other party, if any?
3. If your organization has been involved in litigation, can you think of an ADR process that would have been worth trying before going to court? Analyze the situation to see which ADR processes would or would not be applicable in that situation.

4. Make a list of the sources of recurring, predictable conflict within your organization or with its customers or clients. Which skills or processes could be applied to reduce the negative effects of those conflicts and resolve them at the lowest possible level?
5. Think of a challenging relationship in your work life or a persistent unresolved problem at work. Now, imagine that two years have passed and this relationship or problem has reached an ideal state. What actions would you need to take now to reach that ideal state in two years? (Engage in backcasting.)

GOAL SETTING

On a scale of one to ten, how good a listener are you? Consider asking a trusted coworker or family member to rate you as well. Then choose one skill or technique from this chapter to employ so as to raise your rating by at least one point on the scale.