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The Strategic Relationship between Ethics and Dispute Resolution: What Every CEO Should Know

Mary L. Walker[†] & R. Philip Deavel[‡]

I. INTRODUCTION

After Enron's collapse in 2001 and the enactment of the Sarbanes-Oxley Act¹ the following year, Chief Executive Officers (CEOs) across America established ethics programs designed to bring integrity and compliance to their businesses. But moving an organization to an ethical culture takes more than just a compliance program. This article advocates that there is a dynamic relationship between a values-based ethics program and a commitment to dispute resolution that can revolutionize the way we think about both. Simply put, organizations with an ethical culture value individual integrity and the relationships between people and entities and thus naturally desire to early identify and resolve disputes that arise within those relationships. Ethical behavior promotes trust among individuals, and that trust is essential to consensus-based problem-solving. Likewise, consensus-based dispute resolution requires appreciation of and respect for the other party's interests and values. Long-term strategic thinking recognizes the value of both an ethical culture and enlightened conflict resolution to build trust and strengthen continuing relationships. The United States Air Force is a global organization with many relationships, including those with other governments, other federal agencies, corporate contractors

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1. Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002).

and its members and employees. Hence, these concepts are not academic to us—they are the lifeblood that allows us to successfully accomplish our mission. But they also have implications for our corporate partners.

Examples of deeply rooted corporate ethical failures are all too easy to cite, atypical as they are when viewed against the landscape of general American business practices. Enron's swift fall from a firm with (claimed) revenues of 111 billion dollars in revenue for 2000, to a discredited sham corporation seeking bankruptcy protection in 2001, has made the Corporation's very name a synonym for systematic business fraud. In 2005, Worldcom's CEO was found guilty of orchestrating an eleven billion dollar accounting fraud that placed one of America's biggest telecommunications firms into bankruptcy and resulted in a twenty-five year prison sentence for the CEO.² Also in 2005, Tyco's CEO was convicted of committing a 400 million dollar criminal fraud against the Corporation's shareholders.³

The institutional responses and the policies that well-meaning CEOs formulated in response to these events tended to emphasize more rules and greater enforcement—in a word, compliance. As an example, in 2003, in response to its CEO being convicted of fraud, Tyco adopted a code of ethical conduct to define unethical practices and behavior and required all its employees to take an ethics course and sign an ethics statement.⁴ Formal rules-based compliance programs can have intrinsic value and allow senior leaders to feel that they are “doing something” about the issue of ethical behavior. However, CEOs need to go beyond compliance-oriented ethics programs to instill values-based ethical cultures. Since its first reaction in 2003, Tyco has taken added steps to move toward a values-based program.⁵

Corporations and government agencies have much to share with each other. While at first blush the lack of a profit motive creates a divide, in reality there are many common challenges and goals for the senior leadership of large organizations in the private and public sectors. In

2. Krysten Crawford, *Ebbers Gets 25 Years*, CNN Money, Sept. 23, 2005, http://money.cnn.com/2005/07/13/news/newsmakers/ebbers_sentence/.

3. Krysten Crawford, *Ex-Tyco CEO Kozlowski found guilty*, CNN Money, June 21, 2005, http://money.cnn.com/2005/06/17/news/newsmakers/tyco_trialoutcome/index.htm.

4. Tyco, *Tyco Guide to Ethical Conduct*, <http://www.tyco.com/livesite/Page/Tyco/Our+Commitment/Governance/Guide+to+Ethical+Conduct?>.

5. In 2006, for example, Tyco: (i) revised its board of directors governance principles, recognizing the responsibility of the board for “setting the ethical tenor for management and the company,” (ii) issued to its suppliers a guide to social responsibility, reaffirming its commitment to development of relationships based on integrity and by setting forth the values and principles that suppliers can expect from Tyco and vice versa, and (iii) issued a guide to ethical leadership. Tyco, *Corporate Responsibility, Governance*, <http://www.tyco.com/livesite/Page/Tyco/Our+Commitment/Governance/Overview/?>. These steps and others are part of Tyco's (and its CEO's) efforts to create a values-based ethical culture.

particular, the leaders of all large organizations share a common need to assure their resources are not depleted by litigation, but instead to preserve them by successfully resolving disputes arising both internally with employees and externally with corporate partners, customers and suppliers. American history is replete with examples of large and seemingly invulnerable organizations that have been prevented from functioning effectively or destroyed by their inability to smoothly resolve conflict. This conflict can take many forms: strikes by employees, civil litigation so all-consuming it saps the energy and focus of senior leaders, criminal prosecutions of key executives, and a crisis of confidence in the organization (financial markets, shareholders, consumers, or in the case of public entities, taxpayers and the legislators who represent them).

The culture of a corporation, in particular the strength of its ethical culture, logically has a direct bearing on its level of success in a wide range of dispute resolution policies and practices. While corporate ethics and dispute resolution programs are often viewed as separate organizational “stovepipes,” addressing them in an integrated manner and understanding how they relate produces a powerful synergy that makes both more effective. Importantly, it is top leadership, not simply the legal department, that must be the catalyst for the integration of ethics and dispute resolution programs in large and complex organizations.

Why would we have an interest in how private corporations approach the subjects of ethics and dispute resolution? The Air Force alone (putting aside the rest of the Department of Defense or the federal government) has an extensive relationship with private industry: in fiscal year 2007, we did business with 65,465 different contractors. The total number of Air Force contracting actions (new awards, options, modifications, and other actions) in this last fiscal year was 203,305 for a total of 68.4 billion dollars.⁶ And that’s only at the prime contractor level. For the F-22 air superiority fighter program, there are about 1000 suppliers in over forty states. Contractors with an ethical culture are less likely to defraud or cheat us. Contractors with effective dispute resolution programs are better equipped to resolve conflicts as they arise. For these reasons, we believe it is in the government’s interest to encourage its corporate partners to have an ethical culture and effective dispute resolution policies.

Part II of this article will explain the nexus between an ethical culture and an effective dispute resolution program, and Part III will describe the

6. The data cited in this section is internal Air Force information.

Air Force's approach to both ethics and dispute resolution. In Part IV, we will describe how the powerful synergy between a dispute resolution program and an ethics program that nurtures a culture of ethics beyond a code-based compliance system can lead to a "virtuous cycle." Lastly, Part V will make several practical recommendations for CEOs.

II. THE ETHICS AND DISPUTE RESOLUTION EQUATION

A. *The Limitations of Traditional ADR*

While the use of mediation goes back hundreds of years, dispute resolution techniques other than litigation are still collectively referred to as alternative dispute resolution (ADR). ADR is an umbrella concept for a variety of processes used to resolve disputes outside of the traditional judicial and administrative fora. These techniques include, but are not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombuds, with communication and negotiation skills being the foundation they are all built upon.

The use and acceptance of ADR has expanded markedly over the last century. ADR has been encouraged by the federal government in an expanding number of areas since the passage of the Interstate Commerce Act in 1887, which authorized the submission of labor disputes between the railroads and their employees to arbitration.⁷ The significant expansion of enthusiasm for ADR in recent years can be explained by the backlog and often glacial pace of traditional courts, the opportunity for discretion and confidentiality, control over the selection of the neutral party who will mediate or decide the dispute, the opportunity for a creative solution, and above all, costs. Annual civil litigation costs in the United States are now estimated at 200 to 300 billion dollars.⁸ However, the term "ADR" itself has become anachronistic and self-limiting because it is so closely tied to reactive options to address litigation. Dynamic dispute resolution is far more expansive and envisions the creation of organizational systems designed to resolve (and ideally prevent) conflict far earlier and lessen the frequency of litigation.

A corporate policy of underscoring the importance of relationships and embracing proactive dispute resolution, whether with corporate partners, regulatory bodies, employees or customers, can be a silver bullet for

7. Interstate Commerce Act, Pub. L. No. 49-41, 24 Stat. 379 (1887).

8. AMERICAN ARBITRATION ASSOCIATION, DISPUTE-WISE BUSINESS MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS 3 (2006).

managing conflict. In contrast, traditional ADR, as a reactive tool tied to resolving litigation, presents a severely constrained option for the CEO. In most large organizations, the dispute resolution (or ADR function) is housed in the corporation's legal department. As a result, it is typically viewed as a lawyer's tool and used in a reactive manner, after a dispute has risen to the level of threatened or actual litigation. Once a dispute has reached the point that one party feels the need for vindication in the courts, positions have hardened, trust has evaporated, and the emotional complexity of resolution has increased. In addition, the decisions, if and when, to engage in dispute resolution are often made by litigation counsel who may view each case as a general view of the battlefield—as a challenge to be relished and decisively won. This lack of enthusiasm for dispute resolution can be most pronounced on the part of outside counsel whose interests are often in increasing their bottom line and thus, inconsistent with the interests of the organization they are representing.

The most effective counterbalance to those forces in large organizations that have a visceral tendency to resist meaningful and efficient dispute resolution is the creation of an integrated conflict management system.⁹ As explained in this article, a holistic system of dispute resolution has many tangible and philosophical pieces. Ultimately, it is the senior leader of the organization, the CEO, who will have the responsibility and authority necessary for creating a truly integrated system that promotes the desired ethical culture of the organization and applies to all its operations.

B. The Importance of a Culture of Ethics in Successful Dispute Resolution

If dispute resolution practices are merely overlaid on an “ethically challenged” corporate culture, that culture can operate like an engine of conflict that even the best dispute resolution policies can't resolve. How do we define an ethical corporate culture? “Culture” is an aggregate assessment of the values and likely behavior of many individuals and is thus, difficult to

9. At the heart of any integrated conflict management system is a framework of policies and practices to manage conflict, minimize disputes, and successfully resolve the disputes that do arise. A holistic conflict management system for a large organization will typically address a wide range of conflicts, including workplace disputes (e.g., discrimination, harassment, and labor/management), disputes with external partners (including suppliers and customers), and disputes with regulatory agencies. While there is no single template, an “integrated” system should have policies and practices to address conflicts arising across functional lines and dispute resolution skills training for employees that is relevant across a spectrum of conflicts.

measure with mathematical certainty. Nevertheless, it can be fairly said that the ethical culture of an organization is the generally accepted compass that directs individual and group behavior over time, consistent with a set of values that even if not explicitly endorsed, may be gleaned from an organization's dealings with those inside and outside the organization. It is a lens through which all should be viewed.

Almost all senior managers recognize the importance of having a defined set of corporate ethical standards and the practical value that comes from publicizing those standards to both internal and external audiences. In our experience, large American organizations, public and private in today's environment, will almost always have an ethics office with a full time staff. It is also common for the corporate ethics office to have little, if any, connection to those charged with designing or utilizing dispute resolution policies. We submit that connecting these organizations in philosophical and practical ways can produce significant improvements in the effectiveness of both and will better enable the success of the desired corporate culture. Nevertheless, if that ethics office is solely compliance-oriented (with "ethics" taught and enforced merely as the observance of regulatory rules) this synergy will be difficult to obtain.

The responsibility for integrating ethical corporate values and dispute resolution policies rests squarely with senior leaders, and should not be consigned merely to their legal counsel. "In my opinion, any normative change in a corporation starts with the CEO," stated social analyst and pollster Daniel Yankelovich.¹⁰ His observation certainly applies to the deliberate integration of organizational ethics and dispute resolution policies.

C. *Why They Create Synergy*

A 2005 American Management Association report, titled "The Ethical Enterprise," found that an ethical culture was the single strongest factor in "reinforcing ethical behaviors and practices."¹¹ An organization with an ethical culture and a formal, reinforcing training program was 36% less likely than an organization with a weak culture and a formal training program to experience misconduct.¹² Interestingly, while the report's business ethics survey asked executives to rank order the importance of business ethics to ten different categories, ranging from "protection of

10. AMERICAN MANAGEMENT ASSOCIATION, THE ETHICAL ENTERPRISE, DOING THE RIGHT THINGS IN THE RIGHT WAYS, TODAY AND TOMORROW 6 (2006).

11. *Id.*

12. *Id.*

brand” to “litigation/indictment avoidance,” enhancement of dispute resolution policies and practices was not one of the offered choices.¹³

There is a tacit, logical connection between effective teambuilding (effective relationships within an organization), trust and ethics. In a culture of ethical behavior based on shared values and not just compliance with rules, employees are encouraged: (1) to do the right thing, (2) to treat each other with respect and earn trust, and (3) to work in teams and solve problems collaboratively. This trinity of trust and ethics aimed at effective team building should, logically, be applicable to the resolution of a variety of conflicts, including many that are not typically catalogued under the rubric of “dispute resolution” in large organizations. Shared values include effective and meaningful gender, racial, and ethnic integration of the workforce; promoting diversity of ideas and experiences; balancing religious expression in the workplace; resolving disputes over individual and organizational lines of authority; fostering mutual respect with business partners and customers and transparency in shared values and ethical cultures.

While ethical standards of conduct have always been viewed as crucial for the neutral conducting the dispute resolution (e.g., mediators and arbitrators), we submit that ethical behavior by the parties is also essential to consensus-based dispute resolution (trust). Without this trust in the integrity of the opposing party, individuals and organizations are less likely to even agree to enter consensual dispute resolution, preferring the security of formal judicial forums (traditional litigation) even at substantially greater cost to themselves.

D. Trust: The Fruit of an Ethical Culture

An ethical culture is the garden that best grows trust, and trust is a unique property of tangible value for those individuals and organizations on which it is bestowed. A 2006 article in the *London Financial Times*, entitled *The Failure of Business Ethics*, defined the commercial value of trust as follows: “[E]thics do matter in business because they underpin trust, which is fundamental to business relations. Markets work more efficiently when there is trust between participants.”¹⁴ The article went on to advocate that

13. *Id.* at 49.

14. Avinash Persaud & John Plender, *The Failure of Business Ethics Part I*, FIN. TIMES (London), Aug. 22, 2006, at 8.

corporations lose competitive advantage and face higher costs when the market collectively loses trust in their ethics.¹⁵

Trust in individuals or organizations always represents an act of risk-taking. Carlton Snow, writing in the *Hofstra Labor Law Journal* on the value of trust in successful collective bargaining, observed: "There must be a willingness to endure the risk of loss as a consequence of misjudging someone while trusting that the vulnerability inherent in the risk will not be abused."¹⁶ The belief that a corporation has an ethical culture makes the risk of trusting more rational and likely. Carlton observed the key benefit of earning trust in the context of collective bargaining: "There is not the same need for contractual rigidity because of a decision to be vulnerable to each other. Developing a trusting relationship reduces the complexity of the parties' ongoing involvement."¹⁷

The *Financial Times'* assessment of the market value of trust is also applicable to dispute resolution. It is appropriate to conceive of organizational dispute resolution programs as only one of many offerings available in the marketplace to resolve conflict. Most dispute resolution programs require the consent of both sides. The participants have freedom of choice and, in addition to dispute resolution programs, can elect to "purchase" judicial review or their freedom from the relationship itself by taking their employment or business elsewhere. We submit that if the "customers" (be they employees, vendors, corporate partners or debt and equity holders), hold a core trust in the ethics of an organization and its leaders, there is a greater probability they will remain in the relationship and "purchase" the consensual dispute resolution path to resolve the conflict.

III. THE AIR FORCE APPROACH TO ETHICS AND DISPUTE RESOLUTION

A. *How our Practices Evolved*

While we still have a long way to travel on this path, the Department of the Air Force has made significant strides in the integration of ethics and dispute resolution. Indeed, the Air Force has pioneered the development of the Integrated Conflict Management System that leverages the crosscutting application of dispute resolution and conflict management skills to: (1) more effectively prevent, and (2) more efficiently resolve, disputes.

15. *Id.*

16. Carlton J. Snow, *Building Trust in the Workplace*, 14 HOFSTRA LAB. L.J. 465, 471 (1997).

17. *Id.* at 477.

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An important part of our integrated system initiative is large-scale training conceived and implemented by the Office of the General Counsel to provide Air Force supervisors with the communication and dispute resolution skills that they need to deal effectively with workplace conflicts. Our goal is to equip them to proactively manage conflict and prevent disputes from arising—to equip all to live the belief that relationships do matter.

Another essential component of the integrated system is a robust dispute resolution capability to effectively and efficiently resolve those disputes that cannot be prevented. One element, the Air Force's "ADR First" Program,¹⁸ continues to improve dispute resolution cycle times and avoid unnecessary costs by shortening and streamlining dispute resolution processes.

Perhaps we saw these connections between ethics and dispute resolution in the Air Force because both the dispute resolution function and the ethics program are located in the Office of the General Counsel. In fact, the General Counsel is the chief ethics official of the Air Force and her office houses both the Air Force Ethics Office and the Air Force Dispute Resolution Program. The fact that both these programs are among the core functions of the Air Force General Counsel is not organizationally unique in either federal agencies or private corporations. Indeed, it is the norm rather than the exception. However, our approach to dispute resolution and ethics may be somewhat unusual. First, we do not treat them as separate and unrelated "stovepipes" but as closely related and reinforcing programs, along with the related subject of contractor responsibility.¹⁹ Second, we did not consider these programs to be merely the province of lawyers. As our thinking matured, we deliberately migrated our training and ideas from the lawyers to the managers, and they are now the programs of the whole

18. In 2000, the Air Force adopted its "ADR First" policy for contract disputes. Under this policy, the Air Force will automatically offer ADR to resolve contract controversies appealed from a government contracting officer's final decision (i.e., ADR is the Air Force default position). The Air Force offered ADR in 85% of the cases eligible for ADR in FY 06. There are only two approved exceptions to the Air Force "ADR First" policy—either a dispositive motion is pending, or an exemption is granted at a senior level for one of the reasons enumerated in 5 U.S.C. § 572 (2000). These two exceptions account for the 15 percent of eligible cases in which ADR was not offered. Significantly, once offered, more contractors agree to use ADR than reject ADR. In recent years, the Air Force ADR program has actively encouraged the use of ADR to resolve issues well prior to the time that disputes enter the formal dispute resolution process. The results of this push for early resolution have been very encouraging.

19. In addition to ethics and dispute resolution, the Air Force "Contractor Responsibility" office is located in the Office of the General Counsel. The Contractor Responsibility function proactively works with defense contractors to improve their organizational cultures.

organization with the goal of equipping *all employees* to embrace both the ethical culture and the commitment to dispute resolution. In essence, we discovered the connection between the ethical culture of the organization and dispute resolution by doing it, then observing the synergy and deciding to make it a deliberate choice. This decision has come to fruition in multiple initiatives generated by our ethics and dispute resolution programs.

Our dispute resolution beginnings were narrow but successful. Beginning in 1989, the Air Force was one of the lead federal agencies to use ADR with Equal Employment Opportunity (discrimination) complaints. Our use of dispute resolution has consistently expanded over the ensuing years to all types of disputes, including acquisition and environmental disputes, negotiated and administrative grievances, unfair labor practice charges, and Merit System Protection Board appeals. Over 2000 collateral duty mediators have been trained since the start of the program, including EEO counselors, personnel specialists, and management and union officials, infusing mediation skills through the Air Force.

Air Force policy encourages the voluntary use of dispute resolution to resolve disputes at the earliest feasible stage, at the lowest possible organizational level, and by the fastest and most cost-effective method. The fruits of these efforts are visible in the annual report the General Counsel provides to the Secretary of the Air Force.²⁰

B. The Air Force Ethics Program

The Air Force Ethics Program consists of several components. First, there is the vision from the top. Senior leaders communicate the underlying values of “Integrity, Service Before Self, and Excellence in All We Do” in their messages to all Air Force members. Second, training is provided at various levels designed to integrate the core values with the specific issue being addressed and the needs of the member at the particular level he or she is serving. Where there is a rule that must be complied with, compliance is the goal, but understanding how that rule is consistent with the core values is equally important so that the ethical culture is reinforced. Training also seeks to provide guidance for decision making where there is no rule, often the case as one rises to senior leadership. Particularly at the Headquarters, the General Counsel provides ethics leadership, sets policy, and provides

20. The Air Force has a dedicated system for reporting results, when dispute resolution is used, that shows in clear, quantifiable terms the financial and personnel savings that accrue from a mature dispute resolution program. The Air Force ADR Program, SAF/GCD, *The Airforce Alternative Dispute Resolution Program 2006*, <http://www.adr.af.mil/shared/media/document/AFD-070808-017.pdf>. And, we believe such metrics and accountability are important to demonstrating the positive benefits to leadership in a cost conscious organization.

written and oral guidance to senior leaders and to ethics counselors in the field. Third, while ethics guidance is provided by the General Counsel, enforcement actions are largely the province of an autonomous Inspector General. Indeed, the Department of Defense has a statutorily-mandated Inspector General (IG) program with each of the military services (Army, Air Force and Navy) having its own subsidiary IG programs. Under the provisions of the Air Force program, the IG is charged with initiating audits, investigations, and inspections that create “an atmosphere of trust in which issues can be objectively and fully resolved without retaliation or the fear of reprisal.”²¹ This bifurcation of ethics between a guidance and training function placed in the Office of the General Counsel and an enforcement arm dedicated to an inspector general is routine in the federal government.

Most federal agencies have compliance-based ethics programs whose primary purpose is to ensure government employees “follow the rules.” In the past, that has also been true for the Air Force and the rest of the Department of Defense. Compliance-based systems tend to be legal-centric and represent merely the baseline of a successful ethics program. They measure conduct and decisions against statutory and regulatory minimums, but they do not necessarily emphasize agency or government-wide values. As a result, one of their shortcomings is the potential for leaders to abdicate tough ethical decisions to lawyers, ethics officials, and inspector general investigators. Consequently, ethics, and indeed the values of the organization, can become disassociated from routine and not so routine decision making.

Within the private sector and in some smaller federal agencies, there is movement toward a more values-oriented approach. This change has also occurred in the Air Force over the last several years. The Secretary and the Chief of Staff of the Air Force have agreed that the inclusion of values-based ethics is beneficial to the Air Force. Therefore, more values-based ethics training principles have been incorporated into the Air Force’s ethics program. The goal is to instill an ethical culture where professional and personal decisions, as well as legal advice, are based not just on whether they can be justified within the letter of the law, but on whether those decisions reflect the core values of the organization. This approach emphasizes the lawyer’s role as a counselor and advisor and squarely places

21. *Inspector General Complaints Resolution*, AIR FORCE INSTRUCTION 90-301, Sec. 1C (Air Force, Washington D.C.) Feb. 8, 2005 at 17, <http://www.e-publishing.af.mil/shared/media/epubs/AFI90-301.pdf>.

responsibility for decision making on all employees. It also provides a guiding compass when there is no rule.

Our 2007 Annual Ethics Training (a web-based product) is one of the most recent examples in which the Air Force has incorporated a values-based approach. The visually appealing and intellectually interesting training offers real life examples, positive and negative, as well as current and historical, to illustrate ethical approaches to issues routinely confronted in the average workday. The Air Force is primarily composed of honest and ethical people, but that does not mean we have not had instances when individuals have engaged in ethically unacceptable behavior, some very public. We have not swept these examples (both Air Force personnel and contractors) under the proverbial rug, but have used them as lessons learned for the organization and as training examples to help others understand what went wrong, why it went wrong, and how to avoid the unethical behavior in the future. The training also makes use of positive historical figures such as the Wright Brothers, Billy Mitchell, and Hap Arnold, who are seen as ethically courageous historical Air Force leaders, to illustrate how the core values have been lived.

C. The Air Force Dispute Resolution Program

Our efforts in the last several years to migrate from a rigid, compliance-based ethics program to one that embraces and teaches a culture of ethics are also occurring in our dispute resolution program. We previously noted that ADR as its historic label implies, has been viewed narrowly, as the “alternative” to formal litigation. However, the concept of dispute resolution, applied on a policy basis to an entire organization, is much broader than a tool to resolve litigation or a legalistic, code-based ethics program. Holistic dispute resolution tied to a culture of ethics is a complex adaptive system that looks at the whole organization’s culture as applied to management of conflicts and disputes and creates ripples through the organization that underscore the culture and create buy in and further innovation. We have seen it happen ourselves. At one of our bases, an innovative ADR Champion²² met with a disgruntled employee from the

22. The Air Force has a formal appointment system to designate employees as ADR Champions for workplace disputes. An ADR Champion is “An individual appointed at the Headquarters Air Force, MAJCOM [major command], and installation level to promote the use of ADR processes for resolving workplace disputes, to facilitate the development and implementation of the organization’s workplace disputes ADR plan, and to provide oversight of the organization’s workplace disputes ADR program.” *Alternate Dispute Resolution in Workplace Disputes*, AIR FORCE INSTRUCTION 51-1201 (Air Force, Washington D.C.) Apr. 21, 2004 at 22, <http://www.e-publishing.af.mil/shared/media/epubs/AFI51-1201.pdf>.

shop floor and looked beyond the stated complaint to the “root cause” in order to solve a problem that was affecting the entire unit. As a result, the morale of the entire unit was lifted and all saw the process as valuable and successful.

This method requires a web of mutually reinforcing solutions, not an *ad hoc* remedy applied on an individual dispute basis. A holistic dispute resolution system extends far beyond the legal department of an organization, to the local level and yes, to the shop floor. The organizational culture and view of dispute resolution must be focused on empowering individual employees to act upon disputes quickly, before they escalate. And, when dispute resolution methods are focused on getting to the “root cause” of the dispute, as in the case noted above, they often solve greater problems not the subject of the original complaint to the greater benefit of the organization. They underscore the value of the relationship to the organization. The specific initiatives we have undertaken to bring this holistic approach to fruition include:

1. Embracing Negotiation Skills

In 2005, we established the Air Force Negotiation Center of Excellence (NCE), a partnership of the Office of the General Counsel and Air University.²³ The primary purpose of the Center is to make negotiation and conflict management skills a core competency throughout the Air Force. One of our key philosophical components of the Center from the beginning was that it would not be operated or perceived as “a lawyers’ program” tied to litigation, but rather, it would be a tool to empower commanders, managers and employees in a wide cross-section of functional areas to better represent the Air Force. A large part of the effort has focused on creating negotiation skills for Air Force decision-makers at many levels. It includes training in interest-based, cross-cultural, and multi-party negotiations.

23. Air University, located at Maxwell Air Force Base in Montgomery, AL, provides the full spectrum of Air Force education, from pre-commissioning of officers to the highest levels of professional military education, including degree granting and professional continuing education for military members and civilian personnel throughout their careers. The University also provides citizenship programs and contributes to the development and testing of Air Force doctrine, concepts and strategy. This educational mission made Air University the pivotal location to embed an Air Force-wide program to teach negotiation skills.

2. Negotiation Training for the Acquisition Workforce

A key historical tenet of the Air Force's strategy has been to maintain a stable procurement program that ensures the United States will always maintain a technological edge in the aerospace environment. A skilled corps of procurement personnel, working in concert with our industrial partners, is indispensable to successfully implementing that tenet. The Office of the General Counsel, working with our Negotiation Center of Excellence and the Defense Acquisition University, has developed and delivered negotiation education and training for the acquisition workforce that teaches negotiation skills and techniques utilizing a realistic procurement scenario in which the students role-play as members of government and contractor negotiating teams. The value of this training is that our people learn how to negotiate a better business deal and how to nurture a better business relationship by focusing more on interests than on positions.

3. A Broad View of Cross-Cultural Training

Any dispute highlights a relational breakdown. Relationship building and effective communication can prevent disputes, but miscommunication is most likely to occur when the parties approach an issue with markedly different cultural perspectives. The Negotiation Center of Excellence thus puts a special focus on the challenges of cross-cultural negotiations—that is, any environment where there is no common frame of reference for the issues or how they should be approached. “Cross cultural” is often seen as involving different nation states, but it can arise much closer to home. Even within the national security apparatus of the federal government, the Defense Department, State Department and Central Intelligence Agency often view common problems through very different cultural prisms.

The Air Force Negotiation Center of Excellence formed a partnership with the Moritz College of Law at Ohio State University to produce a treatise on negotiating styles used around the world. This treatise serves as a valuable Air University faculty resource. It is currently being used as a source document for in-residence and distance learning core and elective courses at the Air War College, Air Command and Staff College, and other Air University schools. The goal of this cross-cultural negotiation instruction is to provide students with a negotiation “toolkit” that will be useful no matter where in the world it is needed.

4. Effective Supervisor-Subordinate Communications

Congress recently authorized the Defense Department to undertake the most comprehensive overhaul and reform of its civilian personnel system in the last fifty years. Reform was needed. The old civil service system was slow, cumbersome, and rewarded longevity over performance. The new system would be immediately familiar and unremarkable to any executive in a modern company. However, the process of negotiating salary and being graded on one's work, so common in the private sector, was foreign to the government. Because of this lack of familiarity and the jealousies and insecurity that a "pay for performance" system with employee stratification can produce, the Office of the General Counsel took responsibility for providing interpersonal skills training to facilitate the implementation of this new system across the Air Force. Our goal was for the change to occur in an orderly manner, with minimal anxiety in the organization. We wanted supervisors and employees to feel confident they had the skills required to engage in a dialog to reach agreement and to smoothly manage this change. We have now trained 30,000 Air Force supervisors in interest-based negotiation and communication skills.²⁴

5. Expedited Resolution of Employment Discrimination Complaints

Employment discrimination complaints are easy to make – we all have a race, ethnicity and gender. For the employee, Equal Employment Opportunity (EEO) complaints are a quickly available tool to register anger at an evaluation, with the added punch of attributing an illegal motive to the supervisor. Currently, the system for formal adjudication of discrimination complaints by federal employees is particularly slow and cumbersome. From the day a complaint is filed, it can and frequently does take two years or longer for a final administrative decision to be issued. At the end of this administrative process federal employees have the option of renewing the complaint in court with a *de novo* trial that can take additional years. During this lengthy period the employee sits frustrated, the supervisor operates with a cloud over his or her head, and workplace morale deteriorates.

The Air Force has reduced dramatically the time needed to resolve EEO complaints through a voluntary program of mediation. In FY 2006, formal

24. *Fact Sheets: Negotiation Center of Excellence*, <http://www.adr.af.mil/factsheets/factsheet.asp?id=7440> (last visited April 5, 2008).

EEO complaints were resolved in an average of fifty-nine days for those employees who elected to utilize dispute resolution versus two years for those who selected administrative adjudication with the Equal Employment Opportunity Commission. Informal (initial) EEO complaints were resolved in only thirty-five days. This program led to the pursuit of dispute resolution in forty-four percent of all EEO cases and achieved resolution in seventy-three percent of those cases.²⁵ Best of all, through facilitation and mediation conducted by a cadre of Air Force-trained mediators, we have in many cases been able to address and resolve the underlying “root cause” of the complaints making for a better working environment and improving the morale of all concerned.

The positive annual data for the resolution of EEO complaints cited above is consistent with our aggregate statistics for all Air Force workplace disputes²⁶ for the six year period beginning in 2001.²⁷ Of the 45,984 workplace disputes arising during this time, Air Force employees voluntarily elected to participate in dispute resolution (primarily mediation) in approximately fifty percent of the cases. Of the fifty percent of workplace grievances and EEO complaints diverted to dispute resolution processes, we achieved successful resolution in seventy six percent. What does this all mean in practical terms? The bottom line statistic of most importance to Air Force leaders is that during this six year period a total of 17,079 workplace disputes were successfully resolved and permanently removed from administrative adjudication, with significant savings in time and money and increased harmony in the workplace.

6. Agreements with Corporate Partners

The Air Force has entered into formal ADR agreements with our largest contractors to consider the use of dispute resolution once unassisted negotiations fail. In addition to these formal agreements, the Air Force has instituted an “ADR First” policy, requiring contracting officers in the Air Force to offer dispute resolution in every contract dispute, with very limited exceptions. In recent years, we have emphasized early resolution using structured techniques to resolve issues at the lowest possible organizational level prior to the invocation of the formal disputes process. This concept was culture changing and it has improved both the business relationship with

25. Under the provisions of the Air Force program, the use of dispute resolution for workplace grievances and complaints is voluntary for both management and employees.

26. Workplace disputes includes a variety of non-discrimination employee grievances in addition to EEO complaints.

27. The data cited in this section is internal United States Air Force information.

our suppliers and the execution of our important programs. As a result of this program, the number of formally litigated contract disputes has steadily fallen over the last eight years, and the time required for final resolution has been significantly reduced. From the time that parties to a contract dispute agree to use dispute resolution, the time to final resolution now averages nine months verses thirty-six months for formally litigated cases.

7. Dispute Resolution in Lieu of Debarment Actions

The Air Force has an obligation to the American taxpayers to ensure that government contractors deliver a quality product, on time and within cost. The ultimate sanction for a contractor who does not ethically perform is debarment—rendering them ineligible to compete for government contracts. In egregious cases of shoddy performance or dishonesty, this result is correct. However, there are costs in allowing a dispute to spiral down to debarment. In addition to the loss of the goods and services being provided by the firm, each debarment results in a further reduction in the already shrinking American aerospace industrial base. As noted in a 2002 article published in the *Defense Acquisition Review Journal*:

In 1993, there were 21 companies doing major defense aerospace work – today there are five: Boeing, Raytheon, Litton Industries, Lockheed Martin, and Northrop Grumman. The battle for the shrinking defense budget has resulted in not only mergers, but also an increased emphasis on the formation of partnerships among defense contractors.²⁸

Given the current state of the industrial base, dealing with substandard performance by too quick a reliance on the corporate “death penalty” of debarment would poorly serve the taxpayers and the national defense. A different and more sophisticated approach is now required. In the Air Force, when a potential for debarment exists, in appropriate cases the Air Force is now using proactive dispute resolution vehicles to attempt mutually successful resolution. We bring both sides together, assuring the government’s interests are met while allowing the contractor to change its processes and business practices where change is needed. This can be done informally or through a “show cause” letter inviting the contractor to meet or provide a written explanation as to the allegations. This approach enables us to engage in a dialogue with the contractor without imposing the formal

28. Bruce G. Linster, Lt Col Stephen Slate, USAF, & Robert L. Waller, *Consolidation of the U.S. Defense Industrial Base: Impact on Research Expenditures*, DEF. ACQUISITION REV. J. 143 (Spring 2002), available at <http://www.dau.mil/pubs/arq/2002arq/SlateSP2.pdf>.

sanction of a proposed debarment that would prevent them from contracting with the government. Assuming the company will, when faced with allegations of misconduct or substandard performance, fully investigate, disclose and take remedial measures, we will invite them to bring their most knowledgeable program people in to meet with our most knowledgeable personnel to reach a common agreement.

These practices have been widely praised, especially by contractors who would otherwise have to spend untold millions of dollars on attorneys defending formal investigations and sometimes grand jury inquiries. The 2005 administrative agreement between the Air Force and the Boeing Company ending Boeing's suspension for its misconduct on the Evolved Expendable Launch Vehicle program has been cited as an example of what can be done to solve a problem short of litigation if there is mutual respect and trust.²⁹ If a contractor is known by us to be an ethical organization, then we are more willing to be candid and open in working with them. However, the key ingredient needed for the Air Force to engage in dispute resolution rather than formal debarment is a belief that the corporation has a commitment to an ethical culture, and will do the right thing when faced with allegations of misconduct. We would not engage in voluntary dispute resolution if there were strong evidence of wrongdoing, or simply a lack of trust in the candor and integrity of the company in question.

IV. ETHICS AND DISPUTE RESOLUTION TOGETHER EXPAND THE POSSIBLE: CREATING A VIRTUOUS CYCLE

The Air Force initiatives listed above are designed to expand dispute resolution skills in a variety of contexts and to evolve our ethics program beyond a code-based system of compliance to one nurturing a culture of ethics. Each of these individual initiatives, from teaching enhanced negotiation and communication skills to programs designed to quickly address the interpersonal conflicts that generate discrimination complaints, have practical value as "stand-alone" items. When they are integrated together, they create a climate where senior management can confidently address broader social issues and conflicts in society that arise inside the organization.

Ethical behavior and dispute resolution have many contexts, and some involve issues that are more emotional and difficult to address than whether to accept dinner from a defense contractor or the required specifications of a

29. THE BOEING COMPANY AND THE UNITED STATES DEPARTMENT OF THE AIR FORCE, INTERIM ADMINISTRATIVE AGREEMENT (2005), <http://www.safgc.hq.af.mil/shared/media/document/AFD-071102-016.pdf>.

construction contract. As an example, the issue of religion is a deeply personal subject about which people can and do feel strongly. Most senior executives would not see it as their role to address the issue of religion in the workplace. However, in recent years the senior leadership of the Air Force has been faced with internal conflict and external criticism of its policies concerning religious expression from a wide spectrum of opinions. This dispute had the potential to damage the cohesion of the Air Force if senior leaders did not set forth the appropriate balance between free expression of religious beliefs and the non-establishment of religion by government entities, as our Constitution requires. When our senior leadership had indications that individuals may not have a common and consistent understanding of their obligations, they examined the issues and took direct steps to improve those understandings, by developing guidelines for religious expression in the Air Force, and communicating them clearly.³⁰

Importantly, before those guidelines were issued, Air Force leadership reached out to service members and the American public to get feedback and better understand the “dispute.” They engaged people from all sides of the debate much as a mediator would. It was a high-risk enterprise because the current discussions in America guaranteed that many people on both ends of the spectrum would be unhappy. However, it was necessary to preserve an effective, cohesive fighting force built on mutual respect.

The fruit of this sweeping and creative dispute resolution approach are the guidelines contained in one page that set forth the Air Force policy on religious expression.³¹ They are wonderfully concise, but they are deeply rooted in the Constitution and the cultural ethic of respect for the dignity of each person.

The successful resolution of the dispute over religious expression in the Air Force, at times taking place under the glare of unwanted national publicity, was accomplished because the senior civilian and military leadership of the organization created a virtuous cycle of dispute resolution. This cycle was started when the leadership strongly and publicly expressed respect for the dignity and rights of all Air Force personnel. It was followed by practical actions that gave credibility to their words; above all by simply reaching out and listening to a wide range of opinions, from junior military

30. U.S. Air Force, Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force, Feb. 9, 2006, <http://www.af.mil/library/guidelines.pdf> (jointly approved as interim guidance by the Secretary and Chief of Staff of the Air Force).

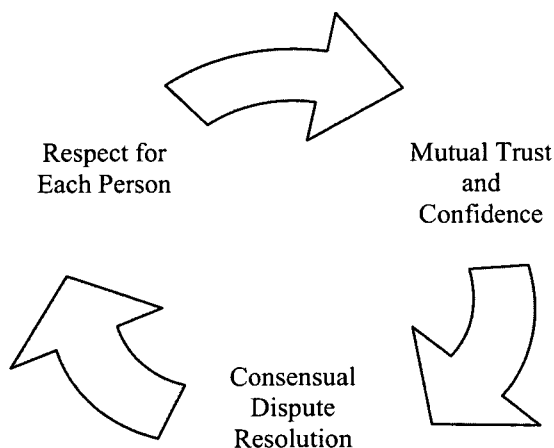
31. *Id.*

personnel in remote overseas locations, to members of the media, religious and legal scholars, and the American public to whom the Air Force is ultimately accountable.

These actions created greater trust that senior leaders had integrity and would treat all sides of the debate with respect, continuing and strengthening the cycle. Lastly, this positive dynamic created an environment where the overwhelming majority of Air Force personnel accepted the legal and ethical legitimacy of the guidelines without resorting to the courts. That is, they voluntarily participated in consensual dispute resolution with the leadership of the Air Force.

As with many significant disputes facing large organizations, this cycle did not unfold in the brief span of a single news cycle. The cycle completed many times over the course of a year, with each cycle stronger and more effective than the one that preceded it. This cycle can be envisioned in the graphic below:

**The Virtuous Cycle
(The Product of a Successful System)**



V. RECOMMENDATIONS FOR THE CEO

The concepts set forth in this article are designed to be more than a guide or a general philosophy. We would suggest that the CEO of a corporation with traditional litigation/ADR and ethics functions view them as related underperforming divisions in need of consolidation and leadership—leadership from the top. The role of senior leaders (CEOs and

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top managers) will be to define the desired culture (and honestly recognize when change is needed in the current culture), or endorse the historic culture if it is the one desired to be maintained. They must speak it, write it, live it and participate in preserving it. Their actions must be genuine, not just “lip service.” In addition, senior leaders must be in a position to hold themselves and others accountable. They must monitor, evaluate, measure and reward success (defined as actions consistent with the organization’s values and commitment to resolve disputes) and build a coalition that will sustain the commitment to the organization’s relationships consistent with its culture.

While the philosophy and values of the senior leadership of an organization are important, and to some degree will permeate the decision making of subordinates over time, there are practical actions that the CEO can take to drive healthy change and create a virtuous cycle of dynamic dispute resolution.

A. Differentiate Between Stated and Real Organizational Values

Every organization has a dominant culture and set of values that will often predict individual and group decision making, especially difficult, high-consequence decision making. The real values of an organization (those values reflected in routine actions by employees) can be markedly at odds with the organization’s officially published values. This contradiction was glaringly apparent in the conflict between Enron’s corporate code of ethics and the routine behavior of its senior officers. Enron’s Code of Conduct forbid officers and employees from participating in the profits of any entity that did business with the corporation unless this interest had been disclosed in writing to the Chairman of the Board and Chief Executive Officer and such officer had determined “the participation does not adversely affect the best interests of the Company.”³² However, Enron’s senior officers, to include its Executive Vice President and Chief Financial Officer, routinely engaged in exactly this type of behavior, personally reaping millions of dollars at the expense of the company and its shareholders.³³

32. WILLIAM C. POWERS, JR. ET AL., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF ENRON CORP., n.8, (2002), <http://news.findlaw.com/hdocs/docs/enron/sicreport/sicreport020102.pdf> (citing the Enron Code of Conduct).

33. *Id.* at 16.

The astute CEO will develop as many avenues of information as possible to detect chasms between the stated ethical values of the organization they lead and its routine practices and behavior. Employee surveys that assure responders of anonymity, observing the behavior and recommended solutions of executives in meetings, and the time honored approach of management by walking around and listening, all provide useful data. A recent Wall Street Journal article reviewed lessons learned for CEOs of financial institutions caught in the meltdown of subprime mortgages.³⁴ One of this article's first lessons was: "Make sure subordinates feel safe delivering bad news."³⁵ The essences of the lesson is that the CEOs of mortgage firms, who were quick to react negatively when subordinates expressed doubts about lending practices to the subprime market, stopped receiving those warnings and were caught flat footed when the subprime market imploded. Kings who kill messengers expressing concerns, or simply waive them away with a "just get it done" edict, soon find that messengers stop entering the throne room.

B. Insist on Metrics That Matter

The organizational adage "that which gets measured gets done" applies to programs designed to consolidate ethics and dispute resolution as much as it would to supply chain management. Indeed, without quantifiable standards of success, the theoretical relationship between ethics and dispute resolution can be dismissed as "fluff" or public relations. In the alternative, as many senior managers have discovered to their frustration, poorly designed performance measurement systems can generate counterproductive behavior. Likewise, metrics without clear goals are often seen as data collecting merely to gather data.

In the Air Force, we can show a consistent drop in litigation and time/expense in resolving employee complaints with creative dispute resolution policies. However, we would suggest the single most important metrics CEOs should want reported are: (1) how often dispute resolution was offered by management officials, and (2) how often those offers were accepted. These foundational metrics should be applied not just to the law department (important as that is) but to contracting, personnel and customer service departments. These two indicators provide a useful window not only into the corporation's culture—how management officials in multiple offices and the law department approach disputes—but how employees and outside

34. Erwin White, *Subprime Lessons Hit Home for CEOs In Other Industries*, WALL ST. J., Feb. 26, 2008, at B1.

35. *Id.*

parties perceive the culture of the organization (as reflected in their willingness to engage in mutually consensual dispute resolution practices).

C. Implement Robust Training Programs that Give Substance to Policy

The public declarations of senior leaders regarding ethics and dispute resolution are important, but robust training programs dedicated to both are critical to infusing those values in the organization. While some are gifted with strong internal ethics, effective interpersonal communication skills and a penchant for smoothly resolving disputes, for many employees these skills are learned. Training for management and employees in the application of ethical values, and perhaps most important, what to do when there are no rules, can pay long term dividends.

Investing in widespread training for dispute resolution that reaches far beyond the legal department builds a constituency for doing business more effectively. This constituency facilitates the organization's constant adaptation to change in a manner that is consistent with the corporate values and ethical culture. The subjects and issues that an organization is willing to invest time and money in teaching also send a powerful tacit message about what the organization really values. One of the key success stories of our program was the decision not to place the Negotiation Center of Excellence under the supervisory control of Air Force legal counsel, but in an institution dedicated to operational leaders (Air University). Likewise, we take pride in the fact that 30,000 Air Force supervisors have received training in the interpersonal skills needed to introduce a pay for performance system. Through training, we believe the connection between an ethical culture in an organization and its commitment to early identification and resolution of disputes can be instilled in the day-to-day practices of employees.

D. Choose Outside Counsel and Partners Committed to Your Values

The easiest time to settle most disputes is early in the conflict, before animosity grows and the corporation's money is wasted. However, most law firms see litigation—particularly large litigation—as a cash cow. As the CEO, let it be known that an outside law firm's ethical culture and proven skill in dispute resolution are key measures of merit that will be used in deciding what firms the company will retain. Be aware that outside counsel's organizational culture will dictate how the dispute is resolved if you do not. Likewise, make a policy of favoring corporate partners that

have similar cultures to your own and will make commitments with you to early identify and resolve disputes.

Placing a priority on obtaining legal counsel and forming partnerships with corporations who have a commitment to high ethical values is not inconsistent with a focus on bottom line results. Indeed, requiring a commitment to ethics in your corporate partners can be predicted to enhance success. John C. Maxwell noted in his book, *There's No Such Thing as "Business" Ethics*, that statistical evidence supports the proposition that those corporations with high ethical standards, who consistently act on those standards in their decisions, and in choosing those with whom they do business, are more profitable than those who don't.³⁶

VI. CONCLUSION: IF YOU'RE REALLY COMMITTED YOU NEVER "GET THERE"

We conclude with a remark by Marianne Jennings in her book, *The Seven Signs of Ethical Collapse*, with which we agree:

[CEO's] have become spectators in the battle for ethics, and they should be leading the charge and determining their own fate in the post-Enron, post-bubble era. . . . No company is perfect, but a word or two from a CEO or two could help in the battle for corporate cultural change. We need cultural change at both the macro and micro levels. And changes can't come without CEO leadership.³⁷

Dynamic dispute resolution policies and strong, ethical corporate cultures are not static. They must both have the fluidity to adapt to new issues and challenges. They require consistent attention, nurturing and reinforcement from senior leaders to operate most effectively. While further research and quantitative analysis are clearly called for, we believe the relationship between the ethical culture of an organization and its commitment to and success in dispute resolution should be a strong one. Those CEOs who see this strategic relationship and push meaningful synergy between these two programs in their organization, so that the organization has a strong ethical culture that values individual integrity and relationships, will harvest long-term positive results reflected in the bottom line.

36. JOHN C. MAXWELL, *THERE'S NO SUCH THING AS "BUSINESS" ETHICS* 14-15 (2003).

37. MARIANNE M. JENNINGS, *THE SEVEN SIGNS OF ETHICAL COLLAPSE* 275 (2006).