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CONFIDENTIAL FROM GENERAL COUNSEL TO CEO: "I'M FED UP, AND *WE'RE* NOT GOING TO TAKE THIS ANYMORE!"

Karl A. Slaikeu, Ph.D.*
Diane W. Slaikeu, J.D.**

Abstract

General counsels of health care organizations – whether hospitals, HMO's, nursing homes, or other entities – have a commitment to protect their organizations from the high costs associated with dispute resolution. They also know that litigation driven dispute resolution is a "hidden culprit" in rising insurance costs. This paper presents an imaginary memorandum from the General Counsel of Health Care (GC), Inc. to the Chief Executive Officer. The GC describes how weak systems inside the organization are leading to increased risk and costs in terms of litigation expenses (and hence, insurance reserves and premiums), turnover and lost revenue. This is followed by the GC's suggestions for change. He recommends channeling predictable conflicts through specific procedural "gates" for early resolution *before* they reach alternative dispute resolution (ADR) or the courts. The argument is for a "more than ADR" approach to conflict resolution in the hospital. The GC's thesis is that while predictable conflict in health care represents a huge financial risk, managing it well can save money, protect corporate assets, and strengthen long-term relationships.

I have been reflecting on our most recent conversations about conflict situations in the hospital. I am thinking of Dr. X, who threatened to take his anesthesiology group to our competitor if we did not commit to the new equipment he demanded – "one step this

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side of blackmail," as you put it. As we know, he makes the same charge about us. And our Emergency Room Director who presented a paper at the University's Health Care Symposium and said from the podium, "The stress in ER and the burnout among the medical staff means that there are fewer doctors available, and service will suffer as a result" (not too good a reflection on us). Then, our Director of Nursing, who won't let you off the hook about retention problems, and over work among the nursing staff, and also everyday conflicts, and lack of communication between nurses and medical staff. I don't suppose either of us liked hearing all of this in light of the upcoming union negotiations. And, of course, there is our "burning platform," the millions of dollars we spend each year for hospital liability coverage. We do better than most on patient safety, but the threat of litigation is driving up all of our costs. Last but not least, I am well aware of the pressure you are getting from at least two board members about conflict within your own executive team, particularly around some personality issues, but also the proposed merger with Health-Z, Inc.

Please know that by listing all of the cases I am not trying to add to your pain, but rather to point out a unifying theme: it is not just that we have conflict around here (everybody does), but the heart of the matter is that we are not managing it very well, and it's costing us. This is a systems problem, and it's not at the doorstep of anyone in particular: not the doctors, not the nurses, not even you. For one thing, we are hearing about these things way too late. In some cases, we are being strong-armed so that we lose our degrees of freedom in these negotiations. You and I both know how to play the game, and if I do say so myself, we do it quite well. With the exception of the neurosurgeon's "call coverage" dispute hitting the front page of the newspaper (forgot to mention that one), and a couple of other pieces of bad press on closing the drug and alcohol rehab center, so far we have been getting by.

On the other hand, I believe that we are at risk, and we need to make some changes. What follows is a summary of the situation as I see it, and a series of solutions that grow from best practice in other health care groups, as well as corporate settings outside our industry. To foreshadow the bottom line, the changes I recommend may take six months or so to implement, and will cost some money, though nothing that we will not recover in reduced litigation expenses, reduced turnover, and reduced insurance premiums within two to three years, with all subsequent savings accruing to the bottom line.

I. COSTS AND RISKS

Unresolved conflict costs us measurable dollars every year in the following categories:

- Legal expenses: For hospital liability we pay outside counsel to defend us in lawsuits or, in some cases, the insurance company pays and we give them an insurance premium to cover this. Since we are mostly self-insured, we cover these expenses ourselves. Our numbers are just as bad as others in the industry: well over 50% of the money we pay on a liability claim goes to attorney's fees alone (our defense counsel, and the portion that goes to the plaintiff's attorney).[1]
- Turnover: It costs 75-200% of the annual salary to replace an employee, depending on their level in the organization.[2]
- Lost productivity: When we have people who are working around one another or outright sabotaging one another, we lose time and the opportunity for them to be involved in other work. When it comes to litigation, the hourly clock totals on our own managers as they go through depositions, hearings, and down time dwarfs the billable time spent by the outside law firm!
- Lost business: We do pretty well with patient relations, thanks to the good work of our Chaplain's office and the Patient Representative, and many stars on our medical and nursing staff, but we all know that when one of these dissatisfied patients slips through the system, they tell others, and this hurts our future business. It costs a lot to recover a customer, if we ever do.

In talking with colleagues in hospitals that are one-fifth the size of ours, I have come to realize that the costs and risks are present no matter how large the institution – they simply take a different form. For example, in a smaller hospital, litigation expenses may not be as high as ours, though conflicts between patients and physicians on interpersonal issues, or even scheduling of staff, can wreak even greater havoc, since the people involved are often "the only game in town." The costs associated with conflict range from the Direct (litigation, settlements, insurance reserves and premiums) to Indirect (absenteeism, turnover, lost productivity) to Intangibles (bad press and public relations).[3]

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1. KARL A. SLAIKEU, HOW TO CUT MEDICAL LIABILITY INSURANCE PREMIUMS BY CONTROLLING DISPUTE RESOLUTION COSTS: COMPREHENSIVE CONFLICT MANAGEMENT SYSTEMS IN HEALTH CARE 6 (1988) (on file with the authors).
2. *See* J.Douglas. Phillips, *The Price Tag on Turnover*, 69 PERSONNEL J. 58 (1990).
3. Karl A. Slaikeu, Address at the Law & Health Care and Dispute Resolution Program, University of Maryland School of Law, MEDispute Conference (Sept. 25, 2001).

II. A CLOSER LOOK AT WHAT DRIVES THESE COSTS

This is where it gets interesting. I have lamented privately at how some people seem to be either clueless, selfish, or flat out evil. The implication of my remarks is that these people are the problem, and we simply have to absorb the costs associated with their behavior. My recent reading on conflict in health care and other organizations has given me a new look at this.

As the experts see it, conflict is predictably present, and there are multiple causes: sometimes it is the clueless, selfish, or evil ones, but other times it is a true "mistake," due to stress, a bad day, or another causal factor.[4] But the real culprit that keeps costs high is not with these people, and not with the nature of the conflict, but in the nature of the *resolution processes available within the organization.*[5] In particular, people who have studied organizations like ours find that, when costs are high, it is usually due to the fact the dispute resolution procedures are based on "higher authority," and they may inadvertently encourage "avoidance" or the use of "force/power" to resolve problems.[6]

If there is no written path that puts collaboration first, and makes this stick with proper documentation, training, and other supports, then many will avoid the conflict until it grows into an expensive dispute. Others will send it up to higher authority, or some will take control of the matter with political (or physical) force.[7] At it turns out, avoidance, higher authority, and force are the most expensive options around.[8] Also, use of them leads to uncertainty, fear of what will happen next, and loss of control for the parties, the ones who are actually in the best position to resolve the conflict and implement solutions.

By way of definition, higher authority refers primarily to litigation, though it can also occur when everyday problems escalate up the hierarchy and end up on the desk of a superior who is far removed from the original problem.[9] In the outside world force/power refers to acts of war, terrorism, or mass movements and civil disobedience.[10]

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4. KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION 6-9 (1998).

5. *Id.* at 10.

6. *Id.* at 11.

7. *Id.* at 9-10.

8. *Id.* at 14-16.

9. *See id.* at 11, 29-33.

10. *See* KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION 4, 58 (1998).

In a hospital, it refers to behind-the-scenes maneuvering to cut deals and force someone else to capitulate. It happens every time we get into a power play with a physicians' group. Sometimes they put the squeeze on us, and sometimes we put the squeeze on them. The interesting thing about the use of force in the workplace is that it often takes place in subtle ways, and even the lowest members in the hierarchy know how to use their power to passively block certain people that are giving them trouble; force is not always a fight in the parking lot. Avoidance involves not dealing with the conflict, which is all right sometimes, but a real problem if it happens because our people *don't know how* to resolve conflict.[11] Collaboration is the method through which people communicate and negotiate solutions themselves.[12]

Since we have no way to prevent it, all of our malpractice claims are of the expensive higher authority type; unresolved issues end up in litigation where judges and juries are the ultimate higher authorities. The same is true of our internal procedures. You can see higher authority written all through our medical bylaws, which are filled with pages and pages about how to hold hearings to take "corrective action," while protecting "rights" of the parties. It even shows up in our employee manual. For example, we tell people to go to their supervisor and then to the next higher up level superviser, all the way up to the CEO to solve the problem. These authorities are removed from the actual conflict between the parties, but are still called upon to settle the matter. While this makes some sense – the parties can't resolve it, so the boss does – the problem is that it takes more time when the authorities have to "hear" the matter, investigate, and render a decision.[13] Another part of the problem is that these outcomes are always win/lose: people end up getting a decision made against them and they tend, not surprisingly, to be unhappy campers after that.[14] Finally, when the decision is made by a higher-up, this removes the accountability for owning and implementing solutions from those who are directly involved.

And now here's the systems point: unless there is a systemic path and a menu of ways to resolve things before or instead of higher authority, then the expensive higher authority, avoidance and force models will carry the day. The result is greater costs in time and attorneys' fees, little or no compliance, and broken relationships due to win/lose outcomes.

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11. *See id.* at 29-33.
12. *See id.*
13. *Id.* at 11.
14. *See id.* at 29.

III. SOLUTIONS FROM OTHER COMPANIES

Some other in-house counsel I have talked to are installing systems to resolve things before they get to higher authority, with force/power and avoidance in a true last resort category. The idea is to channel conflicts through collaborative methods or "gates" in the organization *first*, and then use higher authority as backup. Done well, there is little or no need for the parties to exercise force or power: taking things to the streets, or the press, or behind-the-scenes to beat someone up, politically or physically.

Collaborative methods occur in at least three ways. First, by taking individual initiative, individuals behave in a way that honors the interests of the other side, as well as themselves.[15] I can anticipate your response to this "do the right thing" idea: it'll be a cold day in Hades before we see that happening with some folks we know. And, you're right, though the idea is to systemically frame and encourage this as the first step, primarily in how we select people for key roles and through education and training, and also through other organizational supports. Encourage people to think and act in a way where they look out for the interests on both sides.[16]

A second form of collaboration is negotiation. An individual talks directly to someone with whom he or she has a conflict, and aims for a win/win solution, using interests-based negotiating skills.[17]

A third way to collaborate is to use mediators who have no stake in the conflict, but who serve to assist the parties in their negotiations.[18] Successful mediations help the parties fashion their own solutions.[19] The mediator serves as a buffer, and also uses private meetings to hear interests and matters of the heart that they likely are not willing to share with one another, since they view the other side as an opponent who might actually use this information against them.[20] (See Sidebar: How Mediation Saves Time And Money.) The key point

15. *See id.* at 26.

16. By the way, at times I wish we were a hospital with a religious base, since this honoring of others' interests actually fits with many of the religious hospitals' theologies. For secular institutions such as ours, the individual initiative part is simply good business: prevent problems by treating people well at the start.

17. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES; NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2nd ed. 1991); WILLIAM URY, GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE (1991); KARL A. SLAIKEU ET AL., CHORDA® COLLABORATION SKILLS (2001).

18. SLAIKEU & HASSON, *supra* note 4 at 27.

19. KARL A. SLAIKEU, WHEN PUSH COMES TO SHOVE: A PRACTICAL GUIDE TO MEDIATING DISPUTES 3 (1996).

20. *Id.*

about collaborative methods – individual initiative, negotiation, mediation – is that they help people reach their *own* solutions (win/win) *before* the problems ever get to higher authority or frustration leads to force or power.[21] Training in collaboration skills can also keep avoiders from falling into the worst outcomes by giving them tools to take greater responsibility in resolving their own issues.

How Mediation Saves Time and Money[22]

Of the many models of mediation, some emphasize shuttle diplomacy, others joint talk, and yet others an integration of the two. Any mediation, however, stands to save money by helping in the following ways:

1. Overall, the mediator serves as a buffer and helps control adversarial posturing. In litigation, mediation can control discovery costs (depositions of key witnesses, exchange of records, valuations of property, assessments of damages) by providing a forum for collaborative resolution of issues along the way to court.
2. After an opening meeting, the mediator might meet with the parties privately to hear interests and "matters of the heart" that they and their attorneys may be unwilling to disclose to the other side. To the extent that the mediator uses private caucuses, the mediator will have a greater data set (private information from each party) than the parties themselves had when the mediation began. The mediator uses this information very carefully and does not disclose what the parties do not want disclosed to the other side.
3. In joint meetings, the mediator can assist the parties as they discuss problems and underlying interests, and as they create solutions. Both parties are assisted by having a monitoring process that allows them to get back to the table should there be any difficulties in implementing the agreement.
4. The mediator can float options for resolution that the parties are unwilling to declare or even discuss with the other side for fear of sending the wrong signal. The private caucus gives both the mediator and the party more freedom to explore options than arbitration or litigation ever does.
5. Mediation takes fewer person hours than a hearing, as the primary players are the conflicting parties. They might con-

21. SLAIKEU & HASSON, *supra* note 4, at 28.
22. *Id.* at 38-39. Reprinted by permission from Karl A. Slaikeu and Ralph H. Hasson.

sult with attorneys in the early stages; attorneys might even be present in mediation in certain cases. Still, two parties, two attorneys, and one mediator are considerably fewer people than a full-scale hearing.

The savings in attorney time (a key indication of expense) using this approach are significant. The reduction in legal expenses usually falls in the range of 50-80%.[23]

Here are some examples of how companies use mediation. Motorola reported years ago that they had cut litigation expenses by 75% through including a mediation clause in their contracts with suppliers and vendors.[24] Methodist Healthcare System (San Antonio) followed this approach and put a mediation clause in their conditions of admission form to the hospital.[25] GE reported "double-digit savings" as a result of a similar "early dispute resolution program" in its various companies.[26] Not all mediations are successful, and certainly some mediators are more capable than others, but mediation is truly the sleeping giant of dispute resolution, it seems to me. The more mediation that we see across the board – internal issues, as well as with patients, vendors, suppliers – the better in terms of early resolution and cost control. I will be happy to provide you more information on the approaches that have proven most effective in healthcare.[27]

Returning to collaborative methods, Figure 1 below shows a simple model used by companies that are saving time and money with this approach. They use the model to cast all of their conflict resolution activities – this includes conflicts involving hospital liability, as well as internal issues regarding nursing and other clinical personnel, medical staff, administration and support staff, and outside parties – into a "preferred" path for conflict resolution. They use the preferred path

23. Interview with William L. Bedman (1997), Interview with T.B. Carver & A.A. Vondra (1994); Interview with M.Galen, A. Cuneo & D. Greising (1992). Litigation fees are only one source of potential savings noted in comprehensive cost-benefit analyses of conflict management procedures. *See* M.P. Rowe & J.T. Ziegenfuss, Jr., *Perspectives on Costs and Cost Effectiveness of Ombudsman Programs in Four Fields*, 15 J. OF HEALTH & HUM. RESOURCES ADMIN., 281 (1993) in which the cited cost-benefit studies predict cost savings in such areas as productivity, management time, turnover, and systems and process improvements, as well as litigation expenses.

24. *See* Richard H. Weise, *The ADR Program at Motorola*, 5 NEGOTIATION J. 381 (1989). Michele Galen, Alice Cuneo & David Greising, *Guilty! Too Many Lawyers and Too Much Litigation: Here's a Better Way*, BUSINESS WEEK Apr. 13, 1992, at 60-66.

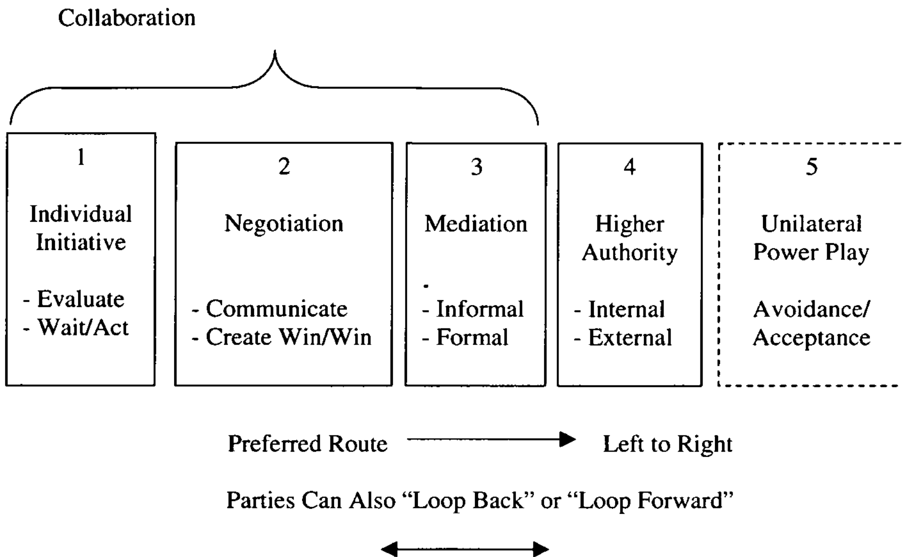
25. SLAIKEU & HASSON, *supra* note 4, at 111.

26. *Superconference Panelists Share Insights on Bringing Corporate America Into ADR Age*, ADR REPORT, Oct. 28, 1998, at 7.

27. *See* SLAIKEU, *supra* note 1.

as a template for evaluating and changing existing procedures. The preferred path says: try collaboration first, and if that fails, then use higher authority as backup, and as an absolute last resort (after all, we can't stop people from exercising their human rights), force or power is always available, and so is avoidance – living with the pain by walling off the problem. As the note below Figure 1 shows, you can loop forward or back at any time.

FIGURE 1
THE PREFERRED PATH



IV. THE RUB FOR US

It seems to me that right now we are where many of the benchmark companies were when they began making their changes.[28] They had many individual features of collaboration in place, but typically they were used haphazardly. In some cases, they were not present at all.

Here is an example. Risk managers and our attorneys will say that, of course, they use mediation, arbitration, or some form of alternative dispute resolution (ADR). They will even talk about how successful they were with a few cases. However, they will still have a fair

28. *See* SLAIKEU & HASSON, *supra* note 4, at 64 (for information on systems at GE, Halliburton and Shell); Karl A. Slaikeu, *Designing Dispute Resolution Systems in the Health Care Industry*, 5 NEGOTIATION J. 395 (1989) (for information on health care).

amount of litigation, EEOC complaints, fear of class action lawsuits, and "labor unrest" (don't you just love that term!). Question: If mediation and other forms of ADR are so great in terms of cost-saving, why do hospitals (including ours) have litigation, and expensive disputes with medical staff, to say nothing of labor unrest?

The answer is that we have no *systemic* requirement that *all* cases be channeled through the collaboration gate before proceeding to litigation. Attorneys on both sides argue forever with one another – "a game without end" as someone once put it to me – about whether a case is "right for ADR." Can you imagine that attorneys who do not agree over the facts of the case, liability, and damages will somehow reach agreement on whether or not to take a case to mediation or ADR? Especially when, by going to mediation or arbitration, they fear showing "weakness," and their fees as litigation counsel may be 1/5 or less of what they would be if the case went to trial or settled on the courthouse steps?

The solution to this "too little too late" scenario is to rewire our organizational procedures across the board in order to channel *all* cases through the collaboration gates early, making sure there is documentation, training and the necessary support to make it stick. This means that if something is not resolved through individual initiative or direct talks (negotiation) by a specific time period – say 30 or 45 days – then any of the parties can trigger mediation, or a "convening" event. In the latter case, a neutral person brings the parties together to select a dispute resolution process, such as mediation or arbitration, and an individual to facilitate the process.[29] The convener helps them choose from national vendors or professionals who are locally available in the community.[30]

Here's the bottom line on our hospital: we have the ingredients of success (good people who show some pretty strong collaboration skills), but they are not organized to give us a financial benefit. Indeed, just the opposite is true; our lack of a comprehensive approach results in wasted money, time, and human resources.

V. A PLAN FOR US

Here is my short list of what we can and should do in order to save money, reduce stress, and, in particular, strengthen our relationships with patients, our own physicians, nursing and other clinical per-

29. *See* Karl A. Slaikeu & Ralph H. Hasson, *Not Necessarily Mediation: The Use of Convening Clauses in Dispute Systems Design*, 8 NEGOTIATION J. 331, 333 (1992).

30. *See id.*

sonnel, administrative staff, as well as strategic partners and the community. (Yes, this will apply even to our negotiations with the city and residents of the historic district who are upset about our new building project!).

A. *Build the preferred path into all of our procedures for conflict resolution.*

This is the point at which we will include mediation clauses in contracts, and perhaps on the condition of admission form. In the patient area, the idea is to create a "patient welcome" that describes our partnership in health care (patient, physician, nurses, and all hospital staff) in collaborative terms. The standard mediation clause (talk about the conflict first, use mediation if necessary, before exercising options in the courts) fits with a model of collaborative healing. The patient welcome, with mediation clause, will appear in brochures, on our patient web site, and in our verbal statements/greetings when patients first enter the hospital. This use of the preferred path through a mediation clause in the patient welcome, can be carried throughout all documents that regulate how we resolve conflict within the hospital (staff, physicians) and with outside parties.

For example, in personnel manuals we will encourage employees to deal directly with individuals with whom there is a problem, using supervisors and the Ombudsman (discussed below) as support resources. In the medical bylaws, we will encourage direct talks regarding corrective action situations, and build in the opportunity for mediation to occur early if direct talks do not solve the problem before, and hopefully instead of, resorting to hearings. We do not need to reinvent the wheel on these edits of procedural guidelines. Others have developed templates that we can use to integrate the preferred path into these documents.[31]

There are a number of esoteric points on all of this that I will not get into in this memo, though we will address them during this rewiring initiative.[32] For example, all procedures need to be reviewed by

31. Further information on file with authors.

32. Question: How can you "require" emergency room patients, who may be treated but did not sign a conditions of admission form, to use the preferred path? This question arises in the same way for consumer products, as in a lawsuit over a product *before* a system was in place, or a slip and fall by a passer by on our sidewalk. The answer is that "as a matter of policy" we go through mediation before, and hopefully instead of, court. This keeps the company from falsely appearing to single out some cases for mediation – the ones with the bad facts – while litigating the rest.

There are only two reasons to be in court these days: (1) to establish a legal precedent (case law), and (2) to send a message to the world (very public dispute resolution). In all

the professional associations to which our people belong: medicine, nursing, and other groups, as well as certifying bodies for the hospital. The positive aspect here is that most of these entities are already as concerned as we are, and many are encouraging their members to take the very steps that I am addressing in this memo. In the procedural phase, we will also involve our Communications and PR people so that we hit all the necessary bases for promulgating the "preferred path" through positive promotional materials.

The policy should have a diagram or schematic that shows the gates for the resolution of conflict in the organization, following the preferred path. As Figure 2 indicates, Gate 1 is what would be called Early Resolution, which is resolution by the people themselves. This is patients talking to staff, doctors talking to nurses, administrators talking to physicians, and so on. Through training, we will equip people with skills to do this well. Resolutions here occur as direct talk/negotiation within the chain of command.

Gate 2 involves our internal support, which might be an Ombudsperson to coach one or more parties for self-help, or to convene the appropriate parties, and refer them to other resources, such as Peer Review or an Internal Mediation team, or even the Ethics Committee.

Gate 3 is the first one that is outside the organization. It includes external mediation and arbitration, offered through links with the numerous vendors of mediation, arbitration, and other ADR methods – locally or nationally. Note that many companies are setting up " Gate 3 only" type "ADR Systems" which is actually just one step this side of the courthouse. We will focus primarily on Gates 1 and 2, but include Gate 3, too.

Gate 4 involves the courts and governmental agencies such as EEOC. Did you know that judges can send cases to mediation? And they increasingly do so. The EEOC even has a mediation program. So we are all on the same page: the difference is that we will *rewire our procedures to resolve things even earlier*, well before they become an official complaint or lawsuit that might be referred to mediation by a judge or a governmental agency (Which would be too late for us!). Gate 5 involves the use of force (strikes – heaven help us! – civil disobedience, press appeals to the public, violence, and behind-the-scenes

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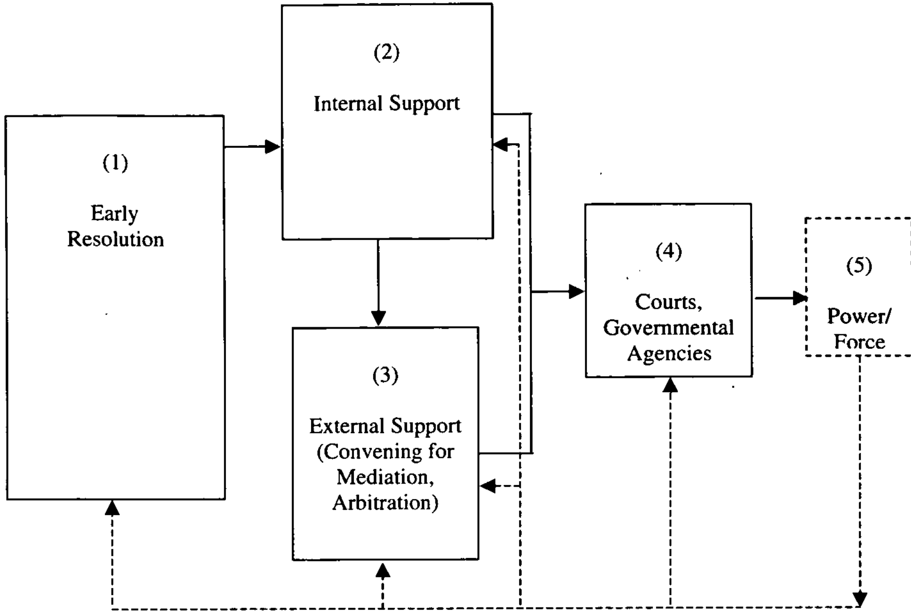
other cases, it can be our "policy," and we will state this to everyone, that we send everything through the collaborative gate first, and only go to court if necessary. I believe the courts will support this. The reality is that the courts themselves are now very likely to send cases to mediation or ADR anyway. By doing it ourselves *first* (especially with a two-track attorney representation model, which I will discuss below), we save time, money, and hopefully the business relationship.

FIGURE 2
COMPREHENSIVE MODEL



political maneuvering). Clearly, we don't picture this in our brochure, though we all know this is the place where some things actually go if we don't resolve them earlier. The fact is that in any free country, the legal use of force/strikes/the press, for example, are part of the picture. For a couple of examples, see the boxed insert for my analysis of how the preferred path model could have made a difference in the year 2000 Bridgestone/Firestone dispute, and even in the failure at Enron in 2001-2002.

BRIDGESTONE/FIRESTONE AND ENRON: EXAMPLES OF ACTION AT GATES 4 AND 5

In both of these situations, the primary form of resolution was at Gates 4 and 5 of the preferred path in Figure 2.

At Bridgestone/Firestone, there was, by all accounts of this terrible situation, no mechanism in place that would require Bridgestone/Firestone and Ford to share data on failed tires (blowouts and car wrecks); they kept their own individual records.[33] They did

33. Timothy Aeppel et al., *Road Signs: How Ford, Firestone Let The Warnings Slide By As Debacle Developed*, WALL ST. J., Sept. 6, 2000, at A1.

not collaborate in sharing data.[34] The discoverer of the pattern of accidents was a State Farm Insurance agent (how's that for a third party!), who then reported the situation to the federal government (Gate 4).[35] When the whole matter hit the press (Gate 5) and the companies essentially divorced after 100 years together, the business relationship was over (even though they may be in the process of trying to put it back together by the time you read this memorandum). The primary action was at Gates 4 (lawsuits) and 5 (the press, and appeals to the public). Had they used a requirement for their own version of the preferred path at Gates 1, 2, and 3 they likely could have saved the business relationship, and by collaboratively resolving the blowout/rollover problem earlier, saved lives as well.

Enron, interestingly enough, is the very same story. There was no systemic requirement for early collaborative resolution between Arthur Andersen and the Enron managers. In particular, there was no role for an Ombudsman (Gate 2) to receive confidential calls and provide help on how to solve things that were being swept under the rug. The whistle-blower in this case had no place to go but Gate 4. There was no way to get appropriate, early corrective action done at Gate 1, and at Gates 2 and 3. One might speculate what would have happened if there had been the opportunity to call a confidential hotline and speak with a professional ombudsman (internal or outsourced) who would convene these parties to face facts in the early going. Instead, as with Bridgestone/Firestone, Enron's downfall came from a combination of wrongdoing *and* the absence of a system for both exposing and resolving issues before they escalated into self-destruction.

B. Equip our people with skills to resolve conflict early and well.

You and I have discussed this before. Many of us have had some exposure to conflict resolution training, some good, some not so good. We will need to adopt a program that is customized specifically for health care, and geared to job function. For example, our frontline employees need an efficient, short, streamlined course; managers need more depth since they do most of their work in Gate 1 on a day-to-day basis; and our specialists, which includes HR, Ombuds staff, patient advocates, ethics committee, and attorneys, need more training, probably the standard 40-hour training attended by

34. *Id.*
35. *Id.*

mediators who hang out a shingle. We can do this through our education department, and through the Continuing Education components for all of our professional staff. Indeed, trade associations now offer credits for such training, and we should help our folks get it as a part of their professional development. The key point is that if we are to resolve things early at Gate 1 of the template, then we have to equip people with the skills to work things out themselves.[36]

C. Support our people with 24/7 ombuds services.

I am not talking about the various hotlines and whistle blowing services that you and I have seen. These are important, but the ombuds service provides a *confidential* and *neutral* resource, *independent* of the chain of command, to support all conflict resolution activities. The ombuds (the gender neutral short word, I am told) can coach parties on how to solve the problem, do shuttle diplomacy, and refer or convene to help the parties use formal processes such as mediation. Interestingly enough, we already have this for our patients through the Office of the Patient Representative. The Ombudsman Association (TOA) and other professional groups have information on this role.[37]

The need met by this support line is obvious: in real life people may forget what they learn in a class, or they may – since they are human – "drop the ball" for some reason, and perhaps fall back to avoidance or something else. If we can provide a confidential 1-800 number for our people, available day and night, all year, then we increase the chance that these problems will surface early, when they are most amenable to resolution, instead of getting swept under the carpet, and surfacing later as a very expensive dispute.

Before we leave the ombuds topic, here's an interesting idea for you: I learned about a hospital construction project in Hong Kong in the 1990's that built in this function right at the very start of the work, in order to resolve construction disputes early, and thereby avoid litigation.[38] The model, apparently, is not just for employment issues. I

36. Information on customizing standard conflict resolution training to address the unique requirements of nurses, physicians, and administrative staff on file with the authors.

37. *See* Mary P. Rowe, *The Ombudsman's Role in a Dispute Resolution System*, 7 NEGOTIATION J. 353 (1991); Mary P. Rowe, *Options, Functions and Skills: What an Organizational Ombudsman Might Wan to Know*, 11 NEGOTIATION J. 103 (1995). The Ombudsman Association is located at 203 Towne Centre Drive, Hillsborough, New Jersey, 08844, phone number (908) 359-1184.

38. *See* Thomas J. Stipanowich, *A Systematic, Dynamic Approach to Conflict Management*, ADR REPORT, Sept. 30, 1998, at 5-9.

am now exploring the option of vendors who might provide an outsourced service for us, which might save money as part of a risk management package.[39]

D. Maximize the benefits of mediation by adopting a "two-track" model for attorney representation in dispute resolution.

I recently heard about a rather out-of-the box idea, though one that I believe will increasingly show itself in leading organizations. As you know, litigation and mediation are very different processes, and the attorney role in each is very different. In litigation, the idea is to convince a judge or jury of the rightness of one's argument according to a point of law. There is no interest in getting cooperation from the other side. Litigation is a battle. Litigation takes more money, and, to be quite honest, its tactics often are not conducive to nurturing long-term, business relationships. Mediation, on the other hand, is just the opposite. Instead of using the adversary model to try to convince somebody else that one is right or wrong, the mediation model helps the parties and their advocates to understand and appreciate one another's points of view and key interests, acknowledge any mistakes or wrongdoing, and then fashion solutions that can be accepted by both sides. How the parties will relate (or not) to each other at the end is very important. When mediation is done well, the parties may settle their dispute with appropriate restitution, and, in some cases, even reconcile with one another through acknowledgements, apologies, and by making mutually agreeable changes in a working relationship in the future.

The rub shows up in formal mediation. If we send a litigation attorney whose main talent is the adversary model, and who will make more in legal fees if the case goes to court rather than if it is resolved earlier in mediation, we shoot ourselves in the foot in at least two ways. First, with few exceptions, this type of advocate won't be as good in the "work together to work it out" part as would an advocate who is trained and paid only to "work it out." Second, if you follow the money, the old model effectively allows a financial conflict of interest to run freely in the mediation, since the financial compensation for the attorney advocate is always greater in litigation (or settling on the

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39. Information on an outsourced ombudsman model on file with the authors. Regarding risk management, there is a provision in the Federal Sentencing Guidelines that curtails a company's liability for damages in white-collar crime *if* the company has an ombudsman program in place. *See* CHARLES L. HOWARD & THOMAS FURTADO, THE UNITED STATES SENTENCING GUIDELINES: WHAT AN ORGANIZATIONAL OMBUDS MIGHT WANT TO KNOW AND SHARE WITH management (1999).

courthouse steps) than in mediation, which typically entails fewer billable hours per case for attorneys.

As a solution to this problem, some observers are now suggesting a "two track" model for representation of attorneys in dispute resolution, and I suggest that we adopt it here.[40] If we get into mediation on any dispute, we will hire one attorney to represent us in the mediation, and use an attorney from another law firm to pick up the case for litigation, if necessary. This is not as inefficient as it may at first sound, i.e., two attorneys instead of one. We can build in an appropriate transfer of the case if we need it. And, even more important, we can actually have the litigation counsel give a private opinion to us, and our mediation counsel, regarding our chances in court, so we can compare a potential mediation settlement with our chances of success in court. The difference is that the one predicting the success of the court path will not be allowed to represent us in the bridge-building, talk-it-out for resolution phase of mediation. As a client, we will have the best of both worlds: a highly skilled collaborative type to reach a win/win agreement if at all possible (sometimes called "the last nice person you will talk to on this matter"), and a "take no prisoners" litigator type to handle the litigation if we need that.[41]

You may wonder if I've gone over the deep end here, with lawyer bashing. I am not bashing lawyers (after all, I am one), but rather the use of the litigation model when we don't need it. Here is another way to put it. In our culture the lawyer jokes are actually grounded in disgust at the litigation/adversary model wreaking havoc in businesses. In the traditional view of lawyers, we are the spoilers who say no because of legal liability issues, or who inflame a case by escalating it with our adversarial/litigation tools, which we use in relating to the other side as an "opponent." A far better approach is to appropriately use one set of attorneys (to maximize the counselor at law role) for the "work it out," mediation, or settlement phase, and then hand it to true litigators for going to court, if necessary. Indeed, there will be many lawyers who will be equipped to do both services, although not both services for the same client.

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40. Further information on the two-track model on file with the authors.

41. All of this relates to the defense side, which we can control. How about the plaintiff's side, which we do not control? The plaintiff's side will take a percentage of whatever the settlement is, however they get it, whether through direct negotiations or mediation, or failing that, a court award. It is actually to their advantage to get many of these cases resolved earlier to reduce their upfront expenses on contingency fee cases. Some plaintiffs' attorneys may also see the value in representing clients in negotiations and mediations on an hourly fee basis.

E. Measure results (with a return on investment (ROI)), and manage lessons learned.

We won't get these ideas past our CFO if we don't document what we are spending on conflict now, then project those expenses going forward (if we do nothing to change our approach), and then demonstrate what we might save if we change our current system. Unless we show a return on investment (ROI) and a business case for action, we will be held up, and we should be.

To get this started, I took a preliminary look at our litigation expenses with our CFO and together we made a startling discovery. We found that in the area of hospital liability costs alone, if we achieved even a portion of the savings that other companies have had (50-80%), we will save enough to fund all the changes discussed in the paragraphs above. As a bonus, if our litigation expenses go down, then so will our insurance costs (the amount of money we put into reserves each year for self-insurance, and our umbrella premium), since the insurance rates are influenced heavily by the litigation expenses.

This will require some new tools for us. There is now software available to collect and analyze data on utilization of various internal conflict resolution processes, the expenses associated with each, resolution at various levels in the organization, and user satisfaction.[42]

This brings us to measurement of benefits that go beyond litigation expense savings. The literature on conflict suggests that when it is resolved early and well, working relationships improve, as people make changes in how they deal with one another. For nurses and doctors, this should improve our relationships, and for patients, this should strengthen our bond with them as their preferred health care provider. From a measurement point of view, we need to track these changes and build the lessons learned back into our organizational process.

Strengthening our diversity initiative is a good example. When our people use skills learned in training and our support systems to resolve problems involving legally protected rights – harassment of any kind, discrimination, and fairness in the workplace – there are several gains for all involved. First, "victims" get remedies and those instigating the problems, if skillfully and appropriately included in the

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42. Further information regarding this software on file with the authors.

process, have a chance to acknowledge wrongdoing, and to participate in the corrective actions.[43]

Separate from the fact that this can help protect us from having a class-action lawsuit against the company, the collaborative processes that involve direct talk and informal mediation in the company (perhaps with the ombuds) strengthen our culture, and make it a more positive place to work. And here is the measurement point: if we have data on the kinds of cases we are facing, then these aggregate data can be used to make changes in our culture when we need to do so. Consider some of the worst-case class action lawsuits on discrimination. If we have vulnerability because we are doing something wrong, then we will learn about it through our early detection/resolution feedback loops in the system. And if we need to change an unfair practice or something else, we will have an opportunity to do it well before any class action has to bring it to our attention. Over time, we are far better off by knowing about things early, and then creating remedies in a timely manner. It is better for our people and for the organization, and far less expensive than lawsuits.

VI. A VISION FOR US

I began by listing some of the situations and people that have been pulling our chain over the last many months. Without promising too much, here is what I envision happening if we install a system along the lines I am suggesting above.

- For Dr. X and his anesthesiology group, if we don't work it out together, then they will be required to meet us in mediation (with mediation counsel and no litigators involved), by virtue of the contract he signed with us in the beginning. In the heat of battle, there would still be words exchanged, though at the end of the day the original contract would require that we meet with a mutually agreeable mediation professional who, along with our mediation attorneys, would help us fashion a solution.[44] This will keep the dispute from escalating to higher expenditures of time and money, a benefit for all of us.
- Over time, we will see that the ER Medical Director will achieve measurable stress reduction in the ER through streamlined and strengthened procedures for resolving predictable conflicts. All

43. *See* SLAIKEU, *supra* note 19, at 35-38 (providing more information on the standard solutions list that mediators use in such situations: acknowledgement/apology; restitution/punishment; plan for future behavior; and forgiveness).

44. *See* SLAIKEU, *supra* note 18 (providing more information on how the mediation process works).

nurses, other clinical personnel, and physicians will be trained in state-of-the-art conflict resolution techniques to be applied with one another when things are tough.

- Our director of nursing will finally have a full-blown system to resolve nursing and physician complaints. Instead of feeling like nurses have to buckle under, go to war, or suffer the indignity of doing nothing, they will know that over the next two years the physicians and nurses will receive similar training in conflict resolution, and that there will be coaching available through the 24/7 support line, including convening at any time, day or night, to do shuttle diplomacy between two people who might need it. This will be empowering for the nursing staff, and acceptable to the medical staff. Remember, we know already that physicians experience a fair amount of frustration over what they consider to be "lack of cooperation." Our point is that we don't care what they call it; there are clear incentives for both sides to do something better. Our new early resolution system will help each group, and it will happen on their own terms, since physicians and nurses will be able to customize training to address situations that challenge them most.
- Regarding malpractice, we will channel all complaints into mediation first, using mediation counsel, with litigation counsel as backup only. If a plaintiff's attorney should turn down mediation on an area where no party signed our mediation clause, we will simply go to the courts and suggest that as a "matter of policy" we send all cases to mediation and respectfully request that the judge send the case back to mediation. Since judges are already doing court ordered mediation, this should not be a problem. Indeed, by making this our policy, we will send a message to the world that we will use all collaborative methods at our disposal, but that we are prepared to go full tilt on litigation if we need to.
- We will track the reduced expenses and negotiate a reduced premium for both hospital and physician malpractice insurance.
- Regarding the board members who are critical of our executive team's personality conflicts, we will have access to high-level external mediators for top-level concerns like this, and we will bring them in as needed. I believe that you will be able to present positive results to them, and show them hard data that the system works.

VII. NEXT STEPS

Based on the experience of other industries, and some hospitals too, we don't have to reinvent a wheel. This will become a project to be managed, involving a team made up of the law department, key

users in each area (physicians, nurses, other clinical and administrative staff), and specialists (human resources, risk management, training). I have access to tested protocols, and step-by-step instructions for a team to use in completing an initial assessment and in writing a blueprint about precisely what we might change around here, complete with budget and timeline. With executive team approval, we will implement the program – the preferred path, skills training, ombuds support, two-track attorney representation, as well as an annual review to capture ROI and lessons learned for continuous improvement. Since the first step is the assessment, I recommend that we proceed immediately. We can't afford to wait any longer.