

**THE LEADERSHIP DIMENSION**

# Dealing with Discord

## Time for a Different Approach?

By Douglas B. Richardson



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**H**ow ironic that law firm lawyers, professionals who are so good at resolving their clients' conflicts and disagreements, are often so uncomfortable addressing disagreements among other lawyers and staff in their own firms. When it comes to dealing with discord within a firm, the cobbler's kids aren't even in stocking feet, let alone shod. As a result, there are predictable consequences: reduced firm productivity, profitability and even reputation.

### Erosion of Kinder and Gentler Communication

Changes in law firm practice appear to be fostering greater discord. As firms have grown ever-larger and increasingly geographically dispersed, close-knit, single-office cultures have eroded in the face of communication that is impersonal, infrequent or incomplete. Many once-collegial firms not only have lost the ability to resolve interpersonal disputes, they have lost the ability to take the pulse of their own morale. In addition, because of poor communication between offices or practice groups, firm management often is slow to learn of disturbing trends, damaging rumors or even serious discord.

Is there a solution? One path apparently worth exploring is the type of organizational ombudsman programs that have been making positive impacts in other kinds of organizations for decades. Yet while law firm management experts and concerned leaders have been exploring the transplantation of these confidential, neutral, independent and informal resources, and a few firms are trying quasi-ombudsman programs, so far something is keeping the concept from taking hold in law firms. This is probably due both to traits common to firms and lawyers and a lack of understanding how ombudsman programs operate.

### Wired for Avoidance

Part of this problem probably stems from lawyers' temperamental makeup, especially their "conflict profile." It surprises many to learn that the basic lawyer personality tends to be less relationship-oriented and far more averse to conflict than the general population. Lawyers may be skilled at donning their adversarial masks and dealing with disputes controlled by formal rules of engagement, but a lot of them simply hate interpersonal discord — all those emotionally charged and unstructured frictions. During 25 years of administering all manner of standardized personality assessments, I have long noted lawyers' pronounced tendency toward avoidance, withdrawal or passive-aggression when faced with interpersonal disputes. In short, many lawyers don't eagerly embrace the "hard conversations."

### "My Profession Has Changed"

Poor interpersonal problem-solving among lawyers is not simply a matter of personality, however. In recent decades, powerful forces have reshaped the legal profession into an increasingly impersonal, contentious, and competitive environment. Even before the current economic crisis, the era of professional decorum was in decline, and the signs of unaddressed law firm discontent were everywhere: associates were bailing out in droves, high-potential professionals eagerly entertained phone calls from headhunters, partners openly proffered their books of business and practices to other firms, and executive committees scanned the countryside for individuals, practice groups or entire firms who were unhappy enough to want to join a new team.

### More Battles, Higher Stakes

Rather than resolving the various seeds of lawyer discontent, the current economic catastrophe

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simply has driven many of them underground. Yet if anything, being thrust into survival mode has exacerbated tensions and multiplied conflicts, both among colleagues and law firm staff, and between lawyers and their clients. There seems to be more things to fight about, and the stakes have never been higher.

Associates desperate to stay employed may appear more compliant these days, but interviews reveal them to be no less disaffected. (As philosopher Ben Shahn once put it, “you have not changed a man's mind just because you have silenced him.”) At other levels, productive rainmakers express frustration at “carrying dead wood,” competent “service lawyers” rail at the dehumanization and hyper-competitiveness of their beloved profession.

Everyone seems to have issues with the compensation committee, and disputes may break out around the lawyer who is trying to poach other lawyer's clients, or the insensitive partner whose territoriality and condescension cross the line into racial, gender or sexual preference discrimination. There are individual gripes and there are patterns of gripes, which firm leadership may or may not be attuned to because most of the information they get is filtered by personal or group agendas. In today's unprecedented conditions, contests for power often erupt into open, even bitter arguments about strategy, tactics and policy.

**Borrow the Model of Corporations, Government and NGOs?**

Corporations and other large organizations, particularly really large multinational ones, have long confronted the need to develop internal mechanisms capable of dealing with a broad spectrum of conflicts and disagreements. Comprehensive ombudsman programs repeatedly have demonstrated the flexibility to deal

informally with one-of-a-kind, off-the-record personal disagreements, while still encouraging aggrieved parties to bring wide-scale organizational problems to the surface, and providing a fair and neutral forum for restoring the peace. Given how closely large firms have come to resemble their corporate counterparts in terms of size, growth and geographic decentralization, has the time come for law firms, particularly large, diversified ones, to explore a similar approach?

**Dialogue with an Ombudsman Expert**

With that question in mind, I talked with John Zinsser, a respected professional who has two decades of experience designing, deploying and evaluating corporate, government and international ombudsman programs. John's clients at Pacifica Human Communications LLC have included IBM, Shell Oil, Halliburton, The Internet Corporation for Assigned Names and Numbers, Eisai Pharmaceuticals Japan, and the US Department of Health and Human Services. He has served as the architect for many corporate problem-solving programs. I asked John about transplanting the time-tested corporate organizational ombudsman model into large law firm settings. As the following excerpts demonstrate, while a well-designed law firm ombudsman program would produce a demonstrable return on investment and powerful firm-wide impact, the unique characteristics of lawyers and law firms do present some unique challenges.

**Richardson:** Just so we're clear about what we're discussing, what are the characteristics, qualities and contributions of a “real” ombudsman program in a law firm setting?

**Zinsser:** First, it is important to distinguish that the organizational ombudsman program differs from

classical ombudsman programs, which are usually found in local, state and federal government institutions for citizens' complaints and regulated communities, or the formal multi-tiered grievance procedures lawyers might be most familiar with from corporations.

Every “real” organizational ombudsman program starts with four essential attributes: confidentiality, neutrality, independence and informality. Without these, you really do not have an ombudsman, and you don't have a resource that is uniform and consistent throughout the organization; you simply have someone assigned to ad hoc troubleshooting. Some law firms use the term ombudsman, but what most have is simply a designated point of contact for certain types of complaints. Let's be clear: effective ombudsmen are highly-skilled and specially trained, and they lead carefully constructed, organization-wide efforts that manage risk, reduce exposure, and improve individual and organizational performance.

The key point of offering the ombudsman model is to create a new space that provides a supplemental process that both supports any existing grievance procedure and assures an additional level of anonymity and safety for issues being raised and addressed. Who the ombudsman is, is important, but not as important as how the program is structured, organized and integrated with the firm. Law firms need a trained individual, embedded in the firm, with appropriate structural support and leadership/organizational access, who can best gain the necessary trust from all parts of the firm.

Ideally, the ombudsman would become recognized as the point-person of first resort for conflicts and challenges. In a sense, every disagreement would have its own process, shaped and facilitated by the ombudsman, to produce the best

chance of satisfactorily addressing various types of issues. It may be a novel concept for law firms and lawyers to contemplate such a highly personalized process, rather than a legalistic formal system where remedies must be exhausted at each level before being appealed upward to the next.

Finally — and this is a point that often is overlooked — without sacrificing confidentiality, the ombudsman can serve as “an ear of the firm.” To the extent that the ombudsman learns of issues that may have broader policy or operational implications for the firm, the ombudsman can serve as a communications conduit, alerting senior management to potentially troublesome issues.

**Richardson:** So if ombudsman programs are so informal, why are they called “programs?” How structured are they?

**Zinsser:** Ombudsman programs are in fact “formalized informality.” It’s not *ad hoc*; it is a structured yet flexible process that creates the safety of a trust-based personal relationship. The ombudsman is in the firm — a presence seen day-to-day on-site, but not *of* the firm. An ombudsman is a person one can talk to about anything, to sound out issues, consider options, and make informed choices. And this is where neutrality and independence are critical.

This combination of informality, independence and neutrality support other key attributes of ombudsman programs. First, they allow them not to be offices of notice or record for the firm. This is essential in helping people feel safe in raising challenging issues and is backstopped by the pledge of confidentiality. These core attributes also make it possible for the ombudsman to work in conjunction equally with all organizational members and other programs. No formal program can

do this because of connections, allegiances, control, and “ownership.”

And while confidentiality, neutrality, independence and informality may sound a bit nebulous and unfocused, in practice they play out against a backdrop of clear and consistent performance standards. For example, all widely accepted ombudsman standards, like the ABA’s from 2001, or the International Ombudsman Association’s Code of Ethics and Standards of Practice, suggest that the ombudsman not have collateral duties, so there is no conflict of interest, and that the ombudsman have access to all the information in the organization as well as access to the top tier of leadership.

**Richardson:** How would lawyers use them? What outcomes do they produce? Would the program also address disagreements with clients, as well as colleagues?

**Zinsser:** Lawyers would, and do, use the ombudsman like any other party in an organization — to raise troubling issues, including witnessing possible unethical behavior or other misconduct, to have a safe place to consider right action, to get assistance in analyzing what options and choices exist, to get support in planning and executing challenging communications, to leverage the benefits of a designated neutral third person, to deliver uncomfortable information to some person or part of the firm while preserving relationships. Given what you have said about lawyers being conflict averse, it seems these would be useful options for them to have.

In the corporate programs I’ve evaluated, organizational ombudsmen produce two major types of outcomes — economic and humanistic. The economic category includes elements such as management time-savings, employee retention and decrease in formal disputing costs

(including litigation), among others. In major corporations, this savings has amounted to tens of millions of dollars. Given the size and economic stakes in law firms today, equally significant savings seem perfectly possible. Think about it this way — if a rainmaking partner reduces the amount of time he or she spends managing inter-firm issues by 15%, that’s 15% more time he or she could be out creating new clients or actually billing time. Or take retention. With the cost of attracting, hiring, training and developing associates, what is it worth to retain those that are productive versus having them walk out the door because they are disgruntled or had an unresolved disagreement with another lawyer?

In the humanistic category, we see measurable benefits in morale improvement, increased trust, enhanced creative problem solving and so on. It’s harder to put dollar figures to these, but there’s certainly no doubt that they make a major difference in how a firm operates.

Dispute resolution with clients and outside vendors perhaps flags a different need. The Canadian banking industry (which the World Economic Forum just rated as the most stable and best regulated in the world) has an entire cadre of ombudsmen dedicated to employees, and a different set for clients. Our own FDIC now has a similar structure. It is rare, however, for a single ombudsman to have both an inward and outward focus. An inward- and outward-facing ombudsman program could create some difficulties, but I suppose it might be possible with appropriate policies and protocols.

**Richardson:** When facing any new kind of initiative, law firms typically ask: How much does it cost? and What’s the return on our investment? How would you respond to these concerns?

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**Zinsser:** Ombudsman programs can be very cost effective and relatively inexpensive to create and operate. For about the cost of a few first year associates, a properly structured and executed ombudsman program could return more than \$20 of value for every dollar invested. Another way to think about this is the “one big event” measure. What if, instead of the firm being sued for discrimination, a contentious issue was resolved fairly (and internally) and to all parties satisfaction? There is also the preservation of reputation value. Think about the cost to the firm if that same discrimination case just mentioned makes it into The Wall Street Journal. Or if The American Lawyer has a piece on a mass exodus of associates, or a less public but still known feud between partners is whispered about in other firms and client hallways? What if these issues were quietly, internally managed? Corrected? And the organization learned and adapted so it did not happen again? What would that be worth?

**Richardson:** Lawyers themselves offer professional alternative dispute resolution (ADR), mediation, arbitration and other conflict resolution services. If a firm already has experts in these professional disciplines, why does the firm need an ombudsman program?

**Zinsser:** What is key here is the systemic aspect of an ombudsman program, versus the episodic nature of a mediator, who comes in after most of the options and choices have been lost to a given situation. Also, mediators do not create an anonymous feedback loop to the organization. So the benefit of learning and improving based on the original problem is lost.

Research indicates that people come forward with issues of potential misconduct and unethical behav-

ior to ombudsman in order to determine what to do. That can not happen with a mediator – it is post fact. The ombudsman might conduct a mediation, if that is determined to be the desired course of action by an initiating party. This shows how an ombudsman has a larger role, a programmatic and a systemic role, in contrast to a mediator who has an episodic role.

Comparing ombudsmen to arbitrators is really an apples-to-oranges issue. Arbitrators are empowered by participants in a formalized legal dispute (very late in the conflict cycle) to decide an issue. Ombudsmen do not arbitrate or judge. They make no formal decisions regarding the issues they are involved with and they neither create nor set aside policy. Also ombudsmen manage conflict, of which disputes are a small, albeit expensive, subset.

Establishing a law firm ombudsman program might be either especially easy or especially difficult because of the “legally knowledgeable” environment in which it would operate. It is important to remember though that the ombudsman is not offering a legal opinion or service; he or she never renders a judgment legally or organizationally. The ombudsman is there to help people help themselves and to manage the challenging issues that arise naturally as part of working with other people. Law firms do not have a pass on internal interpersonal conflict just because they know all the rules and structures of resolving the legal disputes that may be born of those personal conflicts.

In short, if a law firm wants to be proactive, rather than reactive, if it wants to create value by managing the largest set of potential issues, and if it wants to help people raise challenging issues, including potential misconduct, unethical or non-compliant behavior, they want an ombudsman program.

**Richardson:** Several large and respected firms say they already have implemented internal ombudsman programs. What do you see as the strengths and weaknesses of these efforts? Do these programs provide positive precedents and appropriate models?

**Zinsser:** I am not deeply familiar, personally or professionally, with all these programs so I do not want to speak to the particulars of their structure, their performance, or their appropriateness as models. That said, I have noticed that most firms use the term ombudsman committee and seem to staff that committee with partners. I think this is a problem. The idea that firm partners could be designated as neutral, independent and agnostic in regard to the resolution of issues impacting their firms is truly problematic. I would think attorneys, especially, would be uncomfortable with this. For me, an ombudsman is a particular person or team, with no other responsibilities than conflict management, so that they can be neutral, independent, informal and confidential. Research has shown again and again that split-function ombudsmen neither create all potential value nor last very long.

And again, there are codes of conduct and standards of practice. If the firm wants to have a committee of committed, involved and accessible partners to help associates, staff, or other partners with the challenges they face, great. Just don't call it an ombudsman. Because it isn't.

**Richardson:** Historically, lawyers have expressed a preference for addressing their own discord privately and not airing their dirty laundry before outsiders. Doesn't this argue against outsourcing design and delivery of ombudsman programs to outside experts?

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**Zinsser:** The point about an ombudsman is that it is an "inside outsider." Ombudsman programs dramatically reduce the number of issues that end up being resolved publicly. This was one of the original reasons I wondered why more law firm ombudsman programs do not exist.

Outsourcing raises an interesting question. Certainly there are contract ombudsmen. Maybe this might be a good model for law firms. But contracting usually has some performance limitations. One of the crucial factors for ombudsman program success is that it is *in*, but not *of* the culture of the organization. Some of the greatest value an ombudsman offers comes from being seen, known and trusted within the organization. I think it might be hard for a contract ombudsman to gain that same stature, and to respond immediately if they are at the end of a phone line like so many of the compliance hot lines. It is a more human, interactive and connective program and process. Also, the capacity to provide upward feedback and to make recommendations or suggestions to address structural or systemic issues can be affected by the contractor status. That said, if properly structured and carefully executed, I think a contracted option could be made to work in the law firm setting.

**Richardson:** John, I've seen disputes and disagreements in law firms take many forms, including personal squabbles, policy disputes, power battles, compensation issues, succession struggles, partnership discord, staff management problems and disaffected associates. How can an ombudsman program address such a broad array of concerns and interests?

**Zinsser:** Remember, the ombudsman is not responsible for solving the problem. Rather the ombudsman is a support resource that can help, but

never owns the problem, *per se*. The ombudsman's will help the individual with the issue find the best path to manage it. He or she may serve as a coach, mediator or shuttle diplomat, but the resolution is not the ombudsman's, it belongs to the parties. Twenty years ago, I demonstrated via research that part of the reason that an ombudsman program was the most valuable response to organizational conflict in a non-union environment was the breadth of issues it could address. From the annoying, "the person next to me chews their gum too loud," to the most challenging issues of harassment, fraud, embezzlement, etc., ombudsmen have effectively helped manage all of them.

**Richardson:** When addressing disagreements among lawyers, should the ombudsman be a lawyer in order to command respect from the parties? How are people trained to become ombudsmen?

**Zinsser:** Respect comes from different places for different people. In my professional experience, respect for an ombudsman program comes from its capacity to be of assistance, to create value, and to solve problems — to deliver on its promises in short. Delivering these outcomes depends on program usage. What drives usage is a combination of the appropriate structuring and positioning of the program, and the individual ombudsman's or team's ability to operate according to the previously mentioned standards of confidentiality, neutrality, independence and informality.

I can easily see a situation where the ombudsman in a firm has a law degree, but if the management committee didn't properly support and appropriately engage with the program, if it was not used as a tool for firm advancement, this would not guarantee the ombudsman would be

respected. Conversely, I can easily envision a properly designed and well deployed program functioning to standards, that is clear about its goals and objectives, measures its activities against those goals and effectively communicates its achievements and return on investment through external assessment, led by a quality non-attorney.

Unlike becoming an attorney, there is no one way to become an ombudsman. During two decades in this field, I have seen a broad range of people from widely varied backgrounds become ombudsman. There is a lot of crossover from certain professions such as law, social work, and psychology. But I also know of chemists, computer engineers, professors, economists, and physicians who have been successful in the role. The professional associations and the conflict management academia offer an array of useful learning events for professional development. Though a certification requirement does not currently exist, there are discussions in several quarters about the correctness and process for that.

**Richardson:** If you were asked to design a large-firm ombudsman program, what steps would you take and who would have to be enlisted to champion the initiative?

**Zinsser:** Gathering information about the firm's challenges, strategic goals and culture would be the first step. It is important that such a needs assessment collect varied impressions and perspectives from different levels, roles and geographies within the firm. I would work with the firm first to create a broadly representative, organizationally savvy, politically capable committee to oversee the ombudsman design and integration process — although I would not recommend that this committee subsequently perform the ombudsman function itself. Rather, informed by

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the findings of the needs assessment, the committee would define and establish the function. The design committee would also need to define what positive impacts the ombudsman is to make and what these would look like in the firm. This is the most nuanced and complex part of the process. It requires expert input to defend the ombudsman role and to identify what data will come out of the program, in what form and to whom, in order to prove its impact.

This committee could also oversee the recruitment and hiring of the ombudsman, or team, again depending on the size of the firm and the impacts desired. It also would help the firm determine if ombudsman candidates might be selected from inside the firm (certain candidates may have real or perceived challenges to their neutrality/independence)

or only from external candidates (who might be seen as unfamiliar with the culture, players, and power structure). This choice will be different for different firms and must be made on a case-by-case basis.

As the design process moves forward it is important to reach out to those in collateral functions (HR, associate development, diversity committee, etc.) to assure that they understand the relationship between their functions and the ombudsman program, emphasizing that the ombudsman replaces no one. Rather it supplements and complements formal firm processes. It is crucial though that the rules of interaction between the ombudsman and the collateral functions and leadership are completely clear, understood, practiced and honored.

Once this is achieved, one then would introduce and market the om-

budsman program to the firm and have it begin providing service and measuring usage and pre-determined appropriate particulars. Following its initial 12 to 24 months, program assessment and evaluation efforts should be initiated. While that process merits a different interview, it is critical with ombudsman program design and introduction to start with the desired goal and end-state evaluation in mind. Designs that consider these points, and focus on them during creation, deployment and operation of the ombudsman program, result in more efficient and effective programs that more readily demonstrate their significant return on investment. ♦

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