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Editorial Staff

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ABSTRACT: This article describes a framework for oversight of comprehensive conflict management systems. Part I offers a set of principles and accountabilities, based on principles and best practices in corporate governance, management, conflict management and organizational theory, as a starting point for developing or evaluating oversight procedures. Part II presents a flexible framework for oversight, through a series of interrelated procedures, mechanisms and responsibilities. This framework integrates oversight of the system into culture, daily operations and management of the organization, and establishes consistency between oversight of the conflict management system and any other company-wide management system. The objective is effective oversight that meets the needs of the organization, and that is consistent with principles of corporate governance and management, and respectful of best practice standards in conflict management.

Keywords: Conflict management systems, oversight of management systems, corporate governance, best practice

ABSTRACT: People in organizations often see behavior that they think is unacceptable, unsafe, illegal—even criminal. Why do people who observe such behavior hesitate to act on their own, or to come forward promptly—even when affected by that behavior? Why do they not immediately report those whom they see to be acting in an intolerable fashion? Hesitation of this kind has been recognized for years; for example, there is a controversial literature about the "bystander effect." In real life hesitation is not confined just to bystanders. People in all roles may hesitate

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to act. Why do some people—including many managers—waver, rather than acting effectively to stop behavior they find to be unacceptable? The most common reasons for hesitation are: fear of loss of relationships, and loss of privacy, fear of unspecified "bad consequences" or retaliation, and insufficient evidence. There are many other barriers and they are often complex. Perceptions of the organization and of supervisors are important, as is a complaint system that is seen to be safe, accessible and credible. Some people *do* act on the spot or come forward when they see unacceptable behavior. Reviewing the reasoning of people with whom we have talked may provide ideas for employers designing or reviewing a conflict management system.

Keywords: bystander effect, retaliation, whistleblower, conflict systems, complaint options, organizational ombudsman, workplace trust, workplace fear, procedural justice

AUTHOR: Sara Thacker

ABSTRACT: This year celebrates the 200th Anniversary of the first ombudsman. Over the centuries, the role of the ombudsman has evolved. This article provides a rich history of the evolution of the various types of ombuds and a critical analysis of the American Bar Association Standards for the Establishment and Operation of Ombuds Offices.

Keywords: American Bar Association standards, organizational ombuds, classical ombuds, legislative ombuds, executive ombuds, advocate ombuds

AUTHORS: Maureen Scully and Mary Rowe

ABSTRACT: Active bystanders may play a useful role in discouraging negative behaviors, and, we add, encouraging *positive* behaviors in the workplace. We describe the significance of the bystander role — for example, with respect to safety, diversity, and ethics — and review the challenges for bystanders in moving from a passive to an active stance. Bystander training may help bystanders learn small, concrete strategies for intervening effectively. We review current debates about the power and the limits of the bystander role, the efficacy of training, and the capacity of local bystander action to foster broader organizational changes that support safety, inclusion, and integrity.

Keywords: active bystanders, bystander training, micro-affirmations, diversity, bystander effect

columns

biographies

Moving Forward

ALAN JAY LINCOLN

It has been a year since our inaugural issue and what a year it has been. We have witnessed incredible change and challenge and experienced the ripple effects of the severe global economic decline on our organizations, our ombuds offices, our visitors' issues, and our personal lives. We hear and share stories of budget cuts, increased workloads, intensified issues and problems, and even discussions of closing our own or a colleague's office. Working as a sociologist and social psychologist for nearly four decades, I imagine, has influenced my view of the current situation and all of its ramifications. I start to wonder and hypothesize about my colleagues and your work and what is actually happening, how it affects our practices, have we been effective—more so or less so, have we changed our style, are ombuds now viewed or treated differently within their organizations, what are the personal costs of these workplace changes, and so on?

We begin this issue with a discussion of a research agenda requested and approved by our Board of Directors. The ombuds profession, like others, can and (I think) should be studied. This agenda could not be timelier. While some of the specific issues suggested may have become more or less salient, we have questions that need to be answered. The answers can be approached through a wide variety of research strategies and approaches each following sound scientific and ethical guidelines. As you consider what is happening in your practices, refine these questions, add to this list, and think about contributing to JIOA to help us better understand these issues.

Ralph Hasson has provided us with an extensive and thought provoking article on the oversight of comprehensive conflict management systems. He provides a set of principles and accountabilities as a starting point for developing or evaluating oversight procedures. Hasson then offers a flexible framework for oversight that meets the needs of the organization, is consistent with principles of corporate governance and management, and respectful of best practice standards in conflict management.

Mary Rowe, **Linda Wilcox** and **Howard Gadlin** help us understand the process of coming forward. People in organizations often see behavior that they think is unacceptable, unsafe, illegal—even criminal. Why do some people waver, rather than acting effectively to stop behavior they find to be unacceptable? They review many of the complex barriers to coming forward.

Sara Thacker addresses two important issues: the development of the ombuds profession and the impact of the ABA standards on the establishment and operation of ombuds offices. This thorough historical account, clearly in tune with our 4th annual conference, highlights the evolution of the various types of ombuds.

We turn to the important issue of bystander response. **Maureen Scully** and **Mary Rowe** raise the provocative question: What are the possible roles of bystanders with respect to safety, diversity, and ethics? The authors discuss the significance of the bystander role and review the challenges for bystanders in moving from a passive to an active stance. Scully and Rowe review current debates about the power and the limits of the bystander role.

In this issue's "**I was just thinking**" column, **D.A. Graham** shares his experiences as both a military chaplain and organizational ombuds. He compares standards of practice and ethical guidelines for the two professions showing us how, in many ways, they are more similar than different.

In our "**Recent developments: A legal perspective**" column, **Tom Kosakowski** summarizes significant developments in U.S. legislation and case law relating to Organizational Ombuds from February 2008 through January 2009.

We look forward to your comments, suggestions, and contributions as JIOA continues to develop and meet your needs.

Considering an IOA Research Agenda

ALAN LINCOLN, MARY ROWE AND TOM SEBOK

BACKGROUND AND MANDATE

In August of 2007, JIOA Editor Alan Lincoln communicated to the Associate Editors (Mary Rowe and Tom Sebok) that he had begun considering "writing a piece suggesting a research agenda framework for the study of our profession. That is, (the) kind of research . . . sociologists, psychologists and others do on an emerging profession." We are not the first professionals to consider these issues. The sociology of occupations and professions has a rich history and has examined diverse professionals and workers including lawyers, traditional and emerging health professionals, prostitutes, entertainers, athletes, gamblers, educators, and more. Certainly we fit somewhere in this range.

Later that month, the IOA Board of Directors met in Houston, TX to discuss, among other things, the draft IOA Strategic Plan. In the section of the plan on "Research and Scholarly Activity," two goals were identified: 1) "Be the leading clearinghouse for research and scholarly activity in the Ombudsman field" and 2) "Be recognized as the foremost subject matter experts and leading source of knowledge on the Ombudsman profession." One of the strategies identified to accomplish these goals is, "Create mechanisms to provide relevant research (IOA sponsored and external) regarding Ombudsman issues to the public and membership." Following the discussion of the plan, the Board of Directors asked Lincoln, Rowe, and Sebok to develop a research agenda and submit it to the Board for review. They said they wanted to see ideas about a research agenda that would benefit IOA and its members and advance the profession. This agenda was requested by December 2007.

During the fall of 2007, all members of the JIOA Editorial Board as well as a number of colleagues from the East Coast Ombuds Group (ECOG) were asked to contribute ideas to develop a new research agenda for IOA. Eventually, a wide range of excellent ideas were suggested, especially by Mary Rowe, Alan Lincoln, and Tom Kosakowski. Eventually, these ideas to create a proposed IOA Research Agenda were assembled into a list under three broad topic areas including:

1) the ombuds professional,

2) the ombuds profession, and

3) ombuds practices

By the spring of 2008, the outline below was submitted to and accepted by the IOA Board of Directors and now serves as a suggested IOA Research Agenda. A brief review of research ethics and objectives follows the suggested research topics. We hope that this first presentation ecourages the membership to begin the important discussion about research priorities, defining and operationalizing concepts (think of the complexity trying to agree on what is meant by "effectiveness" or the "impact of certification"), developing additional ethical guidelines consistent with our standards of practice, and encouraging and supporting research efforts.

1. Information/research about the *ombuds professional*:

• Who are we?
• Where did we come from (academically, professionally)?
• What attracts people to the profession?
• What can we learn about our personalities, values, interests, personal work habits?
• Do we differ from other professionals on any key variables?
• How and why do we leave the profession?

2. Information/research about the *ombuds profession*:

• How are we perceived?
• What is our history?
• Do we have power? What kinds?
• How are we recruited?
• How are we trained and socialized?
• What are the effects of certification?

- What are salary patterns like? Changing?
- What myths and/or misconceptions exist about the profession?
- What challenges do we face as a profession?
- What trends are we observing (i.e., issues and concerns) of those we assist?
- How do we differentiate ourselves from other kinds of ombuds practitioners?

3. Information/research about *ombuds practices:*

- What tools (including skills) do we use to assist constituents?
- How do we work effectively with others within our organizations whose functions may appear to overlap with ours?
- How do we apply SOP's and COE in practice?
- What are "best practices" and why?
- What strategies work?
- How do we define and measure effectiveness (including cost effectiveness)?
- Are we effective?
- What value do our practices bring to our organizations?
- What is our impact on others?

THE ROLE OF RESEARCH

Why do we conduct research? What can research do for us and what kinds of questions can be answered?

Some research provides **description** of what is occurring. It shows us patterns of behavior and events. For example, we might be able to determine the frequency or changing patterns of bullying. We might consider examining the average salaries of men and women in a particular profession such as the ombuds profession. In fact, we do that now with an annual salary survey which yields a great deal of interesting descriptive data. One emerging example involves the descriptions of "helicopter parents" who continue to hover over their children even as they enter and pursue college educations, apply for jobs, or seek assistance from ombuds. If we are able to provide adequate descriptions of these sitiuations then we are likely to be interested in a second set of questions.

Why are these patterns occurring? What are the possible **explanations** for what we observe? For example, **why** are some parents becoming more involved in their mature children's lives and work? What motivates them? What are their concerns and intentions? If the salaries of women in the ombuds profession are lower than those for men, then why is this the case? If the salaries are equitable, then why is this occurring when it is not the norm?

As the data and information we gather through various kinds of research, and there are many, continues to grow and become more reliable we may be in the position to ask how we can **change** a situation. That is, can we **intervene** in a way that brings about desired outcomes? Can we minimize what we have defined as undesirable and maximize what is good about a situation? Notice that we now have introduced values, preferences, and defintions of what is better or worse. Decisions about what we **should or should not do** may rely in part on data collected through research, but that is not sufficient. The same information often is interpreted, evaluated, and applied differently depending on time, place, values, priorities, political views, and individual differences. For example, if we find that men do get paid more than women in our ombuds profession; how do we determine what, if anything should be done? We could return to our descriptive research and survey the membership. If there is a general consensus that action is warranted then we might alter policy (perhaps salary review committees) or actually try to remedy the situation (perhaps immediate salary adjustments). Research can be valuable in helping us undersatnd the impact of these new policies or changes. For example, if immediate salary adjustments are made (these often are labeled equity adjustments), then how did this impact the work environment? Were the changes truly seen by all as equitable? If research were to show that "helicopter parents" interfere with our ability to resolve disagreements or if their presence at the table threatened or violated our standards of practice we might adopt new policies. We then could reevaluate and assess the impact of the new policy. The process of change and assessment could continue until we reach the most desirable outcomes.

PROTECTING OUR RESEARCH PARTICIPANTS

All research needs to be carried out in a way that protects the dignity and rights of the participants. Whether we are conducting observations of mediation sessions, surveys of IOA members or students/employees, examination of existing records, interviews, field experiments or using other methods; our research strategies should be sound and our procedures must be ethical. Generally, the collection of information/data are considered to be research when the findings are disseminated to a wider audience even if this was not the original intent.

There are general guidelines and requirements established by state and federal agencies as well as institutional polices for the protection of research participants. These guide and monitor the behavior of researchers as well as the treatment of participants. (There are corresponding protections for research involving animals as well.) Some research including standard educational testing, the use of much existing nonidentifiable data, records and specimens, and some evaluation research are considered exempt from these policies, but still usually are reviewed by an independent body to make that determination.

A major protection for research with people that is not defined as exempt is providing all of the information necessary to obtain informed consent from the participant. You may be familiar with the informed consent that is signed prior to many medical procedures. Research participants are offered similar information so that an informed decision to participate or not can be made. They are told about:

a. the study purpose

b. procedure and duration

c. potential risks and discomfort

d. any incentives/compensation

e. anticipated benefits of the research

f. right to refusal or withdrawal of participation

g. assurances of privacy and confidentialty

Most health, educational and other institutions receiving any federal support also have internal review committees or Institutional Review Boards to examine and approve or exempt all research conducted by employees, students and others affiliated with the institution. We, as ombuds, should consider our role in reviewing and monitoring research focusing on our colleagues or by our members and others.

Additional information can be found in the Code of Federal Regulations Title 45 Public Welfare—Department of Health and Human Services, Part 46: Protection of Human Subjects.

Providing Oversight to Comprehensive Systems

RALPH HASSON

ABSTRACT

This article describes a framework for oversight of comprehensive conflict management systems. Part I offers a set of principles and accountabilities, based on principles and best practices in corporate governance, management, conflict management and organizational theory, as a starting point for developing or evaluating oversight procedures. Part II presents a flexible framework for oversight, through a series of interrelated procedures, mechanisms and responsibilities. This framework integrates oversight of the system into culture, daily operations and management of the organization, and establishes consistency between oversight of the conflict management system and any other company-wide management system. The objective is effective oversight that meets the needs of the organization, and that is consistent with principles of corporate governance and management, and respectful of best practice standards in conflict management.

KEY WORDS

Conflict management systems, oversight of management systems, corporate governance, best practice

OUTLINE

INTRODUCTION

BACKGROUND

During the 1990's, a number of major American companies implemented comprehensive conflict management systems. In those cases in which I was involved, decisions about whether or not such a system was necessary, as well as a host of other issues related to the design of the system, were often the subject of significant debate or disagreement: What roles or options should be included in the system? What kinds of problems or conflicts could be raised through the system? How much confidentiality should the organization allow to those coming forward? These and other questions sometimes led to impasse, stalemate or inertia within management because of conflicting views or interests. Wrapped up in such discussions, quite often, were conversations about supervision, reporting relationships and funding, and those discussions could be equally intense. In some cases, decisions about that second set of issues—supervision, reporting relationships, funding—were critical to resolving the logjam. Those conversations, however, were more about the underlying decision about whether or not to proceed, and about meeting the needs of the various parties and the organization. They were less about how and why to provide effective oversight, or how oversight of such systems was related to management or governance principles and practices outside of the area of conflict management.

In 2002, after my involvement with such projects had ended, and after I'd had a chance to reflect on things, I became very interested in a piece that I had begun to feel was missing: Developing a comprehensive framework for oversight of conflict management systems. One source of my interest was certainly reflection on the projects I'd been involved with, as well as the related writing I'd had the privilege of doing with Karl Slaikeu. There was a second source of my interest in this topic—my independent interest and increasing involvement in the world of corporate governance. As I learned more about the roles of the director and the board, and about what principles and best practices in corporate governance and management had to say about how to provide oversight to an organization, I became even more convinced that those same principles and best practices had a lot to say about how to provide oversight to a conflict management system.[1]

This article is about how to provide oversight to a comprehensive conflict management system, including the system as a whole, the options within the system, and those who staff the system or who have responsibilities in relation to the system. This article is *not* about what a system is, or how it works—that question has been covered extensively in the literature.[2] Nor is this article about what constitutes effectiveness in a conflict management system. Much has been said about that topic, and much more probably will be written about it elsewhere.[3] I will discuss a set of principles and a framework for the oversight of comprehensive conflict management systems. First, I will suggest that a set of principles and accountabilities, growing from overlapping sets of principles and best practices in corporate governance, management, conflict management and organizational theory, can provide a basis for developing or evaluating oversight procedures. I will then review a series of processes and mechanisms that, in combination, offer a flexible framework for oversight. I will suggest important considerations for some of the individual oversight mechanisms described, and identify key problems related to others.

The question of how to provide effective oversight to comprehensive systems deserves discussion and research, and, I hope, much more experimentation. I also hope this article will encourage all three of those activities, within and among several groups. One group is composed of those working within the fields of corporate governance, management and dispute resolution. The second group is composed of those who staff or manage comprehensive conflict management systems within organizations. The third group is made up of the management and boards of organizations thinking about how to provide effective oversight to such a system, or to conflict management options and programs currently in place, including programs for ethics oversight.

DEFINITIONS AND PURPOSES

I intend the phrase comprehensive conflict management system to be interchangeable with a phrase used widely in the field today, integrated conflict management system.[4] To offer a very summary definition only,[5] the term comprehensive conflict management systems refers to systems involving a variety of options, including collaborative options (for resolving conflicts by mutual agreement of the parties), higher authority options (for resolving

conflicts via investigation or decision by a person or persons authorized to decide, and specialized options (for responding to unusual or difficult problems, or problems involving specific characteristics, or danger), with collaborative and higher authority options available internally and externally. It includes independent and neutral third-party options that allow parties to seek informal assistance anonymously or confidentially with far less risk of triggering retaliation.[6] By the term option, I mean a process or function for uncovering and/or addressing problems, conflicts or disputes. A well-designed comprehensive system invites parties to come forward with problems of any kind. It encourages collaborative approaches, while providing fair higher authority options and specialized options for use as needed, and allows choice from the available options for all parties to the conflict. It prohibits retaliation for use of the system and punishes retaliation when it can be established and exposed.[7] This approach is established as policy, and is linked to organizational values and goals.[8] The policy, procedures, standards and requirements that form the foundation of the system are integrated into relevant documents and resource materials, printed and electronic, as necessary to trigger or support use of the system. The conflict management responsibilities associated with each role in the organization are integrated into job descriptions and performance assessment criteria and instruments.[9] In a comprehensive system, every employee receives training to understand what the system is, and how it works, as well as the employee's privileges and responsibilities in relation to the system. Each employee also receives skills training, geared to job function and level of responsibility, to equip that employee to fulfill his or her responsibilities in relation to the system. It includes a comprehensive program for collecting and reporting data, as a tool for informing oversight and ensuring accountability.

This discussion focuses on comprehensive systems for managing conflict in the workplace, and the examples I have had in mind involve primarily non-unionized settings. The same principles and approaches can be applied in unionized settings.[10] They can be applied as well to comprehensive systems for managing an organization's *external* conflicts, with customers, partners and vendors, for example, and to comprehensive systems designed to manage internal *and* external conflicts.[11]

In the context of this article, the term oversight refer to procedures, processes and mechanisms used to establish that the conflict management system as a whole, the options within the system, and those who staff the system, or who have responsibilities in relation to it, are: operating as intended and fulfilling their respective functions/roles responsibilities; achieving established goals and objectives related to the system; and helping the organization as a whole to honor its mission and values, and achieve its key business objectives.

The purposes of oversight derive directly from the definitions in the preceding paragraphs: 1) to ensure accountability—that the system functions as intended, and that it achieves its goals; and 2) to allow for continuing improvement with respect to both the functioning or operations of the system, and its success in achieving its goals, as defined by the organization.

PART I:
BASIC PRINCIPLES AND ACCOUNTABILITIES

How can an organization establish a foundation for developing or evaluating oversight procedures— one that provides a solid starting point—while allowing flexibility from organization to organization?

The first section of Part I describes basic principles for oversight. As with the framework presented in Part II, the principles in Chapter 1 grow from overlapping sets of principles and best practices in corporate governance, management, conflict management and organizational theory

By starting with a set of principles based on overlapping standards from several fields, organizations can begin with a common reference point—a foundation. By focusing on balancing principles, rather than adopting a specific model for oversight, organizations can maintain flexibility.

The second section of Part I describes the accountabilities of the conflict management system, and how those accountabilities might be addressed via oversight. Part II will use the basic principles and accountabilities described in Chapters 1 and 2 as a basis for evaluating alternative arrangements for oversight.

BASIC PRINCIPLES FOR OVERSIGHT

By starting with a set of principles for oversight, based on overlapping standards from several fields, organizations can begin with a common reference point. The principles below grow from principles and best practice standards in corporate governance, management, conflict management and organizational theory. The common reference point embodied in these principles provides a foundation for evaluating oversight procedures. By focusing on *balancing principles*, rather than *adopting a specific model* for oversight, organizations can maintain flexibility. There may be a tension, if not an outright conflict, between any two or more of the following principles, and any given oversight mechanism or process. For that reason, achieving a balance, rather than harmony, among the principles seems like a more realistic goal. Oversight and management procedures should be designed to:

• Encourage use of the conflict management system;

• Support operational efficiency;

• Ensure accountability;

• Reflect the characteristics of the organization in question;

• Honor the purposes and features of individual options and roles within the system;

• Provide feedback as a basis for improvement or change;

• Demonstrate consistency with principles of corporate governance, and best practices in dispute resolution; and

• Foster compliance with ethical standards, regulations and laws.

Encourage Use of the Conflict Management System.

One of the basic purposes behind implementing a comprehensive conflict management system is to encourage anyone, with a conflict of any kind, to use the system.[12] Unless the system invites problems of every type and size, those problems cannot be uncovered and addressed.[13]

Support Operational Efficiency.

Oversight procedures should not unduly complicate the work of those engaged in conducting the primary business of the organization, or of those who staff the conflict management system. In other words, oversight procedures should not decrease the ability of management to achieve the primary mission of the organization, or interfere with management systems that support those efforts.

Ensure accountability.

Oversight procedures should help the organization to ensure the accountability of the system as a whole, as well as the accountability of each option within the system, and those who staff the system, or who have responsibilities in relation to it. Oversight procedures must enable the company to assess the success of the system in achieving the goals set for it by the organization.[14] The organization must also be able to determine if the system supports it in achieving its primary business mission and business objectives. Finally, oversight procedures must enable the company to assess whether or not the system operating as intended—whether or not it the system is working in terms of process.

Reflect the Characteristics of the Organization in Question.

As with the underlying system, oversight procedures must be consistent with the mission, values and business objectives of the individual organization.[15] They should be tailored to fit its culture and organizational structure, the nature of its operations and its management procedures and systems.[16] Oversight procedures that serve one organization well may not work in another.

Honor the purposes and features of individual options and roles within the system.

Oversight procedures must also take into account the differing characteristics and purposes of individual options and roles within the system. Human Resources (HR) functions are designed to provide, among other services, a formal mechanism for raising concerns with respect to official company policy, or the requirements imposed by law or regulation. The role of the HR function in a conflict management system is very different, indeed, from that of an Organizational Ombudsman (OO), a function designed to provide neutral, independent, confidential and informal assistance to any member of the organization. Oversight procedures must allow for the differences in how such options operate in order for each to serve its purpose in the system.

Provide Feedback as a Basis for Improvement or Change.

A comprehensive conflict management system can be a powerful tool for improving an organization's overall operations, as well as the system's success in achieving its goals—but only if information is shared. One key principle, therefore, is to structure oversight procedures to provide informa-

tion to managers and functions throughout the organization, as a basis for improving the performance and operations of the system and the organization.[17]

Demonstrate consistency with principles of corporate governance, and best practices in dispute resolution. Principles of corporate governance set out the respective responsibilities of senior management and the board of directors for managing and providing oversight to the company.[18] In doing so, they provide guidance for oversight of the conflict management system, since oversight for any management system or subsystem should be consistent with the principles guiding oversight of the organization as a whole.

In a like fashion, professional standards of practice guide practitioners such as ombudsmen, mediators and arbitrators. Best practice standards for the design and implementation of conflict management systems also exist, and are continuing to evolve.[19] Such standards are the product of considerable experience and research, as well as discussion and debate within the field of dispute resolution. The conflict management system, and those who staff it, will operate more effectively if oversight procedures reflect careful attention to best practice standards for systems and practitioners. It is important to note that the various sets of standards referred to in this paragraph are not themselves totally consistent with one another—hence the suggestion in this paragraph that oversight procedures reflect careful attention, rather than strict compliance, with best practice standards in dispute resolution.

Foster Compliance with Ethical Standards, Regulations and Laws. Every organization is or should be subject to one or more sets of ethical standards, or codes of conduct. Indeed, one of the most pronounced trends in corporate governance is the responsibility of oversight systems to ensure ethical operations.[20] Comprehensive conflict management systems, as defined in the introduction, should enhance the ability of the organization to surface misconduct, or the violation of ethical standards. Oversight procedures should support the system in achieving this goal, and in determining if the system is fulfilling its responsibility to do so.[21]

Similarly, oversight mechanisms should support the conflict management system in ensuring compliance with local, state and federal regulatory and legislative requirements—mandatory standards imposed by society at large. This requires carefully designed procedures, and clearly established supervisory and oversight responsibilities for senior management and the board. To offer one specific example, an Ombudsman, operating consistently with best practice standards, and reporting directly to the CEO, with access to the board, can help an organization comply with federal sentencing guidelines.[22]

TABLE 1:
Basic Questions for Oversight

Does the Framework for Oversight:

1. Encourage use of the conflict management system?

2. Support operational efficiency?

3. Ensure accountability?

4. Reflect the characteristics of the organization in question?

5. Honor the purposes and features of individual options and roles within the system?

6. Provide feedback as a basis for improvement or change?

7. Demonstrate consistency with principles of corporate governance, and best practices in dispute resolution?

8. Foster compliance with ethical standards, regulations and laws?

TO WHOM IS THE SYSTEM ACCOUNTABLE?

A second consideration may be helpful in applying the framework presented in Part II: To whom is the conflict management system accountable?[23] Identifying accountabilities can help the organization determine how oversight procedures should address them, and who bears responsibility for doing so.

The Shareholders: Management operates the company, and the board of directors provides oversight to management, for the benefit of the shareholders, investors with an ownership interest in the company.[24] The system must be accountable to the shareholders regarding any concerns they might have about such matters as treatment of employees,

workplace issues, or the organization's obligations to operate profitably, ethically and legally. In relation to oversight of the system, this accountability will be addressed primarily through the board's exercise of its oversight responsibilities and the CEO's exercise of her management responsibilities. This might include the CEO's management of the system, and board's oversight of the CEO, of the organization's compliance with legal and ethical standards. This accountability may also be addressed through the management's establishment and supervision of channels through which any allegation of misconduct can be brought to the attention of senior management or the board, and through the board's oversight of those channels.

The Board of Directors: The primary responsibilities of a board of directors include oversight of the CEO and the company's senior management, and of the affairs of the organization.[25] The board is also responsible for oversight of the organization's compliance with legal and ethical standards, for overseeing the management of internal control processes, and for oversight of the risk management process. Even more specifically, principles of corporate governance call for companies to see that systems for exposing workplace and ethical problems are in place, including mechanisms through which problems can be brought to the attention of management and the board.[26] The system must be accountable to the board as an effective tool for supporting the organization's compliance with legal and ethical standards, as well as the organization's success in achieving its mission and business objectives.

The accountability of the system to the board should be addressed through the board's oversight of the CEO. This might include attention to the performance of the CEO in managing the conflict management system, and in implementing the necessary oversight procedures. It should also include how the CEO responds to any particular conflicts brought to his attention, or to the attention of the board, and his demonstration of the necessary skills, abilities and knowledge to fulfill his individual responsibilities in relation to the conflict management system. The system's accountabilities to the board should also be addressed through the board's oversight of the organization's compliance with legal and ethical standards, and its oversight of the risk management process and internal control processes—see the Background section of Part II. It should also be

addressed through the board's specific responsibility to ensure that mechanisms are in place through which workplace misconduct or violation of ethical standards can be brought to the attention of senior management or the board. Finally, the system's account ability to the board might also be reflected in the board's self-assessment of its performance in fulfilling its oversight responsibilities, through the board's evaluation processes.[27]

Managers: Senior leadership must approve and fund the design, implementation and evaluation of the conflict management system, and, once the system is in place, must decide whether the organization will continue to authorize and fund it. To merit such support the system must demonstrate success in meeting its own established goals. It must also demonstrate that it assists the organization in honoring overall organizational mission, vision and values, and in meeting its business objectives. It must also demonstrate its ability to serve as an effective tool for uncovering and resolving workplace problems and conflicts, and for helping the organization to operate legally and ethically and to manage risk effectively. The system's accountability to management should be addressed through management's exercise of its responsibilities, as set by the organization, to supervise and to assess the performance of particular programs, options and roles within the system. This includes supervising and assessing the performance of employees with respect to their responsibilities in relation to the conflict management system. Accountability to management can also be addressed through management's participation in specific oversight mechanisms, such as a Systems Support Committee, designed to provide oversight to the system as a whole. Finally, accountability to management should also addressed through the use of data collection and reporting programs to inform oversight, and to help the organization determine if the system is operating as intended, and if it is achieving its goals.

Employees: The system must provide a vehicle through which any employee can raise any workplace concern, or respond to one. As one expert has put it, the system must be "accessible, safe and credible" to every employee, since any one of them might use it.[28] This includes managers, executives and staff professionals, as well as frontline employees. The system should also assist employees by providing informa-

tion for improving its own performance, as well as the performance of the organization in achieving its business mission and objectives. These accountabilities should be addressed via a data collection and reporting program that informs oversight, and that allows the organization to assess if the system is operating as intended, and if it is achieving its goals. As one element in addressing this accountability, the data collection and reporting program should include procedures that allow employees to rate the performance of the system and those who staff it, and that use such feedback to improve the system's performance and operations.

TABLE 2:
Accountabilities of the Conflict Management System

PARTY	ACCOUNTABILITIES
SHAREHOLDERS	• Does the system assist the organization in addressing shareholder concerns regarding the workforce, or regarding the organization's responsibility to operate profitably, legally and ethically?
BOARD OF DIRECTORS	• Does the system assist the board in overseeing management's compliance with legal and regulatory requirements and ethical standards, and with the organization's success in achieving its primary mission and business objectives? • Does the system serve as an effective internal control process and as a key component of the organization's risk management program, by helping the organization to uncover and resolve workplace misconduct, to comply with legal and regulatory requirements and ethical standards, and to operate more effectively and efficiently in achieving its primary mission?
MANAGERS	• Does the system serve the organization as a whole? • Does the system serve every employee? • Does the system operate as intended? • Does the system achieve its goals? • Does the system assist the organization in achieving its mission and its primary business objectives? • Does the system assist the organization in operating legally and ethically?
EMPLOYEES	• Does the system provide channels for addressing any workplace concern? • Does the system serve as a source of information for improving its own operations and performance? • Does the system assist the organization in achieving its business mission and objectives?

PART II:
A FRAMEWORK FOR OVERSIGHT

BACKGROUND

Part II presents a framework based on my belief that ensuring effective oversight of conflict management systems requires a series of interrelated mechanisms, processes and responsibilities. This approach draws on principles and best practices from corporate governance, management, organizational theory and conflict management. I believe the overlap among these sets of standards and practices offers a common reference point and provides a foundation for the framework. Basing the framework on several overlapping sets of principles and standards also establishes consistency between oversight of a conflict management system, oversight in areas outside of the conflict management system, and oversight of some individual conflict management processes and roles. Part II will address the set of mechanisms and processes for oversight that, taken together, make up the framework. The discussion of principles and accountabilities in Part I will provide reference points for evaluating alternative arrangements.

Part II covers the various components of oversight in a series of sections. The third section of this article deals with oversight of the system as a whole. It suggests that direct management responsibility for the conflict management system as a whole should lie with the senior management of the company, and that the board of directors is responsible for providing oversight. It further suggests that senior leadership can strengthen oversight through a number of supporting mechanisms. The fourth section describes supervision and oversight for individual *options* in the system. By options I mean mechanisms or processes for resolving conflicts, offered through established programs or offices. The fifth section describes the role of a data collection and reporting program in informing oversight and ensuring accountability. It also describes an overall approach for developing such programs. The sixth section addresses supervision and oversight of individual employees with respect to their responsibilities in relation to the conflict management system. The seventh and final section addresses special considerations that apply in providing direct supervision and oversight to indi-

vidual key professionals who staff the system. Sections 4, 6 and 7 will suggest that reporting relationships provide the foundation for oversight of the individual options, as well as for oversight of individual employees, including key staff professionals.

DEVELOPING A FLEXIBLE FRAMEWORK

In starting with principles as a foundation, one of my goals is to suggest a flexible framework for oversight. I believe a few key concepts can help in maintaining flexibility:

A Comprehensive Approach as a Management System: The first challenge is promoting a framework for oversight lies in encouraging the organization to think of conflict management systemically. Can the organization see its existing roles, processes and programs for managing conflict as being, or capable of being, an effective management *system*? My experience has been that many do not. Rather, many if not most organizations tend to think of resolving individual disputes on a case-by-case basis. They tend to think in terms of the particular programs or roles currently in place, or the services they can acquire, for resolving the individual matter in question. And they tend to think of using existing programs or roles to resolve full-blown disputes, rather than comprehensive approaches to uncover conflicts early, and prevent them from escalating.[29] If the organization has all of the elements of a comprehensive conflict management system in place, and if it can picture that system as one more company-wide management system, like its budgeting system, or its goal setting process, or its incentive system, it can and should structure oversight just as it would for any other management system.[30] The framework described in Part II should fit with how an organization might provide oversight to any such system.

The Conflict Management System as an Internal Control Process: One particularly useful and practical way to encourage this kind of systemic thinking is to invite the organization to see comprehensive conflict management as an internal control process. This comparison is quite powerful because private sector, non-profit and governmental entities alike are familiar with internal control processes via best practices in corporate governance, management and accounting. It is particularly powerful, I believe, because it is accurate: One can fairly describe a conflict manage-

ment system as an integrated system designed, among other purposes, to support the organization in achieving such objectives as: 1) complying with laws and regulations; and 2) operating effectively and efficiently in achieving the organizational mission. This description fits well with the standard definitions for an internal control process.[31] Since any company-wide management system is part of the internal control system, it also builds on the preceding point—that comprehensive conflict management should be treated as any other company-wide system.[32] Once the organization sees its conflict management system as an internal control process, or as akin to one, the model for providing oversight and the appropriate roles of management and the board become clearer still.[33] To illustrate how this characterization supports the approach described in this article, I have referred to internal control processes at several key points.

The Conflict Management System as a Key Component of Risk Management: An even more recent trend provides further support for the approach described here: Over the past several years, organizations having become increasingly interested in moving beyond strengthening internal control systems, to developing organization wide-approaches to risk management, referred to as Enterprise Risk Management. Internal control processes, or internal control systems as described immediately above and defined in n. 31, are key components of an Enterprise Risk Management Process. As also noted above, I believe a comprehensive conflict management system fits squarely with the definition of an internal control process. Beyond this specific and direct connection, a comprehensive conflict management system also dovetails closely with the definition, fundamental concepts, and objectives of the broader Enterprise Risk Management framework itself.[34] Again, once the organization sees its conflict management system as a key component within a comprehensive risk management program, the framework for oversight and the appropriate roles of management and the board become clear, and consistent with oversight of other management systems. To illustrate the importance of the connection between comprehensive conflict management and comprehensive risk management, I have noted the link between oversight responsibilities and risk management at relevant points.

The dynamic nature of oversight: I am not suggesting a static model for oversight—anything but. Well-managed organizations routinely modify or alter oversight procedures in response to changing conditions. This certainly includes oversight procedures for conflict management systems. Maintaining effective oversight requires an ongoing consideration of existing procedures in light of changes in the conflict management system, or in the organization, its operations or its operating environment.[35]

The design process as collaborative: In *Controlling The Costs Of Conflict*, we suggested that success in designing, implementing and evaluating a conflict management system requires input from those who must authorize the system, those who might use it and those who will staff its operations.[36] The same recommendation applies to oversight procedures. The mechanisms described in the remainder of this article can be sources of great conflict, because of the varying interests of the parties to the system. Involving all parties in the design process can have a lot to do with whether or not the system comes into being in the first place, whether or not employees and managers accept it, and how well it functions. Adopting this approach with respect to oversight also has a lot to do with the adequacy, quality and value of the oversight provided. It has a lot to do with whether or not oversight ensures accountability.

The tension between professional expectations and the needs of the organization: My experience has been that organizations will listen carefully to advice from conflict management experts and practitioners in developing oversight procedures. The individual organization, however, may modify recommended approaches to meet its needs, interests, operating structure and culture. The result can be oversight arrangements that diverge from professional standards, and tension between the views of dispute resolution professionals and those responsible for managing the organization. This tension is natural. Management must run the organization for the benefit of shareholders, and ensure accountability in keeping with principles of corporate governance and best practices in management. The various sets of standards and codes developed within the field of conflict management on the other hand, are the product of much experience, research and debate. Each group is likely to use its own standards and expectations as a starting point.

The value of good-faith experimentation: Evolution and experimentation with respect to conflict management systems and roles has been quite common. Oversight procedures will change along with the underlying system. They may change for many other reasons as well—to accommodate the organization's culture, or changes in its structure, or in the operating environment, for example.[37] Well-managed organizations with comprehensive conflict management systems have experimented with alternative arrangements for virtually every mechanism, process or element of oversight described in Part II. They will continue to do so, and I believe such experimentation is essential to innovation and progress. Balancing the principles described in Part I can provide a starting point for good-faith experimentation, or lead to new ideas when proposed arrangements vary from professional standards or expectations.[38]

OVERSIGHT FOR THE SYSTEM AS A WHOLE

By approaching the topic as it would with any other management system, the organization can develop a practical framework for oversight. Taking this approach suggests that responsibility for the conflict management system as a whole should lie with the senior management of the company, with the board of directors providing oversight to senior management. Senior leadership can further strengthen oversight through a number of supporting mechanisms.

DIRECT MANAGEMENT BY THE CEO, WITH OVERSIGHT BY THE BOARD OF DIRECTORS

Direct management by the CEO: Under principles of corporate governance, the CEO, and the senior management team, under the CEO's direction, are responsible for operating and managing the company. They must conduct the business of the corporation effectively and ethically. This includes achieving the primary business objectives of the organization; implementing effective internal control systems and compliance and risk management programs; establishing a culture, standards and processes that promote ethical behavior; and providing for the fair treatment of employees. Principles of corporate governance also call for companies to establish mechanisms through which any employee can raise concerns regarding misconduct with senior management or the board.[39] Taken together, these obligations suggest that responsibility for oversight of the conflict management system *as a whole* rests with the CEO. If the conflict management system is an integrated, company-wide system, as defined in the introduction, this approach makes sense—see the preceding section on developing a flexible framework, and n.30. Recognizing the conflict management system as an internal control process, or as comparable to one, provides additional support for this approach—see the preceding discussion in the introduction to Part II.[40] The CEO can delegate her responsibility to one or more members of her management team, as she might with any other management system or key program, and those senior managers, may, in turn, assign responsibilities to others. The CEO or the designated manager would be responsible for evaluating, on behalf of the organization, the success of the program in achieving its goals, and whether the program was operating as intended. The CEO/designated manager also would be responsible for recommending any changes or adjustments in program policy, operations or funding, in consultation with senior management and those supervising individual options in the system. Management of the conflict management system should be included in evaluating the performance of the responsible manager or managers.[41]

In a comprehensive system, some of the individual options are designed to operate independently of the normal chain of command. Such options play a key role in supporting oversight of the system as a whole—one of the purposes of such arrangements is to ensure information from any employee or any level in the organization can be brought the attention of the most senior leadership in the organization. Hence the CEO, or a specifically designated senior line officer, should also have direct supervisory responsibility for those individual options designed to operate independently of the normal chain of command. The Ombudsman and the newly emerging Chief Ethics and Compliance Officer (CECO) role are two primary examples of such positions.[42]

Oversight by the board of directors: The board of directors is responsible for oversight of the management of the company's affairs, primarily through its oversight of the CEO and her senior management team. The board is also responsible for overseeing management's compliance with ethical and legal standards, and for overseeing the organization's risk

management process and the management of internal control processes. The company is charged with establishing mechanisms through which allegations of misconduct can be raised with senior management or the board. Based on these standards, the board's oversight responsibilities should include oversight of the CEO's performance in managing the conflict management system.[43] Given the board's responsibilities, and its responsibility to oversee compliance with legal and ethical standards in particular, the Ombudsman, and any other key specialists designed to operate independently of the chain of command, such as a Chief Ethics & Compliance Officer, should have access to the board on an as-needed basis. Conversely, the board should have access to such key specialists as necessary to fulfill its oversight responsibilities. I also believe boards ought to consider some process or mechanism for receiving regular report from roles such as the Ombudsman and/or the Chief Ethics & Compliance Officer, for the reasons described in the preceding paragraphs. Given current trends in corporate governance, and the continuing evolution of the board's role in ethics oversight, such practices may receive increasing consideration. Elsewhere, I have also suggested the idea of a brand new role to support the board in fulfilling its oversight responsibilities, the Board Ombudsman. This role would particularly helpful to the board with respect to problems involving the board or some of its members as parties, as well as with respect to ethics oversight, and with the board's responsibility to make sure channels are in place through which allegations of misconduct can be brought to the board.[44]

CENTRAL SUPPORT VIA KEY STAFF PROFESSIONALS

The organization can enhance oversight by strengthening communication, coordination and information-sharing with the system. One way to achieve this goal is by assigning to one or more key specialists a number of specific responsibilities designed to establish central support for the entire system.[45] Such responsibilities might include: serving as a liaison among the options, representing the program publicly, managing or providing conflict management skills training for employees, managing the evaluation program for the system as a whole, developing communication materials and programs and coordinating common activities.

The roles best suited to such responsibilities are those that: require the broadest range of conflict management skills, abilities and knowledge; operate independently of the normal chain of command, with access to the most senior leadership of the organization; involve the broadest set of working relationships throughout the company; lead to the most extensive knowledge of the problems, patterns and trends occurring in the organization; and include the responsibility to identify and raise systemic issues.

While the Ombudsman seems extremely well-qualified to serve as a central supporting resource, assuming such responsibilities may be inconsistent with professional standards. Those standards call for the Ombudsman to avoid responsibilities that might conflict with the independence or neutrality of the role.[46] In addition, the Ombudsman's time for additional responsibilities such as these may be quite limited, given the day-to-day demands of the role. Assisting with such responsibilities indirectly, as a member of a Systems Support Committee—see below—is something the Ombudsman could probably square with best practice standards, though it might be best if he or she participated on an ex-officio or a periodic basis.[47] The Chief Ethics & Compliance Officer role (CECO) also embodies many of the characteristics desirable in a central supporting resource. Some of the responsibilities of the role, such as training and ethics program evaluation, complement the proposed duties of a central reporting resource. In addition, under proposed best practice standards for the role, the CECO is also likely to have the funding and staffing to support such responsibilities. Other responsibilities of the CECO, such as investigating misconduct and auditing and monitoring ethics and compliance programs, may make the role less suitable for other central supporting resource responsibilities.[48] As with the Ombudsman, however, the duties of the job may not leave the CECO with the time to serve as a sole central supporting resource.

If the organization has a Program Manager for the conflict management system, that role should almost by definition serve as the central supporting resource. The key focus of such a role is on the very responsibilities described above. Few organizations, however, have created this role. Organizations debating how to create central supporting resources without adding new positions might consider establishing the Program Manager role informally, by assigning the responsibilities of a Program Manager to an existing

role. Creating this position informally could also offer a very practical, useful solution for providing oversight to several individual options that do not fit neatly under any office or role. See Figure 1, and the discussion in the next section regarding oversight of individual options. In the absence of a Program Manager two or more roles could split or share central support responsibilities, as appropriate.

SUPPORT AND OVERSIGHT VIA COMMITTEE

The best possible check on the system as a whole is to make sure that the data collected and reported in the individual options are shared throughout the organization, and used to improve the performance of the system, and of the individual components or functions within it. One approach used by some organizations is to provide such oversight through a Systems Support Committee.[49] The committee should be composed of senior line and staff functions, including compliance functions, and the Ombudsman. See the discussion above and n.47, however—the ombudsman should participate in a way that will not create the impression that he or she is performing a management role. The senior officer responsible for oversight of the system as a whole should certainly be a member of the committee. Such committees might meet regularly to review reports generated through the data collection and reporting program, as described later in this article, as well as any ad hoc or special reports, and to exchange information among committee members, for the purpose of identifying trends, warning signs and useful lessons for the entire organization.

While such a committee typically serves in an advisory rather than a decision-making capacity, its review of available data can lead to organizational changes in two key ways. First, the committee can offer advisory recommendations to organizational leadership. Suppose for example the committee identifies a company-wide confusion regarding benefits. The committee could recommend that the organization's leadership develop a new communication plan to resolve the confusion. Second, any individual committee member could take direct action with respect to a problem or concern related directly to his or her primary responsibilities. For example, based on the data reported, the Senior Vice President for Human Resources could conclude that the existing diversity training program needs to be increased, in intensity

and scope. He could act on that conclusion in his individual capacity as the Senior Vice President for Human Resources. Finally, the sharing of information among committee members, and, in turn, with the organization as a whole, is an incredibly powerful check on the operations of each option within the system.

SUPPORT VIA INDEPENDENT EVALUATION

An organization can also support its system by making appropriate use of independent evaluators. By independent evaluators, I mean independent professionals with expertise and experience to assist the organization in evaluating the performance and/or the operations of the system. The organization might ask an independent evaluator to assess a single, particular question, or to conduct an independent review of the entire program. An independent evaluator can assist the organization in assessing whether its goals for the system are being met, and can be especially helpful in: establishing the credibility of a new program; addressing especially sensitive issues, or issues which are the subject of disagreement within the organization; providing expertise with respect to particular roles or functions within the system, or with respect to the design, implementation or evaluation of the system; or in offering new or different perspectives to supplement the views of those normally responsible for reviewing the performance of the system. Some companies we worked with in the 1990s began with questions such as these; some sought an independent evaluation once the comprehensive system was in place.[50]

SUPPORT VIA EXTERNAL RELATIONSHIPS

The organization can also benefit from using external resources to identify problems and trends that might affect its system. For example, through meetings with regulatory agencies, the organization can gather information about problems, trends or emerging concerns that might affect the operations of its entire system. An organization can reap similar benefits by participating in professional associations and conferences related to corporate governance, management and conflict management. By building external relationships, and using those relationships to identify information of value or concern to the system, the organization establishes another check against the operations of its system. To develop external relationships as a source of information for

oversight, the organization must assign responsibility for developing those relationships to specific roles.

Figure 1 depicts how reporting relationships and key oversight responsibilities might look in a comprehensive system, based on the approach described in this Chapter. The system shown in Figure 1 includes a Program Manager, a role which might not exist in many organizations, or which might only exist informally—see the discussion in this section, and in the next section on oversight for individual options. Since Figure 1 presents a hypothetical comprehensive system, the chart also includes an Ombudsman and a Chief Ethics and Compliance Officer (CECO). As the

discussion in the next section regarding oversight for individual options also notes, any of these three roles— Program Manager, Ombudsman and Chief Ethics & Compliance Officer—might have a reporting relationship different from the one depicted. Some of the options included in the hypothetical system are listed under more than one role in Figure 1, to illustrate alternatives for supervision one might see from organization to organization.

Table 4 depicts oversight and direct supervisory responsibilities for individual functions and positions within the system, by role. Table 5 describes oversight and support roles for the system as a whole.

TABLE 3:
Oversight for the System as a Whole

1. Is the CEO or a member of the senior management team responsible for oversight of the system as a whole?

2. Do roles in the system designed to operate independently of the normal line of supervision, such as the Ombudsman and the Chief Ethics & Compliance Officer, report to a senior line officer?

3. Do roles such as the Ombudsman and the Chief Ethics & Compliance Officer have access to the board on an as-needed basis?

4. Do the responsibilities of the board of directors clearly include:
   • Oversight of compliance with legal and ethical standards; and
   • Oversight of risk management and internal control systems?

5. Does the board or a board committee have access to roles such as the Ombudsman and the Chief Ethics & Compliance Officer on an as-needed basis?

6. Has the board considered receiving reports or briefings from key independent channels, such as the Ombudsman and the Chief Ethics & Compliance Officer?

7. Are the specific responsibilities of key staff professionals to serve as central supporting resources for the system clearly established?

8. Has the organization established a Systems Support Committee to share information, provide feedback and improve the functioning of the system?

9. Does the organization have policies for appropriate use of independent evaluation?

10. Does the organization specifically assign responsibilities, by role, for developing external relationships as a source of information for oversight?

TABLE 4:
Direct Supervisory Responsibilities for Functions and Positions, by Role

ROLE	REPORTING RELATIONSHIP	OVERSIGHT RESPONSIBILITIES	EVALUATED BY	COMMENTS
Board	Shareholders	• CEO & Senior Management • Management of company affairs • Compliance with legal and ethical standards • Risk Management • Internal control systems	• Self-evaluation • Shareholders	• Principles of corporate governance require employee access to board regarding allegations of misconduct • Oversight of CEO includes oversight of CEO's performance in managing conflict management system
CEO	Board	• System as a whole • Ombudsman • Chief Ethics & Compliance Officer • Line of supervision responsibilities associated with role	Board	• Oversight responsibilities may be delegated to senior officers • Responsibility to establish mechanism for raising allegations of misconduct with senior management or the board
COO/Senior Line Officers	CEO	• As delegated by CEO —see above • Line of supervision responsibilities associated with role	CEO	
Sr. VP, Human Resources	CEO	• Program Manager? • Compliance Options? • Internal Mediation? • Internal Justice Mechanisms? • External Options?	CEO	• Responsibilities may be shared with General Counsel and/or other compliance officers.
Sr. VP & General Counsel	CEO	• Program Manager? • Compliance Options? • Internal Mediation? • Internal Justice Mechanisms? • External Options?	CEO	• May share responsibilities for oversight of compliance options
Chief Ethics & Compliance Officer	CEO	• Ethics/Compliance Programs • Internal Mediation? • Internal Justice Mechanisms? • External Options?	CEO	• Newly emerging role • Some responsibilities of a central supporting resource?
Ombudsman	CEO	• Office of the Ombudsman	CEO	• Any other responsibilities should be consistent with IOA standards. • Provides feedback/informal consultation re: system as a whole via Systems Support Committee on ex-officio/periodic basis?
Systems Support Committee	CEO	• Exchange of information • Advisory recommendations	• Self-evaluation? • CEO/Senior Management • General Counsel? • Senior VP, HR?	• May make advisory recommendations to CEO/Senior Management • Committee members may take action in their individual capacities
Program Manager	• General Counsel? • Senior VP, HR?	• Central Support • Internal Mediation? • Internal Justice Mechanisms? • External Options?	Line of supervision	• An excellent central supporting resource, if the role exists. • Can the role be created informally?
Line/Staff Managers	Line of supervision	• Line of supervision responsibilities associated with role • Management role in traditional/ compliance options as specified in policies, procedures, job descriptions		

TABLE 5:
Oversight and Support Roles for the System as a Whole

ROLE	OVERSIGHT RESPONSIBILITIES	COMMENTS
Board of Directors	• Oversee management's compliance with legal and ethical standards • Oversee risk management • Oversee management of internal control systems • Oversee performance of CEO, including: management of conflict management system; demonstration of skills to fulfill responsibilities related to that system • Self-Assess board performance • Serve as liaison to corporate governance associations regarding board's role and responsibilities	• Roles and responsibilities of board are increasing with respect to ethics oversight • Some responsibilities may be assigned to board committees
CEO/Senior Management Team	• Supervise all management systems and internal control systems, including conflict management system • Supervise key roles, such as Ombudsman, Chief Ethics & Compliance Officer • Serve as liaison to relevant professional associations	• CEO may delegate oversight responsibilities • CEO/Senior *line of*ficer should supervise key independent roles **Based on responsibilities for:** • Operating company effectively • Implementing internal control systems, compliance and risk management programs • Standards, processes and codes to promote ethical behavior • Mechanisms for raising allegations of misconduct with senior management or the board
Senior Compliance Roles: • General Counsel • Senior VP, HR • Chief Ethics & Compliance Officer	• Ensure organizational compliance with legal and ethical standards, organizational policies. • Code of Conduct/Code of Ethics programs • Oversee or support options in the system for official review/appeal/investigation. • Serve as liaison to relevant professional associations, regulatory and legislative entities • Manage evaluation program?	See discussion re: oversight for individual options
• Program Manager? • Ombudsman? • Chief Ethics & Compliance Officer? • General Counsel? • Sr. VP, HR?	**Central supporting responsibilities for the system, including:** • Advocate for systemic change • Identify patterns and trends • Act as liaison among the options • Provide skills training to support the system • Develop program communication materials • Manage evaluation program? • Act as liaison to dispute resolution associations	• Program Manager a natural central supporting resource, if the role exists • Can the Program Manager role be created on an informal basis? • Ombudsman should only assume supporting responsibilities consistent with best practice standards • Consider practical demands of primary role in assigning responsibilities • Sharing/splitting these duties an option
Systems Support Committee	• Facilitate the exchange of information within the system. • Offer advisory recommendations to senior management. • Facilitate collaboration within system	• No direct management authority • Committee members may take action in their individual capacities
Independent Evaluators	• Assist organization in evaluating the system and/or roles. • Assist organization in addressing sensitive or contentious issues.	• Used on an as-needed basis. • An external check on the system • Can enhance credibility with users and with outside world

FIGURE 1:
Oversight Reporting Relationships and Responsibilities
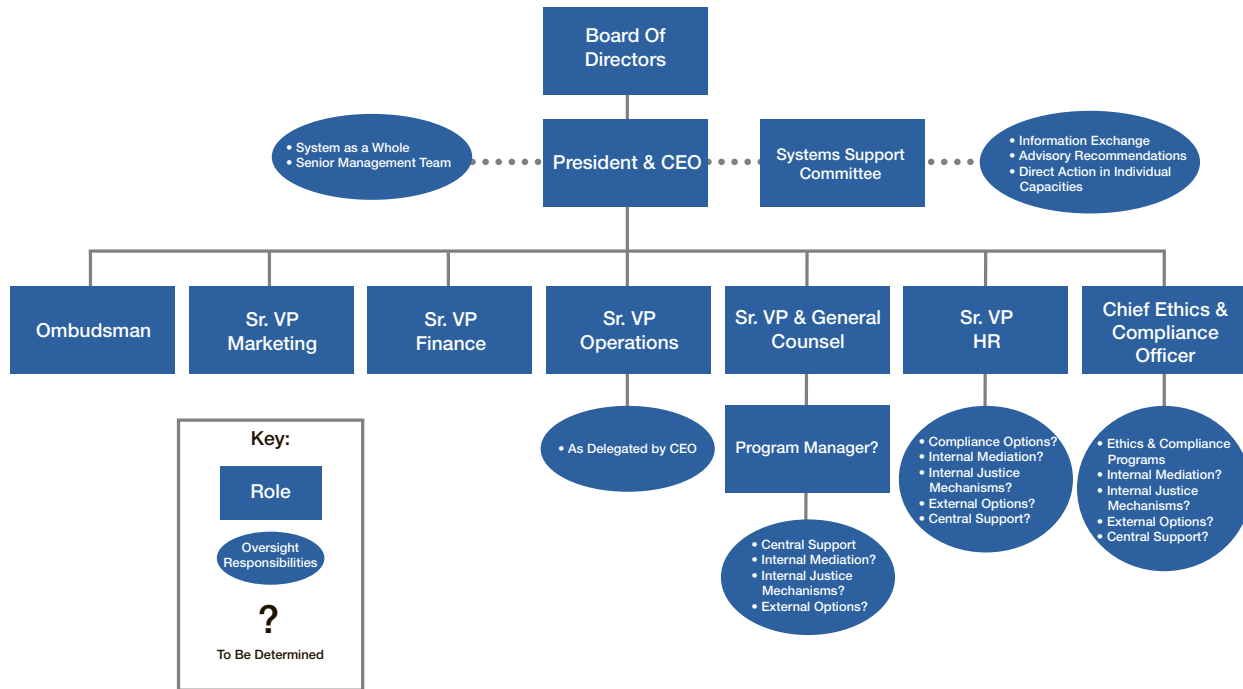
OVERSIGHT FOR INDIVIDUAL OPTIONS

BACKGROUND

Reporting relationships provide the foundation for oversight of the individual options in the conflict management system. They do so by ensuring the accountability of each option in the system, and of those who staff each option, to a specifically designated supervising function or role.[51] The same approach applies to oversight of individual employees—see the section on accountability and oversight for individual employees. By options I mean mechanisms or process for resolving conflicts, offered through established programs or offices. To simplify the discussion, I have placed options with similar characteristics into combined categories. For each category, I will discuss the key characteristics or features of the roles in question, alternative reporting arrangements, and comments regarding key points.

TRADITIONAL OPTIONS AND COMPLIANCE OPTIONS

Key Features/Characteristics: Traditional options are designed to allow those closest to the problem to resolve it among themselves, with support from the line of authority. Such support is often provided through a series of hierarchical steps beginning within the office, department or business unit in question. Compliance options are designed to allow parties to seek assistance regarding the interpretation or application of official company policy, or compliance with a company's legal obligations or ethical standards, through authorized organizational channels, such a human resources department, an equal employment opportunity office, or a corporate security office. Well-designed traditional and compliance options encourage efforts to resolve problems through collaborative means, such as direct talk and informal mediation, whenever possible and appropriate, but also allow for resolving problems through decisions via the line of supervision, or through investigation and decision.

TABLE 6:
Reporting Alternatives for Traditional and Compliance Options

ALTERNATIVES	+	—	COMMENTS
Line of Supervision + HR	Encourages resolution by those closest to the problem.	Parties providing assistance likely to have a stake in the outcome.	Review/appeal via other options in the system may support oversight

Traditional and compliance options are not designed to offer high levels of confidentiality to the parties. While those involved in solving the problem may attempt to hold the matter in confidence, information will be sought and shared as needed to resolve the problem. It is also quite likely that the person whose assistance is requested will have some stake in the outcome—his or her assistance will not be neutral.

One example of a traditional option as defined here would be an Open Door Policy. As I have seen organizations use the term, an Open Door Policy encourages an employee to raise or address any workplace concern or complaint with the parties most directly involved in the problem, with assistance available through the line of supervision, or from the human resources department (HR). The employee may skip levels in the line of supervision to seek assistance, and may proceed to the most senior levels if necessary.[52] Examples of compliance options might include appealing a disciplinary decision or requesting a formal investigation of perceived misconduct through HR, or seeking assistance from an Equal Employment Opportunity Office regarding a complaint of discrimination, or from the company's security staff regarding specific kinds of employee misconduct.

Reporting Arrangements: For traditional and compliance options, supervision and oversight occurs through the line of supervision. Each level of management provides direction and supervision to those within its designated span of control. Broader oversight and appeal occurs through successively higher levels of management, as specified by the organization. Review or appeal may also occur through other options in the system.

Comments: The very definitions of such options specify that oversight will occur through the line of supervision, perhaps with support from staff functions. Options such as these can encourage direct talk and resolution among those closest to the problem, particularly if all of the other elements of a comprehensive system as described in the introduction are present. The opportunity to seek review or appeal through other options in the system can not only broaden oversight, but also increase accountability.

THE OMBUDSMAN

Key Features/Characteristics: For an Organizational Ombudsman, operating under the Code of Ethics and Standards of Practice of The International Ombudsman Association (IOA), four characteristics—confidentiality, neutrality, independence and informality—are central to the role.[53] The Ombudsman offers an exceptionally high level of confidentiality to all parties, protecting the confidentiality of communications with the office, and resisting requests or formal demands for testimony or information in any formal proceeding, internal or external. An Organizational Ombudsman operates independently from the normal chain of command. Independence helps the Ombudsman to resist pressure. It also helps the Ombudsman to preserve confidences, to raise even the most difficult of issues with any person in the organization, and to act as an advocate for systemic change. The Ombudsman also operates as a designated neutral—he or she does not represent the organization, or any individual employee.[54] The Ombudsman provides a wide variety of informal types of assistance, such as listening, coaching, shuttle

TABLE 7:
Reporting Alternatives for the Ombudsman

ALTERNATIVES	+	—	COMMENTS
• CEO/COO • Systems Support Committee informs oversight re: *Office* of the Ombudsman via *advisory* oversight of system as a whole • Ombudsman access to board on an as-needed basis	• Fits key characteristics of role. • Meets professional standards.	• Requires serious commitment from senior leadership.	• Best structural approach to protect key characteristics of the role. • Accepted as best practice by the profession • Excellent approach for meeting corporate governance requirements — a channel through which any employee can raise allegations with senior management or the board anonymously, or in confidence • Ombudsman-Board communication should be two-way: Does the board have access to the ombudsman on an as-needed basis? • Consider a process for regular reports to the board?

diplomacy and informal mediation. The Ombudsman also links or refers parties to other options, and acts as an agent for change when he spots trends or recurring problems that require systemic solutions. The Ombudsman describes and offers the available forms of assistance to any party who contacts the office for help. An Ombudsman operating under IOA guidelines does not conduct formal investigations, and does not have authority to make decisions on behalf of the organization.

Reporting Arrangements: For an Organizational Ombudsman, the approach established under IOA guidelines, specifying that the Ombudsman report to a senior line officer, with access to the board of directors on an as-needed basis, offers the best model. Given the key characteristics of the role, such a reporting relationship addresses many problems likely to arise with other arrangements. This approach is also very helpful in complying with principles of corporate governance, by institutionalizing a mechanism through which any employee can raise concerns with senior management or the board.

The Systems Support Committee may play an *informal* role in *supporting* oversight of the Ombudsman. Its

review of available data and reports, including comprehensive summary reports regarding the operations of the system as a whole, and the exchange of information among committee members, can provide perspective on the performance of the *Office* of the Ombudsman in relation to the system as a whole. The perspective of the committee can in turn be a source of insight for the supervising officer, and can inform oversight. See the sections on oversight for the system as a whole, data collection and reporting and special considerations for key staff professionals.

Comments: The role of the Ombudsman is like no other. The degree of independence and autonomy with which the ombudsman operates is exceptional; no other role offers such a high degree of confidentiality in providing services, or claims the status of a designated neutral. What other role can claim not to be agent of the organization, at least for purposes of putting the organization on notice, while receiving communications about problems in the workplace, and maintaining the status of an employee? The operating procedures followed by the Ombudsman to protect the key features of the role only reinforce its distinct status. As a result, the decision about whether

or not to create the role can be a source of great controversy and conflict. If the role is created, conversations about how to provide supervision and oversight may also prove quite contentious. Organizations worry about how to ensure accountability—see the section on special considerations for key staff professionals. Line or staff officers may be concerned about creating what they see as another level of bureaucracy. The mere discussion of the role can launch turf wars when one or more offices see the Ombudsman as duplicating services already provided, or when one office sees the role as a plus, while another does not. The nature of the role runs so contrary to the training and experience of many Human Resources and Employee Relations professionals that the reporting relationship recommended under professional standards may be difficult to accept. As a result, organizations may encounter fierce internal debates or pressure from some quarter regarding the form and nature of oversight for the Ombudsman. Alternatively, they may find themselves engaging in such a debate later, after the office is in place.

In my experience, it is not at all uncommon for organizations to consider and/or implement reporting relationships for the Ombudsman that vary from professional standards. Similar variations seem to be occurring with the newly emerging role of the Chief Ethics & Compliance Officer.[55] I have seen organizations develop reporting arrangements for the Ombudsman that are quite innovative, including features that have the potential, if structured properly, to support independence and neutrality. An example would be splitting supervision and funding—placing responsibility for direct supervision and performance assessment, with Office A, while providing funding through Office B; and using the Systems Support Committee as a resource for informing oversight. Through its advisory oversight of the system as a whole, the system support committee can provide insight into the performance of the Office of the Ombudsman. At the same time, splitting or sharing oversight responsibilities for any role can increase the complexity of oversight, and create new potential sources of conflict. I believe the organization should avoid any oversight arrangement that conflicts directly with professional standards. One example of this would be placing the Ombudsman under the direct supervision of a single senior compliance officer. Such arrangements create many potential problems for the organization as well as the Ombudsman.

An organization considering alternative reporting relationships for the Ombudsman might start with the principles described in Chapter 1, and consider four questions in assessing the proposed arrangement. Does the approach in question: a) Interfere with the key characteristics of the Ombudsman role? b) Increase the risk that the courts will not honor the Ombudsman's assertion of a privilege/immunity? c) Establish specific responsibility for direct supervision and oversight? d) Decrease acceptance/support by the workforce or within the profession? Conversely, a dispute resolution professional advising the organization, or staffing a role in the system, and concerned about a proposed oversight structure, might start with the principles in Chapter 1, and consider the needs and interests of the organization alongside professional standards. The critical challenge is to respect organizational needs and preferences while protecting the key characteristics of the role.

INTERNAL AND EXTERNAL MEDIATION PROGRAMS

Internal Mediation Functions: An internal mediation program is designed to allow the parties to an individual dispute to resolve their differences in confidence, by mutual agreement, through the services of an employee acting as a neutral third party, and operating independently of the line of supervision. Some organizations with comprehensive systems do not have a separate, formal, internal mediation option. Some organizations provide informal mediation internally through the Ombudsman. Oversight for the Ombudsman should occur through a reporting relationship with senior management, as described earlier in this section, with attention to the special considerations for key staff professionals described in the last section of this article. Some organizations train their Human Resource Managers and/or line managers to use mediation skills as a tool for problem-solving and conflict management in their daily work. This is a very powerful but even more informal application, which is a key element in a providing a comprehensive approach to conflict management. Oversight for the very informal use of mediation skills by line managers and HR professionals occurs through the normal line of supervision, as described in the section regarding accountability and oversight of individual employees. A few organizations have provided internal mediation programs through a pool of trained employees, who

voluntarily serve as mediators on a case-by-case basis, and the discussion below applies only to such formally structured programs for internal mediation.[56]

External Mediation Programs: By external mediation programs, I mean resources designed to allow the parties to an individual dispute to resolve their differences by mutual agreement, offered through an independent provider of professional dispute resolution services. For example, an organization might contract with a local firm providing mediation services, or with an association or company providing such services on a regional or national basis. Typically, the provider will offer its services through a pool of highly trained and carefully selected professionals, who ascribe to standards of practice and ethics set by one or more professional associations. The provider will ordinarily be responsible for the logistical and administrative support associated with its services, including meeting facilities and administrative support for its neutrals and for dispute resolution proceedings. Such support requirements can be extensive. The provider will also be responsible for managing and evaluating the performance of its neutrals and it services.

Key Features/Characteristics: Whether an organization is developing oversight alternatives for an internal mediation function on the one hand, or for an external mediation option, on the other, the same two sets of tasks must be monitored: One set consists of providing administrative and logistical support for the users or consumers of the services in question—the parties to the mediations. Providing administrative and logistical support might include, for example: administering any associated employee benefits on behalf of the users; collecting and reporting data; recording and maintaining any necessary records, including formal agreements and decisions; and providing physical resources, such as appropriate meeting facilities, evaluation forms and the like. The other set of tasks involves ensuring that the company or the vendor providing the services, as well as the mediators, meet professional and organizational standards for performance.

Another way to approach this question would be to think of the skill sets necessary to provide oversight, and, again, one might think of two sets of qualifications: the skills necessary to oversee the management and delivery of a complex set of services; and the skills necessary to evaluate the performance of the neutrals, as well as the performance of the options

they staff. Oversight of an internal mediation function or of an external mediation option can also require a significant commitment of staff time.

REPORTING ARRANGEMENTS

Oversight by a Program Manager: The role of Program Manager, if it exits, is a natural candidate for the oversight of mediation options. Some organizations have created such roles to manage the company's internal conflict management program, including such responsibilities as: supervising options that do not fit neatly into other reporting relationships—mediation and/or arbitration services would be perfect examples; overseeing administrative and logistical services for the program; and providing support and coordination for the system as a whole. Such roles offer the distinct advantage of providing a dedicated resource for oversight.

The role is not widely-established at present, and, as a result, it will not be readily available as an alternative. In addition, companies may not be quick to add a new, distinct position, particularly if the duties may overlap with other existing roles or may be split among them. The essence of the role may begin to show up less formally, without a separate title and position—for example, as a set of duties assigned, alongside other responsibilities, to a staff professional already serving in the Office of General Counsel or in a compliance role. As discussed in the section on oversight for the system as a whole, organizations wondering how to provide oversight to options such as a mediation program might consider establishing an informal version of the Program Manager role, even if the idea of creating and funding a new formally-designated position is not appealing. See Table 8. An informal program manager role could also provide oversight to internal justice mechanisms and external higher authority options. See Table 9 and the discussion below. The mediation option may face some challenges with respect to employee perception if the Program Manager reports to a compliance office, but see the discussion immediately below.

Oversight by a compliance officer: Senior compliance roles offer one possible choice for oversight of mediation options, since such roles are designed to address or to solve problems or disputes related to official corporate policies, ethical standards and legal requirements. Moreover, each of these functions is likely to have staff professionals with many of the

necessary qualifications for oversight, and the resources to commit staff time to the task. One concern I heard expressed repeatedly, from a variety of quarters, was the fear that providing oversight for such options via a compliance function could have a negative impact on employee perceptions of independence and impartiality, reducing the attractiveness of these alternatives.

The pluses and minuses of this arrangement represent a trade-off, and oversight by a compliance officer may, in the end, be a very practical choice. If those using or involved with the mediation option perceive it as offering high quality neutral and independent dispute resolution services, word will travel quickly. The reverse is true as well.

Informal Support for Oversight: The Systems Support Committee may play an *informal* role in *supporting* oversight of internal and/or external mediation options. For example: a primary supervising officer, such as a program manager or compliance officer, has direct responsibility for supervision and oversight of the internal/external mediation options. This might

TABLE 8:
Reporting Alternatives for Internal and External Mediation Programs

ALTERNATIVES	+	—	COMMENTS
• Program Manager	• Dedicated resource for oversight	• Few organizations have established this role.	• A natural choice, if the role exists • Does this role exist *informally*, or can it be established on an informal basis?

• Senior Compliance Officers
  • General Counsel
  • Senior VP, HR
  • Chief Ethics & Compliance Officer
	• Excellent resource for *administrative* over-sight—managing relationships and funding, logistical arrangements, data collection and reporting, recording and maintaining any formal agreements	• Employee perceptions re: independence and neutrality?	• May be a practical choice in many organizations
			
			• Consistent delivery of high-quality mediation services may overcome potential employee concerns

Informal Support for Oversight: • Senior Compliance Officer-direct oversight responsibility • Systems Support Committee-feedback/informal consultation regarding the performance of neutrals and the overall quality of the program/service provider	• Oversight responsibilities tailored to the strengths of each role • More positive employee perception regarding independence and neutrality?	• Does the arrangement increases complexity and/or decrease efficiency of oversight?	

include managing relationships, (including service agreements and funding with the external providers), overseeing logistical arrangements, as well as data collection and reporting, and the recording and maintenance of any formal agreements or decisions that result from the internal mediation or the external options. Through its information exchange and data analysis and reporting, the Systems Support Committee might provide feedback, advice and informal consultation regarding the performance of the mediators, as well as the overall quality of services delivered by internal or external mediation programs. Such an approach might reduce the burden on the primary supervisor, while maintaining accountability via assignment of direct responsibility for oversight to a specific role.

Comments: Internal and external mediation programs do not fit neatly under anyone's umbrella, and there is no clear choice for oversight responsibility. Establishing the Program Manager role informally, by assigning the responsibilities of a Program Manager to an existing role, might offer an efficient, low-cost way to provide oversight. Almost any arrangement imaginable can raise questions regarding the independence and neutrality of the mediation option. On the other hand, if those using or involved with the mediation option perceive it as offering high quality, neutral and independent dispute resolution services, reservations regarding the oversight arrangements may fade quickly.

Placing mediation programs under the sole supervision of the Ombudsman would clash with professional standards, and is not an acceptable alternative. Similarly, placing an internal mediation function directly under the supervision of a senior line officer is not likely to be practical or efficient. The officer in question is not likely to have the resources, the time, or the training to oversee a pool of mediators, and oversight would be likely to suffer.

INTERNAL JUSTICE MECHANISMS AND EXTERNAL HIGHER AUTHORITY OPTIONS

Internal Justice Mechanisms: By internal justice mechanisms, I mean extraordinary processes designed to offer an impartial and independent mechanism for appealing organizational findings or decisions. I use the word extraordinary because I am specifically referring to processes that involve review by a panel of individuals, rather than a review by single individual representing successive levels in the line of authority. The word extraordinary also reflects the fact that such processes typically involve far more extensive formal proceedings than traditional internal options, operate independently of the normal chain of command, and require substantial logistical and administrative support.[57] Internal justice mechanisms exist in a dizzying number of forms: some make only findings of fact, while others review managerial decisions; some are available only to review disciplinary decisions, while others are open to a broader range of issues; some are advisory in nature, while others may reverse or modify organizational decisions or findings of fact that underlie such decisions; some involve panels of executives, others rely on peers of the appealing party, while others still involve a mix of executives and peers.

External Higher Authority Options: By external higher authority options, I mean processes designed to offer an impartial and independent mechanism for reviewing or appealing organizational findings or decisions, offered through an independent provider of professional dispute resolution services. Like internal justice mechanisms, external higher authority options also exist in a wide array of forms: they may be advisory in nature, or binding on one or both parties; they may be conducted by a single highly trained professional, or by a panel of highly trained professionals, and may include simulated review by a jury. The relationship between internal justice mechanism and external higher authority options is parallel to the relationship between internal mediation functions and external mediation options. As with external mediation options, an organization might contract with a local firm providing arbitration and/or other higher authority dispute resolution services, or with an association or company providing such services on a regional or national basis. In many cases, external service providers will provide both mediation and higher authority dispute resolution services. Typically, the provider will offer its services through a pool of highly trained and carefully selected professionals, who ascribe to standards of practice and ethics set by one or more professional associations. The provider will ordinarily be responsible for the logistical and administrative support associated with its services, including meeting facilities and administrative support for its neutrals and for dispute resolution proceedings. Such support requirements can be extensive. The provider will also be responsible for managing and evaluating the performance of its neutrals and it services.

TABLE 9:
Reporting Alternatives for Internal Justice Mechanisms and External Higher Authority Options

ALTERNATIVES	+	—	COMMENTS
Program Manager	• Dedicated resource for oversight.	• Few organizations have established this role	• An excellent choice, if the role exists. • Does this role exist *informally*, or can it be established on an informal basis?
Senior Compliance Officer	• Skill sets and training consistent with key characteristics of such options • Excellent resource for *administrative* oversight—managing relationships and funding, logistical arrangements, data collection and reporting, recording and maintaining any formal agreements	• Employee perceptions re: independence and impartiality?	• May be a practical choice in many organizations • Consistent delivery of high-quality services may overcome potential employee concerns
Informal Support for Oversight: • Senior Compliance Officer: direct oversight responsibility • System Support Committee: feedback/ informal consultation regarding the performance of neutrals and the overall quality of the program/service provider	• Oversight responsibilities tailored to the strengths of each role · Positive employee perception regarding independence and impartiality of oversight?	• Does the arrangement increases complexity and/or decrease efficiency of oversight?	

Key Features/Characteristics: Internal justice mechanisms and external higher authority options do share a number of common characteristics or features: they are designed, as the name suggests to offer justice—an internal organizational alternative or an external private alternative to the courts; if well-designed and administered, they can be very attractive to that small portion of the workforce that prefers formal procedures and decisions, as opposed to informal, collaborative methods; the external processes have the added feature of appealing to those who want a formal decision, but who trust no one in the organization, or who prefer an outside review for other reasons.[58] As noted above, they require very substantial logistical and administrative support; and, in the event of subsequent litigation, the existence and quality of such a mechanism, and its findings or decisions, can be a powerful source of information and/or influence for the judge or jury—one side or the other may seek to introduce the existence of the process, and its findings or rulings, into the litigation.

As with mediation options, two sets of tasks must be monitored: One set consists of providing administrative and logistical support for the users or consumers of the services in question—the parties to the mediations or arbitrations. Providing administrative and logistical support might include, for example: administering any associated employee benefits on behalf of the users; collecting and reporting data; recording and maintaining any necessary records, including formal agreements and decisions; and providing physical resources, such as appropriate meeting facilities. The other set of tasks involves ensuring that the office or the vendor providing the services in question, as well as the individual neutrals—arbitrators, for example—meet professional and organizational standards for performance.

Reporting Arrangements/Comments: The alternatives for oversight of internal justice and external higher authority options are virtually identical to those for internal and external mediation programs. The considerations and trade-offs among those alternatives, and the pluses and minuses of each, are almost identical as well.

DATA COLLECTION AND REPORTING

By data collection and reporting programs, I mean comprehensive programs for collecting, analyzing and reporting data, or evaluation programs.[59] Such programs can provide information and analyses critical to ensuring the accountability of each option within the system, of the system as a whole, and of the professionals who staff the program. Evaluation programs also enable the organization to continue improving the functioning of the system, as well as its success in achieving its goals. Ensuring accountability and continuing to improve performance, are, in turn, important in encouraging use of the system.

In *Controlling The Costs Of Conflict*, Karl Slaikeu and I suggested a comprehensive approach for evaluating conflict management systems, one designed to provide organizations with a model for using data collection and reporting programs as a tool for management and oversight. I will use elements of our model to discuss the link between an evaluation program and oversight of the system. The question of how to collect and report data for purposes of program oversight is one of great interest to researchers and practitioners, alike.[60] I hope the suggestions that follow will encourage further discussion.

DEVELOPING PROGRAMS THAT WORK

Data collection and reporting programs are likely to be under-utilized, resisted, sabotaged, or ignored altogether unless they are structured to work well for the organization as a whole, and for those who must collect and report the data. In other words, data collection and reporting programs must *be useful, efficient and realistic.*

By ***useful***, I mean that the evaluation program must be consistent with the values, mission and goals of the organization as a whole, and with the goals that the organization has for the conflict management system itself.[61] Suppose, for example, one of the reasons the organization established the conflict management system was to enhance its reputation as a wonderful place to work, or to reduce reliance on formal grievance procedures. The evaluation program should help the organization to assess the role of the system in achieving such goals.

By **efficient**, I mean that the data collection and reporting program should not get in the way of the organization's core mission or business-at least not any more than necessary to gather and report useful information. It is often very hard to collect data regarding traditional options, such as an Open Door Policy, or even regarding compliance options such as human resources or employee relations, beyond the most basic information, because of the press of everyday business. For example, data collection often breaks down at the business unit level, because the data collection procedures seem too onerous to the manager focused on the producing goods or services. Similarly, the mere mention of generating and delivering reports can trigger immediate resistance. Data collection and reporting procedures must be designed in a way that respects the other obligations and responsibilities of all parties to the process.

By **realistic**, I mean that the data collection and reporting program should fit with the characteristics of the particular organization and its industry, and with the organization's operating procedures and structures. If the organization has a busy season for production, for example, the busy season would probably not be a good time for an annual report. Similarly, data collection and reporting procedures may be very different for an organization operating from one central location, as opposed to an organization with highly independent business units operating in three states. Finally, to make data collection and reporting procedures useful, efficient and realistic, the evaluation program must be designed with input from all interested parties.[62]

In my experience, organizations are unlikely to implement a program that includes all of the elements set out below. On the other hand, an organization might be willing to draw on the elements described here, customizing them with input from all interested parties, to develop an evaluation program that is useful, efficient and realistic. The challenge is to help the organization develop a well-designed data collection and reporting program, based on solid approaches to program evaluation that meets its needs. The goal is a program that provides useful information and analysis *and* a program that the organization will implement and execute. Such programs can be a powerful tool for informing oversight, even if less comprehensive in scope than possible

DATA COLLECTION

If the evaluation program is to be useful in providing oversight for each individual option, and for the system as a whole, data should be collected from each option and from the workforce as a whole.

For example, imagine a system with an Open Door Policy, a Human Resources function, an Ombudsman, a Chief Ethics & Compliance Officer, a Security Department and external mediation and arbitration. In an ideal world, the organization would collect data in each option, on an ongoing or regular basis. How might the organization collect data from each option?

Typically, each business unit or department will have its own Human Resources (HR) Manager. The HR manager in each department or unit would probably be responsible for collecting data regarding HR activities in relation to the system. Since the Open Door Policy usually proceeds through the chain of command in each business unit, the HR manager might also be designated to collect data regarding open door activities in his or her department. The Ombudsman would collect data regarding the operations of the Office of the Ombudsman. Similarly, a staff member of the Office of Ethics & Compliance would collect regarding its activities, and the same would be true for the Security Department. The role or function responsible for oversight of the external options should oversee data collection by the external providers, and analyze and report regarding those options. The organization should specify the data that it wants collected by the external providers of mediation and arbitration services. It should also provide, or assist in designing, or, at a minimum, review carefully, the data collection instruments and procedures to be used by the external providers.

Each specialist providing services within the system, for example, each HR manager, or each member of the ombuds staff, might track activity individual activity on each matter, using instruments designed for this purpose So, for example, HR managers for each business unit might be entering data concerning their activities in relation to the system using a software program, or otherwise tracking the information on an instrument designed for the purpose, and delivering it to a designated person for data entry. The HR managers might also be tracking Open Door activities for their respective business units/departments in the same way. Each option might be collecting and entering data in a similar fashion.

It is critical to note that highly confidential options, such as the office of the Ombudsman, in addition to collecting and entering data separately, will need separate databases, to protect the confidentiality of the limited information they maintain. At the same time, centralization of some aspects of the data collection process can increase the efficiency of the data collection process. Examples might include: centralization of data entry within each option; uniformity in coding categories regarding the types of problems or concerns raised through the system; the use of existing organizational codes in collecting data regarding such utilization variables as job code, business unit/department, and the like; and the development of uniform instruments or tools for collecting information.[63]

Data should also be collected from the workforce as a whole. This might be done through variety of mechanisms such as annual surveys, focus groups, or websites. In an annual survey, for example, which typically covers a variety of topics, the organization might ask two questions, one about knowledge of the conflict management system, and one about its effectiveness. The organization could also use focus groups and/or websites to allow employees to rate the effectiveness of the system, or of particular options or roles within it, in more detail.[64]

To offer a comprehensive approach to evaluating the conflict management system, data collection and reporting should cover processes and outcomes. [65] The key questions with respect to processes will be: Are the elements/components of a system in place? Are those elements operating as intended? To answer the two key questions regarding process, those evaluating the system will need to observe operations, interview specialists and review data and reports.

The key question with respect to outcomes will be: Is the system achieving its goals? In *Controlling The Costs Of Conflict*, we described four key outcome measures that an organization might collect in each option: utilization, expenses, resolution and satisfaction, and a number of variables that might be collected in relation to each of the four.[66]

The data collected regarding processes and outcomes should be analyzed and reported in keeping with evaluation program procedures, and used to guide oversight.

DATA ANALYSIS AND REPORTING

To inform oversight, the organization must develop effective procedures for analyzing and reporting the data it collects. This includes procedures through which data from each of the options and from the general workforce can be communicated to those responsible for the oversight of each option in the system, as well as to line and staff management throughout the organization, to the senior leadership and to the organization at large. It also includes clearly establishing which roles will be responsible for reporting in each option, and to whom the reports will be given. In addition, it includes establishing the timing, frequency, and format for reporting, as well as the analyses to be performed on the data collected and any standard reports that might be developed. Depending on the data collected, those responsible for evaluation may be able to provide a variety of customized reports as well. Regular reports should be supplemented with ad hoc reporting, as needed. [67]

To stay with the sample system we described at the beginning of this chapter, the HR manager in each business unit might be responsible for reporting to the line management of the business unit regarding activity related to the system occurring through the Open Door Policy and Human Resources. The same HR manager might also be responsible for reporting up the HR chain of command. The Ombudsman must have procedures for reporting to the senior line officer responsible for oversight of the ombuds function, as well as key line and staff management for each business unit, the senior management team, the Systems Support Committee and perhaps even the audit committee or the full board. Some, though not all of this, might be done using consolidated, comprehensive summary reports—see the discussion below. The same is true for other key staff professionals in our hypothetical system, such as the Chief Ethics & Compliance Officer, The Senior VP for HR, Security, the General Counsel and the roles or functions responsible for managing the external options.

Some specific person, or perhaps a small team, should have responsibility for preparing the analyses and reports to be used for oversight of the system as a whole, and for managing the data collection and reporting program. For example, some role or function must be responsible for developing reports for the Systems Support Committee, the CEO, and the

board of directors. Suppose, for example, that either a Program Manager or the Office of General Counsel has responsibility for overseeing the performance of the external options, in the hypothetical system we're described: The designated officer might also have lead responsibility, in consultation with the Ombudsman, Human Resources and the General Counsel, for putting together comprehensive summary reports for the Systems Support Committee, the CEO and the board.

As with data collection, effective reporting procedures often represent a sticking point in developing an effective evaluation program. The most difficult problems in developing acceptable, effective reporting procedures often occur at the business unit or division level. Line managers, in particular, already overwhelmed with operational responsibilities, are likely to resist a series of regular briefings with each of the key staff professionals in the system. To offer an example of how an organization might simplify reporting at the business unit level: Suppose the person responsible for managing the evaluation program develops comprehensive summary reports for the Systems Support Committee, the CEO and the board, as described above. The same reports could be used to brief the business unit managers. Such reports can be customized for use with each business unit. In sum, reporting procedures should be designed to be useful, efficient and realistic, as described at the beginning of this section. The reporting procedures should be kept as clear and as simple as possible, while fulfilling the primary goal of informing oversight. And those procedures should capitalize on comprehensive summary reports and regular reports to avoid duplication, while supplementing regular reporting with ad hoc reporting as necessary.

A caveat: Whatever the reporting procedures, and whatever the steps taken to streamline them, there simply is no substitute for regular contact between key staff professionals and line and staff managers. Regular meetings provide an important avenue through which key staff professionals, such as the Ombudsman and the Chief Ethics & Compliance Officer, can build relationships with managers throughout the organization. Building relationships throughout the organization is critical to the success of such specialists. It is also a task much harder to accomplish in the context of resolving individual problems or disputes.[68]

USE OF DATA COLLECTION AND REPORTING TO INFORM OVERSIGHT[69]

How does it look from the perspective of those responsible for providing oversight? The data collection and reporting procedures should provide them with information needed to fulfill their oversight responsibilities. To stay with the imaginary system described at the beginning of this section:

Those responsible for oversight of the individual options in the system should receive regular reports, or briefings, regarding the option in question. Line managers of business units or significant operating divisions should receive regular reports or briefings regarding use of the system in relation to their units, as well as concerning particular problems and patterns or trends that might be of interest to them. The Systems Support Committee should receive and review the comprehensive summary reports described in the preceding subsection, in anticipation of its regular meetings.

The CEO, or the senior line officer designated to oversee the system as a whole, could receive the same comprehensive summary reports prepared for the Systems Support Committee, or a briefing based on those reports. If the CEO delegates responsibility for management of the system to another senior line officer, that officer should provide the CEO and the senior management team with at least annual briefings. Those briefings might be based on summaries of the comprehensive report developed for the Systems Support Committee. The CEO, or the designated senior line officer, should provide even more summary annual briefings to the board of directors. Some key roles within the system, such as the Ombudsman and the Chief Ethics & Compliance Officer, might report directly to the audit committee or the full board on some regular basis. Based on the summary reports they receive, the CEO and/or the board might request more information from the person or role responsible for managing the evaluation program, or from those with responsibility for any individual option.

Finally, feedback should be provided to the organization as a whole. In other words, the workforce should receive information regarding whether the system is operating as intended, its success in achieving its goals, any trends or systemic problems that have been identified, and any resulting action taken by the organization. This can be done through a variety of mechanisms, including newsletters, websites, emails, orientation sessions or summary reports.

Those responsible for oversight can use the reports described above to identify problems, patterns and trends that must be addressed, or to encourage the further collection or exchange of information. Based on the information provided, those providing oversight can also recommend or make appropriate changes in policies, operating procedures or practices of the system, or of the entire organization, depending upon their particular responsibilities. Unless the information and analyses provided through data collection and reporting are used to make the changes or improvements identified, the evaluation program will have little value. The failure to take action on such reports and recommendations represents a not uncommon source of breakdowns for evaluation programs.[70] The organization should develop policies and procedures, and assign responsibilities, to ensure that the lessons learned from the data collection and reporting program result in appropriate concrete plans for action, and that the action plans are executed.

Data collection and reporting can be use to guide oversight of the individual options, as well as of the system as a whole. The same reports can be a useful tool in evaluating the performance of key professionals staffing the system, a topic discussed further in the two sections that follow. Finally, data collection and reporting procedures can provide a basis for ensuring that particularly difficult or unusual individual problems receive appropriate attention. The key point is that the information and analysis available through a data collection and reporting program can provide the basic information and analysis necessary for effective oversight.

ACCOUNTABILITY AND OVERSIGHT OF INDIVIDUAL EMPLOYEES

With a comprehensive conflict management system in place, each employee has the responsibility, in addition to his or her substantive job duties, to demonstrate the conflict management skills necessary for the job in question. The necessary skills and responsibilities will vary by job function and level of responsibility. What the organization expects of a marketing manager, a human resources manager, an information technology professional and a building maintenance technician, for example, may differ considerably. The conflict management skills and responsibilities needed for each different job in the organization—from frontline employees, to staff professionals, from senior executives and board members to professionals staffing the conflict management system—ought to be specified in the relevant job description, and integrated into performance assessment criteria, instruments and processes.[71]

The net effect should be that for each employee, evaluation of success in fulfilling conflict management responsibilities occurs routinely, as an incorporated element of assessing job performance. This includes key professionals who staff the conflict management system. Since performance assessment occurs through the line of supervision, oversight of individual employees in fulfilling their conflict management responsibilities will occur through each

TABLE 10:
Using Data Collection and Reporting to Inform Oversight

1. Are data collection and reporting procedures useful, efficient and realistic?

2. Are data collected from each option, and from the general population?

3. Are data collected regarding processes and outcomes?

4. Does the program include effective reporting procedures?

5. Are procedures in place to ensure regular contact between key staff professionals and line and staff managers?

6. Are data collection and reporting procedures used to inform oversight and management, and to provide feedback for improving the performance of the system, key specialists, and the organization as a whole?

7. Has the organization assigned responsibilities and developed policies and procedures to ensure that lessons learned through the evaluation process result in concrete action plans, and that the action plans are executed?

employee's immediate supervisor. Additional oversight of employees can occur through oversight of the options in which individual employees play a role—see the earlier section regarding oversight of individual options.

Skills for teamwork, complaint-handling, negotiation and problem-solving are essential for everyday success in almost any endeavor. As a result, many organizations already have built some conflict management responsibilities into job descriptions and performance assessment processes. The organization wishing to enhance oversight of its conflict management system might consider reviewing role descriptions and performance assessment criteria as the opportunity presents itself. The goal of such a review would be to ensure that the specified skills and responsibilities are those necessary for each role in relation to the system. In addition to integration of tailored conflict management skills and responsibilities into job descriptions and performance assessment procedures, there are additional steps the organization can take to enhance oversight and accountability for individual employees: Every employee should receive a basic introduction or orientation to the system, describing what the system is, how it works, the link between the system and organizational mission, vision and values, and employee privileges and responsibilities in relation to the system. To support the ability of employees to fulfill their individual responsibilities in relation to the system, the organization should provide employees with skills training geared to job function and level of responsibility. To create incentives for employees to sharpen or broaden their conflict management skills, relevant training should also be integrated into professional development programs.[72] Skills training programs can also be a tool for assessing the readiness of employees for more complicated or specialized roles in the system—for example whether an employee has the skills to serve as a volunteer mediator, or whether a staff professional has the skills to manage customer relationships—making the skills training process another potential tool in the oversight system.[73]

TABLE 11:
Accountability and Oversight of Individual Employees

1. Are the necessary conflict management skills and responsibilities associated with each individual role specified in job descriptions?

2. Do the performance assessment criteria, instruments and processes include consideration of the conflict management responsibilities associated with the individual role in question?

3. Does every employee receive an introduction/orientation to the system?

4. Are employees provided with skills training, geared to job function and level of responsibility, to equip them to fulfill their conflict management responsibilities?

5. Are relevant conflict management skills integrated into professional development programs?

6. Is skills training utilized as an additional tool for oversight—for example, the readiness of an employee to assume more complicated or specialized responsibilities or roles in relation to the conflict management system?

SPECIAL CONSIDERATIONS FOR KEY STAFF PROFESSIONALS

Roles in the system with certain key characteristics present special challenges regarding accountability and effective oversight. Those challenges arise with respect to staff professionals who: operate with a high degree of autonomy, independently of a traditional line of supervision; report at a senior level; maintain high levels of confidentiality in providing services; and serve on an ongoing rather than a case-by-case basis. Such roles may also be new to the organization, another factor requiring careful attention. The Ombudsman role, if designed in keeping with best practice standards, embodies all of these characteristics. Depending on how it is structured, the role of Program Manager, if the system has one, may present at least some of the same challenges. Some of the same considerations may also apply to newly emerging compliance roles, such as the Chief Ethics & Compliance Officer.

Oversight of line managers and staff employees operating under a traditional line of supervision—and I am including in this category those who staff traditional and compliance options—typically does not present the same challenges, as long as the organization has clear and constructive performance evaluation procedures in place, and as long as those procedures include attention to the employee's responsibilities in relation to the conflict management system. See the preceding discussion regarding accountability and oversight of individual employees. Similarly, providing oversight to mediators, arbitrators and panelists represents a fairly discrete task. Standards, instruments and procedures for evaluating individual dispute resolution events that involve neutrals, such as mediation, arbitration and other internal and external higher authority dispute resolution processes, are well-established and readily available.

For professional staff roles involving the key characteristics described above, it can be very difficult to know how skillfully or well the professional is performing, in individual instances or in general, over time. With respect to the Ombudsman in particular, professional best practice standards set an extremely high standards for independence, neutrality, and the confidentiality of communications, and call for operating structures and processes to ensure that such standards are met. Every aspect of this challenge is magnified if such key staff professionals report to the organization's most senior line officers. Such officers are not likely to start with much knowledge of the role, or of the skills abilities and knowledge necessary to fill it. In addition day-to-day responsibilities of senior line officers are exceptionally demanding, as are their schedules, limiting the opportunities for interaction and for oversight. At the same time, the organization has the right and the responsibility to ensure accountability. The very characteristics that make these key staff professionals so effective and valuable can cause organizational leadership to ask: "How can we possibly know what is going on with such a role? How can we hold such the person who holds it accountable? Why should we even create such a position?"

The key challenge is that such roles require a lot of leeway, in terms of autonomy and the opportunity to operate in confidence, with limited observation. The dilemma has been the absence of an oversight structure that ensures accountability, meeting the organization's needs, while protecting the key characteristics of the role. One solution to this dilemma is to create is to create a structure for oversight around the role that that addresses key elements of supervision and performance assessment, and that provides the supervisor with data that can inform oversight from an array of sources. Establishing such a structure requires extra attention to a number of considerations described in this section.

THE NEED TO ESTABLISH CLEAR OVERSIGHT ROLES, PROCEDURES AND TOOLS

Some standard elements of effective supervision and performance evaluation become doubly important with respect to roles that operate with great autonomy and independence, on a highly confidential basis. Particularly when such roles are new to the organization, or when the conflict management system itself is new or the product of significant change, effective oversight may be weakened or limited if any one of several basic, standard elements is not addressed:

Reporting Relationships: The reporting relationship, including the responsibility of the supervising officer to evaluate performance, must be clearly specified. In my experience, political considerations or turf battles related to highly autonomous, independent roles can turn issues such as funding, reporting relationships and responsibility to evaluate performance into sources of conflict. The result can be a lack of clarity regarding key details, or temporary arrangements, compromises or informal understandings that are unsettled or not very workable. Similar problems can occur in a rush to establish a new system, or to implement significant changes to an existing one.

Performance Evaluation Criteria, Instruments and Procedures: It is equally important to develop and implement clear, well-designed performance evaluation criteria, instruments and procedures. Developing performance assessment processes and tools for roles that involve such a wide range of skills and abilities can be a complex task, calling for extra attention. The need for extra care is only increased when creating high level roles new to the organization. Establishing carefully-developed performance criteria will be very important to the success of the supervising officer in providing oversight and conducting the evaluation

process.[74] Ensuring that the performance criteria are folded into well-designed instruments and evaluation procedures is equally important. Attention to these elements becomes even more critical if, as described above, establishment of the role in question has been a source of conflict, or the product of a rushed effort.

Performance Assessment Training, Accountability and Support: Training for the supervising officer, and processes designed to establish accountability and support for supervision, also deserve extra attention. Providing oversight can be difficult and even intimidating if the supervisor does not clearly understand what the supervisee actually does, or how. Even more so if the supervisor relies on the employee in question for information on emerging problems, patterns and trends. All of these additional elements are likely to be present in supervising professionals who operate autonomously and in confidence, and who provide specialized forms of assistance requiring an extensive set of skills. The supervisor will need a clear understanding of the role in question, the relevant professional standards and the necessary skills, abilities and knowledge. Supervisors also need a clear understanding of the objectives set for the role and for the office or program in question. Supervisors may also need to be educated regarding *how* to provide supervision, which can be tricky when the professional in question operates independently, and often in confidence. Opportunities for direct observation or interaction between supervisee and supervisor may be more limited than they would be for other roles. Appropriate opportunities for interaction and /or observation should be identified, along with other sources of data to inform oversight.[75] For example, careful review of the reports of the office in question, along with other reports, such as the summary, comprehensive reports regarding the performance of the system as a whole—see the section on data collection and reporting—can also provide important information and insight. In short, the demands of supervising and evaluating key staff professionals may require extra education for the supervisor regarding the role and the elements of evaluation process. The challenge of providing oversight can also be greater if the organization does not have well-established systems and processes to *support* supervision and regular evaluation. This includes procedures, processes or standards designed to encourage or prompt the supervising officer to provide ongoing supervision; to conduct regular performance evaluations; to provide the

supervising officer with supporting tools, resources and information; and to hold the responsible officer accountable for oversight responsibilities. For example, the Systems Support Committee can be a valuable tool for supporting oversight, through its regular and ongoing information exchange, through its data analysis and reporting, and through any advisory recommendations it might make. The use of independent evaluators, as described in the section on oversight of the system as a whole, is yet another way to support the supervising officer, and to provide another source of data for use in evaluating performance.[76]

Use of Satisfaction Data to Inform Oversight: The greater the degree of autonomy associated with a role, and the higher the level of confidentiality associated with its services, the harder it can be to assess the performance of those who staff it. As noted above, careful review of relevant information from the data collection and reporting program can supply important information and context. One particular type of data that may be available through such programs, satisfaction data, can be a valuable supplemental source of information for informing oversight.

Before describing its potential value, I want to stress the how these data might be used, and some limitations: *Satisfaction ratings represent only one source of data for informing performance assessment and oversight; such ratings must be used in context, to inform the overall evaluation.* The performance evaluation should be based on a carefully developed role description, based in turn on the skills, abilities, knowledge and experience necessary to do the job. So, for example, satisfaction data from institutional users (see below) might help to inform the supervisor in rating a key staff professional regarding his or her ability to: "establish and maintain positive and effective working relationships with peers, colleagues and fellow employees." Using satisfaction data in context also means remembering, as some experts have noted, that satisfaction data are subjective. This requires the supervising officer, in considering the data, to take into account the nature and dynamics of the relationships between those providing feedback and the Office of the Ombudsman. Any given individual satisfaction rating might be colored by a variety of factors related to elements of the situation other than the performance of the Ombudsman. Considering satisfaction data in context also means taking into account that parties may not take advantage of the

opportunity to provide it. The percentage of parties who provide satisfaction data may be low, which may also limit its value for informing oversight.[77]

The potential value of satisfaction data as an additional source of information in evaluating the performance of key staff professionals does not mean that satisfaction data should not be collected regarding traditional and compliance functions. Satisfaction data for traditional and compliance options can be collected from employees using some of the same approaches suggested here. At the same time, since those staffing traditional and compliance options operate with much less autonomy, and since those options offer a far lower level of confidentiality, satisfaction data may be less critical to assessing performance, or to providing a balance against the independence of such roles. Such data are also likely to be more readily available, for the same reasons. In addition, the cost in dollars and time of evaluation procedures, and the organization's preferences with respect to the extensiveness of those procedures, will have a lot to do with the collection and use of such data. For example, I suspect that an organization would be unlikely to develop evaluation procedures that include satisfaction ratings by institutional consumers (see below) for all internal staff professionals, such as human resources, employee relations, legal staff, EEO officers and security, to offer some examples. As noted earlier in this section, model processes and tools for providing oversight to mediators, arbitrators and panelists, which include the use of satisfaction data, are well-established and readily available.

Moving past the qualifiers, I believe that satisfaction data can be a more valuable source of information for enriching the picture with respect to the Ombudsman's performance, although more complicated to collect. No role operates with a higher degree of autonomy, or honors a higher standard of confidentiality, which means it can be very hard to know how well the ombuds is doing in assisting parties, or in fulfilling her responsibilities in general. Satisfaction data are also highly valuable because the Ombudsman serves on an ongoing basis rather than case-by-case basis, and has responsibilities to the organization as a whole, as well as to individual parties. As a result, the Ombudsman must build and maintain relationships with employees across the organization, and satisfaction data offer one source of information with respect the Ombudsman's success in this regard.

Collecting satisfaction data can be more complicated because a party's contact with the Ombudsman may be more indirect, including anonymous telephone calls, and because any given matter might involve parties from all levels and divisions of the organization, interacting over a long period of time rather than in a discrete proceeding. Again, some of the same considerations may apply to other key staff roles, such as the Program Manager or Chief Ethics & Compliance Officer.

Given the potential value of satisfaction data as one tool for informing oversight and performance assessment of the Ombudsman, I believe the organization should develop a comprehensive approach to collecting it as one element in its data collection and reporting program. Every party who has contact with the Office of the Ombudsman regarding any matter ought to have an avenue for rating its performance. So, for example, any person contacting the office with a question, concern or request for assistance ought to be able to assess its performance. Similarly, any person responding to any inquiry from the office, or any party to a matter in which the Ombudsman is involved, ought to have the opportunity to assess the performance of the office and its staff. The general population can be surveyed to assess its knowledge of the office, and its satisfaction with the services that office provides. Mechanisms developed to allow anonymous parties or the general workforce to rate satisfaction, such as websites, focus groups, or employee surveys, can be tools for collecting satisfaction data regarding any and *all* options in the system.

In addition, because of the responsibilities of the Ombudsman to build and maintain relationships across the organization, to work closely and well with virtually every unit or department, and to act as an advocate for systemic change, there is another category of users who should be invited to provide feedback—institutional consumers. By institutional consumers, I mean those who regularly use or rely on the services of the Ombudsman, or who regularly interact with the Ombudsman, on behalf of some function or department within the organization. For example: What do the senior line managers, who are responsible for the system as a whole, think of his performance? What about the line managers who regularly interact with the ombuds on behalf of their business units? What about the professionals who staff other options in the system, such as Human Resources, Security, EAP or the Legal Department?

The relationships among these functions are often critical to the performance of the ombuds, and to his success in achieving his goals. Satisfaction ratings from institutional users provide one of the few sources of information regarding the Ombudsman's judgment and skill in balancing conflicting elements of the role—the abilities to operate independently and to preserve confidences, for example, against the ability to build and maintain constructive, effective long-term relationships.

In sum, key staff roles that operate in confidence and with a great deal of autonomy are absolutely critical to the system. At the same time, such roles present special challenges when it comes to ensuring accountability and assessing performance. I believe the best approach is to create a structure around the role that that addresses key elements of supervision and performance assessment, and that provides the supervisor with data that can inform oversight from an array of sources. To create this structure, I believe the organization should pay special attention to establishing every element of the reporting relationship, as well as to performance assessment criteria, instruments and procedures and to performance assessment training, accountability and support. Many of these elements of the oversight structure are basic, but they must be tailored and enhanced for oversight of key staff roles such as the Ombudsman.

Providing the supervisor with data from an array of sources is the other key component is creating such a structure. Reports generated by the office in question, summary comprehensive reports on the operation of the system as a whole and the information exchange generated through the Systems Support Committee, offer valuable resources for informing oversight. Satisfaction data, used in context, can be one particularly useful type of data, given the nature of key staff roles. Satisfaction data from institutional consumers, in particular, can be very helpful in assessing the Ombudsman's judgment and skill in balancing conflicting elements of the role. Finally the organization should be alert for new tools that might support oversight. For example, in the future scenario-based performance assessment might offer a new source of information for assessing the performance of the Ombudsman.[78] A structure for oversight composed of such elements can help ensure accountability, without interfering with the essential nature of specialized roles.

TABLE 12:
Oversight of Key Staff Professionals

1) Are the reporting relationships clear, and formally established?

2) Is the responsibility to evaluate performance clearly established as a responsibility of the supervising role?

3) Are the criteria, instruments and processes for evaluating performance clearly established?

4) Are performance criteria based upon skills, abilities and knowledge, with attention to professional codes and standards?

5) Has the supervising officer accepted the responsibility to conduct the performance assessment, and is he or she accountable for doing so?

6) Has the supervising officer been trained regarding the performance evaluation, including a clear understanding of the role in question and the skills, abilities and knowledge necessary to perform the job?

7) Does the organization does have well-established systems and processes to ensure and support supervision and performance evaluation?

8) Do performance assessment procedures integrate a consideration of data and analyses from the evaluation program?

9) In particular, does the performance assessment process include appropriate consideration of satisfaction data?

10) For ombudsmen in particular, does the performance assessment process include appropriate use of satisfaction data from institutional consumers, as one source of information for informing oversight?

CONCLUSION

In my experience, most of the discussions regarding oversight of conflict management systems have either been piecemeal—in relation to individual options or roles within the system, or indirect—linked to an organization's discussion about the components of its system, or whether to implement something new. By considering overlapping principles and best practices from corporate governance, management, organizational theory and conflict management, an organization can develop a comprehensive model for oversight. I believe some basic principles and accountabilities, rather than one specific design, can

provide a starting point. Based on those principles, an organization can create a flexible framework for oversight through a series of interrelated procedures and mechanisms:

The CEO, or a specifically designated member of the senior management team, is responsible for managing the system as a whole, in consultation with the organization's senior management team. Key staff roles designed to operate independently of the chain of command, and to ensure employee access to senior management and/or the board, report directly to the CEO, or to a specifically designated senior line officer, with access to the board on an as-needed basis. The board of directors actively oversees the supervision provided by senior management.

By assuming a number of duties related to coordination, communication and management of system-wide services or functions, key staff professionals can serve as central supporting resources for the entire system. A Systems Support Committee also supports oversight of the system as a whole, by promoting information-sharing and feedback throughout the organization. Independent evaluators and relationships with professional associations and governmental entities provide additional information, and external support.

Reporting relationships are the basis for direct supervision of individual options within the system. Assigning oversight responsibility for each individual option to a specifically designated supervising function or role ensures the accountability of the option, and of those who staff it. These reporting relationships are established with attention to the key features of each option, and support efficient operation of the system and the organization as a whole.

A comprehensive data collection and reporting program informs management and oversight.

Oversight of individual employees occurs through the line of supervision, as an incorporated element of supervision and performance assessment. To enhance and support oversight, each employee receives an introduction to the system, as well as skills training geared to his or her respective roles and responsibilities. Skills training is also integrated into professional development programs, to encourage employees to develop the new conflict management skills necessary for new roles. The organization also uses such skills training programs as a tool for assessing the readiness of employees for more complicated or specialized roles, making such programs another tool for oversight.

The organization provides oversight to key staff professionals by creating a structure around such roles. That structure addresses key elements of supervision and performance assessment, and provides the supervisor with data that can inform oversight from an array of sources. The structure is developed with attention to the special considerations that apply to roles that operate in confidence, with a great deal of autonomy. This approach allows the organization to ensure accountability without compromising the key characteristics of the role.

The result can be a flexible, comprehensive framework for oversight that mirrors the comprehensive nature of the underlying system. The framework, and the principles that underlie it, should accommodate the innovation and experimentation that will undoubtedly occur as organizations adapt oversight procedures to their individual cultures and operating environments, and to changing conditions. The goal should be effective oversight that meets the needs of the organization, and that is consistent with principles of corporate governance and management, and respectful of best practice standards in conflict management. I hope this approach will also encourage discussion and research. Those three activities—innovation, discussion and research—can help organizations and the full range of interested parties move beyond the suggestions presented here.

ABOUT THE AUTHOR

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ENDNOTES

[1] I revised this article extensively while serving as a Fellow-in-Residence with the Center for Public Policy Dispute Resolution of the University of Texas School of Law. I am grateful to the Center and the School of Law for supporting my work. Two of the Center's interns, Dustin Rynders and Kennon Peterson, helped me to assemble some of the materials cited as references in this paper.

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[2] Ury, W.L., Brett, J.M., and Goldberg, S.G., *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict.* San Francisco: Jossey-Bass, 1988. Costantino, C.A., and Merchant, C.S. *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations*. San Francisco: Jossey-Bass, 1996. Rowe, M. P. "Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?" In S.E. Gleason (ed.) *Workplace Dispute Resolution: Directions for the Twenty-First Century,* pp. 87. East Lansing: Michigan State University Press, 1997. Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization.* San Francisco: Jossey-Bass, 1998, pp.44-63. Lipsky, D.B., Seeber, R.L., and Fincher, R.D., *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals.* San Francisco: Jossey-Bass, 2003.

[3] For an excellent discussion of the difficulties associated with assessing effectiveness, See: Lipsky, D.B., Seeber, R.L., and Fincher, R.D., *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals.* San Francisco: Jossey-Bass, 2003, pp.263-284. The topic of effectiveness deserves a great deal more research and discussion. Telephone conversation with Mary Rowe, February 25, 2009.

[4] See: Rowe, M. P. "Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?" In S.E. Gleason (ed.) *Workplace Dispute Resolution: Directions for the Twenty-First Century,* pp. 87. East Lansing: Michigan State University Press, 1997. See also: Lipsky, D.B., Seeber, R.L., and Fincher, R.D., *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals.* San Francisco: Jossey-Bass, 2003, pp. 11-19. For a discussion of terminology in the field, see: Lynch, J.F. "Beyond ADR: A Systems Approach to Conflict Management." *Negotiation Journal*, 2001, 17(3), 208-210.

[5] For a far more detailed description of what I mean by a comprehensive conflict management system, see: Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization.* San Francisco: Jossey-Bass, 1998, pp.44-63. Within the field there is an ongoing discussion as to the key characteristics of a comprehensive conflict management system. Lipsky, D.B., Seeber, R.L., and Fincher, R.D., *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals.* San Francisco: Jossey-Bass, 2003, pp. 11-19.

[6] Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization.* San Francisco: Jossey-Bass, 1998.

[7] Ibid.

[8] A comprehensive conflict management system is composed of more than its options, structures and procedures—it must be integrated into organizational culture and associated with organizational values. Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization.* San Francisco: Jossey-Bass, 1998, pp.18-19, 84-86, 88-104. See also: Rowe, M. P. "Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?" In S.E. Gleason (ed.) *Workplace Dispute Resolution: Directions for the Twenty-First Century,* pp. 87. East Lansing: Michigan State University Press, 1997.

[9] Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization.* San Francisco: Jossey-Bass, 1998, pp. 88-104.

[10] Part Two of Ury, Brett and Goldberg's pioneering book dealt with just this question—how to apply dispute systems design theory to a unionized setting. Ury, W.L., Brett, J.M., and Goldberg, S.G., *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict.* San Francisco: Jossey-Bass, 1988, pp. 85-168. Developing comprehensive systems for unionized settings requires careful attention to the characteristics of labor-management relationships. Conversation with Tom Furtado, July 19, 2003.

[11] Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization.* San Francisco: Jossey-Bass, 1998. The principles we offered in *Controlling The Costs Of Conflict* were designed for any organization, and were not restricted to workplace settings.

[12] Rowe, M. P. "Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?" In S.E. Gleason (ed.) *Workplace Dispute Resolution: Directions for the Twenty-First Century,* pp. 84-88. East Lansing: Michigan State University Press, 1997.

[13] It is not uncommon for organizations to fear that encouraging use will open the floodgates to frivolous complaints. While I believe there is a need for more research, my own experience with a number of systems leads me to believe that this fear is not well-founded. I would also make the following arguments: Frivolous complaints and even malicious complaints can occur in any system. Encouraging people to come forward regarding any matter offers the best opportunity to expose and address frivolous complaints early, before they escalate. In addition, even if encouraging people to come forward does invite frivolous complaints, the organization is making a very valuable trade-off. One of the chief benefits of establishing a comprehensive system is the opportunity to uncover very difficult or serious problems at the earliest possible point. Unless the system encourages use, the opportunity to expose serious or difficult problems early may well be diminished significantly. Finally, those not allowed to use the system may exit it, and proceed through other channels that can be more costly or time-consuming for the organization, such as the courts, regulatory agencies, or the press.

[14] Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs of Conflict: How to Design a System for Your Organization*. San Francisco: Jossey-Bass, 1998, pp.144-158.

[15] Ibid, pp. 63, 74.

[16] Researchers have been paying attention to this principle as a key to success for some time. Westin, A.F., and Feliu, A.G. *Resolving Employment Disputes Without Litigation*. Washington D.C.: Bureau of National Affairs, 1988, pp.217-218.

[17] Management texts describe the value of using feedback controls as a standard tool for making improvements. Schermerhorn, Jr., J.R. *Management 9/e*. New York: John Wiley & Sons, Inc., 9th Ed., 2008, p. 454. Honoring this principle requires careful attention to data collection and reporting programs, as described in this article.

[18] The Business Roundtable. *Principles of Corporate Governance*. Washington D.C.: The Business Roundtable, May 2002; and. The Conference Board. *Board Commission on Public Trust and Private Enterprise: Part 2—Corporate*

Governance: Principles, Recommendations And Best Practice Suggestions. New York: The Conference Board, 2003, pp. 2-28.

[19] Gosline, Ann, et. al. *Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organizations.* Ithaca, N.Y.: Institute on Conflict Resolution, 2001. See also: Lipsky, D.B., Seeber, R.L., and Fincher, R.D., *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals.* San Francisco: Jossey-Bass, 2003, pp. 11-19.

[20] The Conference Board. *Board Commission on Public Trust and Private Enterprise: Part 2—Corporate Governance: Principles, Recommendations And Best Practice Suggestions.* New York: The Conference Board, 2003; and The Business Roundtable. *Principles of Corporate Governance.* Washington D.C.: The Business Roundtable, May 2002. The National "Association of Corporate Directors. *Report of the NACD Blue Ribbon Commission on Director Professionalism.* Washington D.C.: The National Association of Corporate Directors, 2003.

[21] Some of my colleagues have asked what if the mission, values and culture of an organization are not positive, or what if such elements are in conflict? Telephone conversation with Mary Rowe, February, 2003**;** Telephone conversation with Tom Furtado, July 10, 2003. I hope this particular principle, together with the idea of balancing this set of principles as an approach to developing oversight mechanisms, will address such concerns.

[22] For a discussion of this topic, and especially the value of an Ombudsman in honoring the federal sentencing guidelines, see: Howard, C. L., and Furtado, T. *The United States Sentencing Guidelines: What An organizational ombuds might want to know and share with management.* Dallas: The Ombudsman Association, 1999. See also: Furtado, T. *Why An Organizational Ombudsman? What an organization's management might want to know*: Dallas: The Ombudsman Association, 1996.

[23] The question of the accountabilities of corporations and their CEOs and boards are currently topics of great interest in corporate governance. Reference to these principles is important in thinking about the broader accountabilities of the conflict management system, and how such accountabilities can be addressed in oversight procedures. The Conference Board. *Board Commission on Public Trust and Private Enterprise: Part 2—Corporate Governance: Principles, Recommendations And Best Practice Suggestions.* New York: The Conference Board, 2003, pp. 2-28; and The Business Roundtable. *Principles of Corporate Governance.* Washington D.C.: The Business Roundtable, May 2002. For a more detailed historical and theoretical analysis of this topic, see: Conger, J.A., Lawler III, E.E. and Finegold, D.L. *Corporate Boards: New Strategies for Adding Value at the Top.* San Francisco: Jossey-Bass, 2001, pp. 141-163.

[24] The Business Roundtable. *Principles of Corporate Governance.* Washington D.C.: The Business Roundtable, May 2002, pp. iv, 1-2. The Conference Board. *Board Commission on Public Trust and Private Enterprise: Part 2—Corporate Governance: Principles, Recommendations And Best Practice Suggestions.* New York: The Conference Board, 2003, p. 3.

[25] The Business Roundtable. *Principles of Corporate Governance.* Washington D.C.: The Business Roundtable, May 2002, pp. iv-v, 1-6. The Conference Board. *Board Commission on Public Trust and Private Enterprise: Part 2—Corporate Governance: Principles, Recommendations And Best Practice Suggestions.* New York: The Conference Board, 2003pp. 3, 7, 9. For a discussion of different views on this topic, see: Conger, J.A., Lawler III, E.E. and Finegold, D.L. *Corporate Boards: New Strategies for Adding Value at the Top.* San Francisco: Jossey-Bass, 2001, pp. 3-19.

[26] Brancato, C.K., and Plath, C.A. *Corporate Governance Best Practices: A Blueprint for the Post-Enron Era.* New York: The Conference Board, 2003, pp. 11, 54-58, 63-65; The Conference Board. *Board Commission on Public Trust and Private Enterprise: Part 2—Corporate Governance: Principles, Recommendations And Best Practice Suggestions.* New York: The Conference Board, 2003pp. 9, 22, 25; and The Business Roundtable. *Principles of Corporate Governance.* Washington D.C.: The Business Roundtable, May 2002.

[27] Principles of corporate governance call for the board to conduct regular self-evaluations of its performance. The Conference Board. *Board Commission on Public Trust and Private Enterprise: Part 2—Corporate Governance: Principles, Recommendations And Best Practice Suggestions.* New York: The Conference Board, 2003 p.24; and The Business Roundtable. *Principles of Corporate Governance.* Washington D.C.: The Business Roundtable, May 2002 pp. 23-24. The assessment might be quite indirect, and might occur through one question. For example, see: The National Association of Corporate Directors: *Report of the NACD Blue Ribbon Commission on Board Evaluation: Improving Director Effectiveness.* The National Association of Corporate Directors and The Center for Board Leadership: Washington D.C., 2001, Appendix B-2, Board Evaluation Tool, Unocal Board Assessment, p. 42. This board self-evaluation instrument includes the question: "Is the board effective in overseeing financial and compliance control systems?"

[28] The phrase "accessible safe and credible," which comes from Mary Rowe, offers a very helpful and succinct description. Rowe, M. and Baker, M. "Are You Hearing Enough Employee Concerns?" *Harvard Business Review*, Vol. 62, No. 3, (May-June, 1984), pp. 130-133. I also thank Mary for challenging me to address the question raised in this chapter, regarding to whom is the system accountable.

[29] Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs of Conflict: How to Design a System for Your Organization.* San Francisco: Jossey-Bass, 1998, pp.9-19. Mary Rowe has noted that an organization may begin, over time, to see its evolving collection of conflict management programs and

roles as a system. Rowe, M.P. "Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?" In Gleason, S.E. (ed.), *Workplace Dispute Resolution: Directions for the Twenty-First Century*. East Lansing: Michigan State University Press, 1997, pp. 84.

[30] To governance experts, ensuring that oversight of comprehensive conflict management systems is consistent with oversight of other company-wide management systems is very important. Correspondence with Hal Shear, February 17, 2009. The more such a system is integrated into the culture, daily operations and management of the company, the more line managers and senior management will be comfortable with it. This includes structuring oversight as one would for any other company-wide management system. Telephone conversation with Barry J. Kulpa, February 24, 2009. Barry is a distinguished former CEO, COO and CFO, and a fellow of the Center for Public Policy Dispute Resolution of the University of Texas School of Law.

[31] One of the most commonly-cited definitions of an internal control process is the definition offered by the Committee on Sponsoring Organizations of the Treadway Commission (COSO): "Internal control is broadly defined as a process, effected by an entity's board of directors, management and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in the following categories:
Effectiveness and efficiency of operations.
Reliability of financial reporting.
Compliance with applicable laws and regulations.

The first category addresses an entity's basic business objectives, including performance and profitability goals and safeguarding of resources. The second relates to the preparation of reliable published financial statements, including interim and condensed financial statements and selected financial data derived from such statements, such as earnings releases, reported publicly. The third deals with complying with those laws and regulations to which the entity is subject. These distinct but overlapping categories address different needs and allow a directed focus to meet the separate needs." Committee of Sponsoring Organizations of the Treadway Commission: *Internal Control - Integrated Framework:* Jersey City: Committee on Sponsoring Organizations of the Treadway Commission, (1992, 1994), pp. 3-4. A comprehensive conflict management system, as defined in this article, certainly supports the organization in achieving the objectives described in categories 1. And 3., and it has the potential to help in achieving 2. See, Hasson, R. "Why Didn't We Know?" *Harvard Business Review,* Vol. 85, No. 4, (April 2007), pp.33-37, 40-43.

Referring to a comprehensive conflict management system as an internal control system, for which the board should have some oversight responsibilities, also seems directly in line with the use of the phrase in corporate governance.

Brancato, C.K., and Plath, C.A. *Corporate Governance Best Practices: A Blueprint for the Post-Enron Era.* New York: The Conference Board, 2003, pp. 54-56, 63-65.

[32] Telephone conversation with Barry J. Kulpa, February 24, 2009.

[33] Committee of Sponsoring Organizations of the Treadway Commission: *Internal Control - Integrated Framework:* Jersey City: Committee on Sponsoring Organizations of the Treadway Commission, 1992, 1994, pp.6-7. Brancato, C.K., and Plath, C.A. *Corporate Governance Best Practices: A Blueprint for the Post-Enron Era.* New York: The Conference Board, 2003, pp. 54-56, 63-65; The Business Roundtable. *Principles of Corporate Governance*. Washington D.C.: The Business Roundtable, May 2002 pp. 8, 15. On the other hand, tying the conflict management system too closely to the internal control process may drive up the costs of maintaining it, since auditors may want to measure its effectiveness. Telephone conversation with Barry J. Kulpa, February 24, 2009. Even without agreement on this comparison, however, the principles and best practices in corporate governance, organizational theory and conflict management cited throughout this article would lead me to recommend the same framework for oversight.

[34] According to Hal Shear, a noted corporate governance expert and an experienced director, comprehensive conflict management fits within the Enterprise Risk Management Framework, and should not be isolated from it. Telephone conversation with Hal Shear, February 17, 2009. The COSO Enterprise Risk Management Framework describes internal control as an "integral" component of the framework, and incorporates the definition of internal control set out in the 1992 COSO report cited in n. 31, above. Committee of Sponsoring Organizations of the Treadway Commission: *Enterprise Risk Management - Integrated Framework:* Jersey City: Committee on Sponsoring Organizations of the Treadway Commission, *2004*, Foreword, pp.1-9, 122.

[35] Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs of Conflict: How to Design a System for Your Organization*. San Francisco: Jossey-Bass, 1998, p 161.

[36] Ibid, pp. 162-163, 181-192.

[37] Debates about the characteristics, elements or qualifications of various professional roles with the field of dispute resolution offer guidance: See: Gadlin, H. "The Ombudsman: What's in a Name?" *Negotiation Journal*, 2000, 16(1), 37-46, describing different conceptions of the ombuds role within the profession, and the parallel debates among mediators, and Rowe, M.P. "Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?" In Gleason, S.E. (ed.), *Workplace Dispute Resolution: Directions for the Twenty-First Century*. East Lansing: Michigan State University Press, 1997, pp.84, 98. Rowe notes her experience with how workplace systems evolve, and her view there are no "ideal models." She also points to the importance of innovation, and research regarding those innovations.

[38] An organization leaning toward oversight arrangements that vary from best practice standards may want to consider the principles in Chapter 1, and ask itself some questions. For example, does the approach in question: a) Interfere with the basic nature or with the key characteristics or responsibilities of the option, program or role being supervised? b) Establish clear and specific responsibility for direct supervision and oversight? c) Decrease acceptance/support by the workforce or within the profession? Professionals advising the organization, or staffing a role in the system might want to consider the principles in Chapter 1, and ask some questions relate to the needs of the organization. For example, does the approach in question: a) Support operational efficiency? b) Ensure accountability? c) Reflect the characteristics of this organization? d) Demonstrate consistency with principles of corporate governance?

[39] The Business Roundtable. *Principles of Corporate Governance*. Washington D.C.: The Business Roundtable, May 2002, pp. iv-v, 1-8, 26, 28; Brancato, C.K., and Plath, C.A. *Corporate Governance Best Practices: A Blueprint for the Post-Enron Era.* New York: The Conference Board, 2003, p 10, 55, 57-58, 63-65; The Conference Board. *Board Commission on Public Trust and Private Enterprise: Part 2—Corporate Governance: Principles, Recommendations and Best Practice Suggestions*. New York: The Conference Board, 2003, p. 25

[40] Committee of Sponsoring Organizations of the Treadway Commission: *Internal Control - Integrated Framework:* Jersey City: Committee on Sponsoring Organizations of the Treadway Commission, (1992, 1994), pp. 6-7.

[41] One suggestion I've heard is for a Program Manager, or an administrative officer, reporting at a senior level, with responsibility for oversight of the system as a whole. Correspondence with Mary Rowe, February 3, 2003; February 9, 2003.

I prefer assigning direct management responsibility for the system as a whole to an existing senior management role, for several reasons: First, assigning responsibility for oversight of the system as a whole to an existing member of the senior management team integrates the system more fully into the organization, by requiring senior management to accept and share responsibility for the system. Second, this approach is consistent with how oversight is provided to other management systems, or company-wide programs or initiatives. Third, I doubt many organizations will create such a role—see the discussion in this chapter and in the next section on oversight for individual options. In addition, some of the key staff roles in a conflict management system, such as the Ombudsman and the Chief Ethics & Compliance Officer (CECO), operate under best practice standards calling for a reporting relationship to the CEO or senior line management. The CEO and senior line management can only accommodate so many direct reports, and as Ombudsmen and CECOs have found, it can be difficult to arrange such a reporting

relationship. Roles such as the Ombudsman and the CECO are so critical to the success of the system that I would prefer to see senior reporting relationships go to them. On the other hand, a Program Manager, playing the role of a central reporting resource, is an excellent idea, in my opinion. This role might be established at a lower level, or perhaps even more realistically, informally. See Figure 1, and the discussions in this section and in the section on oversight for individual options.

[42] See The International Ombudsman Association: *IOA Best Practices,* July 2008: http://www.ombudsassociation.org/standards/ ; and see The International Ombudsman Association: *IOA Standards of Practice,* January 2007: http://www.ombudsassociation.org/standards/

The *IOA Best Practices* call for the Ombudsman to " report directly to the highest level of the

organization (such as board of directors, CEO, agency head, etc.)" Descriptions of the reporting relationship for the Ombudsman vary slightly in the literature, but the basic principle is that, in order to preserve the independence of the role, the Ombudsman should report independently of the normal chain of command, to a very senior line officer and/or the board. For examples, see: Howard, C.L. and Gulluni, M.A. *The Ombuds Confidentiality Privilege: Theory and Mechanics*. Dallas: The Ombudsman Association, 1996, p. 12; see also: Gadlin, H. and Pino, E.W. *Neutrality: What an Organizational Ombudsperson Might Want to Know.* Dallas: The Ombudsman Association, 1997, p. 6. I first heard the formulation I am presenting here—the Ombudsman should report to the CEO, or to another specifically designated senior line officer, with access to the board on an as-needed basis, from Mary Rowe. I think this formulation best fits the approach to oversight I am proposing here.

In this article, I am using a newly emerging compliance role, the Chief Ethics & Compliance Officer (CECO), to refer to the multiple forms of newer senior compliance roles, such as the Chief Ethics Officer and the Chief Compliance Officer. As with the Ombudsman, best practice recommendations call for the CECO to: "Directly report to either the board or the CEO," with "direct, unfiltered access to the board." Chief Ethics & Compliance Officer (CECO) Definition Working Group. *Leading Corporate Integrity: Defining the Role of the Chief Ethics & Compliance Officer,* Ethics Resource Center: Washington D.C., August, 2007, pp. 3, 19-20.

[43] The Business Roundtable. *Principles of Corporate Governance*. Washington D.C.: The Business Roundtable, May 2002; and. The Conference Board. *Board Commission on Public Trust and Private Enterprise: Part 2—Corporate Governance: Principles, Recommendations And Best Practice Suggestions*. New York: The Conference Board, 2003, pp. 2-28.

In companies covered by the Sarbanes-Oxley Act, the audit committee of the board of directors must establish mechanisms through which employees can anonymously

raise concerns regarding matters related to accounting or auditing. Liggio, Carl D. "Sarbanes-Oxley audit committee obligations—A hidden time bomb." *Metropolitan Corporate Counsel*, Brentwood: Metropolitan Corporate Counsel, Inc., January, 2003, p. 34.

[44] Hasson, R. "How to Resolve Board Disputes Effectively." *MIT Sloan Management Review*, Vol. 48, No. 1, (Fall 2006), pp.77-80.

[45] Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs of Conflict: How to Design a System for Your Organization*. San Francisco: Jossey-Bass, 1998, pp. 135-143; Gosline, Ann, et. al. Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organizations. Ithaca, N.Y.: Institute on Conflict Resolution, 2001, pp. 14-16.

[46] See The International Ombudsman Association: *IOA Standards of Practice,* January 2007: http://www.ombudsassociation.org/standards/ ; and see International Ombudsman Association: *IOA Best Practices,* July 2008: http://www.ombudsassociation.org/standards/

Assigning central supporting resource status to the Ombudsman may seem very attractive to the organization, given the skills, abilities, knowledge and characteristics necessary for the role. In addition, maintaining an Ombudsman function is an expensive proposition, and most organizations are eager to take full advantage of existing resources. At the same time, the concerns within the profession about the dangers of conflicting duties are practical and concrete. Those concerns include: jeopardizing the Ombudsman's ability to assert claim a privilege with respect to confidential communications; and affecting employee perceptions of the neutrality and independence of the office, making it a less attractive resource, and discouraging employees from coming forward.

The passage of Ombudsman shield laws, laws to establish a privilege or immunities protecting the confidentiality of communications with the Office of the Ombudsman, might resolve some of the profession's concerns related to the ability of the Ombudsman to assert a privilege regarding confidential communications. Even such an important advance however, might not address a second set of concerns—the impact of conflicting responsibilities on employee perceptions of the role. The impact of such reforms on professional standards would take some time to unfold.

[47] In order to avoid compromising the ability to assert a privilege in the event of litigation or a request for testimony, ombudsmen avoid assuming any management responsibilities. For the same reason, they should also avoid activities that might create the impression of assuming any management functions. Hence the suggestion that ombudsmen participate on such a committee on an ex-officio or periodic basis. Telephone conversation with Chuck Howard, February 13, 2009. See also: Rowe, M.P. "Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?" In

Gleason, S.E. (ed.), *Workplace Dispute Resolution: Directions for the Twenty-First Century*. East Lansing: Michigan State University Press, 1997, p. 95. Rowe describes this mechanism beautifully.

[48] Chief Ethics & Compliance Officer (CECO) Definition Working Group. *Leading Corporate Integrity: Defining the Role of the Chief Ethics & Compliance Officer,* Ethics Resource Center: Washington D.C., August, 2007, pp. 21-24.

[49] The use of committees as a mechanism for providing oversight is consistent with trends in management, and has been promoted by leading scholars and practitioners in dispute resolution as well. Schermerhorn, Jr., J.R. *Management 9/e*. New York: John Wiley & Sons, Inc., 9th Ed., 2008, p. 400.

And see: Rowe, M.P. "Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?" In Gleason, S.E. (ed.), *Workplace Dispute Resolution: Directions for the Twenty-First Century*. East Lansing: Michigan State University Press, 1997, pp. 95-96. See also: Gosline, Ann, et. al. *Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organizations*. Ithaca, N.Y.: Institute on Conflict Resolution, 2001, p. 15. I believe that clearly and accurately describing the composition and role of the committee can be very important to employee perceptions regarding the fairness of the system.

[50] Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization*. San Francisco: Jossey-Bass, 1998, pp. 64-66, 68, 90. Determining when independent evaluators can be helpful, as well as the external evaluator's role in the process, are key questions in planning an evaluation. Rossi, P.H., Freeman, H.E. and Lipsey, M.W. *Evaluation: A Systematic Approach*. Thousand Oaks: Sage Publications, 1999, pp.54-62.

[51] By the term reporting relationships, I mean the relationship between a role or office with authority and responsibility to supervise, authorize and support the activities of another office or role, including responsibility to evaluate performance, authorize and define roles and activities, and provide funding and administrative or logistical support, and the supervised role.

[52] Both the Halliburton DRP Program and the Shell Resolve Program included policies with these features, though the Shell name for its policy was Early Workplace Resolution. Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization*. San Francisco: Jossey-Bass, 1998, pp, 64-66, 68-69.

[53] When I use the term Ombudsman in this article, I am referring to those operating under the rubric of "Organizational Ombudsman," particularly those operating consistently with the Standards of Practice and Code of Ethics of The International Ombudsman Association: The International Ombudsman Association: *IOA Standards of Practice,* January 2007: http://www.ombudsassociation.org/standards/ ; The International Ombudsman Association: *IOA*

Code of Ethics, January 2007: http://www.ombudsassociation.org/standards/

For an excellent description of the Organizational Ombudsman, as I am using the term, see: Rowe, M.P. "The Ombudsman's Role in a Dispute Resolution System." *Negotiation Journal*, 1991, 7(4), 353-362. As Ombudsmen often do in describing themselves, I am using the terms Ombudsman, Ombuds and Ombudsperson interchangeably. Ibid, p.361n.6.

[54]For a thorough and thoughtful discussion of what neutrality means to an Ombudsman, see: Gadlin, H. and Pino, E.W. *Neutrality: What an Organizational Ombudsperson Might Want to Know.* Dallas: The Ombudsman Association, 1997.

[55] Chief Ethics & Compliance Officer (CECO) Definition Working Group. *Leading Corporate Integrity: Defining the Role of the Chief Ethics & Compliance Officer,* Ethics Resource Center: Washington D.C., August, 2007, p. 14.

[56] For an excellent analysis of why internal mediation programs can be difficult to maintain, See: Lipsky, D.B., Seeber, R.L., and Fincher, R.D., *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals.* San Francisco: Jossey-Bass, 2003, pp. 176-178.

[57] For examples of peer review and executive review procedures, see: Ewing, D.W. *Justice on the Job: Resolving Grievances in the Non-Union Workplace*. Boston: Harvard Business School Press, 1989.

[58] Rowe, M.P. "Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?" In Gleason, S.E. (ed.), *Workplace Dispute Resolution: Directions for the Twenty-First Century*. East Lansing: Michigan State University Press, 1997, pp. 86-87.

[59] Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization*. San Francisco: Jossey-Bass, 1998, pp, 144-158.

[60] Ombudsmen are very interested in light of their need to balance the responsibility to identify trends and patterns for the organization as a whole, while protecting the confidentiality of communications. Experts in program evaluation are interested in new problems and challenges associated with evaluating conflict management systems, and in particular with the need to address the differing concerns of researchers, practitioners and organizations in developing evaluation programs. McEwen, C.A. "Toward a Program-Based ADR Research Agenda." *Negotiation Journal*, 1999, 15(4), 325-338.

[61] Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization*. San Francisco: Jossey-Bass, 1998, pp, 80-87, 144-158.

[62] Ibid, pp, 190-196.

[63] See: Beatriz, D., et. al., "Comparing Apples to Apples: Development of the IOA Uniform Reporting Categories," *Journal of the International Ombudsman Association,* Vol. 1, No. 1, 2008, pp. 8-22. This article describes the pioneering work of the IOA in developing uniform reporting categories for the "questions, concerns, issues and inquiries" with which an Ombudsman might assist a member of the organization. This work illustrates the value, and the challenges, associated with centralizing some aspects of data collection and reporting. It is of enormous value to every organization interested in effective data collection and reporting in relation to conflict management, providing an extremely valuable frame of reference. Similarly, the appropriate use of well-designed management information systems or software programs can facilitate data entry and reporting, with appropriate protections for confidentiality. Correspondence with Ralph Culler, February 19, 2009.

[64] Some problems may involve a mix of external and internal parties, such as cases that involve an employee and a vendor, supplier or contractor. If the system is able to accommodate external parties, those parties should have the opportunity to assess its performance.

[65] Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization*. San Francisco: Jossey-Bass, 1998, pp, 144-158.

[66] Ibid.

[67] As some experts have noted, instant communication in the event of emerging problems, and special reports with respect to rare or unusual problems, can be very important and powerful resources for effective oversight. Telephone conversation with Mary Rowe, February, 2003. In addition to individual problems or particularly difficult or unusual matters surfaced through the system, ad hoc reporting or brief periodic reporting can also be useful when processes or operating procedures are not working as intended or designed—matters such as these may also constitute emerging problems requiring more immediate attention. Correspondence with Ralph Culler, February 19, 2009.

[68] The reporting responsibilities of the Ombudsman bear specific mention. I believe these procedures are particularly important to oversight of the entire system, as well as to oversight of the Ombudsman. In keeping with the approach described in this section, the ombuds should be briefing the CEO, or the senior officer to whom she reports. However the organization chooses to streamline reporting procedures, I believe the ombuds also should be providing regular briefings, or updates, in some form or fashion, to senior line and compliance managers throughout the organization, with additional updates as needed.

Such briefings can be highly beneficial to the organization and to the Ombudsman as well. First, the briefings conducted across the organization help each organizational unit to identify and address problems and trends. Second, such reporting supports oversight of a very autonomous function. The mere requirement of such reporting serves as a very useful check and balance against what must be, because of its very nature, a highly independent function.

Moreover, in my experience, one critical, and often overlooked dimension of assessing the performance of the Ombudsman, or of any key staff professional, is the satisfaction of other departments with the professional's performance. Regular reporting places other organizational units in a better position to assess the performance of the Ombudsman. Finally, such reporting is also very helpful to the ombudsperson as well: it can help her to build relationships across the organization, and to establish credibility.

[69] Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization*. San Francisco: Jossey-Bass, 1998, pp, 144-158.

[70] Correspondence with Ralph Culler, February 19, 2009.

[71] Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization*. San Francisco: Jossey-Bass, 1998, pp. 88-104.

[72] Ibid, pp. 88-154

[73] For an excellent example of using training to assess the skills of mediators, see: National Institute for Dispute Resolution. *Performance-Based Assessment: A Methodology for Use in Selecting Mediators*. Washington D.C.: National Institute for Dispute Resolution, 1995. The same approach can be used in assessing the readiness of any employee to assume new roles that require additional or different conflict management skills. Slaikeu, K.A. and Hasson, R.H. *Controlling The Costs Of Conflict: How to Design a System for Your Organization*. San Francisco: Jossey-Bass, 1998, pp. 113-121.

[74] The performance assessment criteria should pay careful attention to professional standards of practice and codes of ethics, and should be based upon the key required skills, abilities and knowledge for the role in question. See: Hermann, M.S., Hollett, N., Gale, J. and Foster, M. "Defining Mediator Knowledge and Skills." *Negotiation Journal*, 17(2), 2001, 139-153. This article, which focuses on mediators, demonstrates the value of analyzing skills, abilities and knowledge as a basis for selecting and evaluating the performance of key staff professionals in a conflict management system.

[75] Park, Susan Kee-Young, "Scenario-Based Performance Assessment: Evaluating the Work of Ombuds," *Journal of the International Ombudsman Association,* Vol. 1, No. 1, 2008, pp. 23-27. Young's brilliant suggestion for use of scenario-based performance assessment as a tool for assessing an Ombudsman's skills, abilities and knowledge is an excellent one. Such an assessment tool could provide very useful information for informing oversight, and could be one element in a comprehensive approach for assessing the performance of the Ombudsman. It is also analogous to methods already in use with mediators—see notes 73 and 74. As Young also notes, such an assessment method could also be a training tool, for sharpening or enhancing skills.

[76] Telephone conversation with Chuck Howard, February 13, 2009.

[77] Park, Susan Kee-Young, "Scenario-Based Performance Assessment: Evaluating the Work of Ombuds," *Journal of the International Ombudsman Association,* Vol. 1, No. 1, 2008, 23-24.

[78] Ibid, pp. 23-27.

Dealing with — or Reporting — "Unacceptable" Behavior[*]

(With additional thoughts about the "Bystander Effect")

MARY ROWE, LINDA WILCOX, HOWARD GADLIN

ABSTRACT

People in organizations often see behavior that they think is unacceptable, unsafe, illegal—even criminal. Why do people who observe such behavior hesitate to act on their own, or to come forward promptly—even when affected by that behavior? Why do they not immediately report those whom they see to be acting in an intolerable fashion?

Hesitation of this kind has been recognized for years; for example, there is a controversial literature about the "bystander effect." In real life hesitation is not confined just to bystanders. People in all roles may hesitate to act. Why do some people—including many managers—waver, rather than acting effectively to stop behavior they find to be unacceptable?

The most common reasons for hesitation are: fear of loss of relationships, and loss of privacy, fear of unspecified "bad consequences" or retaliation, and insufficient evidence. There are many other barriers and they are often complex. Perceptions of the organization and of supervisors are important, as is a complaint system that is seen to be safe, accessible and credible.

Some people *do* act on the spot or come forward when they see unacceptable behavior. Reviewing the reasoning of people with whom we have talked may provide ideas for employers designing or reviewing a conflict management system.

KEY WORDS

bystander effect, retaliation, whistleblower, conflict systems, complaint options, organizational ombudsman, workplace trust, workplace fear, procedural justice

WHY DID I NOT KNOW ABOUT THIS?

Rupert McGillicuddy, the COO of Global Manufacturing, was alarmed and upset. He came in Monday morning to find that Chris Lee, the company's computer systems wizard, had quit over the weekend. Lee was in the second, and crucial, year of adapting and implementing a new, international, inventory tracking and control system. No one else understood the (not yet fully documented) system as well as Lee. Lee also was unique in another respect. As a child he had learned the several languages and dialects of his four grandparents. Fortuitously this had made him into a "one of a kind" gem for Global Manufacturing—the inventory management system was being built together with teams in three of those language areas.

McGillicuddy made a few, quiet phone calls. He was dismayed by the information that came back. It seemed that Lee was a quiet and devout person who had been uncomfortable working with the head of IT, Greg Garious. Greg's sense of humor was described as a bit crude. It appeared that Greg made jokes about everyone. One of his many jokes was about the fact that Lee's four grandparents came from four different countries. Many people had heard these jokes about Lee's parentage and "probable multiple personalities," but apparently no one had remonstrated with Greg.

McGillicudy was told there had been gossip about Greg for years —about different issues. There was a suggestion that Greg made merry when on travel. His "outgoing nature really blossomed" away from home. There was a story about dare devil driving. There were whispers about his receiving recreational drugs from one of the vendors and "sharing" with his staff. HR said they had not investigated any concerns about Greg, "We never had a complaint."

Greg had allegedly bought the new inventory system from a vendor where he was said to be "very close with" the relevant sales representative. Someone said the woman was a cousin; others thought it was Greg's wife's cousin. One person supposedly had thought the sales rep was Greg's mistress. When that person had (supposedly) asked a supervisor in Purchasing about this, apparently no one had looked into a possible conflict of interest. (The rumor mill said that the supervisor in Purchasing had simply asked about "whether Greg and the sales vendor had the same last name.")

Greg had told everyone that he had chosen the new inventory control system because it cost less than others. However, it appeared that Chris Lee had determined that the staffing model had been grossly underestimated. Lee's staff had grumbled. Might Greg have underestimated the staffing to make his choosing this inventory control system look better?

When presenting a public report about the new computer system, Greg blamed the staffing problem on the "slow pickup" of his computer systems staff. When a woman who worked for Chris Lee had then raised her hand, another department manager had whispered that she should cool it, because there was no time at the meeting to discuss details. Lee quit after that meeting.

McGillicuddy was told that his managers wanted to do the right thing, but they simply did not know what to do. They did not know how to evaluate the significance of the gossip and concerns. They seemed afraid to bring attention to something that spelled trouble; they felt there might have been "repercussions." Ignoring the problems seemed the easiest response. Computer systems staff said that Chris Lee had felt deeply humiliated by Greg's comment: "Greg had added insults to injury."

Listening to the car radio on Friday morning McGullicuddy heard someone quoting a speech by a senior national security expert: "The only answer for electronic systems protection is training and earning the loyalty of employees—who could enable security breaches—whether in government or the private sector." This focused his attention.

McGillicuddy immediately called his General Counsel. "Could these IT rumors possibly be true, or is it all contemptible gossip? Is there anything more to learn? Could you please do a real investigation here? And, if there was a problem, *why was I not told about this*?"

WHY DO SOME PEOPLE HESITATE?

People in organizations often see behavior that they think is unacceptable, unsafe, illegal—even criminal. Why do people who observe such behavior hesitate to act on their own or to come forward promptly—even when affected by that behavior? Why do they not immediately report those whom they see to be acting in an unacceptable fashion?

Hesitation of this kind has been recognized for years; for example, there is a controversial literature with simple explanations about the "bystander effect." In reality, hesitation is not confined just to bystanders and it is not simple. People in all roles may hesitate to act. Why do some people—including many managers—waver, rather than acting effectively to stop behavior they find to be unacceptable? To add to the puzzle, some people *do* act on the spot or come forward when they see unacceptable behavior. Can we learn why?

The topic is important to all those who would like a better understanding of why truly unacceptable behavior continues. If people fear to act when they see unacceptable behavior, or otherwise find it is not in their interests to take action, then employers can learn why this is so and think about specific responses. If people *do want* to act but feel powerless, then an employer may help by providing options.

The limitations of this study: We took a wide-angle perspective, rather than focusing tightly on testable hypotheses. We were tracking all kinds of perceived misbehavior, rather than just one kind. We use the terms "unacceptable," and "offensive," to refer to any behavior that was judged to be unacceptable by people who came to ombuds offices in many different organizations. We realize that a scientific study might find that people deal differently with different issues. By the same token people might behave differently at different times. And some might act on the spot *or* report unacceptable behavior but not both. This study simply pulls together all the reasons that were reported to us for not taking action, or for taking action, about unacceptable behavior.

The data presented here are not drawn from surveys, or a sample of employees and managers. The data are drawn from "close observations" of thousands of visitors who contacted dozens of ombuds offices over

a ten-year period. We were not attempting to assess the efficacy of a single complaint procedure. We report instead some perceptions of the context in which people find themselves, (and also their comments about themselves).

We are aware that new research in neuroscience suggests that many decisions are made intuitively or unconsciously and that people often do not know (let alone report truthfully) why they make the decisions that they make. We also believe that many small errors and transgressions should simply be ignored and forgiven and that some people in fact complain too much. We hope it may nevertheless be useful to present what people report about their inactions and their actions.

The goals of this study: We present what people say, about why they do not act or do act, hoping to be useful to academics, to employers, to policy makers, and, especially, to ombuds practitioners and other human resource professionals.

We present a long list of self-reports, as to why people do not act, and a short list about why they do. We are aware that academic research studies have already affirmed many of the self-reports presented here and hope there will be more such research. We hope that employers may be able to read through these self-reports for ones that will be relevant in their own organizations.

It is important for policy makers who are concerned about illegal behavior to consider a *wide range of barriers* to coming forward. We hope that ombuds practitioners and other human resource professionals, who are faced with a person who refuses to come forward, will be willing to listen to all the concerns and interests that the visitor might have. We hope that this article will make it easier to develop options that address the *specific interests of the individuals who see unacceptable behavior* so these individuals may find it easier to take appropriate action.

PEOPLE HAVE MANY COMPETING INTERESTS

Many people clearly do not want to take action when they see unacceptable behavior, and many see nothing unreasonable about their point of view. Society may determine that certain behavior is unacceptable or declare it to be illegal. Employers make policies in accord with their own values and the

law. However employees and managers may have conflicting interests to consider, as they decide how to react to unacceptable behavior. They may want to stop or report behavior they see as unacceptable—or, on balance, they may *not* want to. They may even not want to learn the rules.

Many barriers: We report on two sets of barriers—which interact with each other: perceptions about the organizational context and managers, and personal factors.

Most people consciously or intuitively consider the context when they perceive behavior that they think is wrong. They may consider the rules—and also the actual norms—of their *organization,* about acting on the spot or "coming forward." They may review their own and their colleagues' perceptions of the *local supervisor*. They may, consciously or intuitively, evaluate their *complaint system and its options,* in terms of safety, accessibility and credibility. Recent events may also affect peoples' actions.

Personal factors include how people understand the issues at hand, their personal preferences, gender and cultural traditions, and their perceived power or lack of power. People also may behave differently depending on their role in the situation—as an injured party, a perpetrator, supervisor, senior officer, peer or "bystander."

PERCEPTIONS OF THE ORGANIZATION

Many people say they fear that "something bad" will happen if they take action with respect to unacceptable behavior. One traditional understanding of this fear is not entirely accurate—it is that people hesitate to act because they are afraid of classic retaliation.[1] Legislators have responded by requiring employers to prohibit retaliation, but this may not help very much.

Forbidding retaliation is morally important, but for at least two reasons the proscription is not very effective. The first is that very few people understand or trust such a policy. Retaliation is hard to prevent, and hard to prove, especially where the retaliation is delayed, indirect, diffuse, outside the workplace, or covert. The second reason is that classic retaliation is only one of many fears. *People fear a whole panorama of "bad consequences" for speaking up*. One purpose of this article is to illuminate *the wide scope of possible*

negative consequences that are reported by employees and also by managers.

In addition to various fears, how do employees and managers describe their thinking, when they hesitate to take responsible action? How might employers respond—what options are needed?

PERCEPTIONS ABOUT RELEVANT MANAGERS

• One of my managers is the problem
• Local managers have the most influence
• Risk management—we do not have enough resources to deal with it
• Teamwork—I am loyal to the team
• Stoicism
• Diversity and globalization
• Affinity group loyalty

One of my managers is the problem: Some managers are perceived to lack integrity and some are dishonest. Some managers are believed to be unwilling to pay to remove serious safety hazards. Some managers are thought to engage in bribery, blackmail, discrimination, harassment, intimidation or conflicts of interests. Some are arbitrary and capricious—their reactions cannot be predicted. Incidents may have disclosed that managers have been misrepresenting or disguising wrongful behavior. Vague, euphemistic language—in reports that hide human costs, kickbacks, and losses, or that cover-up widely disparate perks and compensation—may have set the stage for distrust.

Local managers seem to have the most influence: Employers often communicate that they do—and also do not—want to hear what is going wrong. A chief executive may say, "Report illegal behavior," and the local manager may be heard to say: "In these times of lay off we will be keeping those who keep their minds on the job." *Wherever the immediate interests of local managers do not overlap with the public rhetoric of the employer, there will be mixed messages about coming forward.* Examples abound.

Some senior officers are believed to approve "whatever it takes" to get the job done—even if their local employees and managers behave in an unacceptable way in order to meet high goals. It is common to reward productive managers who are very problematic as supervisors. One hears of harsh taskmasters who achieve impossible deadlines by abusing employees, vendors and others. Managers like this may feel and act powerful, and enjoy their power. They may be unaware they are behaving in an unacceptable way, or, alternatively, they may enjoy the fact that others are intimidated. Either way, people may say, "My manager will never change, because he is being rewarded for it." Employees may report that the manager is "indispensible," and being compensated well, in terms of money, and in terms of recognition and power—the signals from the top are clear.

Organizational rules may not matter if the local manager is blind to unacceptable behavior, since the local manager is the person who can reward or punish. An influential unit head may make a decision, or give an order, or simply have a brusque demeanor, such that most people are discouraged from responsible action. Sometimes a unit head is very direct: "If I ever hear that someone from my unit has brought a problem outside this unit I will see that they regret it." Sometimes a unit manager simply does not know what is going on, has just arrived on the scene because of re-assignments, is completely exhausted, or listens only to good news.

Risk Management: Virtually all managers pursue a conscious or unconscious "risk management" strategy in which competing values are weighed. There are not enough resources to pursue every possible concern. In addition no one would actually want every manager and employee to speak up every time they are offended by something—the world would grind to a halt. Most supervisors pursue this kind of "cost-benefit" approach to hearing complaints. "We are so swamped with work and the deadlines are so tight—is it worth it to pursue this concern?"

Teamwork and the team: A strong emphasis on productive teams, cultivating loyalty and "protecting the image of the employer," may inhibit a person from speaking up. Many teams have been taught to "work things out" on their own as a part of delegating decisions to the level of the team. Many professionals and managers are expected to handle their conflicts on their own.

A peer or bystander may wish not to "spoil an otherwise perfect record for the team." A bystander also may not want to get a well-liked senior manager in trouble if that person did not know of the problem. By the same token, if an employer holds supervisors strictly accountable, a senior supervisor may not

report illegal behavior for fear that it will reflect badly on his or her *own* performance, and that it might reflect on other managers in the line of supervision. In addition, sometimes a person will not speak of a problem because it attaches to a situation or project that is tightly held, "company confidential," or hidden from public view by security regulations.

Stoicism: Many people are taught to "tough it out" in the face of adversity. Especially if times are hard, teammates may think, "we just have to get through this—the boss does not want to hear bad news." If a teammate misbehaves or is exhausted to the point of creating an unsafe work environment, bad behavior may be ignored in the "family environment," or people may say, "we have only one bad apple—forget it," or "it was understandable under these extreme circumstances," or "we have been through worse than this and we survived it."

Diversity and Globalization: Sometimes a person does not speak up because the employer places strong emphasis on cross-cultural tolerance, or effective work on an international team. "I will be misunderstood, I will not look good, I will be called a bigot, and I will probably be ignored as well, if I complain about (that person who is not like me)." Employees working outside their own culture may be dependent on successful globalization and be reluctant to criticize others.

Affinity group loyalty: "Affinity group loyalty" among professionals or union members or senior managers may inhibit action. This also may be true among clan or family members, among members of the same ethnic or age group, or the same gender.

This may happen if an in-group member who is misbehaving is also performing very well in other ways. Affinity group members may be blind to the unacceptable behavior. "I cannot believe that he would do anything wrong—and if he did do it, surely he did not really mean it. Besides, it makes no sense for a person like him to do a thing like this." In addition, when someone who is *not* a member of a given affinity group feels harassed by a member of the in-group, the affinity group may underestimate how painful it is. This will be especially true if the group members do not like the person who is not a member of their group. People may say, "She deserves any-

thing she gets," if the person who is getting hurt is not performing well, or if she has behaved badly in the past, or if she frightens other people.

COMPLAINT PROCEDURES NOT SEEN AS SAFE, ACCESSIBLE AND CREDIBLE

• Ignoring ugly behavior that is not overtly illegal
• Requiring conclusive proof of an alleged offense
• Important people get treated very differently
• No one understands our complaint system
• The complaint system procedures are not "accessible"
• Zero tolerance policies

Sometimes policies and procedures convey mixed messages. For example, an employer may say that it expects all unacceptable behavior to be reported—but many aspects of the complaint system are viewed with distrust. Current events may exacerbate this distrust. Some sources of distrust include:

Ignoring ugly behavior that is not overtly illegal: Some employers will only "hear" complaints if the behavior is obviously illegal *and* actually at the workplace. Examples of problematic behavior which might be "invisible" to the employer include: paying two white male professionals grossly inequitably for the same work when one is a "favorite;" bullying someone who is not of a protected class; grossly crude behavior toward a person who is not a "valued customer."

Hazing, and even stalking or assault, may be ignored, if offenses by employees happen away from the work site, and especially if they happen far from headquarters. Offenses may be overlooked if, like heavy drinking, pornographic movies and sexual partying, they are seen to be part of "traditional high jinks" or "that's his private life," at an off-site celebration—even if everyone is expected to attend. Offenses also may be overlooked, even if they are patterns of offenses, if they are not public knowledge, or if they are subjective in nature, or "everybody does it" and "no harm was intended."

Requiring immediate and conclusive proof of an alleged offense: The need for credible evidence is a serious concern, when someone brings a serious complaint. Responsible employers must safeguard the rights of alleged offenders. However extreme attitudes about evidence may constitute a barrier for complaints. The word of an offended person or a concerned bystander sometimes is just ignored,

unless there are multiple emails, VOIP records, fingerprints, DNA, photos, audiotapes, videotape on YouTube, or prominent witnesses immediately available.

An employer may be reluctant about fact-finding if it could be publicly embarrassing, or if an investigation would cost a lot, or if a thorough investigation might involve people outside the organization, or require forensic evidence and subpoenas—or if the problem seems peculiar or complex, and hard to assess. Ironically, employers may be reluctant to launch investigations if a problem is thought to have per-sisted for a very long time. They may fear to discover evidence of long-term misbehavior about which action should have been taken. The result may be that many people suffer before the organization will do an investigation.

Important people get treated very differently: In every organization some people are seen to be more believable than others. People whose work is seen to be good, persons of a shared and "traditional" back-ground, people in certain job categories, and those on a fast track may be seen to be particularly "credible." Anyone who is not on the high credibility list may not have the same access to report unacceptable behav-ior, or the same ability to act effectively on the spot when they perceive unacceptable behavior. In addition important people may be protected if others complain of their behavior.

"No one understands our complaint system:" An employer may say that it "welcomes" reports of unacceptable behavior—but in fact be ambivalent—and it therefore lacks comprehensible, consistent policies and procedures. Or it may fail to train employ-ees and managers.

The complaint system procedures are not "acces-sible:" For reasons of accountability and control, an employer may insist that all complaints go through a tightly prescribed process. This process however may not be comfortable for employees of a certain ethnic or class background or a given gender. Sometimes a complaint must be in writing (with copies). Some-times the intake person seems to act as if it is the complainant who is the problem. Some intake people are uncomfortable around people unlike themselves. Some systems do not permit a complainant to bring an "accompanying person." Sometimes the complaint process is convoluted, and seems to take forever—or privacy is not respected. Sometimes an appeals

process requires going up the ladder to the very people who are seen to be the problem.

In multi-national and otherwise highly dispersed organizations, accessibility may be restricted by geography. In the complex world of today it is often difficult to understand where and how to bring a multi-issue, multi-cohort, multi-jurisdiction problem.

Zero tolerance policies: Ignoring complaints will discourage reporting, as noted above. A strict "zero tolerance" policy creates problems at the other end of the spectrum—that is, zero tolerance also discourages some reporting of illegal behavior.

This is true for several reasons. In order to gain control over criminal behavior, and to be seen to be doing so, an employer may *require everyone to report* such behavior. The employer may also require a formal investigation of complaints. It may also *prescribe just one or two options* for reporting (usually line manage-ment and a compliance office). And it may require punishment of proven offenses.

However, many people were brought up to solve their problems themselves, do not wish to be tattletales, are in fact expected by the manager "to deal directly" with conflicts, would prefer to act effectively on their own to resolve any problem. Many do not wish to get other people fired or be seen to get others into trouble. Many do not trust the employer to do a fair investigation. As a result, zero tolerance policies may inhibit reporting.

Many require confidential or anonymous options for seeking advice and for reporting. Zero tolerance policies do not mix well with many of the "personal barriers" to coming forward (see below). There is therefore a powerful tension between "getting problems solved efficiently at the lowest possible level" by helping people to act on their own—which requires delegating a significant proportion of conflict management—and trying to establish complete control over all unacceptable behavior by centralizing conflict management.

The employer must manage a balance between encouraging people to act on their own and requiring them to report all unacceptable behavior. Some workable balance is also required between individual complainants and compliance offices, between compliance officers and line managers, between managers and those who report to them, and also between headquarters and autonomous subsidiaries

or field offices. A workable balance requires offering safe options in the complaint system. If the dilemmas are managed badly by providing too few options, (and zero tolerance may offer no options), fewer people will come forward.

PERSONAL BARRIERS TO ACTING OR COMING FORWARD

• Loss of privacy and relationships

• Fear of reprisal

• Fear of other losses

• I do not have enough evidence

• It is important for me to keep my head down for now

• Too exhausted, too busy, de-sensitized

• Formidable dislike of formal investigations

• My employer will do nothing

• My employer will overreact

• Lack of skills

• Someone else will take action

• Fear of becoming responsible for the problem

• Things will work out

• Loss of professional image

• Wrongdoers and potential wrongdoers have many barriers

• A few people prefer covert revenge

Individuals, like employers, pursue a conscious or unconscious "risk management" approach in which competing interests are weighed. Virtually everyone who notices unacceptable behavior hesitates, at least briefly, about coming forward or otherwise acting effectively. This is true for supervisors, senior officers, peers and bystanders, those who injured by the behavior, and perpetrators. There are many personal barriers and they are often complex.

The most commonly reported reasons for hesitation are: fear of loss of relationships, and loss of privacy; fear of unspecified "bad consequences" or retaliation; and insufficient evidence. People may be particularly hesitant if they are required by organizational policy to define unacceptable behavior in terms of illegality and immorality.

Privacy and relationships: Almost everyone who perceives a serious problem within an organization thinks first about losing their privacy, and about damaging their personal and professional relationships. People report a fear of losing relationships with

the problem person, with co-workers and supervisors and future colleagues—and also with family and friends. This is especially true in cultures where people do not confront issues or people head-on, and where families and friends may blame a person for rocking the boat or "sticking their head out."

Many people have been taught not to be tattletales. Bystanders (including managers) may especially fear that friends may turn on them: "This wasn't *your* business!" Some people who have been abused in childhood may especially fear loss of privacy and loss of relationships. In addition, people have different points of view. Many people are in fact not offended by behavior that seems intolerable to others, even if the behavior is illegal. *Those who are not offended are particularly unlikely to risk their relationships by coming forward.*

Fear of reprisal: Especially if a person believes that his or her direct supervisor is the cause of the problem, he or she may fear classic retaliation—being punished by the employer. In addition, many will believe in more subtle "bad consequences," for example, that their careers might mysteriously stall, even if they are not "punished." Even in the rare circumstance where people are overtly commended for coming forward, they may believe they will thereafter be sidelined.

Even if the employer highlights a "no retaliation" policy—which is not a common thing to do—very few people trust such a policy. *A surprising number of people are afraid for their physical safety*. Many people know that the employer and the police and the courts cannot protect them and their families from a vengeful manager or co-worker. This fear may be much more acute if there is any chance that the apparent offender will be fired.

Few people believe that an employer can actually prevent covert, delayed, indirect, subtle, or "unconscious" retaliation, for example, the kind of reference that offers faint or irrelevant praise. Many forms of retaliation leave little trace. In addition, a person may fear retaliation by a third party—shunning by co-workers, gossip by colleagues in another institution, angry criticism from neighbors, punishment by a friend of the offender.

Fear of retaliation is especially common among contract workers, and in multi-national and international organizations—wherever the work force is very fluid and very diverse, and where there are fewer

long-term relationships to build trust. Fear of retaliation becomes very acute in bad economic times and in areas where there is a high unemployment rate. Fear of reprisal is especially painful for those who have no "fall-back position." Single breadwinners and foreign workers who have no options for a comparable job are especially vulnerable. Those who fear reprisal may argue openly for silence.

Public trust in "no retaliation" policies may be further compromised by the fact that a few people who come forward may, themselves, be poor employees subject to progressive disciplinary action. If such a person is demoted or fired, co-workers often believe the action took place because the person "spoke up." This kind of misunderstanding can also happen if someone is disciplined whom people erroneously *thought* was a whistleblower. Widespread layoffs also undermine trust, because sometimes people who "come forward" also get laid off. The message that is received may be, "You can get away with being an inadequate employee, but only so long as you do not reveal our mistakes and problems."

It also sometimes happens that careers *in fact* get sidelined or ended, or a whistleblower is punitively laid off. Even one such case, if widely discussed, may undermine trust throughout an organization.

Fear of overt and covert retaliation may also be especially marked if external regulators appear to be antagonistic, and take a humiliating approach to investigation. Interactions with the media also may affect the fears of employees and managers.

Fear of other losses: Coming forward sometimes leads to serious losses even if there is no retaliation and even when reports of unacceptable behavior are handled perfectly. The company may suffer financially or even go bankrupt. Goods may have to be recalled. A plant or a department may close. A close work team or a wonderful boss may be re-assigned.

Insufficient evidence: Some people may feel concern about a situation—but are not certain that there actually *is* a problem or that it is a serious problem. "I do not know the rules well enough. I will wait until it happens again." Or they may not be certain who it is that is behaving badly. Some people do not want to admit even to themselves that a bad thing has happened, or think it may have been "just an error."

Many people who see a problem fear they will not be believed. Most feel they lack *sufficient* evidence in a situation of "his word against mine," especially if a

problem person is of high status. Bystanders often consider quitting or a transfer, before thinking about coming forward, because of the "evidence" problem. This problem is especially serious if the bystander belongs to a non-traditional group and members of the organization are seen to be racist, sexist, etc.

It is important for me to keep my head down for now: "I am just going to wait for a new boss to come along. If I speak up right now on this one, I may lose my effectiveness on bigger things the next time around, or lose my 'access.' I am the only person who actually knows what has been happening here so I have got to stay here and wait until the time is right."

Too exhausted, too busy, de-sensitized: Some people who perceive a problem are in serious distress or "overload" and do not want to invite more stress or distraction or overload by raising an issue. This problem is truly severe for senior managers as well as for junior employees. Many people believe that successfully pursuing a grievance will require a formidable commitment of time and soul and resources. Many employees are reluctant to lose focus at work, be distracted, derail the team, or "lose time on the job." People may also get detached and de-sensitized about unacceptable behavior—especially if they are exhausted and especially if managers use euphemisms to describe the unacceptable behavior. The observer then will be all the more unwilling to lose time from work.

Formidable dislike of formal investigations: *Most people truly hate formal investigations—this fact is often under-estimated*. In every organization there will be a substantial minority of employees and managers who do believe in formal complaint options and who like them. But a large majority will be very hesitant about formal options. Those who despise investigations are of course reluctant to provoke (or be seen to provoke) a formal finding of fact. Since employees may believe that anything reported to a supervisor has to be formally investigated, they may be especially reluctant to "rock the boat."

"My employer will do nothing." Some people think the employer will not act to address misconduct. "You can't change City Hall." They think reporting a problem is pointless, especially if the problem person is well respected, or powerful, or brings in a lot of money, or is seen to have gotten away with bad behavior in the past. "Misdeeds among the star performers are tolerated here and sometimes even celebrated—look

what has happened in the past." Lack of trust in the organization is very common, especially if morale is low in a whole unit. Lack of trust also grows in times when prominent politicians, religious leaders and corporate leaders are seen to be unscrupulous. Recent events can be very important in sowing trust—and distrust.

The idea that a complaint is useless is worsened by the fact that most employers do not let the workplace know, if justice has been served, after a complaint has been made. Many people therefore assume a) that "nothing happens," *and* b) that the consequences to the complainant will be painful.

There is another reason why employees may not trust senior management. Lower level employees who know that problems exist often presume that senior managers know what is going on, when this is not true. Senior people are usually quite insulated and many are geographically dispersed. Some are ill informed about real problems in the trenches—and some are incompetent. As a result people may wrongly believe that a manager knowingly tolerates or even approves of unacceptable behavior.

"My employer will overreact:" Some people also do not want the employer to "do too much." They "just want the problem solved," but do not want anyone punished. This will especially be true if "the damage is already done—the task now is to minimize damage and get on with it."

Concurrent beliefs—that the employer will do too little *and* that the employer may do too much—pose a real dilemma for employers. This dilemma is one of the reasons why a conflict management system needs informal as well as formal options.

Lack of skills: Some people feel they do not have the skills to express themselves or pursue a complaint, or that they lack sufficient understanding of complex rules. Many have no idea about the resources available to help them, or do not trust the resource people to act prudently. "There is no one to listen and help me know what to do." This is especially a problem if it is "not in anyone's job description to stop this behavior."

In many US workplaces, there is *in fact* no one with the "time to listen," so an offended person may not be able to find a safe advisor inside the organization.

Someone else will take action: Many people simply assume that, "Someone else—maybe someone close

to the problem—will do something about it." Or they may decide not to act "because no one else has taken action." (These beliefs are the traditional explanation for the controversial "bystander effect." As we see in this study, these two barriers to action are only two of many possible barriers—and they are not always important.)

Fear of becoming responsible for the problem: Some people may fear to become legally liable if they admit they know of a problem, or that people will think that now they are responsible for taking care of the problem.

Things will work out: Many people simply presume everything will work out ok in the end, "even if there are some problems along the way."

Loss of professional image: Some people fear being seen as a troublemaker, or thin-skinned, or obsessed, or lacking in a "sense of humor." They do not want to lose professional image, especially if they feel injured, but appear not to have been an intentional target. "I am not going to take this personally—she is just ignorant."

Wrongdoers and potential wrongdoers: The reasons why *wrongdoers* do not come forward are numerous. Some perpetrators, of course, know that they have been at fault, enjoy the fruits of their transgressions, and simply want to avoid punishment or being forced to make restitution. Some people have been bribed or blackmailed not to report illegal behavior. This people may not come forward to report someone else's offense, because they do not want their own behavior to come to light. Some people are afraid that admitting one of their mistakes might illuminate a whole pattern of unacceptable and illegal behavior.

Some are ashamed. People who have injured themselves or others may feel too humiliated to act or come forward. Some people may, rightly or wrongly, believe that they colluded with a perpetrator and allowed that person to behave illegally. This is a common belief with regard to sexual behavior, "I did not say 'no'—it is all my fault." This belief is also common with respect to theft, accepting kickbacks, unsafe work conditions, failures to stop discrimination, and failure to do work as specified by code or contract.

Some wrongdoers may just recently have realized that they themselves acted in the past in a wrongful

manner. They may not have been sufficiently aware of social rules or the employer's rules—but they now realize their own culpability and want to protect themselves by keeping quiet. Some made their mistakes by accident and are afraid of the consequences. Some feel entitled—"the rules are ridiculous—these rules do not apply to me." Some enjoy risk-taking. Some believe they never will get caught. A significant number believe, perhaps almost unconsciously, that "If God really wanted me to stop I would be stopped."

Some people have family members who stop them from reporting their faults. Some wrongdoers and some of their friends say, "Feeling guilty is punishment enough." Many wrongdoers do not act appropriately or come forward, because they do not know how to apologize or make amends.

A few people prefer covert revenge: People who feel let down, humiliated or betrayed by a manager may feel they no longer need to be loyal to their organization, and may seek revenge. They plan on dropping a dime to a government agency, posting gossip in a chat room or a video on YouTube, putting up anonymous graffiti or posters. Some, including targets of unacceptable behavior, would prefer to trap the wrongdoer with a cell phone recorder or camera, even if such a trap is illegal. Their purpose is to settle scores, not to support the employer by acting promptly.

WHY *DO* SOME PEOPLE STOP OR REPORT UNACCEPTABLE BEHAVIOR?

• This is my job
• There is a moral imperative to act
• Tangible and intangible rewards for speaking up
• Tangible and intangible sanctions for people who do not speak up
• I am *forced* to speak up
• There is strong evidence that will support speaking up
• I know the rules and can find out how to come forward
• I can do it without being identified
• I can talk with (the offender) directly
• Important people will help me
• It is reassuring not to have to act alone"
• If it all goes bad I have a good fall-back position

• I will never give up; I am committed

When people who observe unacceptable or illegal behavior do act effectively or come forward, why do they do it? To understand why people hesitate, it can be valuable to learn the opposite—why some people *do* find it in their interests to act or speak up.

Some people believe that rank is synonymous with organizational power and that people of high rank should feel they have enough power to stop bad behavior. As we have seen however, many managers hesitate to act effectively to stop unacceptable behavior.

On the other hand many managers—and many employees—do act effectively. They speak of other kinds of power: a sense of moral authority, having enough information about the rules, trust in a local supervisor, having proof that the proscribed behavior actually happened, having strong relationships with colleagues and family, and having a fallback position. Occasionally some one will say, "I believe in this organization."

Some reasons people give for speaking up:

This is my job: "I am responsible and accountable for this kind of problem." "It is part of my professional responsibility to protect others from this kind of behavior."

There is a moral imperative to act: "Peoples' lives are at stake here." "My religion requires I do this." "I can't sleep at night (or look myself in the mirror, or go to services) unless I bring this forward." "My family believes this is the only moral option—it is the way I was brought up."

Tangible and intangible rewards for speaking up: "I might be rewarded for reporting the problem." "My team—or my candidate for promotion—might win." "The offender will be punished and that person deserves it." "We all lose by silence—it is not doing (the offender) any kindness to be allowed to get away with this—it will hurt him (or her) if it continues—and all the rest of us will be better off if this stops."

Some people facing negative performance reviews or layoff may come forward about unacceptable behavior in order to safeguard their jobs.

Tangible and intangible sanctions for people who do not speak up: "Our honor code requires me to act." "I will be held responsible if I do not act, even though it is not my fault." "The mission of the institu-

tion will be compromised if I remain silent." "I'm innocent, and must come forward, to protect my reputation."

Some people believe that they are _forced_ to speak up: A force outside them requires this. "The computer system—or the surveillance camera system—is set up so that I am forced to disclose what happened." "A group of vigilantes in the X department will go after the bad guy if I do not act." "If and when I am subpoenaed I will have to tell what I know—I have to act." "I am going to get caught anyway. So, I had better come forward on my own and throw myself on the mercy of my boss."

There is strong evidence that will support speaking up: "I have incontrovertible proof—I am not worried about whether people will believe me." "There are emails and photos." "I have witnesses." "I can easily tape-record this terrible behavior."

"I know the rules and can find out how to come forward": "We have a poster (had a training program/ have a website) that lays out the rules and the procedure." "I can go to an ombuds office (HR/EAP/ ethics office/chaplain) and they will help me."

"I can do it without being identified": "I think I know how to set this up so that the information is found by the right people." "I know how to trap the bad guys so they get caught in the act." "I will just call Audit and leave a message after hours." "I will put an anonymous letter under someone's door (or call the ombuds office at night, or I will send anonymous email). I don't want to be seen to rock the boat, but I do not have to." "I have heard that sometimes they can send out a generic letter to get this kind of behavior stopped; that would suit me fine. All I want is for this bad stuff to stop."

"I can talk with (the offender) directly": "I have the option of writing a letter to him; that may stop him." "I can take this problem to Mediation and talk with (the offender) with a third party there and no one else needs to know."

"Important people will help me": "Our department head is fair and approachable on every subject—he really wants to know if there is anything wrong." "My relationships are solid inside and outside the organization." "Our HR person helped a friend of mine last year. I will try that." "My supervisor is not going to let me get hurt by this, and neither will my team." "My family is behind me—this matters to me more than

anything else." "My concern is legitimate, my lawyer says I am right and I can win." "The ombudsman is in the CEO's office; the ombudsman says that the CEO and her whole team take this seriously."

"It is reassuring not to have to act alone": "I was not certain if something really was amiss but others think so too—we could not all be wrong." "If we complain together, we may be taken more seriously and there is safety in numbers." "I am allowed to bring a co-worker with me. My office-mate will accompany me and I will not be alone."

"If it all goes bad I have a good fall-back position": "I am leaving anyway—thank God I have just accepted another job, so I can not be harmed by speaking up." "My spouse has a good job so we are going to be ok." "I have nothing left to lose." "I am going to let people know before I die." (A person full of rage, or a mentally ill person, may not think of consequences—this is itself a kind of fallback position.)

"I will never give up": "I am committed—I want justice—no matter what or how long it takes." "I want revenge and I am going to drop a dime." "An authority needs to decide—and come what may I am going to get this issue to the court." "No matter what they do, I'm going to go right on speaking up." (Not to care what happens, because of overwhelming commitment to a goal, is also a kind of fallback position.)

These reasons, while not an exhaustive list, illuminate the fact that individuals who speak up seem to feel it is in their interests to speak. They see an option that fits their interests. _They also seem to feel that they have "enough power" to speak up, by comparison with those who choose to keep silent._

Organizational ombuds do not hear many people who "trust the system." However, people some of the time do trust some _individual_, especially a local department head, to do the right thing.

A FEW IDEAS FOR EMPLOYERS

There are _many_ reasons why people do not act or come forward when they perceive unacceptable behavior. Two famous reasons: fear of retaliation and the "bystander effect," are only two of many.

"Zero tolerance" policies have not been shown to help, and "No Retaliation" policies, while necessary, are not very effective. It is important for employers to focus on more than one barrier to action.

Employers might wish to review the many findings above and devise individually tailored solutions for problems in this list that are especially important in their own organizations. We offer here just a few ideas.

The employer that wishes its employees and managers either to act on the spot or report unacceptable behavior must try to provide a complaint system that is *safe, credible and accessible*. And it needs to do whatever it can to help people to think that it is *in their interests and in their power* to stop unacceptable behavior.

All large organizations need a "zero barrier" office, like that of an organizational ombudsman. A zero barrier office is almost totally confidential, is neutral and independent, and has no formal managerial power; it does not represent or accept notice for the employer and therefore can be approached off the record. People need to be able to discuss their concerns and their evidence; they need to be able to review rules, and organizational norms, and learn negotiating skills; it may help for them to role-play; they need to learn about effective formal and informal options—at no risk. *Dealing with the fear of "bad consequences" is an essential task for employers. It is especially urgent where people fear for their safety.*

Employers should provide anonymous, systems change, self-help, generic, shuttle diplomacy, and mediation options that may be able to remedy unacceptable behavior at little cost to the complainant. Complainants need to be able to be accompanied by a co-worker, if they wish to be accompanied, when they express their concerns.

Employers must be willing to take formal action with respect to cruel and illegal behavior no matter who the offender is. Employers should try to find ways to let complainants know, when action is taken with respect to unacceptable behavior—for example, with appropriate, partial information; by means of generic yearly reports; or by asking for signed privacy agreements in return for feedback.

Employers should provide appropriate incentives for *wrongdoers* to come forward, including appropriate privacy protection, the right of accompaniment, the possibility of making restitution and perhaps, in appropriate cases, the possibility that the employer will not pursue charges.

Employers should provide clear standards of conduct and "values" training, for all levels in the organiza-

tion—including training for "bystanders." *Local unit heads need special training in active listening and complaint handling*. All cohorts should be able to have regular discussions about why it is important to understand and deal with behavior that is seen to be unacceptable. Everyone in an organization should be able to talk how to deal with behavior that is illegal, and behavior that that is contrary to the values of the organization.

We close with one scholarly note: Tom Tyler has written extensively about the relationship between an organization's commitment to and enactment of principles of procedural justice, and its employees' compliance with its policies and rules[2]. He has demonstrated that in a wide variety of organizational settings procedural justice affects the degree to which individuals identify with a group. He found that the strength of their identification is related to the extent of their cooperation with the group. Tyler has found four major contributors to the perception of procedural justice:

* fairness of formal decision making rules;

* quality of treatment received under those rules;

* fairness of decision making by the immediate supervisor;

* quality of treatment by that supervisor.

In organizations in which there is a strong commitment to procedural justice, and thereby some employee identification with the organization, more people may deal effectively with behavior they find unacceptable.

Organizations concerned with creating a climate in which its members are more willing to come forward need to think more broadly than just creating the right policy about and procedure for reporting wrongdoing. *There is no single policy that will make an organization seem trustworthy and no single procedure or practice that will guarantee that people will overcome all the barriers to coming forward*. A well-publicized commitment to fairness and to procedural justice may be a good beginning.

ABOUT THE AUTHORS

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Rowe has a number of special interests in the field of conflict management: unacceptably unprofessional behavior of all kinds, harassment of all kinds, "micro-inequities," that is, small insults that do damage; mentoring and career development, including "micro-affirmations;" dealing with very difficult people and people who "won't let go," options for action if one sees something bad happen, mediating intellectual property disputes, work/family concerns, the role of apologies. (You might call her if you think you owe someone an apology—or if someone owes you an apology). She likes children, gardens, music, scuba, chocolate—and admires the artistic achievements of other people.

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Dr. Gadlin is past President of the University and College Ombuds Association (UCOA) and of The Ombudsman Association (TOA). For three years, he was chair of the Ethics Committee of the Society of Professionals in Dispute Resolution. He also served 5 years as Chair of the Coalition of Federal Ombudsmen.

Dr. Gadlin is the author, among other writings, of "Bargaining in the Shadow of Management: Integrated Conflict Management Systems," "Conflict, Cultural Differences, and the Culture of Racism," and "Mediating Sexual Harassment." He is the co-author of "Neutrality: What an organizational ombudsperson might want to know" and "Conflict Resolution and Systemic Change."

ENDNOTES

[1] In this article we use the term "classic retaliation" in the technical sense of employer action taken against a person engaging in a protected activity. To prove retaliation one would need to show: that one engaged in a protected activity (such as filing a discrimination claim or reporting illegal activity); that one suffered an adverse employment action (such as termination); and that the protected activity and the adverse action are connected or linked. We wish to differentiate this term from the cascade of many "bad consequences" that people fear, often without a clear formulation of the "bad consequences," when they think about taking action or coming forward.

[2] Tyler, T.R. (2000) Social Justice: Outcome and Procedure. International Journal of Psychology. 35(2) 117-125.

Good Intentions Gone Astray: How the ABA Standards Affect Ombudsmen

SARA THACKER

ABSTRACT

This year celebrates the 200th Anniversary of the first ombudsman. Over the centuries, the role of the ombudsman has evolved. This article provides a rich history of the evolution of the various types of ombuds and a critical analysis of the American Bar Association Standards for the Establishment and Operation of Ombuds Offices.

KEY WORDS

American Bar Association standards, organizational ombuds, classical ombuds, legislative ombuds, executive ombuds, advocate ombuds

INTRODUCTION

"Ombudsman" — the word leaves many scratching their heads. Despite the extraordinary growth in the profession, many individuals either do not know the term or are confused by the various types of ombuds.[1]

The dictionary defines an ombudsman as "someone who works for a government or large organization and deals with the complaints made against it."[2] But this description does not begin to encompass the multiple types of ombuds and the broad and diverse tasks they undertake. As federal, state and local governments, corporations, businesses, universities, and non-profit organizations began to use ombuds with regularity in the 1960's, variations in how they dealt with complaints emerged. For example, some ombuds investigate and issue formal reports or findings; others offer informal, interest-based dispute resolution options; and still others advocate for particular groups. These differences cause public confusion and spark heated debate in the profession over who is a "real" ombudsman.[3]

In response to the lack of uniformity and diverging roles of ombudsmen, in 2001 the American Bar Association (ABA), a voluntary private professional association of lawyers, adopted Standards for the Establishment and Operation of Ombuds Offices (the "Standards"). The ABA developed these Standards with good intentions — to advise and guide ombuds on the structure and operation of their offices and to improve public confidence in the integrity of the ombuds process.[4]

While many ombuds are not attorneys, historically, the ABA has been at the forefront of the ombuds movement. Ombuds are highly effective in dispute resolution, a key component of the American legal system. Ombuds often resolve conflicts in their early stages, which could otherwise develop into litigation or more substantial disputes. Therefore, ombuds — whether or not they are attorneys — serve a vital role by establishing a process to handle complaints, exploring underlying facts through informal inquiry or investigation, and addressing those complaints in a manner that best fits the situation.[5] As a result, since 1969, the ABA has urged the establishment of ombuds offices in the governmental sector to investigate and critique administrative actions.[6] More recently, the ABA has undertaken a greater role in the ombuds profession. By 2001, the ABA had broadened its policies to support greater use of ombuds in all areas, including academia and the private sector, and created the Standards for the Establishment and Operation of Ombuds Offices.[7]

The 2001 Standards categorized the different types of ombudsmen and set forth the basic authorities and essential characteristics by which all ombuds should operate. In 2004, the ABA revised the Standards to include new provisions that address important legal issues, such as confidentiality, notice, and the scope of ombuds authority.[8] While the ABA Standards do not have the force of law, courts often look to the ABA for guidance on legal and ethical issues.[9] Accordingly, the ABA Standards need to be clear and reflect industry practices for the various types of ombuds.

This article examines how the ABA's good intentions to define and legitimize the profession went astray. Part I of this article examines the evolution of the ombuds profession from its origins to the present categorization by the ABA into four distinct types and explores the need for Standards that emphasize the fundamentally different orientations of ombuds. Part II examines the common essential characteristics of ombuds and explores the need for Standards that describe how different kinds of ombuds approach independence, impartiality, and confidentiality differently. By emphasizing these differences and creating separate standards for each ombuds category, the ABA would add more clarity to a profession plagued by public misunderstanding.

Additionally, the ABA Standards should minimize confusion by ombuds over important provisions affecting legal issues, such as confidentiality, notice, and the scope of ombuds authority. Part III of this article examines how these provisions cause confusion and explores the legal and functional implications for ombuds. It also offers recommendations for revising the Standards so that ombuds can function with the strong protection of confidentiality, provides clear provisions defining what constitutes notice of employee acts that may subject an entity to liability, and describes the scope of ombuds' authority to assist union employees.

While the ombuds profession is relatively new in North America, by examining the Standards, I hope to increase knowledge and clarity about the profession and reduce the number of quizzical and confused looks by individuals who ask — "ombudswhat?" In addition, this article speaks to practicing ombuds who may feel threatened by the Standards and their legal implications, and offers recommendations to maintain the integrity of the profession.

I. EVOLUTION OF THE OMBUDS PROFESSION

A. ORIGINS OF THE CLASSICAL MODEL — AN ADJUDICATORY APPROACH

Today's classical ombudsman is based on a model originating in Sweden.[10] In 1713, Swedish King Charles XII appointed a "Chancellor of Justice" to investigate the conduct of administrators who acted in his name.[11] The Chancellor would report his findings to the King and serve as an overseer of administrative actions.[12] As Sweden moved towards a representative democracy, Parliament also wanted a "watchman" who would monitor, investigate, and report back to Parliament (not the King) on the operation of the new government.[13]

In its 1809 Constitution, Sweden instituted the position of the justitieombudsman (justice ombudsman).[14] Elected by the legislature, the justice ombudsman was to be "a person of known legal ability and outstanding integrity."[15] The purpose of the ombudsman was to "ensure the legality of official actions" and protect the public by "investigating complaints of official wrongdoing." If necessary, the ombudsman would prosecute officials who acted unlawfully or failed to perform their duties properly.[16] As the role of the justice ombudsman evolved, he became more of a "'citizen defender,' concerned with resolving public complaints against the public bureaucracy, and less as a prosecutor of official wrongdoing."[17] Today, Sweden has four ombudsmen, each specializing in different public fields.[18]

The concept of the ombudsman did not spread quickly. It took more than 100 years before another country followed Sweden's example and appointed an ombudsman.[19] Momentum for instituting ombudsmen began in 1955 when Denmark appointed its first ombudsman.[20] New Zealand and Norway followed in 1962 and 1963 and the ombuds movement continued to spread around the world to Guyana, Tanzania, Canada, the United Kingdom, Mauritius, Northern Ireland, Israel, Fiji, France, Zambia, Papua New Guinea, Portugal, Australia, Austria, Trinidad and Tobago, Jamaica, The Philippines, Ghana, Ireland, The Netherlands and Spain.[21] While the United States did not adopt a federal ombudsman, several states joined the ombuds ranks, starting with Hawaii in 1969, followed by Nebraska, Iowa, New Jersey, Alaska, Kansas, and Florida, as well as several urban areas.[22] Some scholars refer to this surge from the mid 1950s to the 1980s as "ombudsmania" and attribute it to governmental recognition of "the ability of ombudsmen to advance the cause of human rights, to control the public bureaucracy, to remedy individual grievances against public maladministration, and to draw public attention to administrative maladies in public organizations."[23]

In performing these duties, classical ombudsmen took an adjudicatory approach by conducting investiga-

tions, deposing witnesses, subpoenaing evidence, creating an official record, and issuing findings, judgments and formal public reports.[24] The mission of the classical ombudsman reflects this approach:

> The institution's mission is to generate complaints against government administration, to use its extensive powers of investigation in performing a post-decision administrative audit, to form judgments which criticize or vindicate administrators, and to report publicly its findings and recommendations but not to change administrative decisions.[25]

Thus, the classical ombudsman provides both procedural and substantive justice — procedural justice by following standard procedures for conducting investigations and substantive justice by judging and reporting on the merits of a complaint.[26]

B. ORIGINS OF THE ORGANIZATIONAL MODEL — AN ADR APPROACH

Introduction of the organizational ombuds model in the United States in the 1960s occurred during a period of political and social turmoil, as universities faced student protests against the war in Vietnam and citizens demanded protections from the maladministration of corporate bureaucracies.[27] "From within corporations and universities, there was a growing concern about employee complaints regarding managerial power abuse, the complexities of managing and increasing diverse workforce, recognition of the limitations of hierarchical management structures, and similar issues."[28] As a result, corporations and universities looked to ombuds as a way to manage internal grievances and conflicts. Instead of copying the classical Swedish ombuds model, most corporations and universities who appointed ombudsmen modified the role to meet specific needs within these institutions.[29]

> Corporations and universities were seeking an internal mechanism by which grievances and conflicts could be handled in an impartial manner by an independent person who would be seen as neutral with respect to the various factions, interest groups, and statuses within the organization.[30]

Unlike the classical model, which was born out of a need for independent investigation and prosecution of public complaints, the corporate or organizational ombudsman originated from a need for an alternative form of dispute resolution for employee and con-

sumer complaints.[31]

> The mission of the organizational ombudsman is to provide a confidential, neutral and informal process which facilitates fair and equitable resolutions to concerns that arise in the organization. In performing this mission, the ombudsman serves as an information and communication resource, upward feedback channel, advisor, dispute resolution expert and change agent.[32]

Mary Rowe, ombudsman for the Massachusetts Institute of Technology and co-founder of the Corporate Ombudsman Association — now The International Ombudsman Association — further defined the role of the organizational ombudsman, which highlights this ADR approach:[33]

> An effective [organizational] ombuds program typically would offer all *informal, interest-based, dispute resolution options*: listening, coaching, informal intervention, 'looking into a matter' informally, classic mediation, facilitating generic approaches to a problem, support systems change, training through-out the organization to prevent needless disputes, safe access for people with serious concerns, and confidential transmittal of information for those who need to 'blow the whistle.'[34]

Like the concept of the multi-door courthouse, the organizational ombudsman refers visitors to the appropriate place inside the organization for addressing a visitor's problem.[35] In this sense, "[o]mbudsmen do not deliver due process, they deliver whatever responsible process is appropriate for each individual circumstance."[36]

C. ABA'S CREATION OF OMBUDS CATEGORIES

1. Classical, Organizational and Advocate Ombuds

According to classical ombudsmen, organizational ombudsmen have distorted the Swedish model and are inappropriately using the title, diluting the purity of the profession.[37] While organizational ombudsmen were not the first to lay claim to the title, they are now the most prevalent form of ombudsmen in the United States.[38] In fact, some classical ombudsmen have bitterly complained that organizational ombudsmen have "hijacked" the ombuds movement.[39]

Faced with the tension between classical and organizational ombuds, the ABA sought to define and clarify their different roles. In the Preamble to the Standards, the ABA describes ombuds as those who "receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve."[40] The ABA's definition of an ombudsman unified the profession such that it could apply to both classical and organizational models.

To further define and distinguish between the various types of ombudsmen who have emerged in the field, the ABA created separate categories of ombudsmen. In its 2001 Standards, the ABA identified three categories: classical ombudsmen, organizational ombudsmen, and advocate ombudsmen.

The ABA defined a classical ombuds as "a public sector ombuds who receives complaints from the general public or internally and addresses actions and failures to act of a government agency, official, or public employee."[41] This definition was based on the Swedish model. In contrast, the ABA defined an organizational ombuds as one who "facilitates fair and equitable resolutions of concerns that arise within the entity."[42] This definition alludes to the ADR approach of the organizational ombuds. It may also be construed to limit the organizational ombuds' jurisdiction by failing to address concerns arising outside the organization. Traditionally, organizational ombuds have also handled concerns arising outside the entity, for example, those brought by customers, consumers, vendors, or other public members who interact or are affected by the organization; however, these complaints brought by those outside the organization are not included in the ABA's definition of an organizational ombuds.

Both classical and organizational ombudsmen objected to the addition of "advocate ombudsmen" to their ranks.[43] Advocate ombudsmen looked radically different from other ombudsmen in that that they failed to adhere to one of the fundamental characteristics of ombuds — impartiality. Unlike classical or organizational ombuds, advocate ombuds serve as agents of individuals who may be unable or have difficulty finding a resolution to their disputes and may need a voice to advocate on their behalf.

The first advocate ombuds originated in response to abuse and neglect of nursing home residents in the late 1960's and early 1970's.[44] In 1971, President Nixon directed the Health, Education and Welfare Department (HEW, now the Department of Health and Human Services) "to assist the States in establishing investigative [ombuds] units which would respond in a responsible and constructive way to complaints made by or on behalf of individual nursing home patients."[45] Today these ombudsmen are the largest group of advocate ombudsmen in the United States.[46] Known as Long-Term Care (LTC) Ombudsmen, they serve to promote the interests of institutionalized elderly to protect their health, safety, welfare and rights.[47]

While LTC Ombudsmen assist nursing home residents by coaching them to develop specific strategies to use to address their problems directly, LTC Ombudsmen also advocate directly on behalf of the individual resident.

> There may be times when a resident wants the ombudsman to speak on his or her behalf or needs the support of the ombudsman in pursuing resolution. This usually occurs when resources within the home or community are unknown, when family or legal problems arise, or when there is fear of causing tension in resident-staff relationships. There are also cases where an ombudsman may represent a resident who is unable to communicate his/her wishes and has no one else to uphold his or her rights.[48]

Not only do LTC Ombudsmen assist residents in asserting their rights and expressing their grievances *within* the long-term care facility, they advocate for residents *outside* the facility by seeing administrative, legal or other remedies to protect their health, safety, welfare and rights.[49] These functions are contrary to both the classical and organizational models, which prevent ombuds from suing on behalf of a complainant or advocating on behalf of an individual.

2. Classical Ombuds Further Differentiated — Executive and Legislative Ombuds

In 2004, the ABA further differentiated among types of ombudsmen. In order to distinguish between ombudsmen who are appointed by the legislature and ombudsmen who are appointed by a governmental executive or public official, the ABA broke up the "classical ombudsman" category into "legislative ombuds" and "executive ombuds."[50] For example, a national human rights ombudsman may be estab-

lished by the legislative or executive branch.[51] In Africa, human rights ombudsmen are typically based on the executive ombuds model.[52] Those who support the executive model argue that these ombudsmen are effective because they have more credibility and command great respect due to their proximity to the head of state, their personal disposition and integrity.[53] Conversely, executive ombudsmen may have to investigate, critique or challenge those who appointed them, and therefore may not feel comfortable exercising their duty freely.[54] Because legislative ombuds are appointed by a legislative body, they have more autonomy and statutory protections to ensure their integrity will not be compromised.

Executive ombuds may also be located within the private sector and may be appointed by a private executive. Whether located within the public or private sector, executive ombuds "work to hold the entity or specific programs accountable or work with officials to improve the performance of a program."[55] For example, an executive ombuds office may function as a private non-profit corporation that serves to assist citizens in resolving complaints against agencies of a county government.[56] A news ombudsman may also be considered an executive ombuds. Appointed by the executive editor, publisher or president, "[a] news ombudsman receives and investigates complaints from newspaper readers or listeners or viewers of radio and television stations about accuracy, fairness, balance and good taste in news coverage.[57] He or she recommends appropriate remedies or responses to correct or clarify news reports."[58] Many newspapers have dedicated a column for their news ombudsmen to publish their recommendations or the results of their informal investigations so the public is informed. In this capacity, a news ombudsman holds the media accountable and improves the quality of journalism.[59]

3. The Different Approaches Identified, But Not Clarified

While the ABA Standards identify separate ombuds categories to distinguish their roles, the Standards add confusion by recommending that the enabling ombuds legislation or written ombuds charter should authorize ombuds to investigate and report findings, facilitate, negotiate, mediate, and make recommendations for the resolution of individual complaints.[60] Some of these functions are contrary to the classical and organizational models,

yet are described as part of the role of all ombudsmen. The only ombuds function the ABA points out as not applying to all ombudsmen is the ability to "advocat[e] on behalf of affected individuals or groups."[61] This function is reserved for advocate ombuds and applies only when "specifically authorized by the charter."[62]

The ABA Standards should be revised so that all functions, not just that of advocacy, are specifically authorized by the enabling legislation, written charter or internal regulation. In addition, the scope of the organizational ombuds should be expanded to include concerns that come from outside the organization. Finally, the Standards should make clear that not all legislation, charters or regulations should authorize ombuds to perform the same functions, especially functions that are contrary to the orientations of the different ombudsmen. These different orientations of adjudication and ADR permeate all aspects of certain ombuds operations.

II. DIFFERENCES IN THE ESSENTIAL CHARACTERISTICS AND OPERATION OF OMBUDSMEN

In addition to establishing categories of ombudsmen, the ABA identified essential characteristics common to all ombudsmen, including independence, impartiality, and confidentiality. However, by focusing on these commonalities, real differences in the ways ombudsmen function in accordance with the essential characteristics of the ombuds office are overshadowed.

A. INDEPENDENCE

The Standards require that ombudsmen be independent in their structure, function and appearance. For some ombuds this is a more difficult task than for others.

Structurally, legislative ombudsmen have the most independence because their independence is guaranteed by law. While legislative ombuds are appointed by the legislature and are part of the legislative branch, they are guaranteed independence by the enabling constitution or statute.[63] This ensures that they are "free from interference in the legitimate performance of duties and independent from control,

limitation, or penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry."[64] In addition, legislative ombuds are typically assured a term of service with a high salary equivalent to that of a high officer and may be removed only for cause, which enhances their structural independence.[65]

Legislative ombuds need independence to have the freedom to investigate and perform their duties without fear of retaliation or control by other entities or individuals. For legislative ombuds, the ABA's 1969 resolution outlining essential characteristics for maintaining independence still serves as a model for federal, state and local governments who want to create such an office. In addition to the previous structural characteristics, the following functional characteristics ensure independence:

> • [A]uthority of the ombudsman to criticize all agencies, officials and public employees . . .

> • [F]reedom of the ombudsman to employ his own assistants and to delegate them . . .

> • [F]reedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee;

> • [A]ccess of the ombudsman to all public records . . .

> • [A]uthority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee;

> • [D]iscretionary power to determine what complaints to investigate and to determine which criticisms to make or to publicize;

> • [O]pportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement[66]

Executive ombuds do not have a similarly strong statutory guarantee of independence. Executive ombuds are appointed by and serve at the pleasure of governmental or private executives.[67] As these executives change, the ombuds office may receive more or less support or may even be phased out.[68] Despite these limitations, governmental and private executives can provide the ombuds office with

independence and with the same characteristics previously endorsed by the ABA for legislative ombuds. Because executive ombuds follow a classical ombuds model, which focuses on investigation and reporting the results of these investigations, the legitimacy of this work is jeopardized when the ombuds office is not independent from the chief executive.

Though executive and legislative ombuds are independent, paradoxically their very connection to their chief executives and legislative creators may account for their effectiveness.[69] "When an executive Ombudsman encounters an obstinate or inefficient agency, he may call on his chief for support. When a classical Ombudsman meets a similar situation, he may call upon the Legislature through a special or annual report, or upon the press to impose a similar pressure."[70] For example, the Executive Ombudsman of the City of Portland described how his connection to the Mayor helped him obtain information and documents from public employees who usually provide them under the assumption that the ombuds office is "an adjunct to the Mayor, rather than an independent body."[71] In contrast, legislative ombuds have independent subpoena power and do not need to rely on the perceived power brought by the executive or wait for the Mayor to grant such subpoena power as provided by City Charter.[72] While the close association with the executive may be helpful in fulfilling the ombuds investigative role, it also may confuse public employees over the role of the ombudsman as an independent office.[73]

Independence is necessary to prevent ombuds from being influenced or controlled by executives with political motives. For example, while running for re-election in 1986, Marion Barry created the position of Ethics Ombudsman in response to public concern over alleged corruption in city government.[74] In addition to hearing complaints from city government employees and the public, the Ethics Ombudsman had "the authority to report findings of wrongdoing to the public or to law enforcement officials, as well as to the mayor, the inspector general and city agency heads."[75] While exposing corruption was the stated objective of the Ethics Ombudsman, it is questionable whether Barry truly wanted corruption to be revealed in light of his own political agenda. Shortly after the election, the Ethics Ombudsman position faded away and is now defunct.[76] Without independence, an executive ombuds may feel pressure to provide a

flattering report of governmental activities or modify the results of their investigations to suit the political aspirations of the executive.

Advocate ombuds are often appointed by a governmental executive.[77] However, the location of the advocate ombuds office may pose conflicts of interest. For example, in some states Long-Term Care Ombudsmen are appointed by the governor; whereas in others, they are appointed by a director of an agency where the ombuds office is located.[78] Like other ombudsmen, advocate ombuds need to be insulated from political interference, agency pressure, or retaliation.[79] Independence allows ombuds to "tell it like it is" without the same fear that other internal agency staff may have.[80] For example, advocate ombuds must have the freedom to gather sufficient information about the problem to advocate on behalf of the individuals they serve. Moreover, in advocating for individuals of a particular population, advocate ombuds may be criticizing or arguing against the very agency in which they are housed. As a result, special care needs to be given to ensure independence so that ombuds have the freedom to serve as a strong voice for the people they represent.

Organizational ombuds also require independence, but for a different purpose. Unlike legislative and executive ombuds, the primary purpose of organizational ombuds offices is not to conduct investigations or issue public reports. In fact, investigations are specifically prohibited.[81] Organizational ombuds need to remain independent from all other line and staff structures so that visitors will utilize the office and seek out the ombuds as an alternative to the other channels within the organization. If an organizational ombuds is viewed as a part of the management structure or an extension of the CEO, employees may not come forward for fear that the ombuds will be biased or will breach confidentiality. Furthermore, organizational ombuds provide a variety of services for visitors, offering a flexible process that varies according to the needs of the visitor. Accordingly, organizational ombuds need to operate without interference from other entities or individuals within the organization and should not be penalized for inquiring about a particular issue or problem.

Like executive ombuds, organizational ombuds do not have independence guaranteed by statute. Instead, the governing policy of the institution provides the organizational ombuds with independence. For example, organizational ombuds report only to the highest officer(s) in an organization, such as the CEO. If there are too many people between the ombuds department and the CEO to whom the ombuds reports, employees will recognize that the ombuds could potentially be influenced by or beholden to these individuals.[82]

In addition to reporting only to the highest level within an organization and remaining outside the line management structure, organizational ombuds can be assured independence by policies that provide for renewable term limits, removal clauses for cause only, high salary, access to information within the organization, an adequate budget that cannot be reduced for retaliatory purposes, and access to independent counsel. In this way, organizational ombuds can maintain independence, serving as the "inside-outsider."[83]

Critics of these safeguards argue that without statutory protections, ombuds cannot be assured independence because they are part of the organization they serve.[84] Because organizational ombuds typically report to the CEO or board of directors, they may potentially seek to please these individuals or act in a way to maintain their positions as ombuds.[85]

The ABA uses the following criteria to determine whether an ombuds is independent:

> whether anyone subject to the ombuds's jurisdiction or anyone directly responsible for a person under the ombuds's jurisdiction (a) can control or limit the ombuds's performance of assigned duties or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the budget or resources of the office.[86]

While organizations may have internal policies prohibiting this type of control or retaliation, ombuds can still suffer reprisal by a President or CEO who can find ways to eliminate, remove, or reduce the ombuds office.[87] Organizational ombuds can never attain the same structural independence as legislative ombuds, whose independence is guaranteed by law and protected by the legislative branch. Instead, organizational ombuds are only independent to the extent the entity allows.[88] These differences in independence are important and need to be explained in the ABA Standards so that the public is aware of the limits of independence within these categories.

B. IMPARTIALITY IN CONDUCTING INQUIRIES AND INVESTIGATIONS

The ABA requires that ombuds demonstrate impartiality only when conducting inquiries and investigations.[89] The ABA limited impartiality in response to the needs of ombuds who advocate on behalf of a particular population and for ombuds who issue public reports, findings or recommendations that advocate change in law, policy or decisions.

These actions are contrary to the practice of organizational ombudsmen, who strive for impartiality in all aspects of their work. As in facilitative mediation, visitors to the ombuds office should not expect to be given advice.[90]

> For an ombudsperson, giving advice may be a form of condescending partisanship; condescending because it assumes the inability of the advisee to come to her/his own decision about the best course of action and partisanship because it means we have been seduced — "tell me what to do" is merely the most flattering version of "be on my side." . . . If an ombudsperson gives advice, then the ombudsperson has a stake in the outcome.[91]

Instead, organizational ombuds work with visitors to identify and evaluate a range of options.[92] The visitors, not the ombuds, decide how to proceed with their complaints and which options are best suited to resolve their disputes.[93] If people perceive they have some control over the complaint process, they cope better with tough problems and are more likely to feel the process is fair.[94] In addition, organizational ombuds recognize that there may be several ways to resolve a dispute and that the optimal solution for the visitor is the one freely chosen.[95] Recognizing the importance of self-determination in conflict, organizational ombuds do not provide advice and remain impartial.

Unlike other types of ombuds, organizational ombuds do not conduct investigations or issue reports, findings or recommendations stemming from these investigations. Engaging in such activities would jeopardize their reputations as impartial conflict resolution resources. Organizational ombuds do conduct informal inquiries at the request of a visitor to obtain more information about a conflict and explore options for resolution. However, these inquires (sometimes referred to as informal investigations) are not conducted to generate any reports, findings or recommendations by the ombuds for how the dispute should be resolved. One organizational ombuds described this practice of informal investigation "not as the last word on an issue, but as a catalyst for the parties to attend to the matter anew, and from a different vantage point."[96] Another described the purpose of informal investigations as "uncovering the dynamics of a dispute."[97]

By meeting with visitors, organizational ombuds acquire a wealth of information about the types of conflicts and problems that arise. Although visits to the ombuds are confidential, organizational ombuds may provide upward feedback to management that identifies general trends and patterns in complaints brought to the ombuds office without revealing confidential information or disclosing the identity of the visitors.[98] For example, organizational ombuds may record the demographics of those who visit the office (e.g. gender, race/ethnicity), the visitor's general position held at the organization (e.g. supervisor, administrative staff, or other employee classification specific to the organization), and the type of issues raised by visitors (e.g. policy, benefits, discipline, ethics, discrimination, personnel, management, work environment).[99] These categories are general enough that an individual visitor would not be able to be identified yet the organization has access to information that identifies problem areas. In addition, the organizational ombuds may learn of a particular problem, such as failure to enforce a policy, on the basis of a single case and may provide feedback to management while maintaining the confidentiality of the visitor.[100] This upward feedback allows management to take proactive measures to find solutions to problems that otherwise may go unidentified and leads to systematic change within the organization.

In addition to identifying trends and patterns in complaints, organizational ombuds may provide general recommendations for systematic change. For example, in its 2000 Annual Report, the NIH Office of the Ombudsman, Center for Cooperative Resolution recommended that the National Institutes for Health:

- Strengthen formal and informal systems for addressing complaints and conflicts and ensure that those with grievances and complaints work within those systems . . . .

- Review the current approach to employee performance evaluation . . . .

- Evaluate supervisors on their management responsi-

bilities and provide effective, ongoing training for managers . . . .

• Reconsider the structure of stage one of the agency grievance process . . . .

• Develop new approaches to addressing racial and other identity issues at NIH . . . .

• Shift the focus at NIH away from an exclusive concentration on problems and failures . . .[101]

These recommendations do not advocate specific solutions, but are important starting points to explore options for systematic change within the organization. In performing this function, organizational ombuds have been deemed "change agents."[102]

In providing recommendations for change, organizational ombuds need to walk a fine line. Often organizational ombuds are asked to serve on and advise committees responsible for drafting new policies and procedures that were formed as a result of the very problems identified by the ombudsman.[103] While ombuds want to assist in correcting these problems, it is important that they not serve in a decision-making capacity, draft new policies, or advocate a particular result.[104] Ombuds may have to meet with employees in the future who have problems or complaints with these policies. If ombuds are invested in forming or endorsing particular policies, they may feel compelled to defend them, thereby compromising their neutrality.[105] In addition, if the ombuds serves on these committees with others in the organization's management structure, it may give the appearance that the ombuds is simply an arm of management.

In order to assist the organization in forming new policies while maintaining impartiality, some ombudsmen serve on committees in an "ex officio or advisory capacity" or as a "critical reader."[106] By maintaining distance from management and by refusing to endorse particular policies, these ombuds adhere to their duty to serve in an impartial manner. In this capacity, ombuds should be aware of the "important difference between helping to identify possible problems in proposed policies and procedures and promoting particular policies or procedures."[107]

For legislative, executive and advocate ombuds, this distinction does not exist. As part of their practice, these ombuds not only promote particular policies and procedures, but they may do so publicly. In addition, they may take a position about the merits of a complaint or the outcome of an investigation. For these ombuds, impartiality extends to their conduct during their investigation and the evaluation of a complainant's claim, but does not prohibit them from ultimately opining on who is right or wrong. The fact that impartiality extends only to inquiries or investigations does not mean that it is any less important for legislative, executive or advocate ombuds. If an ombuds is not impartial, complainants may not seek the ombuds' assistance and any criticism or recommendation made by the ombuds will not be viewed as credible.[108]

The ABA Standards should reflect the difference in impartiality between organizational ombuds and others. For organizational ombuds, impartiality extends to all aspects of their work, not simply to informal inquiries or investigations. The ABA should emphasize this difference so that the public has a clear understanding of how various ombuds operate.

B. CONFIDENTIALITY

The ABA recognizes confidentiality as an essential characteristic of all ombuds offices. Under the ABA Standards, "[a]n ombuds does not disclose and is not required to disclose any information provided in confidence, except to address an imminent risk of serious harm."[109] In addition, all "[r]ecords pertaining to a complaint, inquiry, or investigation are confidential."[110] However, this definition is misleading. Under the ABA Standards, an ombuds "may disclose confidential information so long as doing so does not reveal its source."[111] In essence, the ABA Standards guarantee anonymity, not confidentiality. If the ombuds believes that disclosure of confidential information is needed, the ombuds may disclose this information without obtaining consent from the source as long as the sources' identity is not compromised.[112] Unless the sources requests that his/her identity be revealed, the ombuds will protect it from disclosure.

For organizational ombuds, the protection of confidentiality is much broader. Under the Code of Ethics for organizational ombuds, the ombudsman "holds all communications with those seeking assistance in strict confidence, and does not disclose confidential communications unless given permission to do so."[113] Therefore, all information divulged by a visitor is confidential and the information cannot be revealed unless the visitor gives express consent. This gives visitors a feeling of control over their conflicts. Yet the

ABA Standards appear to take this control away: When an ombuds communicates with representatives of the entity about allegations by multiple complainants that may reflect inappropriate or wrongful behavior or conduct, the complainants are only advised after the fact if the ombuds communicated confidential information to the entity.[114] As long as the identity of the complainant is not revealed, confidential information may be shared.[115] Ultimately, the choice to disclose confidential information belongs to the ombuds. A complainant cannot demand that the ombuds disclose such information or direct the ombuds actions.

Confidentiality is the heart of the organizational ombuds practice. Without confidentiality, individuals would not feel safe coming forward to express their conflicts, problems or concerns. The protection of confidentiality is a unique feature that other traditional channels within the organization — such as management, human resources, audit, security, legal, and compliance — do not provide. The ombuds office does not replace these channels; rather, it offers an alternative that enables employees to communicate their grievances by providing them with a confidential forum.[116] Indeed, the organizational ombuds would add little value if "the same information could have flowed through traditional channels."[117]

Individuals fear using formal grievance channels, which "are often ill-suited to providing prompt, efficient and just solutions to the problems that are brought to them."[118] Approximately 10 percent of the complaints within an organization become formal grievances.[119] The other 90 percent come from employees who feel mistreated and will "lump it," failing to bring a complaint because they believe they will not receive their desired outcome or avoiding a conflict by withdrawing from the relationship.[120] Fearing that their dispute will be disclosed, individuals fail to take action to resolve the conflict. Fears may arise from many sources, including:

- Loss of privacy and dignity
- Jeopardizing the relationship
- Covert and/or overt reprisal
- Being thought of as disloyal, lacking in humor or a poor sport
- Being seen as troublemakers
- Not having enough evidence[121]

Without confidentiality, employees may also fear

losing control over their conflict. They need the ability to speak freely with an ombuds about their conflict without fear that action will be taken without their consent. In addition, employees also worry about the organization's response to their complaints. Individuals may not report misconduct because they do not believe employers will take action to stop the misconduct or resolve the conflict.[122] Conversely, other individuals fail to report misconduct because they believe the employer will impose exceedingly harsh measures on the perpetrator.[123] Organizational ombuds may help fearful employees think through which options best suit their individual needs and conflict styles.

Unlike public citizens who bring complaints to a legislative or executive ombuds, employees of an organization who bring complaints are particularly vulnerable.[124] "Participation in an organization, like a company or a university can be terminated in ways that participation in one's country cannot, even if one's rights as a citizen can be drastically restricted."[125] This threat of retaliation warrants strict confidentiality by the organizational ombuds office.

As a result, an organizational ombuds must be very careful not to discuss a case in a way that may compromise the identity of the complainant and must promote strict measures to ensure confidentiality. Not only should organizational ombuds not use the names of visitors, they should not reveal information that could lead to identification of a visitor without that individual's express permission.[126] In addition, the organizational ombuds office does not keep case records for the organization and should have a consistent and standard practice for destroying any notes from a case.[127] All data prepared for the organization should be carefully scrutinized to protect the identity of the visitor.[128] In order for employees to use the organizational ombuds office and discuss their problems and complaints openly and honestly, they need assurance that they are communicating in a safe space and that the organizational ombuds will keep their communications confidential unless given express consent to disclose.

For organizational ombuds, confidentiality is central to their practice and is necessary in all communications with visitors. However, for legislative and executive ombuds, confidentiality is a tool that is offered at the ombuds' discretion in order "to elicit needed information or protect the source of needed

information."[129] Confidentiality does not extend to all communications, but is provided on a case-by-case basis when needed. For these classical ombuds, the ABA Standards do not pose a problem because even confidential information may be revealed as long as the source is protected. Disclosing confidential information will not likely lead to disclosure of the source where the ombuds receives numerous complaints from the public.

Due to the critical role that confidentiality plays in the organizational ombuds practice, the ABA should revise its Standards so that this protection does not merely guarantee anonymity. The Standards should go farther by providing that confidential information not be disclosed unless the source provides express consent and the ombuds agrees to disclose this information. Such a provision would correct the inconsistencies in the ABA Standards that send two different messages — one protecting only the source, not the confidential information, from disclosure and the other protecting all confidential information from disclosure unless the source consents to reveal it.[130]

The inconsistencies in the confidentiality provisions of the ABA Standards may be explained by the need of organizational ombuds to provide upward feedback to the organization. As part of their practice, organizational ombuds may provide an organization with trending data. This information may be used by the organization to promote systematic change. As a result, organizational ombuds must be able to reveal information without the visitor's consent. However, the information that the ombuds reveals is not confidential. This information may include the general demographics of visitors to the ombuds office; the type of issue addressed; the work relationship between complainants and respondents; the processes used by the ombuds office to assist visitors; the time it took to resolve disputes; and the techniques used for resolving cases. The ABA Standards do not adequately address this upward feedback function in its discussion of the limits of confidentiality. While the Standards recommend that the ombuds "discuss any exceptions to the ombuds's maintaining confidentiality with the source of the information," the Standards should explicitly refer to the upward feedback function of ombuds. Clarity is needed for visitors who may be confused as to the limits of confidentiality and what information ombuds retain and distribute as part of this function.

If the Standards are not revised to take into account upward feedback, the Standards may be construed to prohibit this function since "any information the person provides in confidence" cannot be disclosed unless the source provides consent. Such an interpretation would obliterate one of the essential roles of an organizational ombuds to promote change within the organization.

III. LEGAL AND FUNCTIONAL IMPLICATIONS OF THE ABA STANDARDS ON OMBUDSMEN

A. CONFIDENTIALITY — A MISSED OPPORTUNITY

The ABA passed on an opportunity to strengthen the confidentiality of the ombuds office. The seminal case finding an ombuds privilege, *Roy v. United Technologies Corporation*, and its progeny provide a legal basis for protecting the confidential communications of organizational ombudsmen.[131] The ABA, however, declined to incorporate this privilege into its Standards.

Roy is the first case to protect communications of an organizational ombuds from disclosure under a federal common law privilege.[132] Although unpublished, this case has become the most influential and is frequently cited by other courts. In this case, Monoranjan Roy, a United Technologies (UTC) employee, visited the ombuds office. He later filed suit against UTC for discrimination on the basis of age, race, and national origin.[133] When he sought to depose the UTC Ombudsman, the ombuds filed a motion for protective order to prevent disclosure of confidential information.[134]

The court granted the protective order. In his ruling, Judge Cabranes looked to Federal Rule of Evidence 501, which provides that "…the privilege of a witness shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."[135] While this rule provides little specific guidance, it provides judges with flexibility to develop privilege rules on a case-by-case basis.

The court granted the protective order. In his analysis, Judge Cabranes found that the ombudsman relationship must exhibit four factors to support a finding of

common law privilege. Known as the Wigmore test, these factors include:

(1) [t]he communication must be one made in the belief that it will not be disclosed;

(2) confidentiality must be essential to the mainte-nance of the relationship between the parties;

(3) the relationship should be one that society considers worthy of being fostered;

(4) the injury to the relationship incurred by the disclosure must be greater than the benefit gained in the correct disposal of the litigation.[136]

The UTC ombudsman satisfied all four factors. First, there was an expectation that communications with the ombuds office would be kept confidential. This was demonstrated by the "extensive precautions – such as having an 800 number to prevent tracing calls – that were taken to ensure confidentiality."[137] Second, confidentiality is essential to the relationship and is a defining characteristic of an ombuds office. In fact, UTC established the ombuds office for the purpose of ensuring confidentiality and promoting candor.[138] Third, the ombuds office benefits society by promot-ing accountability among contractors, encouraging individuals to report waste and fraud, and enabling many disputes to be resolved informally.[139] Finally, the ombuds strong interest in confidentiality is out-weighed by the plaintiff's minimal interest in discov-ery.[140] Because the privilege belonged to the ombuds office and the plaintiff could not waive it, the ombuds-man could not be deposed about the confidential communications regarding the case.

Relying on *Roy*, the court in *Kientzy v. McDonnell Douglas Corporation*, also recognized an ombuds privilege and prevented discovery of communications made with the corporation's ombuds office.[141] In *Kientzy*, the plaintiff wished to depose employees about communications with the McDonnell Douglas ombuds office to prove discriminatory intent and to prove that the ombuds participated in the final decision to terminate her as part of the company's procedure for appealing a dismissal.

Applying the Wigmore test, the court found the ombudsman satisfied all four factors. Communica-tions made to the ombuds were made under the belief that they would not be disclosed. This policy of confidentiality was supported by the structure of the ombuds office as an independent and neutral entity, by the ombuds' adherence to a code of ethics provid-ing for confidentiality, and by the employer's strict

pledge and advice to employees that communica-tions were confidential. In addition, the court found that confidentiality was essential to the relationships between employees and the ombuds office.

> Without this confidentiality, the office would be just one more non-confidential opportunity for employees to air disputes. The ombudsman's office provides an opportunity for complete disclosure, without the specter of retaliation, that does not exist in the other available, non-confidential grievance and complaint procedures.[142]

The ombuds office also serves an important role in society by providing employees who work for "very large federal government contractors in the aircraft, space, and other industries . . . . [with] an opportunity to make confidential statements and to receive confidential guidance, information, and aid to remedy workplace problems to benefit themselves and possibly the nation."[143] Moreover, society benefits from the ombuds office, which promotes informal dispute resolution and settlement based on confiden-tial communications. In the years following *Kientzy*, several jurisdictions continued to uphold a privilege for the ombuds office.[144]

In a case surprising on its face, McDonnell Douglas, the very corporation that obtained an ombuds privilege in *Kientzy* was denied this same protection six years later. In *Carman v. McDonnel Douglas Corpora-tion*, the Eighth Circuit failed to provide a privilege for confidential communications made by an employee to the company ombudsman who investigated and mediated workplace disputes.[145] However, a closer look at the procedural and substantive history of the case reveals that McDonnel Douglas forced the court's hand by failing to submit evidence to the lower court of the value of its ombuds office. Consequently, the appellate court may not have factual basis in the record to extend the privilege.

In *Carman*, McDonnell Douglas fired Frank Carman as part of a RIF (reduction in force). Carman later sued alleging his termination violated the Age Discrimina-tion in Employment Act, the Missouri Human Rights Act, and the Employee Retirement Income Security Act of 1974.[146] During discovery, Carman requested all the ombudsman's notes and documents concerning the plaintiff and a number of other individuals.[147] The request covered various topics, including meeting notes regarding lay-offs and meeting notes about Carman.[148]

In failing to extend the ombuds privilege, the *Carman* court did not utilize the four-part Wigmore test. Instead the court examined whether the party seeking the creation of a new evidentiary privilege overcame "the significant burden of establishing that 'permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'"[149] The court recognized the public good that the ombuds office fosters in encouraging "fair and efficient alternative dispute resolution techniques." However, this was not enough:

> McDonnell Douglas has failed to present any evidence, and indeed has not even argued, that the ombudsman method is more successful at resolving workplace disputes than other forms of alternative dispute resolution, nor has it even pointed to any evidence establishing that its own ombudsman is especially successful at resolving workplace disputes prior to the commencement of litigation.[150]

In other words, general claims of the benefits of alternative dispute resolution were insufficient to secure a privilege for the ombuds office. Instead, specific proof of the success of the office in promoting alternative dispute resolution needed to be offered. While the *Kientzy* court recognized the ombuds office received 4,800 communications in six years, the *Carman* court found that this statistic did not provide any context to evaluate its significance.[151]

In addition, the *Carman* court was not persuaded that the benefits provided by the ombuds office would be lost without the privilege. According to the court, "when an aggrieved employee or an employee witness is deciding whether or not to confide in a company ombudsman, his greatest concern is not likely to be that the statement will someday be revealed in civil discovery."[152] The court found that even without the privilege employees would utilize the ombuds office since the ombuds could still keep confidential communications from management.[153]

On the face of the opinions, it seems surprising that two courts could come to such drastically different conclusions about the importance of the McDonnell Douglas ombuds office. However, Charles L. Howard, the attorney who represented the UTC ombudsman in the seminal *Roy* case, offers some insight into the decision in *Carman*.[154] McDonnell Douglas first

objected to plaintiff's request for production of documents by simply stating "activities as an 'ombudsman' were considered confidential and any information and documents relating to her activities are immune from discovery."[155] The lower court overruled this objection, but later reconsidered when McDonnell Douglas submitted two unreported orders from the same district court recognizing a privilege for the McDonnell Douglas ombuds office.[156] Ultimately, the district court ruled that McDonnell Douglas did not have to produce ombuds documents, but failed to provide any analysis on the issue.157 "Since McDonnell Douglas had not presented any factual basis to the trial court to prove its entitlement to the privilege, the appeals court had virtually no choice but to deny the privilege."[158]

While this post-hoc rationalization for the *Carman* court's decision is appealing, nevertheless, ombudsmen must still face the precedent *Carman* left behind that weakens ombuds' claim to privilege. Indeed, while most courts considering the ombuds privilege have extended it, *Carman* is the highest court to have ruled on this issue.

Since *Carman*, two other courts denied extending a privilege to ombuds communications.[159] These cases demonstrate the weakness of the protection of confidentiality offered by organizational ombudsmen. In light of the conflicting case law, it is important that the ABA provide guidance and endorse a confidentiality privilege as established in *Roy* and its progeny.

Unfortunately, the ABA Standards do not take this approach. The ABA Standards impose only limited rights of confidentiality and do not mention the legal requirements needed to create a confidentiality privilege. First, the legal requirement that the communication "be made in the belief that it will not be disclosed" is not strongly supported by the ABA Standards. While communications with the ombuds office are confidential under the ABA Standards, an ombuds may disclose confidential information as long as the source is not revealed. If a visitor is aware of this limitation on confidentiality, then communications may not be made under the belief that they will be kept confidential. In order to ensure that communications are made under the belief of confidentiality, the Standards should allow an ombuds to disclose confidential information only with the visitor's permission. The Standards should also encourage practices that will support a privilege, including a

code of ethics that obligates an ombuds to maintain strict confidentiality, use of 1-800 numbers to prevent the tracing of calls, a policy for the destruction of records, access to independent counsel, a policy against testifying in any proceeding, and a process for compiling aggregate statistics regarding the effectiveness of the ombuds office.[160]

Second, the Standards should include a provision that confidentiality is essential to the relationship between organizational ombuds and visitors. A survey by the Ethics Resource Center reveals that 44% of all non-management employees do not report the misconduct they observe.[161] A top reason given for failure to report misconduct was fear that the report will not be kept confidential.[162] Only by having a confidential forum will employees feel safe communicating with the ombuds office.

The ABA Standards should also endorse the ombuds relationship as "one that society considers worthy of being fostered." In this time of corporate scandals, the ombuds office functions as an early warning device of corporate malfeasance. For example, ombuds may provide data on the number of visitors who complained of unethical accounting matters, which may show a trend in these types of complaints. In addition to this upward feedback, ombuds may provide visitors with (1) information about laws or policies requiring employees to report such misconduct, (2) information about the proper procedures to follow when reporting such misconduct, and (3) information about the organization's anti-retaliation policies to encourage disclosure. If the visitor agrees, the ombuds may also assist by reporting the misconduct on the visitor's behalf. In this capacity, an ombuds may increase the amount of reporting of corporate malfeasance in spite of the office's confidential nature.

Congress recognized the importance of confidentiality in the U.S. Sentencing Guidelines, which require that an organization take "reasonable steps . . . to have and publicize a system, which may include mechanisms that allow for anonymity and confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual conduct without fear of retaliation."[163] In addition, the Sarbanes-Oxley Act of 2002 requires the audit committees of the boards of directors of publicly held companies establish procedures for "the confidential, anonymous submissions by employees of the [company] of concerns regarding questionable

accounting or auditing matters."[164] Exposure of corporate corruption would prevent huge losses sustained by the public, shareholders, and employees, and ombuds can serve a vital role facilitating such exposure.

Organizational ombuds also work to resolve disputes informally, thus decreasing the amount of resources spent by the judiciary and organizations on employment litigation. Resolving disputes informally with the assistance of an organizational ombuds, saves on costly attorneys' fees, reduces turnover, increases retention of valuable employees, increases employee productivity and decreases management time spent on workplace disputes.[165] By endorsing these societal benefits and supporting a common law privilege, the ABA Standards could be used by ombuds to counter courts like *Carman* that question the value of ombuds offices and undermine ombuds confidentiality.

B. BEFUDDLED NOTICE

If an employer has knowledge of wrongful conduct by its employees, it may be subject to liability. For example, notice to the employer of a hostile work environment is critical to determining employer liability.[166] Individuals often disclose complaints of sexual harassment or discrimination to the ombuds. If an employer has knowledge or notice of these complaints, then it may be subject to liability for the perpetrators' conduct. As a result, the ABA Standards need to provide clear guidance on what constitutes notice to the entity the ombuds serves.

The standard for determining employer liability depends on whether the hostile work environment was created by a co-worker or supervisor. An employer is subject to liability for hostile environment harassment created by a co-worker if the employer *knew or should have known* of the harassment and failed to take immediate and appropriate corrective action.[167] Thus, an employer may have actual knowledge of the harassment or constructive notice of the harassment where the harassment was so severe and pervasive that management should have known of its existence.[168]

As for supervisors, "an employer is subject to vicarious liability to a victimized employee for actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."[169] Should an employee succeed in making such a claim, the employer has the following affirma-

tive defense and must prove by a preponderance of the evidence that: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, *and* (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise avoid harm.[170] Thus, notice to the employer is important in establishing an affirmative defense to prove it took reasonable preventive and corrective action and that the plaintiff may have been unreasonable in not taking advantage of opportunities after being subjected to harassing behavior.

When an individual complains about harassment to the ombuds office, this communication does not put the organization on notice. Simply because the ombuds is employed by the organization does not mean the ombuds is capable of receiving notice. An organization can be put on notice only through one of its agents. Agency is determined by the following factors:

(1) The manifestations by the principal that the agent shall act for him;

(2) The agent's acceptance of the undertaking;

(3) The understanding of the parties that the principal is to be in control of the undertaking.[171]

Under these factors, ombuds cannot be considered agents of their employer because of the independence of the office. Ombuds do not act on behalf of any person or entity, nor does any person or entity control their actions. Upholding this notion, the ABA Standards expressly prohibit the ombuds from being deemed an agent of any person or entity, other than the office of the ombuds.[172]

While direct communications with the ombuds office does not put the employer on notice, an individual may request that the ombuds discuss her case with management and disclose her identity. Under the ABA Standards, if the ombuds communicates with representatives of the entity and reveals the facts of "a specific allegation and the identity of the complainant" then this communication is considered to provide notice to the entity.[173] This notice provision is consistent with case law that allows for someone other than the complainant to provide notice to the employer.[174]

In addition to actual notice, employers may receive constructive notice of the hostile work environment. Under the ABA Standards, if an ombuds "communi-

cates with representatives of the entity concerning an allegation of a violation, then . . . a communication that reveals the facts of . . . allegations by multiple complainants that may reflect related behavior or conduct that is either inappropriate or wrongful should be regarded as providing notice to the entity of the alleged violation. . . ."[175] Not only is this language convoluted, it fails to recognize the legal standard used to establish constructive notice. In order to have constructive notice of a hostile work environment, the harassment must be so severe and pervasive that the employer should have known of its existence.[176] In evaluating whether multiple instances are so pervasive that the employer is put on notice, courts consider when the past incidents of harassment occurred.[177] If the harassment occurs intermittently over a long period of time multiple incidents are insufficient to put an employer on notice.[178]

In addition to failing to require pervasive harassment, the ABA notice provision raises a number of questions. First, why should an ombuds be required to speak with "representatives of the entity" — i.e. more than one representative — concerning an allegation of a violation before an employer may be put on notice? There is no legal precedent to support such a requirement. In addition, why not use language such as "agents" instead of "representatives" to comport with legal precedent? Second, must the communication reveal the identity of the alleged perpetrator of the harassment? While an ombuds may inform an employer of multiple complaints of related conduct or behavior without disclosing the identities of the complainants, the ABA Standards do not specify whether the identity of the alleged perpetrator must be disclosed to constitute notice. Some courts have found anonymous complaints that fail to disclose the identity of the alleged perpetrator as insufficient to constitute notice.[179] While the Report accompanying the ABA Standards states that the information provided in the complaints should "be sufficiently detailed that the entity could conduct its own investigation with respect to the allegations," it is unclear what details are required.[180] Without clarity on what constitutes notice, employers may restrict the ombuds from communicating anonymous complaints of harassment or trends in the workplace environment to management for fear that they will be put on notice.

Because the ABA Standards are used to guide ombuds offices, more clarity is needed so that organizations

know when they have been put on notice. At the very least, the ABA Standards should require that allegations by multiple complainants identify the alleged perpetrator of related inappropriate or wrongful behavior or conduct. If the alleged perpetrator is not identified by multiple complainants, the ABA Standard should reflect the legal standard requiring that the inappropriate or wrongful behavior or conduct be so pervasive or widespread that the organization should have known of its existence.

Once an employer is on notice of co-worker harassment, it is subject to liability if it fails to take immediate and appropriate corrective action. Likewise, an employer is subject to liability for a hostile work environment created by a supervisor with immediate (or successively higher) authority over the victimized employee unless it can bring an affirmative defense. As part of the affirmative defense the employer must show that it exercised reasonable care to prevent and promptly correct the harassment. In order to correct the harassing behavior, the employer must have notice of its existence. Without notice of the harassing behavior, an employer exercising reasonable care cannot act promptly to correct the harassment.

In addition, an employer must show that the employee failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise avoid harm. Thus, an employer may avoid liability where an employee failed to report or delayed reporting the harassment. While an employee's failure to report is "tantamount to per se 'unreasonable' behavior," courts vary as to how long an employee can delay reporting harassment before such delay is considered unreasonable.[181] Employees who first use an ombuds to resolve their complaints informally may be considered to be unreasonable in their decision to delay their reports of harassment to the employer.[182] An employee who reports to the wrong party may also be considered unreasonable in failing to take advantage of the employer's policies and procedures.[183] Likewise, because an ombuds is expressly not an agent for the receipt of notice, an employee who reports to an ombuds to put an employer on notice may likewise be considered unreasonable.

Because notice impacts the employee's right to recovery, the ABA requires that an ombuds provide warnings to individuals who contact the ombuds office for help or advice. Specifically, the ombuds should inform visitors that:

(a) the ombuds will not voluntarily disclose to anyone outside the ombuds office, including the entity in which the ombuds acts, any information the person provides in confidence or the person's identity unless necessary to address an imminent risk of serious harm or with the person's express consent

(b) important rights may be affected by when formal action is initiated and by and when the entity is informed of the allegedly inappropriate or wrongful behavior or conduct

(c) communications to the ombuds may not constitute notice to the entity unless the ombuds communicates with representatives of the entity as described [in the paragraph about which communications constitute notice]

(d) working with the ombuds may address the problem or concern effectively, but may not protect the rights of either the person contacting the office or the entity in which the ombuds operates

(e) the ombuds is not, and is not a substitute for, anyone's lawyer, representative or counselor, and

(f) the person may wish to consult a lawyer or other appropriate resource with respect to those rights[184]

While these warnings may be appropriate for some visitors, they may be completely inapplicable to others. For example, some visitors contact the organization's ombuds to obtain more information about a particular policy or benefit and may simply be referred to another office. If an ombuds begins every conversation with a series of warnings instead of first listening to the concerns of an upset visitor, the ombuds may be seen as unhelpful or callous and may be jeopardizing the relationship with the visitor. Providing these warnings in brochures, ombuds policies and publicity, and providing ombuds the flexibility to determine how and when to give visitors verbal warnings about notice are consistent with the informality of the ombuds process.

Finally, the ABA's notice provisions invite discovery into the communications made with the ombuds office. The very question of whether a communication constitutes notice depends on the communications the ombuds had with the organization. Because the ombuds is simply passing on information from the visitor, any communications made by the visitor may also be subject to scrutiny. To serve as a provider of alternative dispute resolution services, an organizational ombuds needs to be able to communicate with

both visitors and all other employees, including managers, in confidence. Accordingly, the ABA's notice provisions should promote the confidentiality of these communications.

C. LIMITS OF AUTHORITY

Under the ABA Standards, the ombuds' scope of authority is severely curtailed by preventing ombuds from assisting union employees, an area where they could be of vital assistance. When the ABA revised the Standards, it prohibited any ombuds from "address[ing] any issue arising under a collective bargaining agreement or which falls within the purview of any federal, state, or local labor or employment law, rule, or regulation, unless there is no collective bargaining representative and the employer specifically authorizes the ombuds to do so."[185] First, many of the disputes employees bring to the ombuds office implicate labor or employment laws, rules or regulations. Barring ombuds from handling such matters would create a long line of visitors who would be turned away. Second, even when an issue is covered by a collective bargaining agreement, an ombuds may still be helpful in resolving a dispute.[186] While ombuds should defer to the union process for matters covered under the collective bargaining agreement, this does not mean that ombuds should be excluded from assisting with such issues where union representatives, management, and union members agree to use the ombuds office for informal resolution.[187] As long as ombuds assistance does not amount to an unfair labor practice under the National Labor Relations Act or is not barred by the collective bargaining agreement, the ABA should recommend that ombuds assist in this area.[188]

Many ombuds comment on their effectiveness in resolving disputes with union employees. In the federal government setting, the ombuds and union may attempt to resolve a matter jointly.[189] As an alternative to formal grievance procedures, an ombuds can resolve disputes early on and may decrease retaliation brought by a formal grievance.[190] In addition, the ombuds may assist in facilitating resolution of a dispute by providing access to records, "carry[ing] the union's message to management in a less challenging manner" and providing information about "how hard management will fight on an issue."[191] The ombuds may also serve as a vital link between different offices involved in the dispute resolution process including the union, EEO, EAP and

labor relations.[192] In the university setting, a faculty union employee may even request that an ombuds assist in addressing sexual harassment complaints when faculty members are unwilling to use the formal complaint procedures.[193] Likewise, corporate ombuds have offered their assistance to both union employees and non-union employees alike.[194] Accordingly, the benefits ombuds provide to employers with collective bargaining units should not be curtailed by the ABA Standards more than existing law may require.

The Standards need to be modified. Where the employer, the collective bargaining unit, and the union employee, all agree to use the ombuds office to address an issue arising under a collective bargaining agreement, the Standards should permit such use. For those issues that are not covered by collective bargaining agreements, the Standards should authorize an ombuds to assist union employees. Union employees should not be prevented from the value of the ombuds office and should obtain the same benefits from this office as their non-union peers.

CONCLUSION

Though the ABA has adopted Standards, the largest ombudsman organizations disagree with many of its provisions.[195] In light of the opposition by the very profession the ABA seeks to regulate, the ABA should revise its Standards so that they are consistent with the best practices and standards that ombudsmen use to regulate their own profession.

While attempting to bring general clarity to the ombuds role, the ABA Standards have glossed over important differences in roles and functions thus suggesting the need for separate standards and an elimination of a "one size fits all" approach. While the ABA Standards recognize four categories of ombudsmen, they do not clearly define the fundamentally different orientations of these groups — some ombuds take an adjudicatory-like approach and others are guided by principles of the alternative dispute resolution (ADR) movement.

Moreover, by emphasizing shared essential characteristics of independence, impartiality, and confidentiality, the ABA did not go far enough to describe how ombuds operate differently in accordance with these characteristics. Organizational, legislative, executive and advocate ombuds may all share common characteristics, such as independence, impartiality, and

confidentiality; however, they each operate differently in accordance with their essential roles. While the goal of all ombuds is to resolve disputes, each type does so in a fundamentally different fashion, some relying on facilitation, others relying on investigations, and others relying on advocacy.

In light of the fundamentally different orientations of each ombuds category, it does not make sense to continue to have uniform standards governing all ombuds practices. While the Standards unite ombuds, placing ombuds in the same pot makes these guidelines difficult to digest. This article presents recommendations for structuring standards that comport with the orientations of each ombuds category. By doing so, the ABA would better serve to guide the profession and bring focus to a field diluted by various adaptations of the ombuds model.

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ENDNOTES

[1] The term "ombuds" includes "ombudsman," "ombudsperson," "ombuds officer." These terms are used interchangeably throughout. The author prefers the term "ombuds" as does the American Bar Association; however, this article uses alternative forms of the word in recognition of the variations in terminology.

[2] Cambridge Dictionary of American English 591 (5th ed. 2004).

[3] Howard Gadlin, *The Ombudsman: What's in a Name?*, 16 Negotiation J. 37, 38 (2000) (discussing the evolution of organizational ombuds and the contentious divide between classical and organizational ombuds); Larry B. Hill, *American Ombudsmen and Others; or, American Ombudsmen and 'Wannabe' Ombudsmen*, Address Delivered at the 1997 Spring Meeting of the ABA Section of Administrative Law and Regulatory Practice (April 18, 1997), http://abanet.org/

adminlaw/ombuds/wannabe.html (describing why classical ombuds conducting impartial investigations of citizens' complaints are "real" ombudsmen, while organizational ombuds are "simply mediators").

[4] ABA Standards for the Establishment and Operation of Ombuds Offices Report 10 (2004).

[5] Sharan Lee Levine, et al., *Ethical Dilemmas Arising Out of Ombuds Practice*, in Dispute Resolution Ethics: A Comprehensive Guide 214-15 (Phyllis Bernard & Bryant Garth eds., 2002) (describing the ABA's recognition of the benefits of the ombuds profession).

[6] *Id.*

[7] *Id.*

[8] On August 7, 2001, the American Bar Association first adopted the Standards for the Establishment and Operation of Ombuds Offices. On February 9, 2004, the ABA revised these Standards. Hereinafter all references to the Standards refer to the latter.

[9] *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) (finding "[p]revailing norms of practice as reflected in American Bar Association standards and the like, e.g. ABA Standards for Criminal Justice . . . are guides to determining what is reasonable [effective assistance of counsel], but they are only guides"); *U.S. v. Browne*, 318 F. 3d 261, 267 (1st Cir. 2003) (finding the ABA Standards for Criminal Justice do not have the force of law); *In re Bucknam*, 160 Vt. 355, 365, 628 A.2d 932, 938 (1993) (finding the ABA Standards For Imposing Lawyer Sanctions are not controlling, but provide guidance for determining the appropriate sanction).

[10] While there is evidence of complaint officers that may bear some resemblance to ombudsmen used by ancient Egyptian kings, Moses, the Roman Republic, and the Control Yuan in the Han Dynasty, modern ombudsmen looked to the Swedish model for guidance. *See* Gerald E. Caiden, Niall MacDermot & Ake Sandler, *The Institution of Ombudsman*, in International Handbook of the Ombudsman: Evolution and Present Function 9 (Gerald E. Caiden ed., 1983); *see also* Walter Gellhorn, Ombudsmen and Others: Citizens' Protectors in Nine Countries 194-95 (1966).

[11] Gellhorn, *supra* note 10.

[12] *Id.*

[13] *Id.*

[14] H. H. Kirchheiner, *The Ideological Foundation of the Ombudsman Institution*, in International Handbook of the Ombudsman: Evolution and Present Function 3 (Gerald E. Caiden ed., 1983).

[15] Caiden et al., *supra* note 10.

[16] *Id.*

[17] *Id.*

[18] "Each of the four Ombudsmen is responsible for a supervisory area comprising a number of public authorities," including courts of law, public prosecutions, the police

force, the armed forces, prisons and probation, taxation, national insurance, social services, health and medical care, education, administrative courts, legal aid discrimination, housing and accommodation, and others. http://www.jo.se; *see also* Donald C. Rowat, The Ombudsman Plan: The Worldwide Spread of an Idea 4 (2d ed. 1985).

[19] In 1920, Finland appointed its first ombudsman. *See* Caiden et al., *supra* note 10, at 11.

[20] Caiden et al., *supra* note 10, at 11.

[21] *Id.*

[22] *Id.*

[23] *Id.*; Hill, *supra* note 3.

[24] Mary Rowe & Dean M. Gottenhrer, *Similarities and Differences Between Public and Private Sector Ombudsmen* (1997), http://www.abanet.org/adminlaw/ombuds/g&rsimilar.html.

[25] Hill, *supra* note 3.

[26] Caiden et al., *supra* note 10, at 5.

[27] Carolyn Stieber, *57 Varieties: Has the Ombudsman Concept Become Diluted?*, 16 Negotiation J. 49, 50 (2000) (describing how "[v]irtually every campus of any size was traumatized by repeated demonstrations against the war and the military draft then in effect"); Howard Gadlin, *The Ombudsman: What's in a Name?*, 16 Negotiation J. 37, 38 (2000) (describing citizen's "demand for mechanisms by which people could address maladministration by government, educational, and corporate bureaucracies").

[28] Gadlin, *supra* note 3, at 41.

[29] Gadlin, *supra* note 3, at 39-40.

[30] *Id.* at 40.

[31] *Id.* at 40-41.

[32] The Ombudsman Association Standards of Practice (1985).

[33] In an effort to define the corporate or organizational ombuds role and unify the profession, a group of ombudsmen formed the Corporate Ombudsman Association (COA). Ten years later, in 1992, COA changed its name to The Ombudsman Association (TOA) to better reflect its diverse membership and those individuals served by the organization. Further expanding its membership, in July 2005, TOA merged with the University and College Ombuds Association (UCOA) and became the International Ombudsman Association (IOA).

[34] Mary Rowe & Mary Simon, *Effectiveness of Organizational Ombudsmen* (2001), http://web.mit.edu/ombud/documents/effectiveness_final.pdf.

[35] Ellen J. Waxman & Howard Gadlin, *An Ombudsman Serves as a Buffer Between and Among Individuals and Large Institutions*, 4 Disp. Resol. Mag. 21, 23 (1998); *see also* Carrie Menkel-Meadow, *Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution*, 28 Fordham Urban L. J. 979 (2001) (advocating use of the term "'appropriate dispute resolution' rather than 'alternative dispute resolution,' precisely to signal that different processes may be appropriate for different kinds of disputes or in different types of settings").

[36] Mary Rowe, *The Ombudsman's Role in a Dispute Resolution System*, 7 Negotiation J., 353, 354 (1991).

[37] Hill, *supra* note 3; *see also* Suzane Belson, *Where is Darwin Now We Need Him? The Ombudsman in Evolution*, Keynote Speech at The Ombudsman Association Conference, (May 14, 1997), http://www.abanet.org/adminlaw/ombuds/belson.html.

[38] Waxman & Gadlin, *supra* note 35, at 21; *see also* Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*, 12 Ohio St. J. on Disp. Resol. 95, 109-10 (1996) (noting the proliferation of ombudsmen in the United States, but recognizing that few fit the classical ombuds model); James T. Ziegenfuss, Jr., Organizational Troubleshooters: Resolving Problems with Customers and Employees (1988) (estimating as many as 8,000 ombudsman-like practitioners in North America).

[39] Hill, *supra* note 3.

[40] ABA Standards for the Establishment and Operation of Ombuds Offices (2004).

[41] ABA Standards for the Establishment and Operation of Ombuds Offices § G (2001).

[42] ABA Standards for the Establishment and Operation of Ombuds Offices § H (2001); ABA Standards for the Establishment and Operation of Ombuds Offices § I (2004).

[43] The United States Ombudsman Association refused to endorse the ABA Standards in 2001 and did not participate in the subsequent revisions of the Standards in 2004. See letter from the United States Ombudsman Association to President, ABA Board of Governors (July 19, 2001), *available at* http://www.usombudsman.org/ABA/USOA_Letter.doc (arguing that the term "advocate ombudsman" is an oxymoron); *see also* letter from Presidents of The Ombudsman Association and the University and College Ombudsman Association (July 18, 2001), *available at* http://www.usombudsman.org/ABA/TOA_COA_Letter.doc (objecting to use of the term "advocate ombudsman").

[44] Sara S. Hunt, *Equipping Long-Term Care Ombudsmen for Effective Advocacy: A Basic Curriculum* 5-6 (National Long-Term Care Ombudsman Resource Center, 2004).

[45] *Id.* at 6.

[46] Today all 50 states, the District of Columbia, and Puerto Rico have LTC Ombudsman as required by the Older Americans Act. Div. of Health Care Servs., Inst. of Medicine, Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act 3 (Jo Harris-Wehling et al. eds., 1994).

[47] *Id.* at 1.

[48] Hunt, *supra* note 44, at 14.

[49] Other examples of advocate ombuds include juvenile justice ombudsmen or child welfare ombudsmen, who protect children in foster care, group homes, juvenile facilities or other governmental programs. *See* Judith Jones & Alvin W. Cohen, *State Ombudsman Programs*, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, Juvenile Justice Bulletin (Feb. 2005); *see also* ABA Ctr. on Children & the Law, Establishing Ombudsman Programs for Children and Youth: How Government's Responsiveness to Its Young Citizens Can Be Improved (Howard A. Davidson et al. eds., 1993).

[50] Gadlin, *supra* note 3, at 39.

[51] Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 Harv. Hum. Rts. J. 1, 6 (2000).

[52] Linda C. Reif, *The Promotion of International Human Rights Law by the Office of the Ombudsman*, *in* The International Ombudsman Anthology 287 (Linda C. Reif ed., 1999).

[53] Mjemmas G.J. Kimweri, *The Effectiveness of an Executive Ombudsman*, *in* The International Ombudsman Anthology 379 (Linda C. Reif ed., 1999) (examining the executive ombuds office in Tanzania known as the Tanzanian Permanent Commission of Enquiry, which is responsible for safeguarding individual rights).

[54] Roy Gregory, *Building an Ombudsman Scheme: Statutory Provisions and Operating Practices*, *in* The International Ombudsman Anthology 134 (Linda C. Reif ed., 1999).

[55] ABA Standards for the Establishment and Operation of Ombuds Offices § H (2004).

[56] *See, e.g., State ex re. Strothers v. Wertheim*, 80 Ohio St. 3d 155, 684 N.E.2d 1239 (1997) (holding the executive ombuds office was a public office subject to the disclosure requirements of the Public Records Act since it was a publicly funded agency that acted as an intermediary between citizens and the government of a county, and the requested records were not confidential).

[57] It may be argued that news ombudsmen are organizational ombuds because they do not conduct formal investigations, but rather rely on informal inquiries; however, they do not fit within the ABA's definition. Organizational ombuds only facilitate "fair and equitable resolutions of concerns that arise within the entity." Complaints brought by the public do not constitute concerns that arise within the entity.

[58] Organization of News Ombudsmen, *What is a news ombudsman?*, http://www.newsombudsmen.com/what.htm.

[59] Neil Nemeth, News Ombudsmen in North America: Assessing an Experiment in Social Responsibility (2003).

[60] ABA Standards for the Establishment and Operation of Ombuds Offices § A (2004).

[61] *Id.* at § J.

[62] *Id.*

[63] For example, Argentina's ombudsman "carries out its functions with absolute independence, without receiving instructions from any authority." Jorge Luis Maiorano, *The Defensor Del Pueblo in Argentina: A Constitutional Institution of Control and Protection*, *in* The International Ombudsman Anthology 362 (Linda C. Reif ed., 1999). While the ombudsman may be removed by congress, legislation guarantees that it is an independent institution with control over its own budget and administrative staff. *Id.*

[64] ABA Standards for the Establishment and Operation of Ombuds Offices § C(1) (2004).

[65] In a 1969 resolution, the ABA identified 12 essential characteristics for [legislative] ombudsmen to achieve structural independence, including, "independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body" and "a high salary equivalent to that of a designated top officer." This 1969 policy is still endorsed by the ABA and serves as a model for legislative ombudsmen. *See* ABA Standards for the Establishment and Operation of Ombuds Offices Report at 19 (2004).

[66] *Id.*

[67] Alan J. Wyner, *Executive Ombudsmen, and Criticisms of Contemporary American Public Bureaucracy*, *in* Executive Ombudsmen in the United States 10 (Alan J. Wyner ed. 1973).

[68] *Id.* at 12; *see also*, Michael Mills, *Municipal Government Ombudsman*, *in* International Handbook of the Ombudsman: Evolution and Present Function 426 (Gerald E. Caiden ed., 1983) ("The degree to which the individual [executive ombuds] imparts impartiality to the citizens they serve is largely dependent upon the values of the elected official to whom they are accountable. While I happen to enjoy serving in an office where the values of fairness and equity are shared in common, there is no guarantee of that being maintained beyond the term of the current Mayor.")

[69] Stanley V. Anderson, *Comparing Classical and Executive Ombudsmen*, *in* Executive Ombudsmen in the United States 310 (Alan J. Wyner ed., 1973).

[70] *Id.*

[71] Mills, *supra* note 68, at 428.

[72] *Id.*

[73] *Id.*

[74] Tom Sherwood, *Ethics Official Named; Barry Pledges Total Freedom, Ex-Judge Says*, Wash. Post, July 2, 1986, at B4.

[75] *Id.*

[76] *See* Marie D. Farrell-Donaldson, *Will the Real Ombudsman Come Forward?*, *in* International Handbook of the Ombudsman: Evolution and Present Function 417 (Gerald E. Caiden ed., 1983) (describing how the Ethics Ombudsman position faded from DC government); Tom Sherwood, *All's Quiet for Ethics*

Ombudsman, Wash. Post, June 11, 1987, at J1 (describing how the lack of publicity of the Executive Ombudsman position has led to few calls since its inception); *see also* www.dc.gov (current searches of the DC government's website and directory and calls to DC government failed to provide any results for the Ethics Ombudsman).

77 For example, in Oregon, the Long Term Care Ombudsman is appointed by the governor, whereas in North Dakota, the Long Term Care Ombudsman is appointed by the executive director of the department of human services. *See* ORS §441.103; *cf.* ND §50-10.1-02.

78 *Id.*

79 ABA Ctr. on Children & the Law, Establishing Ombudsman Programs for Children and Youth: How Government's Responsiveness to Its Young Citizens Can Be Improved 7 (Howard A. Davidson et al. eds., 1993).

80 *Id.*

81 The International Ombudsman Association Standards of Practice §4.5 (2007); *see also* Carolyn Stieber, *57 Varieties: Has the Ombudsman Concept Become Diluted?*, 16 Negotiation J. 49, 54 (2000).

82 John S. Barkat, *Blueprint for Success: How to Effectively Design an Organizational Ombuds Department* 5 (2002), http://www.abanet.org/adminlaw/ombuds/organizational ombudsmen.html.

83 Howard Gadlin and Elizabeth Walsh Pino, Neutrality: What an organizational ombudsperson needs to know 3 (The Ombudsman Association 2001).

84 *See* Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*, 12 Ohio St. J. on Disp. Resol. 95, 113 (1996) ("[Organizational ombuds] creation, as well as their continuing viability, is not grounded in law. Thus, their independence is more easily compromised than that of the classical ombudsman.").

85 Gadlin & Pino, *supra* note 83, at 15.

86 ABA Standards for the Establishment and Operation of Ombuds Offices § C(1) (2004).

87 Typically, an organizational ombuds has jurisdiction over and works with all employees, including top executives such as the President or CEO. Retaliation against the ombuds is difficult to prove since an organization can simply blame budgetary constraints as opposed to disdain for the actions of the ombuds in its decision to eliminate, remove or reduce the office.

88 Belson, *supra* note 37.

89 ABA Standards for the Establishment and Operation of Ombuds Offices § C(2) (2004).

90 Gadlin & Pino, *supra* note 83, at 9.

91 *Id.*

92 *Id.*; *see also* Mary P. Rowe, *Options and Choice for Conflict Resolution in the Workplace, in* Negotiation: Strategies for Mutual Gain 105-19 (Lavina Hall ed., 1993).

93 Arguably, ombuds may still "advise" without choosing a particular option. By counseling clients, ombuds may be providing a form of advice. In fact, some ombuds "define their role more in terms of helping individuals." Deborah M. Kolb, *Corporate Ombudsman and Organization Conflict Resolution*, 31 Journal of Conflict Resolution 673, 681 (1987). They "help" by inventing individualized solutions to visitors' problems and assisting in implementing these remedies. *Id.* at 682.

94 Rowe, *supra* note 92, at 110.

95 *Id.* at 108.

96 Frances Bauer, *The Practice of One Ombudsman*, 16 Negotiation J. 59, 72-73 (2000).

97 Gadlin, *supra* note 3, at 44.

98 Marsha L. Wagner, *The Organizational Ombudsman as Change Agent*, 16 Negotiation J. 99, 103 (2000).

99 *See infra* note 101.

100 *Id.*

101 NIH Office of the Ombudsman, Center for Cooperative Resolution was established as a pilot program in 1997 and has served the entire NIH community since 1999. The 2000 Annual Report may be found at http://ombudsman.nih.gov/fy00annualrpt.pdf. This document is an example of the type of important upward feedback an ombudsman can provide an organization. For a collection of annual reports from various organizations, see http://ombuds-blog.blogspot.com/search/label/Annual%20Reports.

102 Wagner, *supra* note 98.

103 Gadlin & Pino, *supra* note 83, at 7.

104 *Id.* at 7-8.

105 *Id.*

106 *Id.* at 8.

107 *Id.*

108 United States Ombudsman Association Governmental Ombudsman Standards § II.B. (2003).

109 ABA Standards for the Establishment and Operation of Ombuds Offices § C(3) (2004).

110 *Id.*

111 *Id.*

112 *Id.*

113 The International Ombudsman Association Code of Ethics (2007).

114 ABA Standards for the Establishment and Operation of Ombuds Offices § F(2)(a) (2004).

115 ABA Standards for the Establishment and Operation of Ombuds Offices § C(3) (2004).

116 Organizational ombuds in corporations refer over 88% of visitors' issues to traditional formal channels, audit, compliance, human resources, and line management as options for resolution. *See* Arlene Redmond & Randy Williams, *Enter the Watchmen: The Critical Role of an Ombuds Program in Corporate Governance*, Risk Management 49, 52 (Sept. 2004). In this capacity, organization ombuds serve as an information resource and assist employees to use resources already at their disposal.

117 William L Kandel & Sheri L. Frumer, *The Corporate Ombudsman and Employment Law: Maintaining the Confidentiality of Communications*, 19 Employee Relations Law Journal 587 (1994).

118 Waxman & Gadlin, *supra* note 35, at 22.

119 *Id.* at 23.

120 William L. Ury, Jeanne M. Brett & Stephen B. Goldberg, Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict 9-10 (1988).

121 Mary P. Rowe, *An Effective, Integrated Complaint Resolution System*, *in* Sexual Harassment on Campus: A Guide for Administrators, Faculty, and Students 203-04 (Bernice R. Sandler & Robert J. Shoop eds., 1997).

122 Mary Rowe & Corinne Bendersky, *Workplace Justice, Zero Tolerance, and Zero Barriers*, *in* Negotiations and Change, From the Workplace to Society 123 (Thomas Kochan & Richard Locke eds., 2002).

123 *Id*.

124 Belson, *supra* note 37.

125 Gadlin, *supra* note 3, at 44.

126 The International Ombudsman Association Standards of Practice § 3.1 (2007).

127 *Id.* at § 3.5 - §3.6.

128 *Id.* at § 3.4.

129 The United States Ombudsman Association Governmental Ombudsman Standards § II.C (2003).

130 Confidential information may also be revealed to prevent an imminent risk of serious harm. *See* ABA Standards for the Establishment and Operation of Ombuds Offices § C(3) (2004). Societal interests may compel an ombuds to disclose confidential information when an individual threatens physical harm upon himself or others. *See* ABA Standards for the Establishment and Operation of Ombuds Offices Report 15 (2004); Charles L. Howard & Maria A. Gullumi, The Ombuds Confidentiality Privilege Theory and Mechanics 12 (The Ombudsman Association 1996).

131 *Roy v. United Technologies Corp.*, Case No. H-89-690 (JAC) (D. Conn. 1990).

132 While *Shabazz v. Scurr*, 662 F. Supp. 90 (S.D. Iowa 1987) is the first reported case to recognize a privilege for communications by a legislative prison ombuds, the federal court simply applied the state statute that expressly provided for the evidentiary privilege.

133 Charles Howard & Maria A. Gulluni, The Ombuds Confidentiality Privilege: Theory and Mechanics 3 (The Ombudsman Association 2001).

134 *Id.*

135 Transcript of Hearing on Motion for Protective Order at 22-23, *Roy v. United Technologies Corp.*, Case No. H-89-690 (JAC) (D. Conn. May 29, 1990).

136 *Id.* at 24-25 (*citing In re Doe*, 711 F.2d 1187, 1193 (2d Cir. 1983) (citing 8 J. Wigmore, Evidence § 2285 at 527 (McNaughton revised ed. 1961)).

137 *Id.* at 25.

138 *Id.*

139 *Id.* at 25-26.

140 *Id.* at 26.

141 *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991).

142 *Id.* at 572.

143 *Id.*

144 *See Smith v. American Express Co.*, Case No. 98-7206-CIV-JORDAN (S.D. Fla. Jan. 3, 2000) (finding the four factors necessary for the establishment of the ombuds privilege under *Kientzy* satisfied and granting defendant's motion for protective order precluding the deposition of its ombudsman); *Van Martin v. United Techs. Corp.*, Case No. 95-8389-CIV-UNGARO-BENAGES (S.D. Fla. July 16, 1996) (finding the four factors necessary for the establishment of a privilege under *Kientzy* met and granting defendant's motion for protective order precluding the deposition of its ombudsmen); *Jones v. McDonnell Douglas Corp.*, Case No. 4:94-CV-355 (CEJ) (E.D. Mo. May 22, 1995) (finding the four factors necessary for the establishment of an ombuds privilege under *Kientzy* present and granting the ombuds' motion for protective order precluding the discovery of documents generated by the ombudsman or his deposition)*; McMillan v. Upjohn Co.*, Case No. 1:92:CV:826 (W.D. Mich. Mar. 8, 1995) (ordering that neither plaintiff nor defendant may seek testimony from employees of the ombudsman about communications made to the ombudsman by any employee other than the plaintiff); *Acord v. Alyeska Pipeline Serv. Co.*, U.S. Dept. of Labor Case No. 95-TSC-4 (Oct. 4, 1995) (determining that respondent has established the four factors necessary for the establishment of the ombuds privilege under *Kientzy* present and granting respondent's motion for protective order excluding discovery relating to complainant's participation in the ombudsman program). *See also Kozlowski v. Upjohn Co.*, File No. 94-5431-NZ (Mich. Cir. Ct., Macomb Co. Aug. 16, 1995) (finding the four factors necessary for the establishment of the ombuds privilege satisfied and granting the ombudsman's motion for protective order); *Wagner v. Upjohn Co.*, File No. A91-2156CL (Mich. Cir. Ct., Kalamazoo Co. April 22, 1992) (granting the ombudsman's motion for protective order precluding the

deposition of ombuds' office members or the production of their documents because information sought by plaintiff is available from sources other than the defendant's ombudsman and that breaching the confidentiality offered by the ombuds office would be highly prejudicial to its dispute resolution services).

[145] *Carman v. McDonnell Douglas Corp.*, 114 F. 3d 790 (8th Cir. 1997).

[146] *Id.* at 791.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 793.

[150] *Id.*

[151] *Id.*

[152] *Id.* at 794.

[153] *Id.*

[154] Charles L. Howard & George R. Wratney, *In Aftermath of the Carman Decision, Ombuds 'Privilege' Still Has Validity*, ETHIKOS (May/June 1999).

[155] *Carman*, 114 F. 3d at 791.

[156] Howard & Wratney, *supra* note 154.

[157] *Id.*

[158] *Id.*

[159] *See Miller v. Regents of the University of Colorado*, 199 U.S. App. LEXIS 16712 (10th Cir. 1999) (affirming district court's ruling failing to recognize an ombudsman privilege); *Solorzano v. Shell Chemical Co.*, 2000 U.S. Dist. LEXIS 12072 (E.D. La. 2000) (refusing to recognize a federal common law privilege for the company ombudsman).

[160] Mary Elizabeth McGarry, *The Ombudsman Privilege: Keeping Harassment Complaints Confidential*, NEW YORK L. J. (Nov. 30, 1995).

[161] The Ethics Resource Center, 2003 NATIONAL BUSINESS ETHICS SURVEY EXECUTIVE SUMMARY, http://www.ethics.org/nbes2003/2003nbes_summary.html; see also The Ethics Resource Center, 2007 NATIONAL BUSINESS ETHICS SURVEY, http://www.ethics.org/research/NBESOffers.asp (42% of employees who observe misconduct do not report it to company leadership).

[162] *Id.*

[163] U.S.S.G. §8B2.1(b)(5)(C).

[164] 116 Stat. 745 § 301.

[165] Rowe & Simon, *supra* note 34.

[166] A claim for hostile work environment harassment is established by evidence that "(1) the employee belonged to a protected group, (2) the employee was the subject of unwelcome [sexual] harassment, (3) the harassment complained of was based on sex [race, color, religion or national origin], (4) the harassment was sufficiently severe to unreasonably interfere with work performance or create an intimidating, hostile, or offensive work environment." 78 A.L.R. Fed. 272. For a sexual harassment claim, a hostile work environment harassment is characterized by "'[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . . [when] such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. 1604.11 (a)). Hostile work environment harassment can also originate from harassment based on race, color, national origin, or religion. *See e.g. Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981) (race); *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269 (11th Cir. 2002) (national origin).

[167] 29 C.F.R. 1604.11 (d).

[168] *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278 (11th Cir. 2002).

[169] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

[170] *Id.*

[171] Restatement (2d) of Agency § 281.

[172] ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § F(3)(a)(2004).

[173] *Id.* at § F(2)(a)(i).

[174] *Notice in Hostile Environment Discrimination*, 112 HARV. L. REV. 1977, 1981 (1999) (citing *Dees v. Johnson Controls World Servs.*, 168 F.3d 417, 423 (11th Cir. 1999) (vacating and remanding district court's entry of summary judgment in favor of employer where a genuine issue of material fact remained regarding whether employer had received notice of harassment from a human resources employee and a fire department employee); *Varner v. National Super Mkts., Inc.*, 94 F.3d 1209, 1213-14 (8th Cir. 1996) (finding communication of reports of sexual harassment by plaintiff's fiancé to supervisor was sufficient to put organization on notice of the incidents).

[175] ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § F(2)(b)(ii) (2004).

[176] *Miller*, 277 F.3d at 1278.

[177] *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777 (10th Cir. 1995) (evidence of employee's earlier sexual harassment of others that is "similar in nature and near in time" to employee's later sexual harassment of plaintiff may be used to prove notice to employer of hostile work environment) *Jeffries v. Kansas*, 147 F.3d 1220, 1229 (10th Cir. 1998) (same).

[178] *Allen v. Tyson Foods, Inc.*, 121 F. 3d 642, 647 (11th Cir. 1997); *Jones v. United States Gypsum*, 126 F.Supp.2d 1172, 1179 (N.D. Iowa 2000) (isolated [multiple] incidents occurring over a 16 year period of time do not constitute notice).

[179] *Notice in Hostile Environment Discrimination Law*, 112

Harv. L. Rev. 1977, 1982 (1999) (citing Juarez *v. Ameritech Mobile Commc'ns, Inc.*, 957 F.2d 317, 320 (7th Cir. 1992) (supervisor who had heard about other female employees being "bothered" or "asked out" by the company's assistant treasurer insufficient to establish knowledge).

180 ABA Standards for the Establishment and Operation of Ombuds Offices Report 18 (2004).

181 David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 Fordham L. Rev. 1265, 1290-97 (2001) (study found that the standard for unreasonableness varied from a delay of one year or more to a delay of months or even weeks between the first harassing action and the report).

182 *Id.* at 1299.

183 *Id.* at 1298.

184 ABA Standards for the Establishment and Operation of Ombuds Offices § F(1) (2004).

185 *Id.* at § D(6).

186 *See infra* notes 189-194.

187 Howard Gadlin, *New Ombuds Standards Create Tension and Opportunity*, Dispute Resol. Mag. 15, 17 (Winter 2005) (advising ombuds to defer to union processes for matters covered under the collective bargaining agreement).

188 *See* National Labor Relations Act, 29 U.S.C. §151-169.

189 D. Leah Meltzer, *The Federal Workplace Ombuds*, 13 Ohio St. J. on Disp. Resol. 549, 588 (1998).

190 *Id.* at 573.

191 *Id.*

192 Id. at 581.

193 Howard Gadlin, *New Ombuds Standards Create Tension and Opportunity*, Dispute Resol. Mag. 15, 17 (Winter 2005).

194 Lee P. Robbins & William B. Deane, *The Corporate Ombuds: A New Approach to Conflict Management*, 2 Negotiation Journal 195, 197 (1986).

195 The United States Ombudsman Association, representing classical ombudsmen, refused to endorse the ABA Standards in 2001 and did not participate in the subsequent revisions of the Standards in 2004. *See* ABA Standards for the Establishment and Operation of Ombuds Offices Report at 10. In addition, the largest organizational ombuds associations that existed at the time disagreed with the 2004 Standards. *See* Resolution of the Board of Directors of The Ombudsman Association (TOA) and the University and College Ombuds Association (UCOA) (Aug. 2004). After TOA and UCOA merged, the International Ombudsman Association issued Guidance for Best Practices and Commentary on the American Bar Association Standards for the Establishment and Operation of Ombuds Offices, Revised February 2004 (May 14, 2006). Also, the Coalition of Federal Ombudsmen modified the ABA Standards for use in the federal sector. *See* Coalition of Federal Ombudsmen (CFO) and Federal Interagency ADR Working Group Steering Committee, A Guide for Federal Employee Ombuds: A Supplement to and Annotation of the Standards for the Establishment and Operation of Ombuds Offices Issued by the American Bar Association (May 9, 2006) *at* http://www.usdoj.gov/adr/pdf/final_ombuds.pdf.

Bystander Training within Organizations*

MAUREEN SCULLY AND MARY ROWE

ABSTRACT

Active bystanders may play a useful role in discouraging negative behaviors, and, we add, encouraging *positive* behaviors in the workplace. We describe the significance of the bystander role — for example, with respect to safety, diversity, and ethics — and review the challenges for bystanders in moving from a passive to an active stance. Bystander training may help bystanders learn small, concrete strategies for intervening effectively. We review current debates about the power and the limits of the bystander role, the efficacy of training, and the capacity of local bystander action to foster broader organizational changes that support safety, inclusion, and integrity.

KEYWORDS

active bystanders, bystander training, micro-affirmations, diversity, bystander effect

INTRODUCTION

A number of organizations, including private sector, non-profit, government agencies, and universities, have been doing "active bystander" training. There are at least two reasons to consider engaging all levels of an organization in such a process:

• **Encouraging the positive:** to foster productive behavior from all managers and employees, and other members of the organization, if any; to improve morale and collegiality; to "build community" and foster "inclusion;"

• **Discouraging the negative**: to curtail discriminatory, destructive, and illegal behavior. At a time when employers around the world are concerned about racism, bullying, harassment, ethics and safety violations, many managers want to encourage people to react, and take appropriate action, with respect to unacceptable behavior.

Although this kind of training appears to have started with respect to topics like safety and diversity, training for active bystanders is pertinent to many kinds of behavior. Training materials have been developed by a number of people (e.g., Aguilar, 2006; Scully, 2005).

WHO IS A "BYSTANDER"?

A bystander could be anyone who sees or otherwise becomes aware of behavior that appears worthy of comment or action. In the past, much workplace training has focused mainly on three cohorts: 1) people who do or say something (whether positive or negative) that might merit a response, and 2) people who are impacted by what is said or done, and 3) supervisors. There is a fourth cohort that is also important: there may be one or more *bystanders* present, who can influence the workplace climate. Bystanders can highlight positive acts that might otherwise be invisible or overlooked. They can redirect or de-escalate negative acts that might be problematic. Bystanders might be peers or teammates. They might be subordinate or senior to the person whose comment or behavior warrants reaction. Training that encourages "active bystanders" takes into account the different power dynamics and contexts that may be involved.

ENCOURAGING THE POSITIVE

Bystander training is designed to help people in all cohorts to note—and to commend—the achievements of their fellow workers. Such commendations often matter a lot to the person concerned and are thought to be useful in encouraging future, socially

desirable behavior. (See Goldstein, Martin, and Cialdini (2008), and Patterson, Grenny, Maxfield, McMillan and Switzler, (2007) on effective persuasion and influence tactics). The hope is that training may help workers in all job categories to be "good mentors" to colleagues who need a bit of information or help—and for everyone who would be delighted by a word of encouragement. The hypothesis is that "on the spot" help and affirmation from bystanders may be especially effective because it is an immediate, positive, often unexpected reinforcement. (See Blanchard's (1982) classic discussion of the "one minute manager" for similar reasoning.)

DISCOURAGING THE NEGATIVE

Bystander training is also thought to be useful in helping people in all job categories to react, and then act appropriately, when they see unsafe, unprofessional, offensive, discriminatory, or illegal behavior in the workplace.

As an example, consider the potential importance of a bystander in the realm of cross-cultural interactions in affirming the norms of an organization. A norm or value at work is only as strong as what happens in the breach of that norm, and bystanders may either help—or make things worse—if there is a breach. For example, a Caucasian person who reacts negatively to a racist comment may signal to Black employees that there are allies in the organization who share values of commitment to diversity and inclusion. (See Blake-Beard, Scully, Turnbull, Hunt, Proudford, Porter, LaRoche & Fanning (2006) on the importance of cross-race allies at work.) By the same token, the *silence* of bystanders in such a situation can leave minority employees wondering if they are being judged adversely, in a way that may increase their interest in leaving an organization. Exit interviews with minority employees often reveal that it is not just inappropriate remarks by individuals that sting, but the silence of a wide array of bystanders. (See the *Corporate Leavers Survey* for more about those who leave a job: http://staging.lpfi.org/workplace/corporateleavers.html)

High-ranking bystanders are believed to be especially important in constraining unacceptable behavior by other senior people, in circumstances when workers in lower ranks might find action more risky or difficult.

WHY IS IT USEFUL TO THINK ABOUT BYSTANDERS?

There are a number of reasons to encourage bystanders in the workplace to be "active" when action is appropriate. These include:

• There are often more peers and bystanders to affirm excellent performance than there are supervisors. The people who go "above and beyond" are often invisible to their supervisors. Bystanders can affirm exemplary behavior much more often than bosses, if only with a quick smile and warm thanks.

• A responsible bystander may be able to react immediately and on the spot, at times when action is safe and appropriate. This may be more effective in affirming good behavior or discouraging unacceptable behavior than are reactions that are delayed. In addition, affirming useful innovations and catching errors on the spot may be more cost-effective than are delayed responses.

• People who are planning an illegal or otherwise unacceptable action do not usually share their plans with supervisors, compliance officers, security, mental health practitioners, or police. They may however boast or give clues to friends and co-workers. (See for example, Fein, Vossekuil, Pollack, Borum, Modzeleski & Reddy (2002) for a study of such behavior by school shooters.) Bystanders have also been identified as key players in reducing the impact of bullies in the schoolyard, who feed on bystander attention but often give up if bystanders do not reinforce them (Coloroso, 2004).

• Third parties may be able to help resolve many different kinds of problems amongst people in conflict (Ury, 2000).

• Social psychologists and neuroscientists have repeatedly demonstrated how people are affected by the actions of those around them. (See the work of Cialdini (1985) who introduced the concept of "social proof.") Collegiality, and even happiness, may be as contagious as the negative emotions. (See recently reported work by Christakis and Fowler (2008) on the cessation of negative behaviors like smoking and the encouragement of positive behaviors regarding health, among people who are connected in social networks, and on the contagious nature of happiness.) Happiness may contribute to workplace morale and good performance, and is, of course, good in and of itself.

In short, the increased interest in bystander training spans issues and parties in the workplace: senior managers who can demonstrate commitment to diversity and inclusion, colleagues who can give instant recognition of exemplary performance, teammates who can improve work-group relations, and a broad base of workers who can affect cost control and safety. This article reviews some hypotheses about the uses and effectiveness of bystander training, as well as some current dilemmas and debates.

FROM PASSIVE TO ACTIVE BYSTANDERS

The word bystander often conjures the phrase, "passive bystander." Much research on bystanders has examined why some bystanders remain passive (Darley & Latané, 1968; Latané & Darley, 1970), and there is even a popular if controversial term for such passivity, namely the "bystander effect." Some reasons that are cited for the "bystander effect" are: diffusion of responsibility (surely someone else will say something, and if others are not doing anything I also will not react).

Further research reported in this issue suggests that in fact *many* factors contribute to making some bystanders passive in their workplaces: fear of losing friendships, fear of loss of privacy, fear of "bad consequences," fear of getting too involved. Bystanders may believe that nothing good will happen if they speak up. They may fear retaliation or be concerned about embarrassing their work-group, or a colleague, or their superior (Rowe, Wilcox & Gadlin, 2009).

Two hypotheses seem worthy of attention:

• It may be better for co-workers and colleagues for a bystander to do something, even something small or a bit clumsy or after the fact, than to remain silent when actions warrant a response;

• With training, many bystanders can learn to be more comfortable and appropriate in their responses.

Some recent research shifts the focus from the numerous inhibitors of active bystander interventions to some of the factors that may enable bystanders (Ashburn-Nardo, Morris & Goodwin, 2008; Rowe, et al. in this issue of *JIOA,* and Levine, M and Crowther, S (2008). The first step from passive to active bystander is recognizing that something has happened that is worthy of a response. Bystander training then ushers in useful discussions of "why was this behavior

exemplary or unacceptable?" or "who might feel included, or excluded, here?" without focusing these discussions in a way that may trigger discomfort.

RECOGNITION OF SOCIALLY DESIRABLE BEHAVIOR

In order to foster productive and inclusive behavior, it is important to train all the cohorts in a workplace. All workplace roles are important in thinking about encouraging and commending good teamwork, excellent performance, and productive human interactions within the workplace. The concept of "distributed leadership" (e.g., Gronn, 2002) shows a move away from the idea of one leader at the top to the idea of "a leader in every seat."

All groups may benefit from the practice of **micro-affirmations** (Rowe, 2008) which are defined as: "*apparently small acts, which are often ephemeral and hard-to-see, events that are public and private, often unconscious but very effective, which occur wherever people wish to help others to succeed.*" However, micro-affirmations may be unequally distributed in organizations. This is one of the reasons to be sure that training is offered to *all* cohorts including bystanders. For example, members of a predominant group at work, or of senior managers, may recognize and comment upon one another's contributions, but miss the less understood and appreciated contributions of another group. Research on the "invisible work" of women, particularly actions that foster collegiality and trust in groups, shows that women's opportunities at work may be limited when they do not receive appreciation for their different but important types of contributions (Fletcher, 2001).

RECOGNITION OF UNACCEPTABLE BEHAVIOR

By the same token everyone in the workplace is important in discouraging and dealing with unethical and discriminatory behavior. The new standards of accountability encouraged by Sarbanes-Oxley legislation, in the wake of ethics scandals that might have been forestalled had more managers and employees reported their misgivings, encourage the involvement of peers and bystanders (Samuelson & Gentile, 2005).

Diversity research and diversity training also have addressed the importance of all four of the groups mentioned earlier. That is, there is research on why

"perpetrators" of injustice do what they do (because of stereotypes, prejudice, threats to their status); what "victims" or "targets" of injustice might do (develop a personal armor, find allies for change, pick their battles); and what managers can do to create a climate that fosters effective collaboration across a diverse workforce. Active bystanders may also be effective with respect to discrimination. A bystander, for example, may be able to "*pivot*" a situation—from one where there is awkward silence, exclusion, or hurt—to one where there is support, both for individuals, and for an organization's espoused values of inclusivity.

TOOLKIT FOR THE ACTIVE BYSTANDER

Bystander training usually includes observing and practicing a range of potential bystander options. Scenarios based on real world incidents illuminate bystander training. The scenarios often include **micro-inequities** (Rowe, 1990) — the seemingly small slights whose impacts may accumulate. Here is a sample scenario from a participant in bystander training (LaRoche & Scully, 2008):

José recalled his mentor's advice about networking, so when he was at the company's holiday party and saw two colleagues talking to the regional Vice President, he walked right over to say hello. The VP responded, "Thanks, I'll take another white wine please." It took José a few stunned seconds to realize the VP had mistaken him for a waiter, and a few more stunned seconds to realize his two colleagues were not setting the record straight and introducing him.

The apparent micro-inequity in this example was exacerbated by the silence of the bystanders—the two colleagues who did not correct the Vice President's biased perception. In an organizational context, where power differences are involved, bystanders may be silent—to help the powerful save face, to avoid provoking conflict, and to preserve their own status. Recent research shows that bystanders with a high social dominance orientation (who respect authority and reinforce inequality) are less likely to respond – and respond more slowly – to discriminatory remarks or actions (Rosette, Hewlin, Carton, 2008).

Bystander training might emphasize a range of responses that the two colleagues in the above scenario might use, in order to bring Jose into the conversation, save face for the Vice President, and/or

show their own social adeptness at networking and connecting people (LaRoche & Scully, 2008). One of Jose's colleagues might say:

- "I could use more white wine, too. Let's find a waiter."

- "You should talk to Jose about our Northeast accounts. I'll try to find a waiter."

- "Good idea. Jose, would you join us for a glass of wine, too? Let's flag the waiter for four more glasses. So, have you met Jose? He's a key player in Northeast accounts."

Notice that the last two responses not only pivot the prejudiced assumption but bundle in a micro-affirmation.

Practice makes it easier to respond, instead of freezing in stunned silence. Bystander training also permits discussions about the "underlying issue" in a scenario. It will not be evident to all training participants that "unconscious bias" may have made the Vice President in this scenario perceive that a Hispanic man in a nice suit and tie is a waiter rather than a fellow business colleague. Tackling this matter head-on in a training session might lead to resistance. But such insights may surface as a scenario is unpacked—creating a spontaneous, focused, productive dialogue about the challenges faced by people of color in the US.

THE IMPACT OF ACTIVE BYSTANDERS ON "INCLUSION"

Workplaces in which all people can fully contribute their energies and talents are increasingly valued, worldwide. Fostering inclusivity is seen to be important to the bottom line. Both affirming a wide range of contributions and curtailing inappropriate comments and actions create a workplace where all may flourish.

Bystanders can signal that inclusivity is a real value by *praising* the contributions of a colleague who may normally be ignored by the majority—as when an invisible support staff person is thanked in public, for various, specific contributions, by the manager who is accepting an award for her department. A lab technician might *interrupt* inappropriate and escalating personal remarks between two research scientists, by *shifting the conversation* back to the work at hand. A gracious supervisor might *raise a question* to clarify who actually contributed to the success of a project, and then *demonstrate concern* for appropriate compensation for all contributors. A professor might

assign work that covers the art and architecture of many different religions, demonstrating to students from different religions *that they are not invisible*. A manager might gently remonstrate with his peer, about a thoughtless putdown of a new Black employee, in a way that indicates to the new employee that *he is not entirely alone*.

Active bystanders can be valuable allies in the workplace. Some organizations train "allies" – across dimensions of diversity – to help build inclusive workplaces in which employees trust that their colleagues will support them appropriately, even when they are not in the room. Allies provide support not just for other members of their own social identity group, but across dimensions of difference (Scully, 2009). There are challenges in finding and trusting true allies, for example between Black women and white women, but a virtuous cycle of trust and support can be created (Blake-Beard et al., 2006). Working collectively, rather than as individuals, to create an inclusive environment (Scully & Segal, 2002) and finding safe space in which to "ask the difficult questions" across differences (Proudford, 2002) may be helpful with the challenges of the global workplace.

LINKING THE TWO "FACES" OF BYSTANDER TRAINING

Encouraging the positive and discouraging the negative may operate as related processes. Recent work in neuroscience suggests that much of our decision-making is not available to conscious thought. Many of the manifestations of bias and of exclusivity are likely to be unconscious. (See the IAT at **https://implicit.harvard.edu/implicit/research/)**. One of the few ways of dealing effectively with unconscious bias is to encourage a universal mode of respectful and appropriately affirming behavior. This behavior may have two effects: to affirm good performance and socially desirable behavior, and to *block* "unconscious" discrimination.

SOME CURRENT DEBATES AND CHALLENGES

Several debates are of interest in the area of bystander training in organizations. For example, how does unconscious behavior operate? In a November 18, 2008 review article in the New York Times, "*Bias Test, Shades of Grey*," John Tierney discussed different points of view about unconscious bias. Many people

agree that unconscious bias exists—and that this has been shown by substantial research—but there is controversy about the tools used to measure such bias, specifically the IAT mentioned above. Many people intuitively agree that micro-messages, (positive and negative) appear anecdotally to have significant consequences. However, more research would be needed to demonstrate whether and how micro-inequities and micro-affirmations may actually have consequences in the workplace. In particular more research is needed about the hypothesized linkage(s) between unconscious judgments and workplace behavior.

DOES TRAINING MATTER?

There is also a concern in this field, as in others, about how, if at all, to demonstrate that training has an effect on beliefs and/or behavior, and, if so, how training may affect different populations. Research is also needed on the question of how training might best be presented in various cultures and different kinds of workplace. Some employers, for example in the US military, are working to instill the concept of "personal accountability." Research is needed to examine how this concept may translate across cultures and in various different languages.

IS THERE A "CRITICAL MASS" AT WHICH BYSTANDERS MAY HAVE MEASURABLE EFFECT ON A WORKPLACE CLIMATE?

A premise of training is not just that individuals become more able to be active bystanders but that the accumulation of many active bystander interventions positively shapes a workplace climate. There is anecdotal evidence that, after bystander training, individuals feel more comfortable in making a bystander move, and may even self-consciously reference the training (in terms such as, "OK, I'm going to be an active bystander here.") In a culture where many or all people have experienced bystander training, there may be more support for bystanders (other bystanders who are present might help) and less anti-bystander backlash.

CAN BYSTANDERS MAKE THINGS WORSE?

Some participants in bystander training express the worry that a bystander might "make matters worse." This complex concern rests on the question, "whose interests are at stake?" A bystander interven-

tion might reassure one party while causing embarrassment to another. What one bystander sees as problematic, another may not. In addition, people sometimes misinterpret what they see and act on that faulty assumption. A bystander might make matters worse for the people at hand, while acting in the best interests of the organization. Training should include thorough discussions about when to act, when and whom to consult, and of course, whether to report the unacceptable behavior of another person to a compliance office.

Clearly, a bystander might "make matters worse" for an injured person by damaging that person's relationships or by causing acute embarrassment. An "active bystander" might make things better for himself or herself and be "feeling better" to have taken some apparently righteous action—but might at the same time infringe on the privacy of the person defended. For example, a supportive comment about gay people that accidentally "outs" a colleague may be intended to show commitment to diversity but cause an individual harm. Even commendations may be problematic in an organization, if majority employees overlook minority groups.

Including bystander training as one part of a set of organizational resources

Bystander training emphasizes that bystanders are but one mechanism for responding to difficult situations. Some employers who encourage active bystanders provide a comprehensive list of resources and compliance offices, and a detailed discussion of the organizational complaint system, for the use of bystanders who would prefer to discuss their observations, or report their concerns, rather than deal with problems at the time and on the spot. This support is vital with respect to the most serious issues, including safety violations, discrimination, criminal and other illegal behavior.

Because, as noted above, so many bystanders hesitate to act, it may be especially important for a complaint system to provide a zero barrier, confidential resource, like an ombuds office, as well as compliance offices. These broader structural supports may permit bystanders to consider their options safely, before taking action.

ABOUT THE AUTHORS

MAUREEN SCULLY is on the faculty at the College of Management at University of Massachusetts Boston. She received her Ph.D. in organizational behavior from Stanford University. Her research focuses on grassroots change efforts inside organizations to advance social issues such as civil rights, distributive justice, and workplace democracy.

MARY ROWE is an MIT Ombudsperson and Adjunct Professor of Negotiation and Conflict Management at the MIT Sloan School of Management. She came to MIT in 1973. She has a PhD in Economics, has been a mediator for many years, and was a founding member of the Corporate Ombudsman Association, now the International Ombudsman Association. The MIT Ombuds Office website **(http://web.mit.edu/ombud)** includes some of her articles on the ombuds profession, conflict management system design and other topics, including "Options Functions and Skills," and "Dealing with the Fear of Violence." She has lived and worked in Africa, the Caribbean, and in Europe. She is currently working with a number of other Ombuds colleagues on a "close observer" study: ***"Dealing with—or Reporting—"Unacceptable" Behavior"*** and another ***"Why does a Conflict Management System Need an Ombuds Office?"***

Rowe has a number of special interests in the field of conflict management: unacceptably unprofessional behavior of all kinds, harassment of all kinds, "micro-inequities," that is, small insults that do damage; mentoring and career development, including "micro-affirmations;" dealing with very difficult people and people who "won't let go," options for action if one sees something bad happen, mediating intellectual property disputes, work/family concerns, the role of apologies. (You might call her if you think you owe someone an apology—or if someone owes you an apology). She likes children, gardens, music, scuba, chocolate—and admires the artistic achievements of other people.

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I was just thinking...

Military Chaplaincy and Ombudsing

D. A. GRAHAM

Most people don't realize it but military chaplaincy and ombudsing are more alike than different. When I was commissioned as an officer in the spring of 1996 into the United States Navy Chaplain Corps I never dreamed that I would have the opportunity to continue my work as an Ombudsman after leaving the University of Alabama where I served as the University's first Student Ombudsman in 1994. Prior to becoming the Student Ombudsman I had no idea what an Ombudsman was or what the job entailed. As a graduate student I was hired to be a Graduate Assistant in Career Services and the Emergency Loan Officer for the Student Government Association. In both jobs I counseled students, listened to their needs and helped them develop strategies to help themselves. This was done through referrals, advice, coaching and guidance. I believe these were the skills that propelled my candidacy for the job of Student Ombudsman.

HERE I AM — SEND ME

I enjoyed my work at Alabama. I protected the rights and interests of students, afforded relief, and restored harmony in difficult situations. I guided students with a complaint through normal and/or official channels for redress and acted as a mediator in the resolution of conflict. I advised students, faculty and staff of their rights and delineated procedures to be followed in filing a grievance with the University and assisted the complainant with the presentation of materials. I conducted investigations with tact, diplomacy and discretion, respecting the individual's right to privacy and protecting the individual against retribution. I also recognized complaints that lack merit and tactfully advise the visitor accordingly.

I had never heard of this kind of work before 1993. As an undergraduate Speech Communication major and Political Science minor this job clearly was a special opportunity. Upon entering graduate school in 1993 for a Masters in Rhetorical Studies I was looking for a career that coincided with my ministerial aspirations. I had been in ministry (officially) since I was 18 years old; licensed to preach the "Good News" to all who would hear it. Social Gospel had always been important to me. The concept of fighting for those who could not fight for themselves, being the voice of the voiceless appealed to me tremendously. I knew going into graduate school I wanted to work in a field that allowed me the freedom to advocate for fairness and justice. When God asks "Who will go for me?" I, like Isaiah (the prophet) said, "Here am I, Lord, send me."

MANY ARE CALLED BUT FEW ARE CHOSEN

The spring semester of 1995 before graduating from Alabama I met a Navy recruiter. He was not a regular recruiter like the one who enlisted me in the Navy Reserves when I was 17. He was a Staff Officer recruiter and specifically a Chaplain recruiter. I had always dreamed of wearing the officer uniform since seeing Tom Cruise in Top Gun (1986). Now I was about to get my opportunity to combine the two things I enjoyed most; being in the military and being in the ministry. I did not realize I how my vocation and avocation were about to collide.

Many apply for military chaplaincy but few are actually chosen to be shepherds for warriors. These young men and women are the same age (practically) as the young people I worked with at the university. They have the same dreams and goals but decided for whatever reason to attempt something that 96% of the American population will never do and that is to actually volunteer to serve in our nation's armed forces. I saw this as an opportunity to give back and harness my skills at the same time.

WHAT IS A CHAPLAIN?

Most people when they hear the word "chaplain" automatically envision a clergy person for good reason.

A **chaplain** is typically a priest, pastor, ordained deacon, rabbi, imam or other member of the clergy serving a group of people who are not organized as a mission or church, or who are unable to attend church for various reasons; such as health, confinement, or military or civil duties; lay chaplains are also found in other settings such as universities. For example a chaplain is often attached to a military unit (often known as padre or chaps), a private chapel, a ship, a prison, a hospital, a high school, college or especially boarding school, even a parliamentary assembly and so on. A chaplain provides spiritual and pastoral support for service personnel, including the conduct of religious services at sea or in the field.

According to Norman (2004), though originally chaplain was a Christian term it is also now applied to people in other religions filling the same role. In recent years many non-ordained persons have received professional training in chaplaincy and are now appointed as chaplains in schools, hospitals, universities, prisons and elsewhere to work alongside or instead of ordained chaplains.

The **Chaplain Corps** of the United States Navy consists of ordained clergy who are commissioned naval officers. They "promote the spiritual, religious, moral, and personal well-being of the members of the Department of the Navy," which includes the Navy, the United States Marine Corps, and the United States Coast Guard. They share in the difficulties and rewards of Navy life. The Chaplain Corps consists of clergy endorsed from ecclesiastical bodies, providing assistance for all Navy, Marine Corps, Merchant Marine, and Coast Guard personnel and their families. Navy Chaplains come from a variety of religious backgrounds; chaplains are Catholic, Protestant, Orthodox, Jewish, Muslim, and Buddhist.

STANDARDS OF PRACTICE

Similar to the International Ombudsman Association (IOA) military and more specifically navy chaplains have priorities, mission, vision, guiding principles and a code of ethics. Unlike IOA, military chaplains do have mechanism in place to verify that members are operating to these standards of practice. Let's look at some of them and see how similar or different they are from ombudsing standards. The biggest difference will be the focus on faith and religious services.

My mission as members of the United States Navy Chaplain Corps was to:

- **PROVIDE** religious ministry and support to those of our own faith.
- **FACILITATE** for all religious beliefs.
- **CARE** for all Marines, Sailors and their family and friends.
- **ADVISE** commanders to ensure the free exercise of religion.

The words in **bold** are similar to my function as an Ombuds:

- **PROVIDE** support to members of my academic community
- **FACILITATE** for all groups dealing with difficult or controversial issues
- **CARE** for fair policies, procedures and treatment.
- **ADVISE** stakeholders of analysis, feedback of trends and climate**.**

The listed priorities summarize what's required of a chaplain and/or ombuds to move the command and/or organization toward the fulfillment of its mission:

- Promote **ethical** and **moral** behavior.
- Ensure **learning** and **development** enhances current readiness.
- Think **strategically** for future readiness.
- Help improve **recruitment** and **retention**.
- Enhance **external** and **internal** communications.
- Leverage **technology** to support the mission.

The Navy Chaplain Corps guiding principles coincide with the principles of Ombudsing except for the religious overtones:

- We are **faithful** to our individual religious traditions and practices.
- We **respect the right of others** to hold spiritual beliefs and religious practices different from our own
- We **cooperate and collaborate** in ministry.
- We are **committed to the highest standards of morality and personal integrity**.
- We are committed to **professionalism in the performance of duty**.

As Ombuds we should believe in all of these ideals. The values that the Ombuds Office holds and promotes are the same values that University espouses: integrity, respect for others, diversity, and freedom from bias and harassment. Like the Ombuds Office the Navy Chaplain is also committed to the professional principles of confidentiality, impartiality, independence, and informality as prescribed by the International Ombudsman Association Code of Ethics and Standards of Practice and the Uniform Code of Military Justice (UCMJ).

ETHICAL PRINCIPLES

As a Navy Chaplain I was held to the same ethical principles as the organizational ombudsman. The authority to for these principles is rooted in and guided by the Uniform Code of Military Justice (UCMJ). Like the IOA Code of Ethics as a Navy Chaplain I was afforded independence, neutrality, confidentiality and informality.

INDEPENDENCE

Like the Ombudsman as a Navy Chaplain I was independent in structure, function, and appearance to the highest degree possible within the organization (IOA Code of Ethics). My office reported directly to the commanding officer (CO). I had a dotted line on the organizational chart. Although for administrative purposes I was aligned under the executive officer (XO). This allowed me freedom to not be a representative of the command or an advocate for sailors or marines I was an advocate for fairness and a fair process.

NEUTRALITY AND IMPARTIALITY

The Ombudsman, as a designated neutral, remains unaligned and impartial. The Ombudsman does not engage in any situation which could create a conflict of interest (IOA Code of Ethics). Unlike the ombudsman, as a chaplain I was not held to strict impartiality if I saw injustice. Yes, it was my job to try to be the voice of reason but my loyalty or allegiance was to fairness and justice. Regardless of how I personally felt about an issue I had to remain open more than neutral. For example, when there was a domestic violence case and the service member was accused of perpetrating the crime. I had to be there to minister to him and the spousal (victim). If I saw that a sailor or marine was not being treated properly I could advocate for that service member. On many levels it was expected that I would. I know that many Ombuds shy away from advocacy even when they know a wrong has been committed in order to remain "neutral and impartial. I understood that as a chaplain in the United States Armed Forces that I would function in a pluralistic environment to provide for ministry to **all** military personnel and their families entrusted to my care. This ranged from Wiccans, Devil Worshipers, etc. My understanding of my neutrality was summed up in this say "I must be all things to all people.

CONFIDENTIALITY

The Ombudsman holds all communications with those seeking assistance in strict confidence, and does not disclose confidential communications unless given permission to do so. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm (IOA Code of Ethics). Confidentially was the most sought after part of my work as a chaplain. The Army, Air Force, and Navy all have the same rules about confidentiality. (In case you're wondering about the Marine Corps and the Coast Guard, they use Navy chaplains.) The rules are very simple. Everything is confidential. The legal term for that is "privileged communication." That means it's the member's privilege to decide whether or not the chaplain can reveal what they talked about. Without the member's permission, the chaplain must stay mum. The conversation with a chaplain or chaplain's assistant is considered "privileged" so long as the member is doing it as a formal act of religion or an act of conscience and they intend it to be confidential.

INFORMALITY

The Ombudsman, as an informal resource, does not participate in any formal adjudicative or administrative procedure related to concerns brought to his/her attention (IOA Code of Ethics). It was my job to help service members resolve their conflicts or disputes at the lowest level possible. As a chaplain you are afforded the opportunity to work with all levels of the command. This gives you influence and credibility to help senior and junior enlist and officers avoid the formal process of a formal grievance or even courts martial. Most times the chaplain is brought in during Non-Judicial Punishment (NJP) meetings to be a witness or a voice of reason.

CONCLUSION

What makes the Chaplain and the Ombudsman so similar is that they operate exclusively on their reputation, credibility, integrity, respect for others and ourselves, maintenance of disciplined professional and personal development, and recognize the special power afforded us by our office. Chaplain and Organizational Ombudsman are more alike than different. In many ways they are doing work that helps to make sure their institutions are mission-ready, demonstrating spiritual, moral and ethical maturity, supported by the innovative delivery of services and compassionate care. I believe this is why I was able to transition from higher education ombudsing to military chaplaincy back to higher education ombudsing. Chaplaincy has made Ombudsing more than just a profession (for me) it has made it a calling.

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ABOUT THE AUTHOR

D. A. GRAHAM was appointed in February 2009 to serve as University Ombudsman at Princeton University. Before arriving at Princeton University, D. A. was the University Ombudsman at San Diego State University for two years. Prior to that, he served as a Navy Chaplain for 9 years participating in Operation Iraqi Freedom and Operation Desert Storm as a Hospital Corpsman. In 2001 D. A. received the Military Chaplain's Association Chaplain of the Year Award. He is a graduate of the University of Alabama, where he earned B.A and M.A. degrees in Speech Communication in and was the Founding President of the Alabama Student Society of Communication Arts (ASSCA). He also was the first Student Ombudsman for the University of Alabama. D. A. attended the Interdenominational Theological Center in Atlanta, GA, where he received his Master of Divinity degree in Pastoral Counseling in 1998. During this time he served as a Resident Director at Morehouse College where he received the Student Advisor of the Year Award. While stationed in Okinawa, Japan he received his Master of Human Relations degree from the University of Oklahoma in 2002.

recent developments. . .

A Legal Perspective

TOM KOSAKOWSKI

This article summarizes significant developments in U.S. legislation and case law relating to Organizational Ombuds from February 2008 through January 2009.* During this period, the federal government implemented legislation creating an Ombuds-like office to resolve Freedom of Information Act disputes and a Washington state court found that a university Ombuds' attempt to mediate a sexual assault case created liability for her institution.

LEGISLATION:

FEDERAL FOIA OMBUDS PROGRAM IMPLEMENTED AFTER FUNDING FIGHT

In May 2007, the U.S. House of Representatives introduced the OPEN Government Act of 2007 to make federal agencies more responsive to requests under the Freedom of Information Act.[1] In addition to policy changes designed to promote government transparency, the bill also created a new office within the National Archives and Records Administration – Office of Government Information Services — to facilitate informal resolutions of FOI disputes.[2]

The program, signed into law by President Bush on January 31, 2007[3], was dubbed the "FOIA Ombuds-man Office" by the press and transparency advocates.[4] The legislation, however, does not use the term "ombudsman" per se and states in relevant part:

> The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.[5]

The Bush administration subsequently defunded the program and relocated it to the National Security Administration — one of the targets of FOIA reforms.[6] The press, FOIA activists and members of Congress objected, but to no avail.[7]

Days after President Obama took office in January 2009, the FOIA ombuds program was restored.[8] At the time this article was written, the National Archives and Records Administration was accepting applications for the directorship.[9]

CASE UPDATE:

WASHINGTON APPELLATE COURT VOIDS MEDIATION BY UNIVERSITY OMBUDS

In the case of **S.S. v. Alexander**, the Washington State Appellate Court considered the involvement of a university Ombuds in a dispute between two undergraduate students.[10] The unnamed plaintiff was a University of Washington student and equipment manager for the UW football team. The plaintiff alleged that she had been sexually assaulted and raped by her former boyfriend, a well-known UW football player. According to the plaintiff, when she reported the incident, the UW assistant athletic director convinced her to mediate the matter with the university's Ombuds. The plaintiff agreed to mediation, but later claimed she was never offered alternatives, such as the campus disciplinary process or the university program for sexual-assault victims.

The mediation was conducted by the UW Ombuds and attended by the plaintiff, her alleged assailant, and the UW assistant athletic director. According to the plaintiff:

She reported feeling dismissed and unheard through the process of mediation, stating that the University of Washington Ombudsman's Office appeared to take the perpetrator's side and imposed minimal consequences so that her experience was trivialized. She indicated that the questioning of her truthfulness and credibility was devastating.[11]

At the conclusion of the mediation, Ombuds allegedly decided that Alexander should attend counseling and perform community service. Unhappy with the outcome, the plaintiff sued the university alleging sex discrimination in violation of Title IX.

The trial court granted summary judgment for the university, concluding that there were no genuine issues of material fact and that the university was entitled to judgment as a matter of law. The plaintiff appealed and the state appellate court reversed the trial court upon a finding that:

1. The plaintiff had presented substantial evidence of sexual harassment;

2. University officials, including the Ombuds, were "appropriate persons" (i.e., an official "with authority to take corrective action to end the discrimination") who responded in a deliberately indifferent manner;

3. The single act of rape was sufficient to support the plaintiff's claim of sexual harassment; and

4. The plaintiff presented evidence that the university's handling of her incident resulted in her being denied the full benefit of her educational experience.[12]

The decision also noted that, if the plaintiff's allegations were correct, the Ombuds failed to suggest options for dealing with the alleged rape other than mediation, failed to investigate the plaintiff's claims, and exhibited bias in handling the matter.[13]

Given the procedural posture of the case – the plaintiff's motion for summary judgment – the court considered the facts in a light most favorable to the plaintiff. The facts as they are ultimately determined by the court may be quite different. Nonetheless, the characterization of the UW Ombuds was remarkable and troubling. In significant respects, the UW Ombuds' practices were at odds with Organizational Ombuds' core principles of confidentiality, neutrality, and informality[14]:

• The UW Ombuds had responsibility for receiving complaints from students on behalf the university[15], which is contrary to IOA Standards of Practice[16] mandating confidentiality[17];

• The failure of the UW Ombuds to provide a range options to the plaintiff violated the Standard of neutrality[18]; and

• By rendering a decision after the mediation, the UW Ombuds also failed to hew to the standard of informality.[19] (Moreover, it is generally considered inappropriate to mediate matters of sexual assault.[20])

For these reasons, the practices of most Organizational Ombuds are distinguished from the actions of the UW Ombuds in the **S.S. v. Alexander**. However, the court did not address these distinctions and, because this is a published decision of an appellate court, it may be cited as precedent by Washington courts.

OTHER NOTABLE CASES INVOLVING OMBUDS

Lachtman v. Regents of the University of California[21]

In this case, the California State Appellate Court considered the claims of a UC Irvine graduate student who alleged that the history department had unfairly denied him advancement to PhD candidacy and breached his research and fellowship contracts. The university Ombuds was briefly involved in the matter and prompted the history department to reconsider its initial review of the student. The court found no due process violations, but returned the case to the trial court for reconsideration of the breach of contract claims. The Ombuds did not appear to violate any standards of practice and the court did not address the propriety of the Ombuds' involvement. This is a published decision of an appellate court and may be cited as precedent by California courts.

Byra-Grzegorczyk v. Bristol-Myers Squibb Co.[22]

Two research scientists in this matter claimed that Bristol-Myers retaliated against them for filing complaints with the corporate Ombuds and others. The court denied Bristol-Myers' motion for summary

judgment on the retaliation claim without commenting on the role of the Ombuds. Although the decision was reported, it has limited precedential value because it was issued by a trial court – the US District Court for Connecticut.

Depree v. Saunders[23]

In this case, a professor claimed violations of his constitutional rights and retaliation after he was terminated by the University of Southern Mississippi. Evidence showed that the university made its decision based partly on a written report by university Ombuds as part of the investigation into the professor's situation. The Ombuds' actions were clearly formal and non-confidential, and thus did not conform with best practices for Ombuds. However, the court dismissed the case in favor of the university without delving into the role of the Ombuds. This is an unreported decision by a trial court and of very limited precedence.

EEOC v. American Laser Centers, LLC[24]

This federal trial court decision from the Eastern District of Michigan involved a dispute over the costs of a pre-trial facilitation. During the course of the civil case filed by the Equal Employment Opportunity Commission, the court ordered the parties to a facilitation with district court's own Ombuds, who serves as an intermediary between judicial officers and local bar. The EEOC refused to pay the facilitator's fee, arguing in part that the facilitator was already being paid as an employee of the district court. The trial court disagreed and ordered the EEOC to pay its share of the facilitation costs, thus implicitly confirming that the Ombuds was able to serve in both roles. This is an unreported decision by a trial court and has virtually no precedential value.

EEOC v. Pitt-Ohio Express, Inc.[25]

In this matter, a federal trial court ordered the resolution of employment discrimination claims filed by the Equal Opportunity Commission pursuant to a settlement agreement. Among other measures, Pitt-Ohio agreed to implement an Ombuds program to informally resolve workplace issues that may arise from women hired into driver and dockworker jobs. This is an unpublished decision of a trial court and this has limited importance as precedent. However, EEOC and practitioners may look to this resolution as a model for other similar cases.

ABOUT THE AUTHOR

TOM A. KOSAKOWSKI is the Ombudsperson for the Center for Health Sciences at the University of California, Los Angeles. Tom serves on the IOA Board of Directors and is a member of the IOA Legal and Legislative Affairs Committee. He publishes the **Ombuds Blog** (http://ombuds-blog.blogspot.com)and has been an attorney in California since 1996.

ENDNOTES

[1] H.R. 1309, 110 Cong. (2007), available at http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01309:.

[2] Ibid.

[3] Pub. Law No. 110-75.

[4] See Scott A. Hodes, "FOIA Facts: Are Ombudsman The Answer?", LLRX.com, April 24, 2007, http://www.llrx.com/columns/foia41.htm; "House Panel OKs Legislation to Strengthen Freedom of Information Act," Fox News, March 6, 2007, http://www.foxnews.com/story/0,2933,257121,00.html; Laurie Kellman, "Congress to Consider FOIA Reform Measure," San Francisco Chronicle, March 8, 2007, http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/03/08/national/w144945S47.DTL&type=politics.

[5] Pub. Law No. 110-75, § 10(a).

[6] Rebecca Carr, "Bush eliminates FOIA ombudsman,"

Austin American-Statesman, February 4, 2008, http://www.statesman.com/blogs/content/shared-blogs/washington/secrecy/entries/2008/02/04/bush_eliminates_foia_ombudsman.html.

[7] Dan Friedman, "Senator says White House is trying to undermine FOIA law," CongressDaily, February 5, 2008; New York Times (editorial), "The Cult of Secrecy at the White House," February 7, 2008, http://www.nytimes.com/2008/02/07/opinion/07thu2.html?_r=1; Hannah Bergman, "Congressional Hearing Focuses on New FOIA Ombudsman," Reporters Committee for Freedom of the Press, September 17, 2008, http://www.rcfp.org/newsitems/index.php?i=7010.

[8] Clint Hendler, "The Openness Ombudsman," Columbia Journalism Review, January 29, 2009, http://www.cjr.org/campaign_desk/the_openness_ombudsman.php.

[9] Tom Kosakowski, "Update/Job Posting: National Archives Hiring FOIA Ombuds," Ombuds Blog, January 30, 2009, available at http://ombuds-blog.blogspot.com/2009/01/httpwwwrcmupreduprocuraduriaestudiantil.html.

[10] 143 Wn. App. 75; 177 P.3d 724; 2008 Wash. App. LEXIS 333 (2008), available at http://www.courts.wa.gov/opinions/pdf/58335-2.pub.doc.pdf.

[11] S.S. v. Alexander, at 95, fn. 7.

[12] S.S. v. Alexander, at 101-117.

[13] S.S. v. Alexander, at 87, 88, 106-107.

[14] International Ombudsman Association, "Code of Ethics," revised January 2007, available at http://www.ombudsassociation.org/standards/Code_Ethics_1-07.pdf.

[15] In finding that the Ombuds was an "appropriate person" under Title IX, the court observed: The UW's ombudsman is appointed by the president "to assist in the protection of the rights and interests of individual members of the student body, the faculty, and the staff against arbitrary and capricious action or lack of appropriate action by University agencies, the student body, the faculty, or the staff." The ombudsman is charged with the authority to receive complaints from students with regard to "alleged inequities," to seek to resolve such inequities, and "recommend to the President redress when the Ombudsman believes that an individual has been improperly treated and when the Ombudsman has been unable to resolve the matter."

S.S. v. Alexander, at 87, fn. 4.

[16] International Ombudsman Association, "Standards of Practice," revised December 2006, available at http://www.ombudsassociation.org/standards/Stds_Practice_1-07.pdf.

[17] IOA Standard of Practice 3.1, states in relevant part:

The Ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality….

IOA Standard of Practice 3.2, states: Communications between the Ombudsman and others (made while the Ombudsman is serving in that capacity) are considered privileged. The privilege belongs to the Ombudsman and the Ombudsman Office, rather than to any party to an issue. Others cannot waive this privilege.

In addition, IOA Standard of Practice 3.8 states: Communications made to the ombudsman are not notice to the organization. The ombudsman neither acts as agent for, nor accepts notice on behalf of, the organization and shall not serve in a position or role that is designated by the organization as a place to receive notice on behalf of the organization. However, the ombudsman may refer individuals to the appropriate place where formal notice can be made.

[18] IOA Standard of Practice 2.6 states: The Ombudsman helps develop a range of responsible options to resolve problems and facilitate discussion to identify the best options.

[19] IOA Standard of Practice 4.3 states: The Ombudsman does not make binding decisions, mandate policies, or formally adjudicate issues for the organization. In addition, Standard 4.5 states in relevant part: The Ombudsman does not participate in any formal investigative or adjudicative procedures.

[20] U.S. Department of Education, Office of Civil Rights, "Sexual Harassment Guidance 1997," March 14, 2005 ("In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis."), available at http://www.ed.gov/about/offices/list/ocr/docs/sexhar01.html; see also Jeffrey C. Sun, "University Official as Administrators & Mediators: The Dual Role Conflict & Confidentiality Problems," BYU Education & Law Journal (1999) Summer:19.

[21] 158 Cal. App. 4th 187, 70 Cal. Rptr. 3d 147, 2007 Cal. App. LEXIS 2063 (2007) (although the decision was issued December 20, 2007, it did not become public until February 2008), available at http://www.precydent.com/OriginalVersion/G037102.PDF?id=84737.

[22] 572 F. Supp. 2d 233, 2008 U.S. Dist. LEXIS 63553 (D. Conn. 2008).

[23] 2008 U.S. Dist. LEXIS 76586 (S.D. Miss. Sept. 30, 2008).

[24] 2008 U.S. Dist. LEXIS 77936 (E.D. Mich. Oct. 1, 2008).

[25] No. 106 CV 0747, consent decree (N.D. Ohio Oct. 19, 2008), available at http://op.bna.com/dlrcases.nsf/id/kmgn-7nkjld/$File/pitts.pdf.

biographies. . .

HOWARD GADLIN has been Ombudsman and Director of the Center for Cooperative Resolution at the National Institutes of Health since the beginning of 1999. From 1992 through 1998 he was University Ombudsperson at UCLA. He was also director of the UCLA Conflict Mediation Program and co-director of the Center for the Study and Resolution of Interethnic/Interracial Conflict.

While in Los Angeles, Dr. Gadlin served as consulting Ombudsman to the Los Angeles County Museum of Art. Prior to coming to UCLA, Dr. Gadlin was Ombudsperson and Professor of Psychology at the University of Massachusetts, Amherst.

An experienced mediator, trainer, and consultant, Dr. Gadlin has years of experience working with conflicts related to race, ethnicity and gender, including sexual harassment. Currently he is developing new approaches to addressing conflicts among scientists. He is often called in as a consultant/mediator in "intractable" disputes. Dr. Gadlin has designed and conducted training programs internationally in dispute resolution, sexual harassment and multicultural conflict.

Dr. Gadlin is past President of the University and College Ombuds Association (UCOA) and of The Ombudsman Association (TOA). For three years, he was chair of the Ethics Committee of the Society of Professionals in Dispute Resolution. He also served 5 years as Chair of the Coalition of Federal Ombudsmen.

Dr. Gadlin is the author, among other writings, of "Bargaining in the Shadow of Management: Integrated Conflict Management Systems," "Conflict, Cultural Differences, and the Culture of Racism," and "Mediating Sexual Harassment." He is the co-author of "Neutrality: What an organizational ombudsperson might want to know" and "Conflict Resolution and Systemic Change."

D. A. GRAHAM was appointed in February 2009 to serve as University Ombudsman at Princeton University.

Before arriving at Princeton University, D. A. was the University Ombudsman at San Diego State University for two years. Prior to that, he served as a Navy Chaplain for 9 years participating in Operation Iraqi Freedom and Operation Desert Storm as a Hospital Corpsman. In 2001 D. A. received the Military Chaplain's Association Chaplain of the Year Award. He is a graduate of the University of Alabama, where he earned B.A and M.A. degrees in Speech Communication in and was the Founding President of the Alabama Student Society of Communication Arts (ASSCA). He also was the first Student Ombudsman for the University of Alabama. D. A. attended the Interdenominational Theological Center in Atlanta, GA, where he received his Master of Divinity degree in Pastoral Counseling in 1998. During this time he served as a Resident Director at Morehouse College where he received the Student Advisor of the Year Award. While stationed in Okinawa, Japan he received his Master of Human Relations degree from the University of Oklahoma in 2002.

RALPH HASSON is the Director of the Policy Office for the University of Texas System, where he oversees the Policy Office and assists the Vice Chancellor for Administration with long-term strategic initiatives. He also currently serves on the Advisory Board of CareFlash L.L.C., a web-based services company, and is Chair of the Austin Board of Advisors for the Texas TriCities Chapter of NACD (National Association of Corporate Directors). Mr. Hasson previously served as Vice President of Chorda Conflict Management, Inc., where he assisted a number of major U.S. corporations in designing and implementing comprehensive conflict management systems. He is the author of numerous articles on corporate governance and ethics oversight, and the co-author of *Controlling the Costs of Conflict: How to Design a System for Your Organization* (San Francisco: Jossey-Bass, 1998).

Hasson is a Fellow of the Center for Public Policy Dispute Resolution and a Fellow of the IC² Institute of the University of Texas at Austin.

In 2005 and 2007, Hasson took a leading role in initiating and organizing the efforts to pass a shield law bill for ombudsmen in the Texas legislature.

TOM KOSAKOWSKI is the Ombudsperson for the Center for Health Sciences at the University of California, Los Angeles. Tom serves on the IOA Board of Directors and is a member of the IOA Legal and Legislative Affairs Committee. He publishes the **Ombuds Blog** (http://ombuds-blog.blogspot.com)and has been an attorney in California since 1996.

ALAN JAY LINCOLN was hired as the first member of the criminal justice program at UMass Lowell in 1977. He served three terms as graduate coordinator for the Criminal Justice Department and eleven years as Special Assistant to the Graduate Dean. Alan was named the first University Ombuds in 2001 and continued to serve in that role until his retirement from the university in 2008. He also served on the editorial board of the Journal of the California Ombuds Caucus and the Research Committee for The Ombuds Association.

Alan earned master's degrees in psychology and sociology and a doctorate in sociology. He completed a Postdoctoral National Institute of Health program in Family Violence and also held a Fulbright Professorship in the Netherlands. He is the author of numerous articles and three books on crime and violence, and is a former journal editor of Library and Archival Security. Alan is a certified mediator and recently completed advanced mediation training. He currently serves as the editor of JIOA and is looking forward to the new personal and professional opportunities and adventures that are part of the retirement transition.

MARY ROWE is an MIT Ombudsperson and Adjunct Professor of Negotiation and Conflict Management at the MIT Sloan School of Management. She came to MIT in 1973. She has a PhD in Economics, has been a mediator for many years, and was a founding member of the Corporate Ombudsman Association, now the International Ombudsman Association. The MIT Ombuds Office website **(http://web.mit.edu/ombud)** includes some of her articles on the ombuds profession, conflict management system design and other topics, including "Options Functions and Skills," and "Dealing with the Fear of Violence." She has lived and worked in Africa, the Caribbean, and in Europe. She is currently working with a number of other Ombuds colleagues on a "close observer" study: ***"Dealing with—or Reporting—"Unacceptable" Behavior***" and another ***"Why does a Conflict Management System Need an Ombuds Office?"***

Rowe has a number of special interests in the field of conflict management: unacceptably unprofessional behavior of all kinds, harassment of all kinds, "micro-inequities," that is, small insults that do damage; mentoring and career development, including "micro-affirmations;" dealing with very difficult people and people who "won't let go," options for action if one sees something bad happen, mediating intellectual property disputes, work/family concerns, the role of apologies. (You might call her if you think you owe someone an apology—or if someone owes you an apology). She likes children, gardens, music, scuba, chocolate—and admires the artistic achievements of other people.

MAUREEN SCULLY is on the faculty at the College of Management at University of Massachusetts Boston. She received her Ph.D. in organizational behavior from Stanford University. Her research focuses on grassroots change efforts inside organizations to advance social issues such as civil rights, distributive justice, and workplace democracy.

TOM SEBOK has been an ombudsperson at the University of Colorado at Boulder since 1990. Between 1976 and 1990 he worked as a counselor in three different community colleges. He has published numerous journal articles on both ombudsing and restorative justice and is an Associate Editor of the Journal of the International Ombudsman Association. He helped establish the University of Colorado's Restorative Justice Program, the first of its kind at a US university. He served as the first Secretary on the IOA Board of Directors from 2005-2008.

SARA THACKER is the Associate Ombudsperson for the Staff Ombuds Office at the University of California, Berkeley and co-chair of the IOA Communications Committee. Ms. Thacker is a certified mediator and provides training to employees on managing conflict, facilitating workplace disputes, dealing with difficult people, and bullies. Prior to joining the Staff Ombuds Office, she served as Adjunct Professor and Hewlett Fellow in Conflict Resolution and Legal Problem Solving at Georgetown University Law Center where she taught courses in negotiation, mediation, and multi-party dispute resolution. Ms. Thacker holds a *Juris Doctor* degree and previously worked as a litigator for two international law firms.

LINDA WILCOX is the Ombudsperson at Harvard's Medical, Dental and Public Health schools. Since 1991 she has been assisting faculty, staff, students, and appointees with interpersonal and research-related problems. Linda holds a Master's Degree in Administration, Planning, and Social Policy, and a Certificate of Advanced Graduate Study from the Harvard Graduate School of Education and a Certificate from Harvard Law School's Program on Negotiation. She has been on the both the UCOA and IOA boards and was IOA president in 2000.

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The Journal of the International Ombudsman Association (JIOA) is a peer-reviewed online journal for scholarly articles and information relevant to the ombudsman profession. As members of a relatively new profession, we continually strive to understand, define and clarify the role and function of the professional organizational ombudsman. JIOA will help foster recognition that what we do for our agencies, corporations, colleges and universities is worthy of study. While we must vigorously protect the confidentiality of our interactions, we can still study and be studied to understand what we do and how we do it; what works well and what doesn't work; what our options are; how social, technical and legal changes may impact us; what the profile and career development of ombudsman professionals might be, and other matters of interest. The JIOA can facilitate a greater interest in ombudsing, enhance our professional standing, and serve to give us a better understanding of our dynamic roles and the impact on our institutions and agencies. The journal also will allow IOA members, other ombudsmen, and other professionals to reach out to their colleagues with their ideas, research findings, theories, and recommendations for best practices and to engage in ongoing discussions of critical issues.

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Examples of citations:

Kosakowski, T., & Miller, D. (2007). Why we get no sleep at night. Journal of the International Ombudsman Association, 1, 100-101.

Rowe, M.P. (1977). Go Find Yourself a Mentor. In P. Bourne & V. Parness (Eds), Proceedings of the NSF Conference on Women's Leadership and Authority, University of California, Santa Cruz, California, 1977 (pp 120-140). Santa Cruz: University of California Press. Miller, D. (2000). Dying to care? Work, stress and burnout in HIV/AIDS careers. London: Taylor & Francis.

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