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Introduction

Jeffrey A. Rosen

Deputy Attorney General of the United States

The Department of Justice’s (Department) mission is

[t]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.¹

Because we have been entrusted with such a formidable responsibility, the men and women of the Department are called upon to serve as leaders both in their communities and in the nation. A fundamental component of that leadership is our commitment to conduct ourselves with honesty and integrity.

As President Dwight D. Eisenhower said, “The supreme quality for leadership is unquestionably integrity. Without it, no real success is possible, no matter whether it is on a section gang, a football field, in an army, or in an office.”² Those words are especially apt at the Department, where we work to ensure the “fair and impartial administration of justice for all Americans.” To fulfill our mission and maintain public trust, honesty and strong moral character are imperative.

This issue of the *Department of Justice Journal of Federal Law and Practice* showcases the Department’s commitment to leadership and those essential attributes. It recognizes the impact great leaders can have, acknowledges the difficulties we face, and provides insight into successful strategies employed throughout the Department to combat those challenges.

Behind any successful organization are leaders with the wherewithal to get the right people, put them in the right position,

¹ U.S. Dep’t of Justice, *About DOJ*, <https://www.justice.gov/about> (last visited Jan. 14, 2020).

² Chad Plenge, *Traits of Successful Leaders—Character*, CJO BLOG (Mar. 27, 2019), <https://juniorofficer.army.mil/traits-of-successful-leaders-character/> (quoting Dwight D. Eisenhower).

and cultivate an environment that empowers them to succeed. When leaders establish that sort of winning culture, the impact extends beyond their tenure. The Department of Justice is now 150 years old, and the great leaders of our past established such a strong culture and made us into one of the most respected institutions of the federal government. But it does not stop there. We continue to build on the foundation that prior leaders from past decades put in place through the great work the Department performs every day. I am proud to be part of an organization that strives to get better, leads by example, and commits to doing the right thing. I hope this issue of the Justice Journal proves valuable to all who read it.

Foreword

Richard W. Moore
United States Attorney
Southern District of Alabama

If you are a U.S. Attorney or member of the leadership team in a U.S. Attorney's Office (USAO), the articles that follow were developed and written specifically to help you build a high-performance team.

Many of us began a concerted effort in 2018 to invest in a sustainable, high-performance culture within our respective offices. That focus on a healthy culture within USAOs resulted in a much higher participation in the U.S. Office of Personnel Management (OPM) Federal Employee Viewpoint Survey (FEVS) given in May 2018. Our response rate in FEVS had been historically lower than the government-wide response rate until 2018, when it rose significantly above the government-wide response rate.

The focus of then-Attorney General Jeff Sessions and the Attorney General's Advisory Committee (AGAC) on employee engagement also sparked an investment by many U.S. Attorneys to improve morale and operational performance by conducting SWOT (Strengths, Weaknesses, Opportunities, and Threats) analyses and creating employee advisory boards. This level of investment in a better operational culture is unprecedented in the history of the Department of Justice (Department). Those who have been a part of this effort have participated knowing that it will probably be their successors who will reap the full rewards of this vision. This is public service at its best.

In an era where both government and private sector employees are regularly reported to be disillusioned and disengaged, the U.S. Attorney community has the opportunity to defy that trend. Many U.S. Attorneys and their management teams have become leaders in creating employee-driven culture change, and they regularly consult with their peers in other offices about both the challenges and rewards of taking on this important mission.

These articles offer practical tips from U.S. Attorneys like Trent Shores, our colleague in the Northern District of Oklahoma. Trent's article, *The Leadership Council Model*, offers first-hand experience of a fellow U.S. Attorney who has successfully integrated an employee advisory board into his office. His experience suggests that giving

employees a structure to offer their suggestions promotes ownership of office operations and creates buy-in for the mission.

We are fortunate to have several recognized experts joining us in this compilation of leadership articles. Shawn Moon currently leads Franklin Covey's work in the U.S. Attorney community, and his article, *Building a Winning Culture in Government: Inspiring Trust*, applies the principles of founder Stephen M.R. Covey to our environment within USAOs. He suggests that, as a leader, your first imperative may very well be to inspire trust both in you personally and in your organization. His article raises the question, in my mind, whether the U.S. Attorney should aspire to be the most trusted government leader in his or her community.

David Maxfield is the Vice President of Research for VitalSmarts and the author of three *New York Times* bestsellers, all designed to help leaders create healthy teams. His article, *Crucial Conversations: The Science of Speaking Up*, is a primer on the application of the fundamental principles of communication as set forth in VitalSmarts' seminal work, *Crucial Conversations: Tools for Talking When Stakes are High*. David clearly articulates the high risk we assume as leaders when we choose silence over speaking up. As he says, "Silence is often implicated in organizational failure."¹

James Ferrell is a managing partner of the Arbinger Institute and the author of multiple best-selling books including, *The Outward Mindset*. He is a graduate of Yale Law School, class of 1992, and a former lawyer at Latham and Watkins. His article, *Self-Deception and the Law*, applies the principles of *The Outward Mindset* to our work as lawyers. He observes that, as lawyers, we choose, moment by moment, to have an outward mindset: "A person whose mindset is outward sees others as people. . . . In a legal context, a lawyer with an outward mindset sees and regards allies and foes alike as people."²

Ferrell contrasts this with the more common inward mindset, which is typically only about winning. He then asks, "Which of these mindsets is likely to do more justice, and which more harm?"³ As we strive to be authentic leaders in our offices, we benefit from the

¹ David Maxfield, *Crucial Conversations: The Science of Speaking Up*, 68 DOJ J. FED. L. & PRAC., no. 1, 2020, at 81.

² James Ferrell, *Self-Deception and the Law*, 68 DOJ J. FED. L. & PRAC., no. 1, 2020, at 66.

³ *Id.* at 71.

analysis that Ferrell offers that tends to reveal where we are willing to indulge in a little self-deception for expediency's sake, or as Ferrell puts it, to pull a "fast one." My management team found these principles so useful that we started each staff meeting with a discussion of chapters from *The Outward Mindset*; this helped all of us become more self-aware.

All of the articles in this issue are worth reading, but Tate Chambers's list of leadership books merits special consideration. His article, *Five Titles for the Leader's Bookshelf*, is a great place to start as you and your team read these articles. For example, Tate discusses Edgar Schein's *Humble Inquiry*, which teaches the fine art of asking questions to create a climate of openness within an organization. This is a foundational work to effectively lead culture change.

Our colleague Gretchen Shappert, U.S. Attorney for the U.S. Virgin Islands, has given us a profile of Amos T. Akerman, the 31st Attorney General of the United States, who as federal prosecutor, maximized his influence within a narrow window of time in a very inspirational way. Thank you, Gretchen, for bringing this important piece of history to us.

This edition is intended to spark a broader conversation about how we as leaders influence our teams and how we can achieve the Department's goals more effectively. Please share your observations with me as you read these articles and offer your ideas about how we can build a stronger U.S. Attorney community.

Finally, I want to thank our former Director of the Executive Office of U.S. Attorneys (EOUSA), Jim Crowell, who is now an Associate Judge on the Superior Court for the District of Columbia, for conceiving of this leadership edition for the journal. I have been honored to assist in this project after Jim presented his vision for this work to me over a year ago. As Director of the EOUSA and a former Assistant U.S. Attorney, Jim understood the importance of building stronger teams in our USAOs, and he demonstrated that by providing the budget to fund the much-needed services of Franklin Covey for all of us. Jim made a real difference in the U.S. Attorney community. Thank you, Jim, for modeling true leadership and investing in your colleagues.

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Exercising Leadership in Managing Employees

Jay Macklin

General Counsel

Executive Office for United States Attorneys

Supervisory responsibilities in a U.S. Attorney’s Office (USAO) present considerable challenges. Aside from the expertise required for practicing substantive criminal or civil law, or otherwise supporting the operations of the office, a supervisor must also possess an in-depth knowledge of a myriad of substantive legal issues, such as recusals, leave issues, requests for accommodation, disciplinary actions, and performance management. Most important, however, all supervisors in the U.S. Attorney community should understand how to exercise leadership in their management of employees and how to promote better employee engagement. This article will discuss what leadership is, what management is, how they compare with each other, and how supervisors can use an understanding of the differences between the two to improve in both aspects.¹ It will also discuss how good leaders and managers can use different tools to promote better employee engagement, thereby motivating employees to invest their best efforts in achieving the outcomes needed for the USAO to succeed in its mission.

I. Defining “management” and “leadership”

As a starting point, it is important to attempt to define “management” and “leadership.” A quick search of the internet provides some possibilities.

Webster’s New World Dictionary defines management as “the act, art, or manner of managing, or handling, controlling, directing.”² Peter Drucker, a recognized expert on management, defines management by distinguishing it from leadership: “Management is

¹ While this article is primarily written for managers in USAOs, the discussions on leadership and employee engagement are equally applicable to managers throughout the Department of Justice (Department).

² WEBSTER’S NEW WORLD DICTIONARY 820 (3d ed. 1988).

doing things right. Leadership is doing the right things.”³ Finally, Connie Willis, a notable satirical author, dryly explains that “management cares about one thing. Paperwork. They will forgive almost anything else—cost overruns, incompetence, criminal indictments—as long as the paperwork is filled out properly. And in on time.”⁴ Although the essence of these three attempts at defining management is to describe one who is competent in completing a task, none of them provides a sufficient definition of the concept.

Perhaps the best definition of management comes from three words—act, use, and purpose. Putting them together, management is the *act* of getting people together, *using* available resources efficiently and effectively, for the *purpose* of accomplishing a goal. These three words convey the clear idea that management, as an action, is putting together a team of people to use resources to accomplish a pre-established goal.

Leadership definitions, however, tend to include an inspirational component. John Quincy Adams wrote, “If your actions inspire others to dream more, learn more, do more and become more, you are a leader.”⁵ In a similar vein, John C. Maxwell, a leadership expert, describes a leader as one who “knows the way, goes the way, and shows the way.”⁶ Finally, Nelson Mandela, the world-recognized leader from South Africa, wrote that “[i]t is better to lead from behind and to put others in front, especially when you celebrate victory when nice things occur. You take the front line when there is danger. Then people will appreciate your leadership.”⁷ These definitions diverge from the task-oriented view of management and incorporate elements of inspiration, personal example, and sacrifice.

³ *Management Quotes*, BRAINYQUOTE, https://www.brainyquote.com/quotes/peter_drucker_131069?src=t_management (last visited Oct. 7, 2019).

⁴ CONNIE WILLIS, *BELLWETHER* 140 (1996).

⁵ PAT WILLIAMS, *THE PARADOX OF POWER: A TRANSFORMING VIEW OF LEADERSHIP* 49 (2002).

⁶ *John C. Maxwell Quotes*, BRAINYQUOTE, https://www.brainyquote.com/quotes/john_c_maxwell_383606 (last visited Oct. 7, 2019).

⁷ *Nelson Mandela Quotes*, BRAINYQUOTE, https://www.brainyquote.com/quotes/nelson_mandela_393048 (last visited Oct. 23, 2019).

The military also defines leadership. Field Manual 22-100 is the Army's handbook on leadership, containing several hundred pages of information on leadership. In the second chapter, it sets out what it purports to be the Army's time-honored principle of Be, Know, and Do.⁸ The concept of leadership begins with what the leader must *be*—the values and attributes that shape character, the internal and defining qualities that must be possessed all the time.⁹ Next is what the leader must *know*. Leadership requires knowing about systems, organizations, management or resources, and the tendencies and needs of people. Knowledge shapes a leader's identity and is reinforced by a leader's actions.¹⁰ Finally, the Army focuses on what a leader must *do*.¹¹ While character and knowledge are necessary, by themselves, they are not enough. Leaders cannot be effective until they apply what they know. What leaders do, or a leader's action, is directly related to the influence they have on others and what is accomplished.

In its essence then, leadership goes beyond simply managing resources to perform a task that satisfies a goal. The notion of leadership has, as its core, the concept of providing the purpose and vision for the work being performed by an organization. It includes providing appropriate direction and setting proper expectations for the team that will perform the work. And leadership must also involve using various motivational techniques to ensure the team performing the work has high morale to focus on the goals of the work at hand.

Considering the differences between managing and leading, the two terms are perhaps best captured by these words penned by Stephen R. Covey: “[M]anagement is efficiency in climbing the ladder of success; leadership determines whether the ladder is leaning against the right wall.”¹²

⁸ HEADQUARTERS, DEP'T OF THE ARMY, ARMY LEADERSHIP MANUAL FM 22-100 2-1 (2007).

⁹ *Id.* at 2-10.

¹⁰ *Id.* at 2-24–2-26.

¹¹ *Id.* at 2-26–2-28.

¹² STEPHEN COVEY, THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE 101 (1989).

II. Characteristics of top-quality leaders

Whether one identifies as a leader or a manager—and certainly there should be great overlap between the two, with every manager acting as a leader for the team he leads—all top-quality leaders share certain characteristics. Each of these characteristics contains an action verb, which signals the need for the leaders to perform a task.

First, leaders should know the standards that apply to them and their staff, and they should be the first to *exemplify* such standards. It is difficult, if not impossible, for a leader to expect his team to comply with the standards if he does not lead by example in setting those standards. Second, a leader focuses his time, energy, and talents to *accomplish* the mission, including being willing to perform the same work he asks of his employees. Third, a leader knows how to *communicate* effectively with his employees. Effective communication includes both talking and listening, getting to know each employee, and articulating expectations in an understandable way. Fourth, a leader will *build* and *empower* his employees. Obviously, unless the leader knows the strengths and interests of each employee, it will be difficult to play to the employees' strengths, empower them to act independently, and permit them to excel in their performance. Fifth, a leader must *teach*, *coach*, and *counsel*. This shows up in every day interaction with employees and is marked by a leader walking through the office and taking time to talk with each of his employees. Sixth, an effective leader must *develop* the skills of his employees. By knowing each of them, their needs, and their level of experience, a top quality leader can work to improve the skill set of their employees through effective training opportunities. Finally, the effective leader knows how to *treat* his subordinates well, with dignity and respect. A good rule of thumb is for a leader to treat his employees as if someday they may be his own supervisor.

Keeping in mind the differences between a leader and a manager, leaders in USAOs have in common certain actions that they must take or carefully avoid. First, a leader should be considerate, empathetic, and respectful to his employees. In essence, show he truly cares about his employees. He should be friendly with employees, not necessarily their friend. Friendship may result in other employees' claims of favoritism or inconsistent treatment. Often this concern comes into play when a leader goes to lunch or to after-hours events with the same group of people so regularly that other employees feel left out and disenfranchised. By being sensitive to this reality, leaders can

walk this line of being friendly with all of their employees, while not appearing to be friends with only a select group. This, in turn, will create a work culture of high morale and teamwork.

Second, leaders must avoid embarrassing their employees. A leader should never counsel, criticize, or single out for poor performance or misconduct an employee in a group setting. Rather, such discussions should take place in the privacy of the employee's office or the leader's office. Being a top-quality leader is difficult and often it can lead to anger or frustration. Nevertheless, an important rule of thumb for a leader is to control such anger and frustration so that it does not show or guide action. A leader should never let his emotions guide his decisions or act in such a manner as to tear down the morale of his team. This is a particularly important concept for new leaders. Since their words now carry more weight, they need to use them carefully. Properly placed, they build great structures. Carelessly thrown around, they not only fail as a foundation, they can crush employees.

Finally, a good leader must do his best to foster an environment of openness and trust by allowing employees to have input into key decisions. This is critical for the health of an organization. Great leaders do not just tolerate the expression of other views; they actively cultivate it. Good ideas get stronger when tested by different viewpoints and perspectives. If an idea cannot withstand this process, it likely lacked the needed value. When subordinates experience this process of encouraging and embracing a constructive, frank exchange of opposing views, they take ownership in the decision and the organization gets stronger. Leaders who lack this courage end up going in the wrong direction because subordinates are afraid to speak up to challenge it or lack interest in doing so.

In his book *Good to Great*, Jim Collins presents universal distinguishing characteristics of top-level leaders who caused their organizations to go from good to great.¹³ Collins develops a hierarchy of leadership levels that starts with a highly capable individual who goes from contributing team member, moves to competent manager, rises to effective leader, and culminates at an executive—what he refers to as a Level 5 leader. As he describes it, a Level 5 leader builds enduring greatness through a paradoxical combination of personal humility and professional will.¹⁴ Level 5 leaders display real humility

¹³ JIM COLLINS, *GOOD TO GREAT* (2001).

¹⁴ *Id.* at 21–24.

by taking personal blame when the organization falters but praising the employees when the organization shines.¹⁵

They also have an unwavering resolve to have their organization succeed. Level 5 leaders possess inspired standards; they cannot stand mediocrity in any form, and they are utterly intolerant of anyone who accepts the idea that good is good enough.¹⁶ These highly successful leadership attributes offer a valuable yardstick through which USAO managers and leaders can judge where they are in the hierarchy of leadership and how well their team, section, or office is led. A USAO supervisor's ultimate goal should be to achieve Level 5 status.

III. Level 5 leaders' top priorities

According to Collins, there are a few top priorities that Level 5 leaders invariably follow. They start with people first and then move to vision and strategy.¹⁷ The Level 5 leader makes sure that they get the right people on the bus, move the wrong people off the bus, and then usher the right people to the right seats on the bus.¹⁸ The Level 5 leader does not determine where to drive the bus until he ensures that he can staff the organization with those people best suited to top-quality performance. The bus's path is the vision and strategy through which the leader will lead his eager team. To highlight for USAO leaders and managers the importance of this process, this section discusses each of these priorities.

First, a Level 5 leader ensures he has the right team in place—the right people on the bus. To accomplish this goal, he ensures that hiring strategies place a premium on hiring and selection processes that will result in bringing in employees who have not only the requisite knowledge, skills, and abilities, but also the right drive, motivation, and attitude.¹⁹ This is a daunting, but important task. If USAO leaders devote the right time and energy to form effective employee-level interview panels and develop motivation-focused questions and hypotheticals, they can help ensure exceptionally high-quality employee selections while complying with the merit system principles.

¹⁵ *Id.* at 33–35.

¹⁶ *Id.* at 31–33.

¹⁷ *Id.* at 13.

¹⁸ *Id.*

¹⁹ *Id.* at 51–56.

The second priority for Level 5 leaders is to move the wrong people off the bus. While none of our employees are actually “wrong,” managers must take appropriate performance action for those employees who are performing unsatisfactorily. This priority also means taking necessary disciplinary action against those employees who engage in conduct that is adverse to the efficiency of the federal service.

A leader’s proper management of his employees’ performance begins with effective use of the Department Performance Work Plan and Appraisal Record (PWP/AR). This document is an extremely effective tool for leaders to use to set clear expectations for their employees’ performance during each evaluation year. If an employee’s performance becomes unsatisfactory at any point in the evaluation year, there are informal and formal means to improve the employee’s performance. USAO leaders should work closely with the General Counsel’s Office (GCO) for the Executive Office for United States Attorneys (EOUSA) throughout this process.

Similarly, when an employee engages in conduct that is adverse to the efficiency of the federal service, leaders should work closely with GCO to take appropriate disciplinary action. Using the concept of progressive discipline, leaders should attempt to correct the misconduct by using both informal and formal measures, as appropriate, in consultation with GCO.

By taking appropriate performance or disciplinary action, successful Level 5 leaders can ensure their teams are not pulled down by poor performing employees or those who engage in misconduct. When leaders fail to take appropriate action against their employees who are engaging in poor performance or misconduct, they risk alienating their outstanding employees and adversely affecting the morale within the office. A supervisor’s employees are acutely aware of how well the supervisor is addressing another employee’s performance or misconduct. Those supervisors who just kick the can down the road, or fail to effectively address these issues, do not garner respect and soon find themselves charging up a hill with no one behind them.

Third on the priority list for Level 5 leaders is ensuring that the right people on the bus are sitting in the right seats.²⁰ In other words, those high-performing employees are placed in positions with duties that are best suited to their strengths and skill sets. Collins explains

²⁰ *Id.* at 61–62.

that Level 5 leaders spend sufficient time with employees in their organizations to know and understand them, to learn what motivates them, and to learn their individual stress points and personality styles. In that way, Level 5 leaders can create the right work environment for their employees and place them in positions within the organization to play to their strengths and allow them to achieve great success. As a result, the organization achieves great success.

Finally, after accomplishing the first three priorities, the Level 5 leader must determine where to drive the bus. As envisioned in the quote by Stephen Covey above, the Level 5 leader is responsible for formulating the vision and strategy for his organization, thus providing employees with the goal and target for the accomplishment of their work. Within a USAO, the vision, strategy and overall goals of the office are primarily set with priorities established by the Attorney General, the Deputy Attorney General, and individual U.S. Attorneys. Leaders of each component, division, or section within the Department should establish the direction for their own organization, keeping in mind the overall goals of the Department.

IV. Impact of employee engagement

Consistent with the view that good leaders and managers care about their employees, they also care about productive and effective employee engagement. In a report issued in 2014, the federal government's Merit Systems Protection Board (MSPB) found that employee engagement has an enormous impact on organizational outcomes.²¹ Employee engagement as a concept has flourished in recent years within the U.S. Attorney community.

But what is employee engagement? In its report, the MSPB defined it as a heightened connection between employees and their work, organization, or people they work for or with, that results in a high level of motivation to perform well at work and have a passion for the work.²² The MSPB found that engaged employees "are absorbed intellectually and emotionally in their work and [will] vigorously invest their best efforts in producing the outcomes needed for the

²¹ MERIT SYSTEMS PROTECTION BOARD (MSPB), *MANAGING FOR ENGAGEMENT—COMMUNICATION, CONNECTION, AND COURAGE 2* (2014).

²² *See id.* at 1.

organization” to succeed.²³ The essence of effective performance management for good leaders and managers is found in embracing this concept of employee engagement—a continuing dialogue of communication and connection between two people who share the same goal of optimizing the employee’s contribution to achieving the agency’s mission. The engagement of employees in their work is vital. It results in employees using their best efforts in achieving the outcomes needed for the agency to succeed in its mission.

While it is easy to understand that there is a strong positive relationship between high levels of employee engagement and desired organizational outcomes, such as customer satisfaction, low turnover, productivity, and profitability, it is not necessarily easy to know how to manage employee engagement. To this end, there are six factors that can help leaders and managers drive employee engagement.²⁴

The first factor is the promotion of a greater sense of pride in employees’ work, office, and agency.²⁵ This should be an easy lift for leaders and managers in the Department, since the Department’s mission is to enforce the law, to defend the interests of the United States, and to ensure public safety. The second is simply exercising effective leadership over employees.²⁶ The concepts articulated above provide examples and best practices to assist leaders and managers in ways they may exercise more effective leadership, including timely and effectively addressing performance or misconduct issues.²⁷ The third factor is providing employees with opportunities to perform well.²⁸ To accomplish this factor, good leaders and managers will take the time to know their employees’ talents, skills, and abilities, so they can play to the strengths of their employees and put them into positions in which they can excel. Fourth, good leaders and managers will establish a positive work environment that includes a collegial work atmosphere, challenging work assignments, autonomy to complete the work, and possible flexible work options.²⁹ The fifth factor is using the appropriate recognition tools available to leaders and managers in the EOUSA

²³ *Id.*

²⁴ *Id.* at 4.

²⁵ *Id.* at 7–9.

²⁶ *See id.* at 15–16.

²⁷ *See id.* at 6–7.

²⁸ *Id.* at 21.

²⁹ *See id.* at 31.

and the USAO community. These tools include retention bonuses, on-the-spot cash awards, time off as an incentive award, gain-sharing awards, performance awards, or even simple tools such as challenge coins or certificates of appreciation.³⁰ Finally, the sixth factor in developing better employee engagement is assuring employees of prospects for professional growth by encouraging them to take appropriate training courses; offering cross-training in different positions; giving them quasi-leadership roles, such as leading a specific project; and promoting them to higher positions when appropriate and merited.³¹

When leaders and managers use these six factors, employees feel valued and connected to the work they perform, the organization they serve, and the people they work for or with. This heightened sense of engagement naturally results in a higher level of motivation for employees, causing them to vigorously invest their best efforts in producing the outcomes needed for each USAO or the Department to achieve its goals.

V. Conclusion

There is a saying that relates to those supervisors in the EOUSA and USAOs who desire to be leaders and managers because it seems to be the next step for their careers, or they want the title. It goes like this: There are many people who think they want to be matadors only to find themselves in the ring with 2,000 pounds of bull bearing down on them and then discover that what they really wanted was to wear tight pants and hear the crowd roar. Being an effective leader and manager is a tough job, and many of us do not fully realize this fact until we see the bull headed our way. We must regularly perform arduous tasks and difficult actions that not only do not result in the roar of the crowd, but also may engender poor morale and a disgruntled workforce. We do not want to model Casey Stengel, manager of the New York Yankees from 1949–1960, who said, “[T]he secret of successful managing is to keep the five guys who hate you away from the four guys who haven’t made up their minds.”³² Instead,

³⁰ See *id.* at 43.

³¹ See *id.* at 59–60.

³² See Casey Stengel: *They Didn’t Hire Him for Laughs*, THE SATURDAY EVENING POST (Apr. 9, 2019),

using the techniques and best practices set forth in this article, USAO leaders and managers will persevere in their quest to understand how to exercise better leadership in their management of employees, become a Level 5 leader, and use all available tools to promote better employee engagement. All of these actions taken together will result in motivated employees that invest their best efforts in achieving the outcomes needed for a USAO and the Department to succeed in their missions.

About the Author

Jay Macklin is the General Counsel for EOUSA. He and his office provide legal advice and assistance to the EOUSA, U.S. Attorneys, and their offices. Jay's publications include *Summary Judgment Motions in Discrimination Litigation*, *The Army Lawyer* (Nov. 1995) and *Information Operations and the Law: A Practical Guide for Signal Planners and Operators*, *The Communicator* (Aug. 1999). He graduated from George Washington University Law School in 1987 and the United States Military Academy in 1980.

<https://www.saturdayeveningpost.com/2019/04/casey-stengel-they-didnt-hire-him-for-laughs/>.

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Building a Winning Culture in Government: Inspiring Trust

Shawn D. Moon
Executive Vice President
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FranklinCovey

*Compelling trust is the highest form of human motivation.*¹

Stephen M.R. Covey

Think of a top-notch organization you know—one you wholeheartedly tell others to work for or whose story you share with friends at dinner. Why do you recommend it? What makes it so unique? Or, put more forcefully, why is that organization so remarkable and rare that you tell stories about it? What causes you to feel so strongly about the organization?

After 30-plus years of partnering with some of the greatest public and private sector organizations and leaders worldwide, we know that top organizations share the most powerful, hard-to-replicate, and sustainable competitive advantage—a winning culture. Creating this culture is a critical responsibility for any leader and certainly for leaders at all levels of the offices of the U.S. Attorneys. Winning cultures are unique, deliberately designed and maintained, and rare.

Culture is defined as the collective behavior of your people. It is what the majority of your people do the majority of the time. It includes the nature of the language and relationships and the spoken and unspoken values, norms, and systems at work. Winning cultures are filled with superb people who deliver as promised time after time. In the public sector, a winning culture means that customers go to you not just because they must, but because they know you can effectively provide services or support. They give you someone and something to trust.

In his classic, *The Speed of Trust*, Stephen M.R. Covey explained that the first imperative of a leader—at work or at home—is to inspire trust.² It is to bring out the best in people by entrusting them with meaningful stewardships and to create an environment in which high-trust interaction inspires engagement, creativity, and possibility.

¹ STEPHEN M.R. COVEY, *THE SPEED OF TRUST* 319 (Free Press 2008).

² *Id.*

Given this, maybe no other job of a highly effective leader is more pressing than the need to create an enduring culture of trust. Your job is to model trustworthiness and to help your team members become high-trust individuals. Investing time in the development of trust among your team is a smart investment and is critical to creating long-term, sustainable mission success.

The opposite can have dire consequences. The repeated financial shocks of the 21st century produced steep declines in public trust in bedrock institutions like big business, banking, and government. Many have lost faith in the foundations of society.

Let's consider the impact of low trust in businesses. Only 10% of workers trust their bosses to do the right thing, and only 14% believe their company's leaders are ethical and honest.³ Less than a fifth of the general public trusts business leaders to be ethical and honest.⁴ Only 16% of Americans trust large corporations.⁵ And 82% of workers believe that their senior leaders help themselves at the organization's expense.⁶ They look at their leaders and see too much self-interest, short-term focus, and ego-driven decision-making.

Oxford University Professor Colin Mayer diagnoses the situation this way:

The loss of trust in the [organization] reflects a belief that it exists simply to make money for its owners, its shareholders, and it will do whatever it takes to achieve this. From our point of view as customers, employees, and communities, we are therefore pawns in a game in which we are manipulated for the benefit of others. The repeated recurrence of scandals only serves to reinforce

³ Jeanette Mulvey, *American Workers Don't Trust Their Bosses*, BUSINESS NEWS DAILY (July 12, 2011), <http://www.businessnewsdaily.com/1195-employees-dont-trust-bosses.html>.

⁴ Geoffrey James, *Warning: Customers Don't Trust Leaders*, INC. (Apr. 19, 2013), <https://www.inc.com/geoffrey-james/warning-customers-dont-trust-leaders.html>.

⁵ Paola Sapienza & Luigi Zingales, *With the Economy Recovered from the 2008 Financial Crisis, Chicago Booth/Kellogg School Financial Trust Index Shows Trust Restored*, CHICAGO BOOTH/KELLOGG SCHOOL FINANCIAL TRUST INDEX (Feb. 14, 2019), <http://www.financialtrustindex.org/index.htm>.

⁶ Patrick Leddin, *How the High Cost of Low Trust Hurts You and Your Organization*, LEDDIN GROUP (Oct. 11, 2018), <https://leddingroup.com/how-the-high-cost-of-low-trust-hurts-you-and-your-organization/>.

the belief that the corporation is inherently untrustworthy.⁷

If you think that the general low trust in for-profit organizations is sobering, consider how citizens see government. For over 50 years, the Organisation for Economic Cooperation and Development (OECD) has “helped forge global standards, international conventions, agreements and recommendations in areas such as governance and the fight against bribery and corruption, corporate responsibility, development, international investment, taxes, and the environment.”⁸ The organization consists of 34 member countries including the United States, Australia, the United Kingdom, Mexico, and Japan. In 2014, OECD reported that only 40% of citizens trusted their government. “Trust in government is deteriorating in many OECD countries. Lack of trust compromises the willingness of citizens and businesses to respond to public policies and contribute to sustainable economic recovery.”⁹

Levels of trust in government differ among countries, but nearly all are reporting unprecedented lows. According to the Pew Research Center, the United States is experiencing historic lows in the public’s trust in government. “In 1958, when the American National Election Study first asked this question, 73% [of Americans] said they could trust the government just about always or most of the time.”¹⁰ Now, “[o]nly 19% of Americans today say they can trust the government in Washington to do what is right.”¹¹

Widespread mistrust acts like a brake on the economy. Everything in the supply chain slows down because transactions have to be regulated, verified, documented, and double-checked. Deals take forever because due diligence is now *intense* diligence. Costs go up at every point. Low levels of trust in government and business conspire

⁷ COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 44–45 (Oxford Univ. Press 2013).

⁸ ORG. FOR ECON. COOPERATION & DEV., SECRETARY-GENERAL’S REPORT TO MINISTERS 10 (2016).

⁹ *Trust in Government*, ORG. FOR ECON. COOPERATION & DEV., <http://www.oecd.org/gov/trust-in-government.htm> (last visited Nov. 4, 2019).

¹⁰ *Beyond Distrust: How Americans View Their Government*, PEW RES. CTR. (Nov. 23, 2015), <http://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/>.

¹¹ *Id.*

to make everything cost more and take longer. An example: The Sarbanes-Oxley regulations in response to the scandals at Enron and World-Com are unbelievably time-consuming and expensive—one study pegged the costs of implementing just one section of the law at \$35 billion!

I. Trust—a performance multiplier

When an individual, team, or entire government agency is known for being trustworthy, the bad news is good news. People, both inside and outside your organization, are hungrier than ever to work with and support people they can trust. At every level of your organization and in every interaction, the “economies of trust” are at work. Consider this: trust always affects two measurable outcomes—speed and cost. When trust goes down, speed goes down and cost goes up. This creates a *trust tax*. When trust goes up, speed goes up and cost goes down. This creates a *trust dividend*. It’s that simple, real, and predictable.

How do you feel about those relationships where trust is high? How effective is your communication with a person you trust? In our experience, it’s easy, simple, and fast. Even if we’re dealing with a tough issue, it can be resolved with the person quickly. In high-trust relationships, you can misspeak, but you don’t feel like you’re walking on eggshells, worrying that you’ll offend the other person or make a commitment by accident.

Conversely, when trust is low, it seems that no matter what you say, your words are misunderstood or taken out of context. Communication is nearly impossible, even about the most trivial things.

Trust is the great accelerator. Where trust is high, everything is faster and less complicated, and where trust is low, everything is slower, costlier, and encumbered with suspicion.

Once we understand the hard-edged, measurable economics of trust, it’s like putting on a new pair of glasses. We can see the quantifiable impact everywhere we look. If we have a low-trust organization, we’re paying a tax. While these taxes may not conveniently show up in financial reports as “trust taxes,” they’re still there, disguised as other problems. Once we know where and what to look for, we see low-trust organizational taxes everywhere, including the following: redundancy, bureaucracy, politics, churn, fraud, disengagement, and turnover. Have you ever seen low trust cause people to leave your organization? If so, who typically leaves? More often than not, it’s the people you

want to stay. Fortunately, just as the taxes created by low trust are significant, the dividends of high trust are also incredibly high.

When trust is high, the dividend we receive is a *performance multiplier*, elevating and improving every dimension of the organization. Specific dividends include the following: increased alignment, enhanced innovation, improved collaboration, stronger partnering, higher engagement, better execution, and heightened loyalty. When you add up all the dividends of high trust—and you put those on top of the fact that high trust decreases or eliminates all the taxes as well—is there any doubt that there is a significant, direct, measurable, and indisputable connection between high trust, high speed, low cost, and increased value? Indeed, trust is the one thing that changes everything!

For organizations, trust is critical both internally and externally. In fact, given the performance multiplier effect of high trust, leaders who make building a high trust culture a priority are in a position to achieve unprecedented results. Creating this culture is key to accelerating mission success. And creating such trust is a skill—a performance multiplier—and arguably the key leadership competency needed in today’s low-trust environment.

The job used to be . . .	The job that you must do now . . .
To be one of many government organizations doing good work.	To become the <i>most trusted</i> organization in the government.

II. How to build it: The five waves of trust

But how do you do it? What is the method for building a culture where trust is prevalent?

In *The Speed of Trust*, Stephen M. R. Covey presents a “framework, language and process” that enables us to establish and grow trust at five levels, or contexts, what he calls “The Five Waves of Trust.”¹² This model derives from the “ripple effect” metaphor that graphically illustrates the interdependent nature of trust and how it flows from the inside out, starting with each of us. It also gives us a framework so we can think about trust, a language so we can talk about trust, and a process so we can do something about actually creating trust. The

¹² COVEY, *supra* note 1, at 10.

underlying principle behind the first wave, Self Trust, is *credibility*.¹³ The key principle behind the second wave, Relationship Trust, is *behavior*.¹⁴ The key principle behind the third wave, Organizational Trust, is *alignment*.¹⁵ The underlying principle of the fourth wave, Market Trust, is *reputation*.¹⁶ And the principle underlying the fifth wave, Societal Trust, is *contribution*.¹⁷ The principles are cumulative as we move from the inside out, creating an exponential effect in growing trust. While the principles are cumulative, the first two principles—credibility and behavior—represent the twin building blocks for how trust is built.

III. Trust starts with who you are

Where does it start? Ultimately, trust starts with you—with your personal credibility. In *The Speed of Trust*, Covey explains how credibility is the foundation on which all trust is built and how, in the long run, you'll never have more trust than you have credibility.¹⁸ Credibility is a function of two things: (1) your character (who you are—your integrity and intent); and (2) your competence (what you can do—your capabilities and results). Competence is visible above the surface, while your character, like the roots of a tree, lies beneath the surface and feeds your success—or lack of it.

If I were doing business with you, and you knew that I had all the right professional qualifications and skills but didn't keep my word, you wouldn't trust me, and everything would stop. My lack of character would prevent you from doing business with me, even though I might be the best at what I do. Think of the many high-profile athletes and executives with world-class competence the public no longer trusts because of some very deep lapses in character.

Conversely, if I were doing business with you, and you knew that I was honest and cared about you but didn't have the right capabilities or a track record of results, you also wouldn't trust me, and everything would stop. My lack of competence would undermine trust, even though I might be extremely honest and caring. You might trust me to

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 42.

watch your home if you went on vacation, but you wouldn't trust me on a key project or deliverable.

Both character and competence are vital to building trust, with character being the deeper root, the first among equals. Drilling a level down on the character and competence dimensions enables you to assess yourself against what Covey calls “the 4 Cores of Credibility”—the first two cores belonging to character and the second two belonging to competence.¹⁹

The first core of credibility is *integrity*. To use the metaphor of the tree, integrity is the root. It means honesty, truthfulness, and congruence. It means doing the right thing. A great educator, Dr. Karl G. Maeser, described what it means to have integrity:

Place me behind prison walls—walls of stone ever so high, ever so thick, reaching ever so far into the ground—there is a possibility that in some way or another I may escape; but stand me on the floor and draw a chalk line around me and have me give my word of honor never to cross it. Can I get out of the circle? No. Never! I'd die first!²⁰

The second core of credibility is *intent*. In the tree metaphor, it's the trunk—part of it is beneath the surface, part of it is above. Intent refers to our motive and agenda. The motive that best builds credibility and trust is when you care about the people you're leading—and they know you care about them. The agenda that best builds credibility and trust is when you are open and seek mutual benefit—that's called Win-Win. Think about it: When you suspect a hidden agenda from someone, you question everything they say and do. Gandhi put it this way: “The moment there is suspicion about a person's motives, everything he does becomes tainted.”

The third core of credibility is *capabilities*. On our tree, capabilities are the branches that produce the fruits. Capabilities refer to your ability to inspire confidence and the means you use to produce results. Capabilities comprise your talents, skills, expertise, and knowledge. The key question here is this: Are you relevant? A family doctor might

¹⁹ *Id.* at 55.

²⁰ RONALD J. BURKE ET AL., CRIME AND CORRUPTION IN ORGANIZATIONS: WHY IT OCCURS AND WHAT TO DO ABOUT IT 176 (Gower Publishing 2012) (internal quotation marks omitted).

have integrity, his motives might be good, and his track record might be strong, but unless he's trained and skilled to perform a particular task at hand—brain surgery for example—he'll be lacking in credibility.

The fourth core of credibility is *results*. Results refer to your track record, your performance, and getting the right things done. Results matter enormously to your credibility. People won't and shouldn't trust you if you are unable to “deliver the goods.”

Each of these four cores—integrity, intent, capabilities, and results—is vital to personal and organizational credibility, and credibility is the foundation on which all trust is built.

IV. Trust is strengthened by how you act

After credibility, the other key building block to trust is *behavior*. Behavior means what you do and how you do it. People not only judge your results, they also judge how you achieved them—and how you behave in the marketplace. The astonishing spectacle of high-level business and government leaders pointing fingers and fighting each other during the Great Recession probably destroyed trust as much as anything. “In the midst of the worst economic crisis in decades, people saw their leaders not leading but squabbling and name-calling,” explains former San Francisco mayor Gavin Newsom.²¹

It's not enough just to talk about a behavior: You have to put it into action and into practice. Think about trust and your relationships in terms of a bank account—making deposits and withdrawals. Deposits and withdrawals ultimately manifest themselves as behaviors. In *The Speed of Trust*, 13 high-leveraged, trust-creating behaviors are specifically identified.²² These include keeping commitments, righting wrongs, practicing accountability, demonstrating respect, listening first, and talking straight.²³ The opposite of these 13 behaviors diminish or even destroy trust: breaking commitments, denying wrongs, shirking responsibility, showing disrespect, failing to listen, and lying.

While these behaviors and their opposites are straightforward and common sense, all too often they are not common practice. The common practice for far too many people and organizations tends to be

²¹ GAVIN NEWSOM, *CITIZENVILLE 12* (Penguin Press 2013).

²² COVEY, *supra* note 1, at 125–26.

²³ *Id.* at 231–32.

what are called *counterfeit behaviors*, like “spinning” a story so it is technically true but leaves a false impression instead of talking straight. Other common counterfeit behaviors include covering up a mistake instead of righting the wrong, having hiding agendas instead of creating transparency, blaming others instead of practicing accountability, and overpromising and under delivering instead of keeping commitments.

More often than not, it’s the 13 counterfeit behaviors, perhaps more than the 13 opposite behaviors, that trip up people and organizations, causing them to lose trust. This is because it’s fairly obvious that the opposite behavior will destroy trust (for example, lying), while the counterfeit behavior, like counterfeit money, is deceptive in that it appears to work, but ultimately diminishes the trust (for example, spinning).

The following story has been told throughout offices of U.S. Attorneys and highlights the enduring impact that can come when a credible, high-trust leader demonstrates courageous, trust-building behaviors.

When Jeff Sessions was the U.S. Attorney in the Southern District of Alabama in the late 1980s, one of his Assistant U.S. Attorneys was assailed by 11 defense attorneys out of Miami, Florida, claiming that the Assistant United States Attorney (AUSA) had committed all manners of prosecutorial misconduct. The claims were spurious, but because the defense attorneys were from another state, they apparently felt that they had nothing to lose in making false and outrageous claims against an AUSA in Mobile, Alabama. Upon learning of the motions of prosecutorial misconduct against his AUSA, Sessions told the attorney he would be appearing for her in court on the motions. On the day of the hearing, Sessions entered the courtroom with his AUSA to face a barrage of accusations that went on for hours.

When the defense attorneys had spewed their worst, Sessions started his defense of his AUSA. His indignation was obvious as his face turned red and his voice became louder. He knew his AUSA was being abused, and he wanted to make a clear statement that the U.S. Attorney would take a hard line against spurious attacks on members of his team. A courtroom observer would later remark, “It was like Gucci-shoed lawyer meets junk yard dog.” As Sessions’s rant went on, the defense lawyers started to eye the exits and seemed to lose interest in making any further arguments.

At some point, the district court judge attempted to cut Sessions off, but Sessions continued to berate the defense lawyers for their attacks on a prosecutor he knew was in the right and undeserving of the scandalous claims made against her. Finally, the district court judge said, “Mr. Sessions, you are going to have to sit down and shut up.” The judge and the U.S. Attorney had a mutually respectful relationship, which both valued, but Sessions was willing to risk offending the judge in order to send a clear message that he would back his lawyers when they were in the right.

Within minutes, what happened in the courtroom made it back up to the entire U.S. Attorney’s Office: “Did you hear what Jeff did? The defense attorneys left town with their tails between their legs.” This one widely known event created a lasting belief that the U.S. Attorney was willing to risk his own reputation with a federal judge to protect his people. For years, the word went out: “The U.S. Attorney has our back.” Sessions trusted his people, and they trusted him. The team was empowered by an example set in a crowded courtroom in Mobile, Alabama, over 30 years ago, and it is still indelibly etched in the hearts and minds of those who were there during that time.

As a leader, your influence counts. By building up your own credibility and then behaving in ways that establish trust, you’ll go a long way towards creating a sustainable culture where trust flourishes.

About the Author

Shawn D. Moon has worked with clients across the globe, from Fortune 500 to governmental organizations, bringing his first-hand experience in leadership and management, sales and marketing, and consulting services to help them achieve remarkable results for over 30 years. His deep knowledge and robust experience inspire others to become leaders through personal effectiveness and execution.

Shawn founded FranklinCovey’s Government Services Division and, for several years, led the company’s efforts with local, state and federal agencies—including military, civilian, and law enforcement agencies.

In addition to his work with Government Services, as the Executive Vice President at FranklinCovey, Shawn had responsibility for FranklinCovey’s worldwide direct offices, as well as the company’s Speed of Trust practice, Execution practice, Sales Performance practice, and Customer Loyalty practice.

Shawn is an experienced executive and Wall Street Journal best-selling author. He is a author and co-author of several books, which include the following:

- *Building a Winning Culture in Government: A Blueprint for Delivering Success in the Public Sector;*
- *Fierce Loyalty: Cracking the Code to Customer Devotion;*
- *Talent Unleashed: 3 Leadership Conversations to Ignite the Unlimited Potential in People;* and
- *The Ultimate Competitive Advantage: Why Your People Make All the Difference and the 6 Practices You Need to Engage Them.*

His books have been published in multiple languages across the world.

Shawn has been on faculty for instructing senior leaders at FranklinCovey's Executive Leadership Week. He is a highly sought-after speaker, having address leaders across the world and has shared the stage with notables such as leadership expert and best-selling author Seth Godin, Olympic Gold Medalist Michael Phelps, and Apple Co-Founder Steve Wozniak.

He was previously a Principal with Mellon Financial Corporation where he was responsible for business development for their Human Resources outsourcing services. Shawn also coordinated activities within the consulting and advisory community for Mellon Human Resources and Investor Solutions.

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Leading Change in a Government Agency

Richard W. Moore
United States Attorney
Southern District of Alabama

I. Who cares about culture anyway?

Deke was a veteran special agent for the Tennessee Valley Authority (TVA), Office of the Inspector General (OIG), in Knoxville, Tennessee. Earlier in his career, he had been “first in the door” as a local police department SWAT commander. Just as when he played college football, he gravitated toward the “contact” part of the job. Now, he found himself sitting in a room with other members of the TVA OIG hearing the Inspector General (IG) talk about learning how to have a “crucial conversation.” After about 20 minutes, Deke raised his hand and tersely said, “This culture stuff is interesting and all, but can I go? I have real work to do.”

Who cares about culture? Alabama football coach Nick Saban, for one. Coach Saban is considered by many to be the greatest coach in college football history. Everyone else chases him and wants to beat him. How he gets young 18- and 19-year-old, high-octane football players to care about team culture is a bit of a mystery. But what we do know is that Nick Saban’s belief in culture is important enough for him to bring in Dr. Kevin Elko every year to talk to his players about it. Dr. Elko explains that culture is about deciding “who you want to be,” whether it is a college football team or a Fortune 500 company. Leaders in college sports as well as in business believe the old adage, “Culture eats strategy for breakfast.” Dr. Elko will tell you that if you skip over the culture work, you will pay for it later.

Back in 2011 when Deke raised his hand and said, “Hey I have real work to do,” I had no idea what Coach Saban would have said in response. Now I think do. (Ok, yes, I know that Deke would not have said that to Coach Saban.) I think, however, that Coach Saban would have said, “This is real work.” The “real work” part of culture work is simply “stacking hands” on what behaviors the football team or corporate team decides will best propel them to accomplish the mission, whether it is winning a national football championship or gaining more market share. If it is real culture work, there is nothing fuzzy or “Kumbaya-ish” about it. Real culture work is hard. It takes

courage and focus. That is why most “culture change” efforts fail. Looking each other in the eye and being accountable to each other for the good of the team is actually a rare thing. If a football team, a company, or a U.S. Attorney’s Office (USAO) can sustain world-class culture, it will translate into world-class performance. Just ask Nick Saban.

Oh, and Deke? When he asked that question, “Can I go?” I paused and just said, “Hang with me here, Deke.” He did, but begrudgingly. After about a year, he came back to me and said, “Hey, you know all that training we did about how to talk to each other and be respectful but direct?” I said, “Yes, how has it been for you?” He smiled and said, “It really seemed like a waste of time to me at first, but then I started trying it with my 15-year-old son at home. I think this kept us from going off the rails. We can talk to each other about anything now, and it really feels good. I think it helped me here at work too, particularly with interviewing witnesses. In an interview, I know what to say now in the first 20 seconds of the conversation to build some trust with them. Before we worked on holding these really awkward conversations, I think I probably pushed too hard right off the bat. I would never have believed it, but I think I am a better special agent now.”

My experience as an Assistant United States Attorney (AUSA), an Inspector General, and now a U.S. Attorney, causes me to believe that too often we skip over the culture work because we are focused on the most urgent operational task in front of us. The metrics we use to gauge how we are doing operationally mask a hole in our program. Years later, we wonder why it did not last.

Whether you are a special agent, an auditor, or an attorney, chances are, no one offered you a class in “How to Build a Winning Culture.” If you were pulled off the line and told to supervise a division in your office, chances are you were good at your job, but never had much experience actually building a team and leading people. That was certainly true for me. This article will not make up for that gap in your education, but it will give you an outline to do the critical culture work that is usually missing in most organizations. I offer what you will read here in all humility because, unfortunately, I learned most of it by doing the wrong thing first. As it turns out, education is expensive.

II. Grading your own test

Over the years, I have seen a pattern develop among leaders when they are asked, “How’s the culture of your office?” The responses generally fall into two camps: (1) leaders who “grade their own tests”; and (2) leaders who have an independent measurement of culture. I can readily identify with the first group because, as the IG at the TVA, I was pretty smug about our office culture. I was confident that our culture was “great” and told people. I did so in good faith and with absolute confidence. In retrospect, I was “grading my own test.”

When I ask IGs or U.S. Attorneys about their office culture, the response that I often get is the same one I gave and for the same reasons. What I said was, “Well, you know I have a great staff, and they tell me that my folks are really happy, and everyone is doing fine. Oh sure, we have some soreheads, but I am dealing with them.” I would add, “You know, I walk the halls, I have an open door policy, my people talk to me, and they really tell me what’s on their minds.” I always mentioned that “our work has never been better, and we are hitting it out of the park.” Most of that was true, but it turns out that I was happily delusional and about to have a rude awakening.

For a variety of reasons, I approved an employee engagement survey in 2010 at the TVA OIG, and the story I had been telling about our great culture started unraveling. It turns out that I was watching the duck on the surface of the water when there was a lot of churning below the water that I was not seeing. The survey revealed that my employees had low trust in me as their leader, and many of them were planning to jump ship and leave as fast as they could. They would not recommend the TVA OIG as a place to work, and they were dissatisfied with their jobs.

Finally, I learned that employees and my direct reports did not think it was safe to offer an opinion differing from mine, and they did not think I really cared about them. It created an environment where one of my managers was able to sexually harass young female auditors in a division of my office, and no one ever reported it because the employees were not sure that I would care. I was shocked. I vowed never to be that ineffective or clueless as a leader again; I had a high-risk culture, and I did not know how to mitigate what I now recognize as a very high risk. Additionally, I realized that I neglected to communicate my values and what was important to me as a leader, other than putting operational points on the board.

Fast forward to 2015, when the TVA OIG was named a “Best Place to Work” organization in the federal government, having the highest raw score ever recorded on the Office of Personnel Management Federal Employee Viewpoint Survey (OPM Viewpoint Survey). That score of 96.3¹ was not a number in a vacuum, but represented a transformation from a high-risk culture to a sustainable, high-performance team of highly engaged employees who owned the culture that they had created. The TVA OIG has been at the top of the list of all federal agencies ever since, even with a change of leadership at the senior management level in 2017.²

What changed? The single most important thing we did as a management team was to start focusing on culture as a way to sustain high performance. Previously, our approach was to deal with poor employee performance, our employee attrition rate, and what we called “HR problems” on an ad hoc basis. We had a detailed strategic operational plan but a bush league culture plan. We had legitimate metrics for assessing whether we were meeting our operational goals, but no metrics for assessing the strength of our team. We were judging our leadership effectiveness by our own smug narrative. For conservative auditors and lawyers, this was risky behavior, but sadly, the norm in most government agencies.

Our focus on culture started with our management team accepting the results of the OPM Viewpoint Survey as a legitimate measure of the perceptions of our employees. Rather than dismissing survey results as “a platform for the whiners,” we accepted that, if the majority of employees said they would not recommend our office as a good place to work, we had a problem. If the survey results indicated that the majority of employees did not have confidence in senior leaders, we had a problem. We made a fundamental shift in our philosophy about employees. Rather than suggesting that employees are lazy and have to be watched all the time, we started extending trust to our employees and embracing the philosophy that most people want to do a good job and can be trusted to do so. We put more faith in the motives of our employees when they gave us feedback about how

¹ *Agency Report, Office of Inspector General (TVA), BEST PLACES TO WORK FED. GOV'T.*, <http://bestplacestowork.org/rankings/detail/TV01> (last visited Nov. 6, 2019).

² *See Best Places to Work Agency Rankings, BEST PLACES TO WORK FED. GOV'T.*, <http://bestplacestowork.org/rankings/overall/sub> (last visited Nov. 6, 2019).

they thought we were doing. We also started providing employees with a low risk and anonymous way to give us feedback that we then acted upon as best we could.

Shawn Flinn is the Chief Human Resources Officer for the Executive Office of U.S. Attorneys. As Mr. Flinn indicates in his article, *The Case for Employee Engagement*, all the research shows that employee engagement surveys are a reliable predictors of sustainable operational performance.³ A key component here is the “sustainable” part. As IGs and as U.S. Attorneys, we can push, drive, and coax high performance out of our people for a while. This is what politically appointed leaders sometimes do with little or no interest in improving a culture that was developed (often dysfunctionally) over many years by their predecessors. Low trust and escalating frustrations of employees that are not addressed, however, will inevitably irrupt and interrupt operational success. This issue has occurred both in the IG community and in USAOs. On some occasions, it has, unfortunately, resulted in the removal of a presidentially appointed IG or U.S. Attorney.

III. How to use employee engagement surveys

There are four cardinal rules for using employee engagement surveys. First, take the time to get as much buy-in from your management team as possible before you start surveying your employees. Initially, first line supervisors tend to be fearful that employees will give answers on a survey that will be used against them by upper management. The reality is that, if as a leader you have been grading your own test, you may discover (as I did in 2010) that one or more of your supervisors should not be in management. Even good managers who are trustworthy and competent may still resist the survey process because they have promoted the grading your own test approach and they do not want to rock the boat. What the managers have been telling you, as the leader of the organization, may not marry up with the survey results. They need to know that if that is the case, you are going to fix it as a team after some respectful dialogue and analysis. Make it safe enough for them to express their doubts about the wisdom of the boss “opening Pandora’s box.” The

³ Shawn Flinn, *The Case for Employee Engagement*, 68 DOJ J. FED. L. & PRAC., no 1, 2020, at 85.

more you can encourage them to vent up front, the better the process will go. Ultimately, this is about leadership. It is as simple as this: The more you know about what your employees are thinking, the lower your risks are as the most visible, and often politically vulnerable, person in the organization.

Second, do not let any of your managers opt out. You have to monitor efforts of supervisors to marginalize the significance of the survey process. That includes subtle signals to employees by managers that suggest responding to the survey is not safe and that the responses of employees are not anonymous. If the response rate of employees turns out to be very low, supervisors can then argue that unflattering survey results are not valid. Clear and firm messages from you regarding your belief in the validity of the survey should be reinforced early in the process. Once managers have gone through the survey process, there will be more buy-in the next time the survey is given. Keeping the lines of dialogue open and understanding the trepidation of these managers will ease the process.

Third, if employees have not felt heard over many years and the survey is the first opportunity for them to vent, prepare to get what may be harsh, and in some cases unfair, criticism of you and your management team. Demonstrating that you don't have thin skin and that you are not afraid of a robust discussion is critical to employees believing that this is a legitimate process. Tell employees you believe that if they are willing to express a different opinion than yours, you consider that a sign of progress. There is nothing that increases trust in a leader faster than making it safe to offer differing opinions without retaliation. This requires courage and confidence in your ability to engage in high-stakes dialogue without using your title to merely default to "now hear this."

Fourth, commit to transparency throughout the process. That means, when the results of the survey come back, you will share those results with your employees. Do not give in to the temptation to summarize the results yourself; bring in an independent third party to deliver the results in your absence. Let the third party field questions from your employees about the survey results. This will demonstrate that you are genuine about promoting a safe and robust discussion of the survey results. Have the independent third party inform your employees that he or she will not attribute any statement to any particular employee in the discussion with them but that the management team will be briefed on themes raised by the employees.

The more candid employees are, the quicker you can begin to build a more unified team and create a sustainable high-performing organization.

Finally, whatever employees say needs to be fixed, turn those things back to them by giving the “fix this” list to a dedicated group of employees tasked with making recommendations to the management team. Do not, under any circumstances, take on the task of coming up with solutions for employees. Start the process of involving employees directly in owning the challenges of the organization. Once employees give you their recommendations, say yes to as much as you can and inform employees of your thoughts about their recommendations. You are likely to find that most of what employees want matters more to them than it does to you, and it will be easy to agree to their recommendations. Implement changes quickly to show responsiveness to the process and to contradict naysayers. Err on the side of more dialogue at this point in the process and particularly about items where you have to decline to follow employee recommendations.

IV. Getting the sequence of culture change right

Ellen heard what some other IGs were doing to improve their office culture and set out to implement some of the techniques she knew that other IGs like herself were doing. Her OIG had about 150 employees and 35 more contractors. The main office is in D.C. with four regional offices. Before Ellen was appointed by the President and confirmed by the U.S. Senate, she had been the legal counsel for a large federal agency. Ellen liked the idea of conducting a SWOTs survey (Strengths, Weaknesses, Opportunities, and Threats) and setting up an employee advisory council,⁴ so she called her management team together and outlined how she wanted this implemented.

Her staff politely nodded as they took notes, but all of this was hitting them cold. At the “meeting after the meeting” minutes later, a few members of Ellen’s staff sat down over coffee to collect their thoughts. Becky, Ellen’s HR Director, said, “I know that Ellen has the right motives here, but you know our employees, and I am afraid this is just going to give a platform to the dissenters in the office.” “Yeah,

⁴ See Trent Shores, *The Leadership Council Model*, 68 DOJ J. FED. L. & PRAC., no. 1, 2020, at 53.

sounds like we are turning the asylum over to the inmates if you ask me,” Bob, the head of Investigations, said. Taci, the director of Contract Audits, said, “Well, we have seen this before, right? Our job is to not let her drive the bus off the cliff, so how are we going to handle those ‘SWOTs’ she wants us to do?” “That’s easy,” Becky replied. “Make sure you tell your folks that we’ll know what they said in there and there are no free swings.” “I agree,” Bob added, “Make sure we all get our people on that ‘Leadership Council’ or whatever they call it. They’ll know what to do.” Taci sighed and said, “Ok, well, I feel better about this. We can survive this too.”

Having an idea about what the “end state” should look like and what the sequence to culture change should be is critical to success. Most efforts at culture change fail. Leaders hoping to start a culture revolution often end up defeated before the first shot is fired. Knowing the dynamics of your group that naturally resist change is essential to a successful culture change effort. Getting too far ahead of your management team can be a disaster. Likewise, not “going first” and actually leading and being direct will cause the initiative to stall early.

Most of us in leadership positions are usually guessing about that critical balance of building a consensus but also being as direct as necessary, depending on where you are in the process. This delicate balance reminds me of a wiry and weathered old cowboy who was trying to teach me how to get a reluctant horse on the horse trailer. Finally, in frustration after not making much progress with me, he said, “Ok, listen. This is one of those ‘better felt than telt’ things. Feel the motion of the horse and move with him. Be his partner. Don’t overthink it.” It took a few more attempts, but I stopped fighting the horse, and I focused on getting the horse to “join up” with me in a direct way that was not aggressive. Finally, Pete (my horse) popped up on the trailer on his own with just a little direction from me.

You should have seen my smile. Working with people involves that same delicate balance: Do not be aggressive about it, but do be direct. Invite them to join up and make it about them as much as possible.

In practical terms, what this means for you if you are leading culture change in your organization is that you are going to have to “up your game” if you want to be successful. Here are seven things that will help: (1) understand the principles of creating an employee-driven culture before launching the initiative; (2) commit to change your leadership style to be more effective, ask people who

know you at work—“How am I doing?”—and lead on the really hard stuff, like resolving conflicts with poor performers; (3) make it safe enough for your management team to express their reservations about what you are proposing to do; (4) explain to your staff that you will not allow anyone to opt out and that you will not tolerate staff members not making it safe for employees to raise issues in the SWOTs or on the Leadership Council; (5) identify the “influencers” on your management team and among your employees and get them on board early; (6) bring in consultants to teach your people how to resolve conflict and to raise issues in a respectful way; and (7) look for the “early wins” to show that the culture change effort is a benefit to both employees and managers.

The sequence of steps you take as a leader to improve the culture is not always intuitive. For example, encouraging employees to go directly to other employees to initiate resolving something between them is a necessary part of creating a healthy culture. Not proving the skill set to do that beforehand can create a worse culture. Sue recognized that she had been stewing about something for a while, and she decided to follow the U.S. Attorney’s admonition to “not let little things become big things.” So when she saw Jane (another legal assistant like Sue) in the break room at lunch one day, she sat down across from her. “Jane, you know that the U.S. Attorney says we should go directly to the person we are upset with rather than just talking about them, so I am here to talk to you about something,” Sue began. “Ok, like what?” Jane stiffened up in her chair and waited for what Sue had to say. “Well, somebody in IT told me that you are one of three people who take up the most bandwidth on the internet because you are watching videos when you should be working. I have gone by your desk, and I have seen you on the internet watching those Ted Talks. I never took you for a slacker before, but now I wonder.” Jane’s jaw dropped as Sue spoke, and she was trembling as she replied, “Well, you can talk to Jim (the Deputy Criminal Chief) because about two months ago he asked me to start looking for Ted Talks that he might draw from when he goes out and talks to the community about drug abuse in schools. I try to look every day for something that Jim can use.” Sue, who is now looking at her shoes quietly, says, “Well, ok, I guess that makes sense. Sorry I brought it up.”

The sequence here becomes important. Encouraging employees to initiate resolving conflict should be done in tandem with providing training for employees on how to use, for example, the *Humble Inquiry*⁵ approach to avoid the scenario above with Sue. Likewise, standing up a Leadership Council should be done only after the office has gone through SWOTs with everyone, which provides a venting process, making it safer for those on the Leadership Council to begin their work. Ideally, the management team should first demonstrate that they think they can be better leaders and that they are willing to learn new skills to make it safe for employees to raise dissenting views. A common pattern is for employees to report back to the boss, “Hey, you seem sincere about this, but those managers are just waiting you out and they think this is all nonsense.” There are many “levers” for the U.S. Attorney to pull simultaneously, but the “make it safe” lever is one to pull very early.

While there is an appropriate order to culture change, do not fret about an exact order—what we are discussing here are general principles for the most part. While human nature is fairly predictable, there are no two organizations alike. Again, it is like my old horse trainer buddy told me, “it’s better felt than telt.” Know your people well enough to alter the order of things if it is going to move the culture along.

V. Making it stick

The end of the culture change cycle is a step that leaders often neglect. That step is getting a commitment from employees to “make it stick.” If you are successful improving employee engagement, employees see the benefits, and the organization is more productive. But when the effort crashes and burns, it is probably worse than if you had never tried. You will be yet another example the doubters point to saying, “See, it doesn’t work.”

Start thinking now about how to galvanize the good office culture the team has created from the most likely forces that can undermine it. There are, of course, no guarantees that an organization’s good culture will continue. There are definite steps that you can take, however, that increase the chances that what you and your people have built will survive.

⁵ See generally EDGAR H. SCHEIN, *HUMBLE INQUIRY: THE GENTLE ART OF ASKING INSTEAD OF TELLING* (1st ed. 2013).

First, when employees are to the point where they are saying that they want to keep the good culture they have created, then, and only then, will they be motivated to invest in sustaining anything. This is a delicate timing issue where you, as the leader, have to determine whether the organization has reached the critical “tipping point” before you start asking employees to think about sustainability. Don’t wait for 100% of your employees to get there (most experts agree that 90% is about the best you can expect), but when you get to a good two-thirds buy-in, start the discussion about sustainability.

Second, resist the temptation to drive this effort yourself. Sustainability has no chance unless it is employee driven. Start by asking employees for their views about what their greatest risks are for the good culture they have created. Do this in a way that allows for open discussion in SWOTs that focus on this single issue, but always let your Leadership Council solicit anonymous suggestions. By the time you do this, it should be safe enough for most employees to suggest solutions, even if they think it is contrary to what management thinks. But allow for an anonymous option. What you will be doing is a culture risk assessment.

Employees will tell you what they want to keep, what they view as the things most likely to “blow up” your culture, and what they are willing to do to mitigate the high risks they identify. Get them to name what they think is most likely to occur and which of those could most severely impact the culture. The highest risk that they will identify with the most severe damage to the culture should be that the management team is replaced by a management team that is either indifferent or hostile to what built the good culture. Giving employees a head start to prepare for that possibility empowers them in a way that is unique in any organization. Once they “stack hands,” that commitment becomes a strong bond independent of you and your management team.

Third, ask each division in your office to prepare a written sustainability plan that identifies what they are willing to be accountable to do to preserve the culture. For example, in a USAO, the Criminal Division might include in their written plan a commitment to go to lunch once a month as a group, discuss a communications skills book, or come up with one improvement in their processes every month. The Civil Division might have a very different lists they adopt, but the key is to build in accountability. One way to do that is to start monthly division meetings with a discussion

about whether the employees kept the commitment or not. If leadership does not give this visibility, it will likely fall by the wayside. You will be surprised how enthusiastic employees become in driving this once they own it. This is no longer “the boss’s idea” but theirs, and they enjoy telling you what they did on that Friday at lunch; that is building camaraderie in a way that you never could. They are invested in a pact among themselves that is unique among government organizations and one that will be a source of their identity going forward. As a leader, it never gets better than this.

VI. Resolving conflict within the team

Every organization has what is called “legacy issues” that usually involve unresolved conflict between team members. As a new leader in an organization, you ignore these unresolved legacy issues to your detriment. The earlier you bubble up those issues through SWOTs and the Leadership Council, the sooner you can focus on the kinds of conversations that need to occur across the organization. In terms of where this falls in the sequence of culture change, once team members start to feel safe enough to express why they distrust other members of the team, the work to resolve conflict should begin in earnest. Ideally, employees should initiate conflict resolution themselves and have the skills necessary to conduct what are often high-risk conversations. Few employees are equipped, however, to initiate and hold these conversations. Forcing this action before team members are ready may do irreparable damage to the individuals involved and to the team.

There is a predictable and organic cycle in leading culture change in any organization, and understanding what is “normal” will steel your nerve going through the process. My orientation is IG offices and USAOs. I have had experiences in both organizations that lead me to believe that what I have encountered is not because of the nature of the work in those offices or that one office had many auditors and the other had many lawyers. I have concluded that I experienced the same dynamics in both organizations leading culture change because both organizations had people in them. Some vagaries aside, human nature tends to be fairly predictable. See if some of what I describe here is familiar to you.

Victoria and Justin do not remember exactly what started it, but they do know one thing: they do not like each other. They are both criminal prosecutors in a large USAO, and both work primarily public

corruption cases. Sixteen years ago, “the freeze” occurred, and from that time on, Victoria and Justin spoke to each other only when absolutely necessary, and they never set foot in each other’s offices again. The federal special agents who worked with both Victoria and Justin learned early on that they were expected to pick sides. Agents were viewed with suspicion if they brought cases to both Victoria and Justin rather than lining up according to the unspoken, but ironclad, rule of “you’re either on one side or the other.”

This dysfunctional and common dynamic coagulated over the years into what may be fairly characterized as “a hot mess.” Victoria’s agents were working the same criminal targets that Justin’s agents were working, and those agents were not sharing intelligence with each other because they knew to do so would jeopardize their relationship with their prosecutor. Victoria’s agents were working with the Georgia Attorney General’s office, and they learned that one of Justin’s agents was about to be indicted by the AG for running a fraudulent scheme with one of his informants. Justin was unaware of this because Victoria’s agents did not share what they knew would have been useful information to Justin. The U.S. Attorney approved the consideration of the agent for a prestigious Department of Justice (DOJ) award based on Justin’s recommendation. The agent was indicted a month later. The U.S. Attorney discovered that she was not told about the problem because the two prosecutors in her office were at war with each other.

Unresolved conflict in any organization can negatively affect operational performance. These dysfunctional relationships are allowed to exist for primarily three reasons: (1) the consequences of allowing them to continue are not fully appreciated; (2) there is not sufficient motivation to address them head on; and (3) the parties involved lack the skill set to hold the awkward conversations that should have occurred.

The purpose of this article is not to outline the details of how these awkward conversations should be held. There is specific training available that all employees in any organization should have to equip them to resolve the inevitable conflict that arises.⁶ Most organizations

⁶ See David Maxfield, *Crucial Conversations: The Science of Speaking Up*, 68 DOJ J. FED. L. & PRAC., no. 1, 2020, at 73 (describing the Crucial Conversations training). The VitalSmarts Crucial Conversations training

will not be able to develop a healthy culture without the investment in this type of training.

The point here is to stress the importance of identifying unresolved conflict among team members, set the expectation in the organization that conflicts between employees will not be “stuffed” but will be addressed directly, develop a plan to identify the conversations that need to occur, and provide the specific training to enable employees to successfully hold these important conversations. This is where “Me First Leadership” is critical.

Me First Leadership is just the opposite of what it may seem at first. Rather than you as leader being catered to and you pulling rank, you, as the leader, model the behaviors of a healthy culture by taking on the thorniest relationship problems. You, as a leader in your organization, must go first in one of the most difficult parts of changing the culture.

Employees need to experience you demonstrating that this is not just an amorphous theory, but a new part of your culture. When there is a difficult conversation to be had, you, as the leader, have to initiate having it. You demonstrate how to do it respectfully but directly. You take the training necessary to equip yourself to be artful at holding these conversations. You coach others to do the same. If you do, others will follow your lead, and this will be the catalyst that drives your culture change. This is the single most important dynamic of creating a new culture. No high-performance organization remains as such if it does not execute on this critical behavior of the team.

VII. Building the employee-driven culture

Political appointees with a limited term face a particularly daunting challenge in leading culture change. The reality is that, unless your organization embraces the change as their own before you leave office, the chances of it sticking are slim. Balancing being direct enough to set expectations and stepping back at the right time to allow employees to make it their own is a delicate matter. If you get too far ahead of your team, you are likely to frustrate them, but if you don’t provide enough structure and also model the expected behaviors yourself, your team may flounder.

provides a common language to your team that becomes a kind of shorthand to resolve conflict.

Sailors know that they have to watch closely the tell-tales at the top of the mast to constantly trim the sails to maximize performance. Your tell-tales in your organization are equally important. For example, you should identify and cultivate the “influencers” in your office as quickly as possible. These employees are not necessarily people with titles or the loudest voices. Rather, they are employees that others watch to see if they are buying in to the culture change effort. Constant monitoring of what those influencers are seeing is critical, particularly for political appointees who cannot afford to lose any momentum.

Kathy surprised me by how influential she was in the office. I had begun to reach out to attorneys who I knew were respected for their courtroom skills to test whether the culture stuff was too much or not enough. I got good feedback from some of them, but I kept hearing, “You might ask Kathy.” This Kathy was not on my radar. Kathy was a legal assistant who rarely said anything in office meetings. Yes, I had noticed that in division meetings, when Kathy did speak, she was confident and measured, but after more office support staff and attorneys continued to ask, “Have you talked to Kathy?” I went into Kathy’s cubicle more out of curiosity than anything else.

As I sat down in a chair opposite Kathy, I grinned and said, “Ok, I give up. Everybody says I need to talk to you. Why is that?” Kathy smiled back, “Got me.” I looked over my shoulder to see who might hear us and then leaned forward, “Seriously. I think I might need some help here.” Without missing a beat Kathy said, “Well, that’s a start.” “What do you mean?” I said. She had my attention. “You seem to be always watching the clock, and we get that you know you may have just a few years to do this, but really, it’s too much too soon.”

I sat back, “Like how do you mean?” She sighed, “Most of us really like what you are trying to do, and you seem sincere, but this is all very new to us. We get that we probably have been a little dysfunctional before now, but this idea that we can resolve our differences and become a team sounds frankly like a real stretch. Some people here just don’t like each other, and they never will. You might want to slow down and get to know us a little better.”

From that first conversation with Kathy, I learned a couple of things. First, Kathy didn’t have a personal agenda or an axe to grind, and she just wanted what was best for the office. Second, employees trusted her, and she was an accurate telltale of office climate, just like those strips of cloth at the top of a mast on a sailboat. Finally, I

learned that I could trust Kathy to be straight with me and to keep a confidence if I told her something sensitive. I started making a habit of dropping by her cubicle to first ask about her mother who was in a nursing home and then to ask, “How am I doing?” It became a running joke with us, but I knew she would give me the straight scoop. I “trimmed the sails” every time I talked to her. Checking in frequently with your “Kathys” will guide your speed and direction as you help employees own the culture change.

VIII. Things that blow up a good culture

The two highest risks to losing the good culture that you and your employees have built are a change in leadership and the loss of funding for the culture change. You and your management team have to model the behaviors of a healthy culture, as well as providing the structure and training necessary to effectuate the change. The danger becomes a culture that is too dependent on you and your management team. The second risk is becoming dependent on a budget that provides training for things like conflict resolution or improving communications. The challenge is lateraling off driving the culture change from you to your employees. To do that, you have to answer this one question for your employees: “What’s in it for me?” That is a legitimate question and one on which the fate of the culture change initiative depends. In the beginning, employees will see this as “the boss’s thing” and not their thing. If it remains the boss’s thing, it will fail. This is particularly true if you have left the building and it is not the new boss’ thing.

Employees are motivated in any organization by a variety of factors, but one thing that you can depend on to motivate them is their desire to have more control over their own work environment. Most human beings desire more autonomy and less what they typically describe as “micro-managing.” So, that’s what employees want. Now let’s consider what you want. While you might prefer that all your employees be happy, that is not your goal. Neither is it your goal to have a great culture. It is just that having a great culture full of happy employees tends to get you what you really want, which is operational success. In the beginning, it is easy to take your eye off the ball while you are building a better culture. It is critical that leaders, as they try to say “yes” to employees in terms of work place issues, continue to stress that our *raison d’etre* is the mission, not culture change.

Every organization needs some sort of employee advisory council to make recommendations to the chief executive, whether that is the IG or the U.S. Attorney. Giving employees an anonymous way to tell you what they want is a huge advantage to you as the leader. You will find that you will be able to agree to the majority of things employees want. As you hold discussions with them and announce that you are, for example, authorizing a more flexible telework policy and more flexible hours, what is important to you is that you can measure the increased productivity that you believe employees will be able to give you because you have allowed them to work in a more relaxed environment.

Always tie anything you give employees with meeting operational goals. Ask, for example, “How will we know that the office is benefiting from allowing you to do this?” Press them for what amounts to a commitment to deliver more productivity in exchange for a better work environment. Here is a reality that you know is true: Government employees choose whether to give you discretionary effort. Start building a consensus about how you and your employees can measure the increased productivity due to an increase in discretionary effort that stems from employees wanting to hang on to what you have given them that provides more autonomy and flexibility. Stress that “we are all about the mission all the time.”

There is a counter argument to this approach. I have heard some leaders say when presented with the approach outlined here, “I don’t need to coddle employees to accomplish the mission. I can drive high performance and never do any of those things.” Actually, that is true . . . for a time. In a military operation with a short duration, “driving performance” by a leader is effective. In an office full of auditors or attorneys, that approach usually fails over time.

In a USAO, for example, depending on a leader-driven culture has been the norm. If employee engagement survey results from those offices is any indication, that approach has resulted in a low trust environment, which generally means low production. An autocratic, top-down leadership style does not require employees to own their culture because the culture belongs to the leader and not the employees. For prosecutors who may stay in the same office for 30 or more years, being subjected to this type of leadership time after time tends to breed a culture of solo practitioners sharing office space rather than being part of a team. That is not particularly important to

the U.S. Attorneys who come and go. It is a lost opportunity to employees in the USAO.

The other threat that can blow up a good culture once you have built one is being too dependent on a budget. In the beginning, it is necessary to hire consultants to, for example, teach communication and conflict resolution skills. Sometimes, it is also useful to have those consultants advise your leadership team as you go through the various stages of culture change. If you are the leader of the culture change, however, before you leave the organization, the consultants should be out, and the employees should own the culture. Otherwise, it becomes too easy to be dependent on a budget and consultants rather than employees driving the effort.

We can only hit the highlights of the process of shifting from the traditional, top-down culture most common in government to a high-performance, employee driven culture, but here, in summary form, are the essentials: (1) set expectations that the culture will be characterized by mutual trust, mutual respect, and mutual accountability, and then as the leader, go first and demonstrate what that looks like; (2) let employees tell you what would make them more productive and happier, and then strike a bargain to give them those things in exchange for higher performance; (3) discuss operational metrics with your employees on a regular basis to demonstrate that you are tracking their performance; (4) let the Leadership Council collect the behaviors of the team that employees are willing to stack hands on so that employees can hold each other accountable rather than defaulting to “that’s management’s job”; (5) provide training that demonstrates for employees how to conduct what VitalSmarts calls a “crucial conversation.”⁷ This process will create a new and common language to resolve conflict and avoid letting little things become big things. If an organization does only this one thing, it will be better; and (6) have each division of the organization develop their own written sustainability plan that is a commitment to what they are willing to do to preserve the culture.

⁷ The Crucial Conversations program by VitalSmarts is only one of many such programs, and no endorsement is made here of any one of those specific programs. For more information, see Maxfield, *supra* note 6.

IX. Making it safe

Most leaders have an unrealistic assessment of how safe employees feel to offer a different opinion from the boss or management. The same leaders who will tell you they know their people feel safe routinely are often told the opposite by their employees when those employees have an opportunity to provide feedback in an anonymous way. This disconnect is common. Those of us in leadership naturally prefer to grade our own tests when we are able to do so. Ironically, this is actually self-defeating because we miss an opportunity to allow employees to tell us where they are stuck and not really “bought in.” Our fear of creating a record that contradicts the narrative we tell others about how well we are doing as leaders robs us of a powerful opportunity to build a high-performance organization. Employees are smart enough to figure out that the boss does not really want to hear anything that contradicts his or her narrative. This dynamic explains the high rate of failure for most organizations attempting culture change. It does not have to be that way.

Political appointees with limited terms know that the culture of their agencies is rarely at issue unless there is an embarrassing public incident. The metrics for being a “successful” government leader in an organization are usually strictly operational goals. Knowing this fact makes the investment in culture change questionable for most leaders. When the effects of poor culture hits the front page of the *Washington Post*, however, what often follows are sanctimonious cries for “heads to roll,” accompanied by diatribes about “this horrible culture.”

In response, leaders can opt for a variety of strategies in hopes of lowering their risks of the agency culture getting them in the media. One strategy is to double down on threats against employees that violate agency rules. Rule by terror can actually work for a time, but it is shortsighted and rarely encourages employees to lean forward and give the kind of discretionary effort that promotes higher operational performance.

Employees who are threatened by their leadership are unlikely to think of ways to improve the organization and are more likely to hunker down into a survival mode. What the boss might think is good to lower his or her professional risk is extremely detrimental to the culture of the organization.

The key, then, is providing leaders with a strategy that lowers their professional risk and, at the same time, promotes a high-performance culture. That strategy is very simple. It involves diffusing the very common frustrations of employees that often allow them to justify to themselves poor performance or bad behavior. Threatening them will not do that. The alternative, however, is not intuitive for most leaders and requires a great deal of courage. Making it safe for employees to vent and reveal where they are stuck is not for the faint of heart. Critics contend that this is merely giving a forum to the whiners, which they claim undermines the management team. There are many excuses managers give to not step down in the pit with their employees and have an honest conversation. The leaders who have chosen to do this difficult thing, however, tend to become enthusiastic proponents.

The “making it safe” strategy will work every time if it is done with the right spirit and with some understanding of the skill set required. You simply “work the model” and the model works every time. Employees will be skeptical because the likelihood is that they have never seen anyone in leadership do this. You have to resist your natural tendency to become angry and shut down when you first hear employees challenge the genuineness of your motives, which will surely happen; it is a process of dealing with years of pent up emotions that employees often have. It is, typically, a rough ride in the beginning. Most relationships worth anything usually are, and this strategy is all about building a healthy relationship between you and your employees.

Practically, there are many ways to do this in an office environment, but the best one is conducting what we call “SWOTs.” U.S. Attorney Trent Shores’s article, *The Leadership Council Model*, explains the mechanics of how SWOTs are conducted.⁸ While the stated purpose of conducting a SWOT is to allow employees to voice their views about what your organization’s strengths are, there is an even more important purpose. Employees need to see the boss make it safe for employees to give their views anonymously. Views that may, in fact, be contrary to your own. This is where prepping for what can be an awkward and stressful event is essential.

Employees are likely to be surprised if, instead of pulling rank and cutting off the discussion, you receive feedback without rancor and,

⁸ See Shores, *supra* note 4.

instead, ask for more details to help you understand their views. This practice, usually, is not smooth or pretty in the beginning, but as employees realize you genuinely want to hear them, you will start to have a real conversation. Instead of having a spokesperson give the group's views, employees will start to tell you in the SWOTs what they think without the need for anonymity. This is a tremendous breakthrough that sets the stage for discussing topics that are even more sensitive like, for example, any perceptions among employees that decisions by management discriminate against a class of employees based on race or gender.

These are perceptions that you need to know whether you agree with your employees about them or not. Also, you are modeling for your manager who accompanies you in the SWOTs and for employees in the group how you expect to communicate going forward. Dialogue that is respectful but direct is the expectation. Building trust in each other to give and receive feedback in a healthy way becomes the norm. The SWOTs becomes a catalyst for the transformation of the culture.

Keeping it safe requires attention to how employees may perceive how transparent you are about how things work in the office. For example, some leaders have a mindset that information should only be broadcast to employees on a need-to-know basis. That is how some employees meet new employees for the first time, when the boss brings them around the office announcing that they are now on the team. Does the boss have the right to hire whomever he or she wants and exclude employees in any part of the process? Absolutely. Will employees feel slighted and disrespected? Absolutely. The point is that making it safe extends beyond the SWOTs, and whatever progress you make in those SWOTs can be undermined by not thinking through how your management decisions are likely to be perceived by employees. Err on the side of transparency.

Psychological safety of employees is a prerequisite for building a high-performance culture. Moving from a top-down, hierarchal leadership style to a more collaborative, employee-driven style requires inviting employees to have a respectful dialogue with management. This requires leaders to go first on the really hard stuff, like asking employees to tell you what they are thinking when it might be painful to hear.

Operational success depends on relationships. Productive relationships are based on mutual respect, mutual trust, and mutual accountability. Leaders demonstrate that they are accountable to

their employees by sincerely asking for their input on the way the organization should operate. Employees will respond positively to a leadership style that is unique and refreshing.

X. Conclusion

The model of culture change described in this article has been referred to as the “Me First Leadership” model. That simply means that the champion of healthy organizational culture has to be willing to go first on the hard stuff. That requires a great deal of humility, patience, and courage. Staying in dialogue with employees when, as the boss, you can pull the plug anytime demands laser focus on building the team. Showing what being respectful of others looks like while everyone is watching is stressful. Holding yourself out to your organization as someone who is trustworthy is risky. Promising to be accountable even to your own employees is a novel concept. The good news is that this is not just theory. This model has a proven success record. Committing to be a “Me First” leader and following through pays big dividends. Work the model. It works every time.

About the Author

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The Leadership Council Model

Trent Shores

United States Attorney

Northern District of Oklahoma

On June 6, 2019, the United States commemorated the 75th anniversary of D-Day, the Allied invasion of Normandy. That day changed the course of history and represented one of the finest hours of American military heroism. Perhaps one of the best-known books (and later, television miniseries) about D-Day was *Band of Brothers*, the story of Easy Company of the U.S. Army's 101st Airborne Division.¹ The leadership of Major Dick Winters drives the story, but each member of Easy Company brought his own skills to the mission. Whether they were a communication specialist or a member of a mortar team rifle squad, each soldier fully understood his own expertise and that he could use that expertise to reach the common goal. Simply put, the men of Easy Company learned the immeasurable value of communicating and working together as a team to accomplish a critical mission.²

The Leadership Council in the Northern District of Oklahoma is a U.S. Attorney's Office (USAO) "Band of Brothers (and Sisters)," using individual expertise to collaborate on a common mission. An IT Specialist may work with the receptionist and an Assistant United States Attorney (AUSA) to solve a recurring issue. A docketing clerk may raise an issue unique to his work and find that those sitting with him are eager to help find a solution. Repeatedly, we find that the collective knowledge throughout the divisions in the office can be tapped to discuss issues and give solid advice and counsel to a U.S. Attorney and the senior leadership team.

I. Introducing the Leadership Council concept

An aspiration for every organization should be to develop, nurture, and sustain an employee-engaged office. Work environments with higher employee engagement report reduced absenteeism, increased retention rates, higher customer service ratings, increased innovation,

¹ STEPHEN E. AMBROSE, *BAND OF BROTHERS* (2001).

² *See id.*

and higher productivity. Employees also show increased discretionary effort in their everyday duties—the willingness to do more than the minimum and to think about doing things better. A Leadership Council is a proven way to promote and sustain employee engagement. It is a form of American democracy in the workplace.

The concept of a Leadership Council is best introduced first to the senior leadership team for discussion and debate. Even though the Leadership Council is an advisory group, rather than a decision-making body, support from the division chiefs and the administrative officer, as well as the U.S. Attorney and First Assistant United States Attorney (FAUSA), is vital to the success of the project. Ultimately, senior leadership will see firsthand that the collective knowledge and experience of the entire staff is the best source of information and innovative ideas about problems and potential solutions.

When introducing the Leadership Council to the office as a whole, a general outline of the organizational structure and role can be presented to the office via an email, followed by an all-hands meeting. The U.S. Attorney and FAUSA should present the Leadership Council concept to the entire staff and discuss how it will help to further the office mission. A Leadership Council Charter showing a basic structure and vision can then be circulated. In my office, the Leadership Council is charged with the following:

- (1) advocating for positive culture;
- (2) serving as a “think tank”;
- (3) suggesting recommendations to solve problems related to organizational performance;
- (4) focusing the leadership role of all participants;
- (5) discussing ways to celebrate USAO successes;
- (6) gathering, advocating, monitoring, and communicating the status of:
 - (a) improvement suggestions; and
 - (b) concerns and issues (including anonymously-posed topics).

II. Structure of a Leadership Council

Designed to be a representative body, the Northern District of Oklahoma’s Leadership Council originally included six voting representatives, selected yearly by their respective divisions. This structure worked well for an office with approximately 60 total

employees and has been successfully scaled to work in larger offices as well. The initial Leadership Council consisted of one AUSA and one non-AUSA, each from the Civil and Criminal Divisions, and two individuals from the Administrative Division. In addition to those six, the FAUSA, Division Chiefs, Deputy Chiefs, and the Administrative Officer have been permanent, non-voting members.

The voting representatives were to be selected yearly by their respective divisions. Through the Leadership Council's first year of experience, however, they learned that a staggered, two-year term would work better, so they implemented that change. Each division independently determined how they would select their representatives. One division voted for their representatives by secret ballot, while another solicited volunteers. Once established, the voting members selected a chairperson. The Leadership Council meets, at a minimum, every other month and schedules ad hoc meetings as needed.

The Leadership Council determines the frequency of its meetings with management, which has worked out to be approximately once a quarter. The Leadership Council also appointed subcommittees for "Open Line" projects and issues related to USAO "Sustainability." Before making any recommendation to the U.S. Attorney, the Leadership Council must first reach a consensus on the proposal.

III. Identifying your office's strengths, weaknesses, opportunities, and threats

In order to provide the Northern District of Oklahoma's Leadership Council with the information it would need to carry out its mission, every person working at the USAO participated in small group sessions. These meetings were intended to be brainstorming and trouble-shooting in nature, but the basic instruction was to identify Strengths, Weaknesses, Opportunities, and Threats (SWOTs). We held two rounds of SWOTs, with the first focusing on office procedures and processes and the second centering on culture and morale.

While participation was mandatory, the senior management team made every effort to create an environment of open and honest dialogue. Although lists of SWOTs facing the office were written on large paper, none of the comments were attributed to one person or even a particular small group. Each attendee had an equal voice, and no subject was off-limits.

This process turned out to be quite novel for the employees—never before had each employee been *asked* for their thoughts and encouraged to share their ideas, as opposed to simply knowing that “management’s door is always open.” Moreover, employees shared much more through the SWOTs than they did in one-on-one conversations with their supervisors or the U.S. Attorney. With such an invitation, the list of items that the office wanted the Leadership Council to address was varied—everything from the way particular forms were used, to allocation of communal copier/printers, to the perception that the two litigating divisions had become rivals. The Leadership Council set out to tackle all of these issues, among others, to great success. For example, it spearheaded the reformatting, digitizing, or doing away with a number of internal forms; examining copier/printer metrics to identify “hot spots” where another copier/printer was needed; and organizing office cultural and social events to promote office-wide unity and interaction among all divisions.

The Northern District of Oklahoma’s SWOT meetings immediately identified two priorities. First was the request for an explanation of flexible work options. Although the office had a policy in place, employees were not aware of the policy, how to request flexible work options, or management’s position on flexible work options. As a result, the flexible work option policy was disseminated, and senior leadership addressed the topic at division meetings. This is an example of the bridge between the Leadership Council and management. While not every request for flexible work times can be granted, employees now understand the policy, their options, and the mechanism to raise any issues.

Another concern was safety and security of office employees. The Leadership Council arranged a self-defense training class for employees who wished to participate, contacted the Executive Office of United States Attorneys about getting the USA-Alert mass notification system, and worked with the District Office Security Manager to request a review of security cameras. Altogether, the Leadership Council’s security review was a great, direct response to the concerns raised by employees.

IV. The NDOK experience

Senior leadership received immediate positive feedback for its efforts to hear different viewpoints. Small problems that simply never would have been raised in the past, have been addressed and solved. Again, the issue of copier placement was not on the radar of the management team, but the suggestions for strategic re-deployment that percolated through the Leadership Council made sense and were implemented, providing an easy win for everyone. On more difficult issues, the Leadership Council implemented real innovation through brainstorming and bringing all interested players to the table with inclusive collaboration across all divisions and employee sectors. As a result, employee satisfaction began to improve.

Many employees said they felt encouraged to come up with new and better ways of doing things and that they were willing to put in the extra effort to get a job done. I attribute much of this improvement to the Leadership Council. The addition of a Leadership Council has enormous potential to have a positive impact on any organization.

Beyond the statistics is the positive effect of the Leadership Council process on office culture and morale. In previous years, office luncheons or events were sparsely attended and generated little enthusiasm. A recent office-wide event generated a crowded room with employees sitting intermingled among divisions, groups, and grades. The Leadership Council has helped foster an atmosphere where people set aside “who does what” and focus on each other as individuals with one common mission. It was a welcomed sight and a definite sign of morale enhancement for our office.

V. Address questions and concerns up front

The Leadership Council concept is not without its naysayers, who argue that it is nothing more than a “union” or that it wrongly delegates power that belongs to managers. These are important concerns to raise and discuss thoroughly among your senior leadership before bringing the concept to your office.

The essential, primary experience of those who have implemented a Leadership Council, however, is that these concerns are generally misplaced. The Leadership Council is a representative body designed to focus on bringing problems and solutions *to* management, not act as a replacement *for* management.

Every U.S. Attorney strives to build a high-performance organization. To do so, the senior leadership of a USAO needs all of the information it can possibly gather. And what better way to be informed about the office than simply to *ask* the members of the staff team? This collaborative leadership model does not usurp a U.S. Attorney's authority; rather, it brings more information and opportunities for improvement than one could hope for otherwise. The Leadership Council is responsible for communication, but operational decisions continue to be the responsibility of senior leadership.

There are also concerns that inviting communication, including complaints, in an open forum is tantamount to opening up rant sessions on steroids. That has not been the experience, generally, of USAOs with Leadership Councils in place. The fact of the matter is that leaders need to be prepared to face difficult issues head on, and having all possible information to fashion a solution to a particular problem is preferable to "willful blindness."

With a Leadership Council in place, employees can approach their division representative with a comment or concern, and their representative then brings that information—without attribution to the employee—to the attention of the entire council. The Leadership Council, in turn, determines if any particular concern is an operational/procedural issue or a culture/moral issue for the office.

Not every item that makes its way to the Leadership Council is raised with senior leadership or receives immediate favorable action, but often, the small issues of today can be addressed effectively before becoming the office-wide morale-busters of tomorrow. The process by which a Leadership Council considers issues raised by employees also serves as training and education in problem solving, leadership skills, and familiarity with Department of Justice policies.

Another consideration that gives some U.S. Attorneys pause is the commitment of time. Isn't it inefficient to have voting, SWOT discussions, Leadership Council regular meetings, and the like? An excellent book by a top military leader of our time, General Stanley McChrystal, addresses this issue. In *Team of Teams*, General McChrystal points out that a misguided quest for efficiency can lead to decisions and plans made quickly by a small group, but without the benefit of the full measure of knowledge and insight available throughout the organization.

In sum, he states, “The connectivity of trust and purpose imbues teams with an ability to solve problems that could never be foreseen by a single manager—their solutions often emerge as the bottom-up result of interactions rather than top-down orders.”³ In other words, extreme speed (quick top-down decisions) should not be equated with mission success. It may be much faster (or “efficient”) for a U.S. Attorney to skip the information gathering process or to keep the burden on individual employees to speak up if they want to raise an issue. Doing so, however, creates a cost—the cost of uninformed decision-making. In the long run, the perceived “costs” of a Leadership Council are far outweighed by the benefits it brings.

VI. The closing: Leadership Councils maximize opportunity for success

Many U.S. Attorneys served as an AUSA or as an Assistant District Attorney before their appointment. While in those line positions, they likely had good ideas for office improvement, innovation, or efficiency based on their day-to-day experiences. They should not forget that the career service men and women of USAOs are a force multiplier for great ideas. Whether it is the press of business or a directive to “stay in your lane,” career employees often don’t communicate their ideas because their ideas may not be welcomed.

The truth is, even with a managerial “open door” policy, concerns and ideas are not always communicated to the ultimate decision-maker because a mid-level manager does not want to “rock the boat” or perceive new ideas and innovation as a threat to the status quo. The result? Problems and inefficiencies that could have been easily addressed linger and fester to become operational or morale issues haunting an office for years longer than necessary.

Remember, the Leadership Council acts as a conduit to bring ideas, information, complaints, and solutions to senior leadership for consideration and implementation. Is it possible to re-create the Band of Brothers through collaboration and empowerment in the USAOs? Yes. Enhance cooperation across “silos” and engage with career employees to optimize the chance for mission success and “empowered execution.” Your Leadership Council can and will make this happen.

³ GEN. STANLEY MCCHRISTAL, *TEAM OF TEAMS: NEW RULES OF ENGAGEMENT FOR A COMPLEX WORLD* (Penguin Random House 2015).

About the Author

The Honorable Trent Shores was sworn in as the United States Attorney for the Northern District of Oklahoma in September 2017. Before his appointment as United States Attorney, he served as an AUSA from 2007 through 2017, as Oklahoma First Assistant Attorney General in 2015, and as the Deputy Director of the Department's Office of Tribal Justice in Washington, D.C. He graduated from Vanderbilt University with a degree in political science and received his Juris Doctor from the University of Oklahoma.

Self-deception and the Law

James Ferrell
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One afternoon, as I sat in the San Diego office of Latham and Watkins, I had an epiphany while watching the string of incoming flights pass by my office window. Then in my third year, I had been assigned to land use matters, corporate finance projects, tax issues, and litigation cases, doing my best to avoid the tobacco company defense cases that were floating around the office at the time. My epiphany was this: Although I had not chosen to be on any of these projects, I was dumbfounded to realize that I had been on the morally right side of every case I'd been assigned! Every. Single. One. I felt incredibly fortunate.

While theoretically possible, the more likely explanation was that I hadn't sufficiently seen or understood the other sides of the cases I worked on to realize that the sides I represented weren't so lily-white. I had so immediately jumped into the role of advocate that I interpreted every fact and facet of my cases in ways that validated the rectitude of my clients' positions. I hadn't really seen the cases—not fully. I missed nuance and had, therefore, left myself and my clients exposed to surprise and blind to facets of their cases that might have been helpful and, perhaps, even decisive to know. That is to say that my zeal for advocacy undermined my ability to effectively advocate.

Of all the skills a successful and helpful lawyer must possess, the most important skill is hardly discussed, if at all. That skill is the ability to *see*—to see *all* the facts, *all* the opinions, *all* the beliefs, *all* the biases, *all* the merits, *all* the weaknesses. It is almost trite anymore to say that a good lawyer is able to argue the opposing party's case as well as his own. But being able to argue the other side depends, first of all, on being able to *see* the other side of the case. And that skill is available only to those who possess a certain, specific characteristic.

I. People or objects?

Nearly a hundred years ago, Austrian philosopher Martin Buber observed that people are always situated with others in one of two ways—either seeing and regarding others as people like themselves or seeing and regarding others more like objects (as vehicles to get

something done, for example, as obstacles that get in the way, or as irrelevancies that don't really matter because they can't add any value).¹ He called the first way of being with others the "I-You" way of being.² He called the second the "I-It" way of being.³ In the I-You way of being, we regard and treat others as people, while in the I-It way of being, we regard and treat others as objects.⁴

Buber's observation of these two ways is important for a number of reasons. For lawyers and the practice of law, one aspect of this distinction is of particular importance: Since people *are*, in fact, *people* and not objects, when we nevertheless see them as objects, we fail to see the truth either about them or about their cases. If one is interested in seeing clearly, it is essential to start from a position where one is seeing others—even one's adversaries—as they are, as people, rather than seeing them merely as objects.

II. Justification or justice?

When we objectify, and therefore see others falsely, we create a new need in ourselves. We create the need to be *justified* for why we are objectifying others. Once this need takes root in us, we no longer see dispassionately and straightforwardly. Rather, we see those we have objectified in ways that justify our objectifications of them. We can construct a case against them, yes, but it is a case blinded by our own motivated need for justification, rather than a case in service of truth and justice. We might get it right in some cases despite our own self-deceptions, but our objectification of others and justification of ourselves for doing so puts truth and justice unnecessarily at risk.

Let me give you an example of this from my own legal experience and then a second example from life in general. Years ago, as a young lawyer, I drafted a legal brief that was particularly effective. So effective, in fact, that I convinced the judge to overlook facts that might have implicated my client. I remember smugly laughing to myself as opposing counsel tried in vain to get the judge to consider his points. The judge had been so swayed by the way I had wielded the facts that he closed his mind to opposing views. He summarily threw

¹ MARTIN BUBER, I AND THOU (Ronald Gregor Smith trans., T&T Clark 1937) (1923).

² *See id.*

³ *See id.*

⁴ *See id.*

out my opponent's lawsuit. My client and I had won—early and decisively.

Although we won the case, I knew that I'd pulled a fast one. "Ah, but it was my job to advocate and the judge's job to sift through the merits," I told myself. "I did my job; it's not my fault that the judge failed at his." "Besides, everything I said was true," I continued arguing with myself (an admission, by the way, that my own conscience was suggesting something was amiss). "I just effectively kept the judge from considering other facts that might have done us harm. That's what I was employed to do."

From the perspective of the raw pursuit of victory or power, perhaps one could say that I had done my job that day. But from the perspective of what the world needs most in this day and age, I was simply part of what has become a collective problem. I could have done my job in a way that didn't dishonor the people on the other side of our dispute. And I could have respected the judge enough to lay the facts out as clearly and openly as I could and then argued for why my client was in the right. That, too, would have been doing my job—not just effectively, but also honestly and honorably.

A few years ago, I attended a speech by the magician Penn Gillette (of *Penn and Teller* fame). He maintained that "every storyteller is a liar." Why? "Because," he said, "as soon as you pick one thing to say and leave other things behind, you are lying." He said that magicians are storytellers and, therefore, liars. There is a lot that magicians don't communicate to their audiences. In fact, the mesmerizing power of their illusions depends on this obfuscation. Penn and Teller's way of handling this is to let their audiences in on their tricks. They are open to surprising their audiences and certainly to delighting them with their tricks, but they don't want to deceive them. They make sure they do their magic tricks in ways that don't invite them to believe a lie.

But that's not the way I crafted my legal brief. I crafted it specifically to deceive the judge. I wouldn't have painted my act so harshly at the time, of course. I would have used a word like *sway* rather than *deceive*. But my language is part of my self-deception. This point is emphasized by words the brilliant author Fyodor Dostoyevsky put in the mouth of one of his characters in his book *Devils*: "My friend, I've lied my whole life. Even when I was telling the truth. I've never spoken for the sake of truth, only for my own sake."⁵

⁵ FYODOR DOSTOEVSKY, *DEVILS* 729 (Oxford Univ. Press 1999).

Whenever one is motivated to win rather than to seek the truth, justice becomes one's secondary, rather than primary, concern. Lawyers who tell their stories that way—as I did in this case—are lying, both to themselves and to others. Ironically, their need to justify those lies, since it blinds them to key nuances of their cases, makes them worse advocates than they otherwise would be.

III. Self-deception

This trouble is not confined to the courtroom, of course. A number of years ago, in a workshop the Arbinger Institute was delivering, a participant asked if he could share a story about an interaction he'd recently had with his 16-year-old son. He said that he had grown to mistrust his son over the prior couple of years, as the boy had fallen in with a bad crowd. The father had caught him in lies and witnessed a deterioration in his son's work ethic and seriousness about school. He was at a place in his life where he was feeling bugged about his boy.

And then, on a particular Friday evening, his son asked him if he could borrow the car for the night. The father, feeling as he did about his boy, didn't want to lend the car to him. But he had no plans for the night himself, so the car would just be sitting in the garage. He didn't want to seem mean-spirited, but he also didn't want to allow his son to take the car. In that moment, he had what he thought was a flash of inspiration—a way to preserve the illusion of generosity while ensuring that his son wouldn't take the car.

His plan? He told his son that he could take the car if he was home with it by 10:30 p.m. He thought that the unreasonably early curfew condition for a Friday night would produce the outcome he hoped for.

Think of yourself when you were 16. What would you have done in this case? Probably the same thing that this boy did—tell your dad, “Sure, no problem,” grab the keys, jump in the car, and take off. And perhaps your father would have reacted the same way this father did. That is, as soon as his son took the keys and drove away, the father knew he'd been had. The one thing he knew for sure was that his son wouldn't be home by 10:30 p.m. It was only 7:00 p.m., but the father was already mad that his son would be late, which is interesting, if you think about it.

As the evening wore on, the father's anger grew. He described sitting down at 10:00 p.m. to watch the evening news. As the newscasters proceeded through the main stories and then on to weather and later sports, the father's anger grew. He started

compulsively looking at his watch. When it hit 10:29 p.m., his anger exploded into a hardened position against his boy: “This is the last time he will ever use the car!” Just then, the father heard a squeal of tires into the driveway. He quickly glanced at his watch again: 10:29 p.m. His son had made it.

Since the boy arrived before the curfew, just as he said he would, you might think this father would have been happy. In fact, however, he wasn’t happy at all. He wasn’t happy for a specific reason: All night long, he blamed his son, and in order to be justified for blaming his son, he needed his son to be blameworthy, wrong, and guilty.

Although the son made it home by the deadline, there were still ways the father could characterize the boy’s actions to make him out to be wrong. Consider a few:

- What’s up with squealing the tires? You know how expensive they are? Have some respect!
- You probably sped all the way home, didn’t you? Broke the law the whole way!
- Did you fill the car with gas? Or do you expect me to pay for everything for you?

The son bounded into the house, his arms raised triumphantly in the air. “Made it, Dad!” he said, to which the father chose another way to blame his son and justify himself. “You sure cut it close, didn’t you?” he sneered. Which is to say, “This doesn’t count! Why are you always pushing the limits on things? How am I supposed to trust you when you act like that!”

When we consider this story, we see how the father got it wrong and missed a fantastic opportunity with his son. The problem, however, is that the father couldn’t see it. He was self-deceived. The need for self-justifying views blinded him to the situation. Accordingly, he failed to see his son as a person.

The very structure of legal actions can set lawyers up to be like this father. Cases pit one party against another and divide people into dehumanized categories, like plaintiffs and defendants. Lost in such terms is the humanity of these people, and if we allow ourselves to miss and, therefore, to fail to honor the humanity in others, we will miss not only them, but the nuances of their cases. When this happens, our work isn’t so much for justice as it is for winning.

IV. Two mindsets

How can lawyers stay connected to what's real and, therefore, advocate more effectively and more in service of justice? An understanding of the Arbinger Institute's work around mindset is a strategically helpful first step.

Consider what the research reveals about what Arbinger calls an "outward mindset." A person whose mindset is outward sees others as people. Seeing them as people, she realizes that others matter like she herself matters. And because other people do matter, their needs, objectives, and challenges matter to her as well. As a result, her objectives and behaviors take others into account. In a work context, a person with an outward mindset holds herself accountable to accomplish her own objectives and to do so in a way that makes it easier, not harder, for her colleagues to succeed in their responsibilities as well. In a legal context, a lawyer with an outward mindset sees and regards allies and foes alike as people. This enables her both to work more collaboratively with colleagues and to see and understand the nuances of her opposition's case. The same act—seeing others as they are, as people—increases her effectiveness in every direction.

By contrast, a person whose mindset is inward sees others more like objects—like vehicles to use, obstacles to blame, or irrelevancies to ignore. From his point of view, others don't really matter like he matters. He is consumed with his own objectives, and the needs, challenges, and objectives of others don't really matter to him. His own objectives and behaviors become self-focused. On the job, such a person may successfully achieve his objectives, but he won't care much if the way he does his work makes it harder for others to achieve theirs.

A lawyer whose mindset is inward makes work more difficult for his colleagues and hampers his own ability to objectively assess the facts of the cases he handles. The same act—seeing others as they are not, as objects—decreases his effectiveness in every direction.

Our research uncovers an additional debilitating effect of an inward mindset: One person's inward mindset invites others to respond in kind. Party 1 sees and treats Party 2 as an object, which gives Party 2 reason and justification for seeing and treating Party 1 as an object, which then gives Party 1 further justification for his objectification of the other, and so on. This destructive cycle amplifies disputes and keeps parties from settling even when it would be best for them to do

so. This dynamic is as true between groups of people who have turned inward as it is between individuals. Consider the current state of the political system in the United States, for example. Members of each party find themselves within a system that spins negatively and corrosively in both directions because of the mutual blame and demonization of the other. The problem is not so much the erosion of civil discourse as it is the erosion of the willingness or ability to see the equal humanity of others, including those with whom one disagrees.

What can be done about this? How can one turn outward?

V. Applying the outward mindset pattern

It turns out that people operating with an outward mindset exhibit a particular three-part pattern, even when unaware they are doing so. As we discuss in Arbinger's bestselling book, *The Outward Mindset*, people who consistently work with an outward mindset excel in three ways that those who work with an inward mindset do not: They (1) see the needs, objectives, and challenges of others; (2) adjust their efforts to be more helpful to others; and (3) measure and hold themselves accountable for the impact of their work on others.⁶ This pattern can be summarized by the acronym SAM: (1) See others; (2) Adjust efforts; and (3) Measure impact.⁷

Consider an attorney-specific example of the outward mindset pattern from Arbinger's bestselling book, *The Outward Mindset*:

Attorney Charles Jackson, a third-year associate lawyer at a midsized law firm, was attending a leadership course Arbinger was conducting. Charles spent about 90 percent of his time working on issues for clients that had been brought to the firm by partners in the firm. He spent the other 10 percent of his time on client work he himself had generated for the firm. As we discussed working with an outward mindset, Charles couldn't get two of his own clients out of his mind. Both of them were unhappy with the job Charles had done, but until that moment, Charles hadn't been overly concerned about this. *Not every client is going to be happy with you*, he had assured

⁶ ARBINGER INSTITUTE, *THE OUTWARD MINDSET* 69 (2014).

⁷ *Id.*

himself. *There's nothing you can do about that. Besides, I did the work, even if they weren't happy with some aspects of it.* During the workshop, we presented the idea that working with an outward mindset requires that people take responsibility not just for what they do but also for the impact of what they do. As Charles began considering this idea, these client situations started to seem a bit different to him. He applied the outward mindset pattern—SAM—to the situations.

First, he worked on seeing others. One of the clients had been unhappy with how long it had taken Charles to handle his issue. Until then, Charles had brushed the complaint away. As he now thought about it, however, he realized that his client had a legitimate gripe. Charles hadn't given the work high enough priority, and his slow pace had created difficulties for his client that he had never apologized for or addressed.

The second client had been surprised by the bill Charles sent him. Charles hated talking about billing and had avoided the conversation altogether with this client. The first time the client learned about Charles's cost was when he received the invoice Charles had sent.

Next, Charles considered what adjustments he should perhaps make. As he considered his impact on these clients, he felt he should return their money. One of these clients lived in a different state, so Charles wrote a letter of apology and enclosed it with a check. The other client lived in Charles's city, so Charles offered his apology and delivered the check in person. He returned the money in May of that year.

Charles then wanted to make sure he held himself accountable for his impact on his clients going forward, so he began tracking his impact on his clients by checking in with them on a regular basis to

make sure that he was meeting or exceeding their expectations.

Then something interesting happened. These clients started talking to their friends and acquaintances about their honest and conscientious lawyer. By July, Charles was receiving seven new client matters per week. By November, that number had grown to thirteen per week, and Charles was employing three of his law-firm colleagues nearly full-time on client work he had brought in. In March, he left his job to start his own law firm. All of this happened because Charles made a disciplined effort to apply the outward mindset pattern and hold himself accountable for his impact on his clients.⁸

Consider another example of applying the outward mindset pattern, this one a law enforcement example from *The Outward Mindset*. In chapter 1, you find yourself in a Kansas City (MO) Police Department SWAT van. They were about to hit a house with a no-knock warrant in order to apprehend and arrest two murder suspects. Three officers sprinted around to the back of the house and took cover, supplying containment should the targets attempt to flee. Seven others ran to the front door, six of them with their guns drawn. The seventh ran a well-used battering ram up to the door and slammed it through.

“Police,” they yelled. “Everybody down!” Inside was bedlam. Men attempted to scramble out of the room, some to the stairs and others down hallways. Young children stood as if paralyzed, screaming. A number of women cowered in terror on the floor, some of them shielding infants who were screaming at the top of their lungs.

Two of the men—the two suspects it turned out—went for their weapons but were taken down by officers. “Don’t even think about it!” the officers shouted. Then they pulled the men’s arms behind them and put them in cuffs.

With all the young children, the scene in this home was more hectic than most, but within five minutes, the two suspects were face down on the living-room floor, and the rest of the inhabitants had been gathered into the dining room.

⁸ *Id.* at 88–90 (emphasis in original).

With everyone's safety secured, the officers began their search. They moved with purpose and precision. The commander noticed his point man leaving the room, and he assumed he was simply joining the search. A couple of minutes later, the commander passed the kitchen as he walked down the hall. His point man was standing at the kitchen sink. He was mixing baby bottles.

This one act of responsiveness changed the entire scene. Everyone calmed down, and the SWAT squad members were able to explain the situation thoroughly and then smoothly turn the two suspects over to the detectives.⁹

Arbinger began training and working with this particular Kansas City Police Department (KCPD) SWAT squad in 2007, after leaders there had become acquainted with Arbinger's work through our first two books, *Leadership and Self-Deception* and *The Anatomy of Peace*.¹⁰ As we do with all of our clients, we trained, coached, and consulted with them to help them move from inward mindset practices to outward mindset practices.

This work with and by the 1910 SWAT Squad led to a dramatic and unprecedented drop in complaints filed against the department due to their operations.¹¹ From the decade spanning 1996–2006, KCPD received two to three community complaints per month due to the activities of this squad.¹² On average, these complaints cost the department \$70,000 per incident.¹³ Since they purposefully began applying outward mindset principles and strategies to their operations, however, they haven't had a complaint filed against them in 13 years.¹⁴ These changes have increased the cooperation that the SWAT squad members receive from the community.¹⁵ As a result, in addition to shrinking community complaints against them to zero, in just the first three years after adopting this approach, the 1910 Squad recovered more illegal drugs and guns than it had in the previous decade.¹⁶

⁹ *Id.* at 3–5.

¹⁰ ARGINGER INSTITUTE, *LEADERSHIP AND SELF-DECEPTION* (2018); ARBINGER INSTITUTE, *THE ANATOMY OF PEACE* (2015).

¹¹ See *THE OUTWARD MINDSET*, *supra* note 6, at 5–7.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

VI. The lawyer's choice

Whether practicing law, enforcing the laws, or working in organizations with others, one chooses, moment by moment, whether to operate with an outward or inward mindset. An outward mindset allows one to see clearly, without self-deception or self-justification, and it invites collaboration and cooperation from others. An inward mindset, on the other hand, clouds sight and judgment, provokes one to blame others for problems, and therefore provokes blame and inward mindset responses in return.

Which of these mindsets is likely to do more justice, and which more harm? Which mindset holds promise to heal communities, and which to divide? Which equips one to see, and which obscures and blinds?

In every moment, one is choosing to see those around her either as people or as objects. One of these views is accurate. The other is a lie. This choice determines the nature of justice.

About the Author

James Ferrell is managing partner of the Arbinger Institute and author of multiple bestselling books, including Arbinger's international bestsellers, *Leadership and Self-Deception*, *The Anatomy of Peace*, and *The Outward Mindset*. He is a 1992 graduate of Yale Law School, a former lawyer at Latham and Watkins, and an adjunct professor of law at Brigham Young University Law School.

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Crucial Conversations: The Science of Speaking Up

David Maxfield

Co-author and Vice President of Research

VitalSmarts

I. VitalSmarts

As well-trained and highly motivated people imagine their careers unfolding, none of them envision making a steady climb up the ladder (punctuated with notable successes and laudable accomplishments) only to be brought to ruin by a wide-sweeping and devastating disaster. And yet, a number of highly publicized catastrophes over the last few years send a warning that leaders need to be more aware of the very real dangers they face. For instance, who can forget the day we saw or heard about the space shuttle Columbia exploding as it reentered earth's atmosphere? Together, the world mourned the loss of seven heroes. How could rocket scientists—renowned NASA scholars and acclaimed technicians no less—have failed to avert such a disaster?¹

NASA isn't the only organization that has suffered a calamity over the past decade. Look at the button-down corporate world. How could the leaders at Johnson & Johnson² and Wells Fargo³ allow the abuses that now threaten their reputations? And consider Michigan State⁴

¹ RODNEY ROCHA, ACCIDENT CASE STUDY OF ORGANIZATIONAL SILENCE & COMMUNICATION BREAKDOWN: SHUTTLE COLUMBIA, MISSION STS-107 (2011).

² Reuters, *Johnson & Johnson Knew for Decades that Asbestos Lurked in Some of its Baby Powder*, NBC NEWS (Dec. 14, 2018), <https://www.nbcnews.com/health/health-news/johnson-johnson-knew-decades-asbestos-lurked-its-baby-powder-n948016>.

³ Matt Egan, *Wells Fargo was Silent about Fake Account Probe for At Least 6 Months*, CNN (Jan. 12, 2017), <https://money.cnn.com/2017/01/12/investing/wells-fargo-fake-account-disclosure/index.html>.

⁴ *Spartan Silence: Crisis at Michigan State (ESPN)*, PEABODY (2018), <http://www.peabodyawards.com/award-profile/spartan-silence-crisis-at-michigan-state>.

and Penn State⁵ Universities. How could their accomplished leaders ignore the sexual predators they brushed shoulders with for so many years?

What's remarkable about all of these cases is that they weren't the result of careless or dim-witted leaders stumbling through their jobs. In each case, highly educated and well-meaning people were at the center of the disaster. How could such brilliant and motivated folks fail so miserably?

It turns out that each of these calamities shared a similar root cause, and each was avoidable. These catastrophes resulted from what we call cultures of silence. Individuals saw the warning signs of an impending disaster and yet remained silent. They realized that, if changes were not made, serious problems would possibly follow—but nobody actually vocalized their concerns. Or if they did speak up, those who heard them remained silent. Why?

It's a matter of mental calculus. Each person who anticipated the possible disaster feared that speaking up was more likely to cause personal problems than lead to a real solution. Here's the thought process underlying this disastrous form of silence:

- You observe a potential problem, but you figure the possible calamity isn't a sure thing. It's not like death or bankruptcy is imminent; they're just possibilities.
- Nobody else seems concerned, and you don't want to sound like an alarmist. In fact, you aren't sure it's any of your business to say anything.
- You figure even if you do speak up, nobody will actually change anything—others might disagree or take offense. Or maybe you tell yourself that the organization is too mired in bureaucracy to change anyway.

Finally, it seems like a sure bet that saying something will damage your career. You would be delivering a really unpopular message (“I think you need to re-examine the launch—at the cost of \$50 million.” “I think we need to confront the senior execs and maybe send them to jail.” “I think our famous doctor (or coach) might be a sexual predator.”). And messengers get shot.

⁵ Ivey DeJesus, *Jerry Sandusky Scandal at Penn State: The Culture of Silence*, PENN LIVE (July 1, 2012), https://www.pennlive.com/midstate/2012/07/jerry_sandusky_scandal_at_penn.html.

Sound familiar? Does any of this reasoning or behavior happen within the Department of Justice (Department)?

As I prepared this piece, I collected a few examples from within the Department. Ask yourself if you've seen this kind of thing within your team:

- A new criminal Assistant United States Attorney (AUSA) was assigned an experienced, capable legal assistant who had a knack for avoiding work. After a few attempts, the AUSA decided it was easier to work around his assistant than to try to get him to do his job.
- An attorney was promoted and had to manage her former boss. They had been friends, but now there was jealousy and resistance. After a couple of failed discussions, she decided that correcting her former boss's work created more friction than it was worth.
- A staff person felt "shot down" when one of his ideas was rejected by his manager. Both the manager and the staff person shared their own self-serving versions of what happened, but never talked it out with each other. Now, years later, the bad feelings continue to drag down their relationship.

I also examined a few true fiascos within the Department, looking for its version of the Columbia Disaster. My goal was to see whether silence or the failure to speak up contributed to these high-profile incidents. An example of a disaster was Senator Ted Stevens's corruption trial, where his conviction was dismissed with prejudice, and the judge ordered an external investigation into prosecutorial misconduct.⁶ Below is a summary of the investigation's conclusion. Look for the role that silence played.

The leader of the trial team wanted to avoid second-guessing others on the team. So she stayed silent, rather than playing an active supervisory role. The most experienced prosecutor on the team no longer believed he was in the chain of command. So he stayed silent, except when others brought specific concerns to his attention. The most junior prosecutor on the team was privy to all the relevant facts

⁶ Anna Stolley Persky, *A Cautionary Tale: The Ted Stevens Prosecution*, DC BAR (Oct. 2009), <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/october-2009-ted-stevens.cfm>.

but assumed others were making the decisions. So he stayed silent and deferred to their judgment.⁷

The result was a slow-motion game of chicken. Each member of the prosecution team figured a team member—somebody else—would notice the oncoming collision and steer clear. But they never spoke up to warn each other. The crash was spectacular.

II. Silence and crucial conversations

I've been studying organizational silence since I was a doctoral student at Stanford in the mid-1970s. When I started, I didn't know I'd be studying silence. I thought I was studying leadership.

My colleague, Kerry Patterson, and I convinced Ford and Hewlett Packard to let us see if we could identify the behaviors that differentiated their best from their next-to-best front-line supervisors. Their senior teams identified the two groups (top 10% and top 20%), but didn't tell us who was in which group. Then we shadowed the supervisors, wired them with tape recorders, attended their meetings, reviewed their paperwork, and put them through exercises to see if we could tell them apart. Most of the time we couldn't. Their actions, conversations, meetings, paperwork, etc. were all very similar, except in a few key circumstances. This was where we discovered the deciding role silence plays.

The only reliable difference between the two groups was how they handled volatile interpersonal interactions, especially situations that involved their bosses. In these situations, the next-to-best supervisors would typically go to silence and then complain afterwards. But the best would speak up in a way that worked—direct and frank, but also respectful.

Our conclusion was that most leaders have no trouble talking about most things most of the time, but that these “casual conversations” have little impact on their success or failure. What separates the best from the rest is how they handle conversations that include three elements: (1) high-stakes; (2) differences of opinion; and (3) strong emotions. The best are able to stay in dialogue, while the rest move to either silence (or sometimes to its opposite, angry confrontation). We began calling these “crucial conversations.”

⁷ HENRY F. SCHUELKE & WILLIAM SHIELDS, REPORT TO HON. EMMET G. SULLIVAN OF INVESTIGATION CONDUCTED PURSUANT TO THE COURT'S ORDER (2009).

These conversations are crucial for two reasons. First, they test the limits of many leaders' skills. Often leaders avoid or bungle them. Second, these conversations are crucial because they have a disproportionate impact on the results organizations care about most. They are pivot points between success and failure.

We formulated what we call The Law of Crucial Conversations: Anytime you are stuck, there is a crucial conversation you're either not having or not having well enough.⁸ And to get unstuck, you'll need to step up and have this conversation. Crucial Conversations isn't about good manners, getting along, or political correctness. It's about getting unstuck, so you can achieve the results you really want.

III. The science

The academic research related to these high-stakes, emotional situations goes back to World War I, when Walter Cannon, a battlefield surgeon, discovered that more wounded soldiers were dying of shock than of the wounds themselves.⁹ After the war, Cannon devoted his life to the study of shock. He put shock into an evolutionary context: When our ancestors were surprised by a sabre-tooth cat or some other predator, their bodies went into preparation mode, what we call shock. Adrenaline flooded their system, causing blood to rush to their major muscle groups. This made them ready to either fight or flee. In fact, Cannon coined the term: the Fight or Flight Syndrome. You can see how shock would be an ideal response to a threat, prepping us for fight or flight, but a catastrophic response to being wounded.

Cannon's work was published in the 1920s and 30s. Today, most research focuses on how our brains manage this response to threat.¹⁰

Most of the time we live in our visual and frontal cortex. These are the parts of our brain responsible for our attention and ongoing awareness—basically, our conscious selves. We are at our best when we are in control and are purpose-driven.

⁸ KERRY PATTERSON ET AL., *CRUCIAL CONVERSATIONS: TOOLS FOR TALKING WHEN STAKES ARE HIGH* (2d ed. 2012).

⁹ James Campbell Quick & Charles D. Spielberger, *Walter Bradford Cannon: Pioneer of Stress Research*, 1 *INT'L J. OF STRESS MGMT.* 141, 141–43 (1994).

¹⁰ See Belinda Liddell et al., *A Direct Brainstream—Amygdala—Cortical 'Alarm' System for Subliminal Signals of Fear*, 24 *NEUROIMAGE* 235–43 (2005).

All of this changes the instant a threat is perceived. Threats cause a circuit-breaker reaction inside our brain. Specifically, the right hemisphere of our inferior frontal cortex cuts in and takes over from the superior frontal cortex. It purges whatever we were thinking of—our long-term goals, our charitable thoughts, etc.—and replaces those thoughts with an exclusive focus on the threat. At the same time, our amygdala floods us with emotions that prep us for fight or flight.

The good news is that when this happens, our vision, our hearing, and our reaction times are all improved. The bad news is that our reasoning and verbal skills drop precipitously. Our brains and bodies are designed to deal with threats from predators, not threats from our bosses, peers, neighbors, or family members.

And, in our social environments, it doesn't take much to set off this fight-or-flight cascade. A threat to our current plans or goals, a perceived personal slight, or the sense we've been disrespected takes us out of dialogue and into fight or flight—usually flight and silence.

IV. Turning this science into skills

Our team took what we learned about the fight or flight syndrome, and wrote the book and training course titled, *Crucial Conversations*.¹¹ The goal of the book and training is to show people how to master what happens to their brains and bodies during high-stakes, risky conversations. Below I'll give an overview of the entire skillset and then dive into a few specific skills you can use right away.

V. Overview

The concepts within the course are built around the science of fight or flight. This basic science holds true across cultures and communities. When people feel unsafe, they move toward fight or flight. The differences among cultures, communities, and individuals are in what it takes to cause a person to feel unsafe and in the diverse ways individuals express fight or flight. In the training, we show how to recognize the different signs of fight or flight; how to diagnose the safety concerns that drive them; and how to use a variety of skills for restoring safety, without backing off of your frank, honest message.

¹¹ PATTERSON ET AL., *supra* note 8.

A. Learn to look—when others (or you) are going to fight or flight

When people feel attacked or unsafe, they leave dialogue and move towards fight or flight. If we detect the early signs of fight or flight—in a meeting, during a policy discussion, around the dinner table—we can take quick action before the conversation gets too far off the rails.

In the course, participants learn to look for subtle social forms of fight and flight.¹² We label them “Silence” and “Violence” and describe a continuum. On the Silence side, this continuum includes masking their true meaning, avoiding touchy topics, and withdrawing from the conversation or relationship altogether. On the Violence side, this continuum includes controlling the conversation, labeling people in ways that dismiss them, and verbal attacks that use threats and intimidation. Participants also learn to recognize these subtle signs within themselves.

Try this skill at home or at the office. The next time you’re in a group, look for these subtle forms of Silence and Violence. And, when you see them, ask yourself, “What is going on right now that is causing this person to feel attacked or unsafe?”

B. Make it safe—when others’ emotions kick in

The mistake most people make is to dilute or soft-pedal their message, so that the receiver doesn’t feel unsafe. Or they back off their message as soon as they notice the signs of silence or violence. They compromise the *content* of their message in an effort to create safety.

The liberating truth is that safety has far more to do with *intent* than *content*.¹³ People aren’t reacting to *what* you are saying as much as to their fears about *why* you are saying it. They fear your motives, your intent. If you can make your positive motives clear, you can restore safety without compromising your message.

One strategy for making your motives clear is based on a saying you hear in the military: “Always salute the flag before you disagree with

¹² See Laura Martinez et al., *Contributions of Facial Expressions and Body Language to the Rapid Perception of Dynamic Emotions*, 30 COGNITION & EMOTION 939–52 (2015).

¹³ Susan T. Fiske et al., *Universal Dimensions of Social Cognition: Warmth and Competence*, 11 TRENDS IN COGNITIVE SCIENCES 77–83 (2007).

your commanding officer.” Think for a minute about what this saying means.

Saluting the flag reminds us to take two distinct actions. First, show respect—respect for the person, their role, and their point of view. Second, show that you serve under the same flag—that you are on the same side, that you share the same purpose. If you show respect and mutual purpose, you will restore safety without compromising the hard truth you are trying to communicate.

C. Master my story—when your own emotions are kicking in

If you don’t master your emotions, they will determine your success, or, more likely, your failure. Learning how to gain this control requires knowing a bit about how emotions function.

Most of the emotions that get us into trouble fit James Gross’s definition of top-down:¹⁴ See and Hear→Tell a Story→Feel→Act.

It begins with facts: our eyes and ears collect information—the facts. These sensory perceptions travel to the top of our brain, our prefrontal cortex, which creates a story to make sense of them. If this story involves a threat, it’s sent down to our amygdala, which generates feelings of fear, rage, frustration, etc. These feelings impel us to act, often in fight-or-flight mode.

The key is that it’s not the facts that drive our feelings. It is our interpretation of the facts, our story, that drives our feelings. Consider the example below:

- **See and Hear:** You’re struggling to get your team fully proficient at a new process. One employee keeps challenging your directions. She is really smart and keeps finding fault with your instructions.
- **Story:** You begin to think she is working to undermine your authority. She seemed to smirk the last time she caught you in an error.
- **Feel:** You feel disrespected and a bit defensive. As you think about it, you feel angry. You need this employee to be on your side, not working against you.

¹⁴ See Kevin N. Ochsner et al., *Bottom-up and Top-down Processes in Emotion Generation: Common and Distinct Neural Mechanisms*, 20 J. ASS’N PSYCHOLOGICAL SCI. 1322–31 (2009).

- Act: You decide to sideline her. You assign her to work on tasks that need to be done, but that take her away from the new process. Now she can't block you.

Suppose you told yourself a different story: that your employee isn't trying to undermine you; she's trying to help you achieve your goal for the team. That would change your feelings and actions. Often your story is little more than your best guess.

James Gross and his team at Stanford have studied how exactly these stories drive feelings. What they've discovered is that stories only drive feelings when the stories are treated as if they were facts, the gospel truth, rather than tentative hypotheses. If you can get a person to question their story, it loses its power over their feelings.

Participants in the Crucial Conversations course learn how to challenge their stories by asking, "Am I sure I have enough information to be confident in this story?" and "Is there any other story that might fit this same set of facts?"

If the answer to the first question is "no" or the answer to the second is "yes," emotions subside and the person is back in control. But here is the fascinating finding: Professor Gross has found that even when the answers are "yes" to the first and "no" to the second, the questioning alone causes the emotions to subside, putting the person back in control.¹⁵

D. Summary

If you can notice when others (or you) are heading to fight or flight, and you can either make it safe for them without backing off your message or master your story, without losing sight of the facts, then you can master the crucial conversations you will face.

VI. Implications for organizations

Silence is often implicated in organizational failure. The opposite is also true: Dialogue is key to organizational success. A powerful example comes from Google's Project Aristotle.¹⁶ Google realized that teams were the key to their success and that there was a wide gulf

¹⁵ Kateri McRae et al., *Unpacking Cognitive Reappraisal: Goals, Tactics, and Outcomes*, 12 EMOTION, no. 2, 2012, at 250.

¹⁶ Charles Duhigg, *What Google Learned from its Quest to Build the Perfect Team*, N.Y. TIMES (Feb. 25, 2016), <https://www.nytimes.com/2016/02/28/magazine/what-google-learned-from-its-quest-to-build-the-perfect-team.html>.

between their best and worst teams. They decided to put their brainpower to work to determine why some teams were so much better than others.

They tested several hypotheses: Are the best teams those with the most talented people? Does it have to do with the diversity of the team members? Or the mix of personalities on the team? What if the team members are friends outside of work? Google tested each of these, but none made the difference.

The key to team success at Google boiled down to two factors: (1) psychological safety; and (2) speaking up. On successful teams, the members felt safe to speak up. They were confident their ideas wouldn't be met with rolled eyes, groans, or attacks. And they actually did speak up. Everyone contributed, though often in very different ways.¹⁷

We've also looked more specifically at project execution—the ability of an organization or team to deliver results on time, on spec, and on budget.¹⁸ We identified five situations that pretty much guarantee project failure:

- (1) Fact-free planning. The project's deadlines, specs, or resources reflect leaders' "wishes" rather than a true understanding of what's possible.
- (2) AWOL sponsors. A sponsor doesn't provide leadership, political clout, time, or energy to see a project through to completion.
- (3) Skirting. Team members avoid, circumvent, or shortcut the agreed-upon standards.
- (4) Project Chicken. Team leaders and members don't admit when there are problems with a project but instead wait for someone else to speak up.
- (5) Team failures. Team members are unwilling or unable to support the project.

Our data show that eight out of ten projects experience one or more of these situations. That's bad, but it gets worse. When project team members do face these problems, fewer than 20% of them step up and have the crucial conversation. As a result, their projects become "dead

¹⁷ *See id.*

¹⁸ Joseph Grenny, David Maxfield & Andrew Shimberg, *How Project Leaders Can Overcome the Crisis of Silence*, 48 MIT SLOAN MGMT REVIEW 46 (2007).

projects walking.” Project team members know they will fail, but they keep plodding along as if everything were fine.

The good news is that the few teams that do address these problems improve the chances of their project succeeding by 70%. When people handle crucial conversations with skill, they can turn potential failure into success.

We’ve conducted research within a number of industries, including technology companies, hospitals, and accounting firms. In each case, we’ve been able to identify a handful of situations that are common, costly, and largely undiscussable. For example, in hospitals it’s common for nurses to have a concern about a team member’s basic clinical competencies. More than half of nurses surveyed report having this concern about a colleague.¹⁹ This concern is tightly tied to a costly outcome, patient safety, and yet it is largely undiscussable. Fewer than 15% of nurses who have this concern have ever spoken up to share it.²⁰ Getting these nurses to have the crucial conversations, to address and resolve these concerns, produces dramatic improvements in patient safety. And we find similar improvements in a wide range of industries and professions.

VII. Conclusions

Here is the bottom-line: The health of a relationship, team, or organization is a function of the average time lag between identifying and discussing problems.

Think about your own relationships, teams, and organization. Do people tiptoe around undiscussables or treat bosses as if they were landmines? Or do people voice their concerns, even when these concerns are volatile and involve senior people?

Below are a few questions you can use to judge whether you and your team would benefit from Crucial Conversations training:

- I could be significantly more effective if I could find a way to be completely candid about some issues that concern me with my boss, peers, direct reports, or others.
- There are some “sacred cows” that we have a hard time discussing that keep us from being as successful as we could be.
- Some of our critical projects and programs suffer because leaders

¹⁹ David Maxfield et al., *Silence Kills: The Seven Crucial Conversations for Healthcare*, VITAL SMARTS, 2005.

²⁰ *Id.*

aren't held accountable for offering leadership and support in the way we need them to.

- There are some issues I just can't talk about in a healthy way with some of my family members (children, significant other, parents, siblings, etc.).

The promise of *Crucial Conversations* is that you can master these skills, and, when you do, you will be able to discuss the undiscussables, remove the elephants from the room, and improve your relationships, teams, and organization.

About the Author

David Maxfield is the co-author of three New York Times bestsellers: *Influencer*, *Crucial Accountability*, and *Change Anything*. He also conducted the research behind the book, *Crucial Conversations*. He did his doctoral work in psychology at Stanford University and has taught at both Stanford and Brigham Young Universities. David is the vice president of research at VitalSmarts, a research-based training company that works extensively within the federal government.

The Case for Employee Engagement

Shawn O. Flinn

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I. What is employee engagement?

In the early 1900s, Frederick Taylor published *The Principles of Scientific Management*.¹ His series of “Time and Motion” studies were designed to determine the most efficient and effective manner to perform any given task. The business community quickly latched on to his theories and, for years, it was believed that there was a way to organize work that resulted in the most productive employee. The “scientific method” became a management theory that was designed to train employers in the best way possible to get the most production out of individual employees.

Controversy surrounded Taylor’s theories, and critics contended that he missed the “human factor” and reduced human beings to machines. Though the “Time and Motion” studies were well suited to the industrial age, the modern worker in the information age may not respond as well to such interventions. The question today is how do we address the “human factor”?

Employee engagement is the extent to which employees feel passionate about their jobs, are committed to the organization, and put discretionary effort into their work.² Though measuring employee engagement was not a primary concern of Frederick Taylor in the early 1900s, it is critical for organizational leaders in today’s workforce.

¹ FREDERICK W. TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (The Floating Press 2012) (1911).

² See *What is Employee Engagement?*, CUSTOM INSIGHT (2019), <https://www.custominsight.com/employee-engagement-survey/what-is-employee-engagement.asp> (concerning the definition of employee engagement).

II. The business case for engagement

Why be concerned about whether employees are “engaged” or not? Certainly there are a variety of ways to measure productivity and to motivate employees. The issue is, how do we lead employees in a manner that will enable them to put *discretionary* effort into their work? In the case of federal prosecutors and support staff—why should we be concerned whether engagement indicators are high?

A more engaged workforce brings numerous benefits to any organization. Individuals who are engaged with their organization will have an “esprit de corps” or a sense of pride and loyalty towards it. They will be a great representative for the organization and are likely to go the extra mile or take on responsibilities outside of their job description. And ultimately, these “engaged” attitudes will positively affect outcomes such as productivity, innovation, attrition, absentee levels, and even accident rates.³

Why does employee engagement matter? It matters because low levels of engagement lead to lower productivity, more absenteeism, negatively influenced workers, increase in injuries, and low customer service. Alternatively, high levels of engagement lead to higher productivity, less absenteeism, drive and innovation, decrease in injuries, and high customer service ratings.⁴

III. Historical metrics in the U.S. Attorney community

The primary mechanism for measuring employee engagement within the federal workforce is the Federal Employee Viewpoint Survey (FEVS). The FEVS is administered by the U.S. Office of Personnel Management (OPM). OPM first administered the survey in 2002, as the Federal Human Capital Survey (FHCS). Initially, it was administered every other year—in 2002, 2004, 2006, and 2008. In 2010, the FHCS was renamed the Federal Employee Viewpoint Survey (FEVS). Beginning in 2010, OPM began administering the

³ See U.S. MERIT SYS. PROT. BD., FEDERAL EMPLOYEE ENGAGEMENT: THE MOTIVATING POTENTIAL OF JOB CHARACTERISTICS AND REWARDS 2 (2012).

⁴ See *id.* at 3; GALLUP, STATE OF THE AMERICAN WORKPLACE, EMPLOYEE ENGAGEMENT INSIGHTS FOR U.S. BUSINESS LEADERS 9 (2013).

FEVS annually. OPM alternately has used a “sample” of employees for the FEVS or a “census,” where all employees receive the survey.⁵

Each year, the non-profit Partnership for Public Service publishes its *Best Places to Work in the Federal Government*.⁶ The Best Places to Work index is calculated based on the percentage of positive responses to the following three questions from the FEVS:

- (1) “I recommend my organization as a good place to work.”
- (2) “Considering everything, how satisfied are you with your job?”
- (3) “Considering everything, how satisfied are you with your organization?”⁷

Federal agencies are ranked in groupings based on their size: large, midsize, and small. The Department of Justice is considered a large agency. In addition, over 400 agency subcomponents are ranked separately. In this manner, organizations can contrast and compare their scores amongst similarly situated federal agencies, as well as individual subcomponents within those agencies.⁸

IV. U.S. Attorneys current profile

The FEVS response rates for the U.S. Attorney Office (USAO) community have historically been lower than the government-wide average. That changed in 2018. In 2017, 38% of U.S. Attorney community employees completed the survey,⁹ compared to 45.5% government-wide.¹⁰ In 2018, however, 50% of U.S. Attorney

⁵ See *Federal Employee Viewpoint Survey*, OFF. PERS. MGMT. <https://www.opm.gov/fevs/about/> (last visited Oct. 4, 2019).

⁶ *Best Places to Work in the Federal Government*, BEST PLACES TO WORK IN THE FED. GOV'T (2019), <https://bestplacestowork.org/>.

⁷ *Government-Wide Analysis, Overall Findings and Private Sector Comparison*, BEST PLACES TO WORK IN THE FED. GOV'T (2019), <https://bestplacestowork.org/analysis/>.

⁸ See generally U.S. OFF. OF PERS. MGMT., FEDERAL EMPLOYEE VIEWPOINT SURVEY, TECHNICAL REPORT (2016).

⁹ U.S. OFFICE OF PERS. MGMT., FEDERAL EMPLOYEE VIEWPOINT SURVEY, AGENCY MANAGEMENT REPORT, DEPARTMENT OF JUSTICE 6 (2017).

¹⁰ *2017 Response Rate by Agency, Participating Agencies by Employee Population Size Categories and Response Rates*, U.S. OFF. PERS. MGMT., <https://www.opm.gov/fevs/reports/data-reports/data-reports/response-rate-by-agency/2017/2017-response-rate-by-agency.xls> (last visited Nov. 1, 2019).

community employees completed the survey;¹¹ whereas the government-wide average dipped to 40.6%¹² (see chart¹³ below).

Agency & Subagency Name	2018 Number of Completed Surveys	2018 Number of Surveys Administered	2018 Response Rate	2017 Response Rate	Percentage Point Change
Government wide	598,003	1,473,870	40.6%	45.5%	-5%
Department of Justice	30,978	110,050	28.1%	35.1%	-7%
Office of the U.S. Attorneys			50.0%	38.0%	12%

Comparison of 2017 and 2018 FEVS Response Rates—Government-Wide/Department of Justice/U.S. Attorneys

In terms of overall results, the engagement score (as measured by the three questions outlined in section III above) for the U.S. Attorney community has been above the government-wide average. Looking at historic data going back to 2003, the “high water mark” for the community was 2010, when the engagement score was 79.3 (compared to 65.6, which was the median for all sub-components).¹⁴ The scores began to decline beginning in 2011 and hit the “low water mark” in 2014, when the engagement score was 67.7 (compared to 58.5 for all sub-components).¹⁵ The engagement scores then began to trend upward with the next “high water mark” being achieved in 2018, with

¹¹ U.S. OFFICE OF PERS. MGMT., FEDERAL EMPLOYEE VIEWPOINT SURVEY, AGENCY MANAGEMENT REPORT, DEPARTMENT OF JUSTICE 6 (2018).

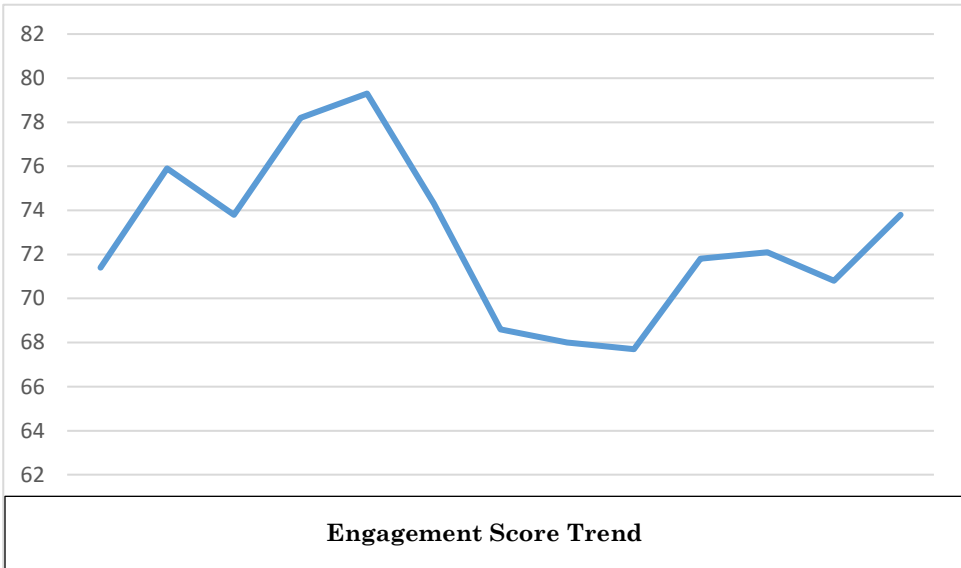
¹² *2018 Response Rate by Agency, Participating Agencies by Employee Population Size Categories and Response Rates*, U.S. OFF. PERS. MGMT., <https://www.opm.gov/fevs/reports/data-reports/data-reports/response-rate-by-agency/2018/2018-response-rate-by-agency.xls> (last visited Nov. 4, 2019).

¹³ U.S. OFFICE OF PERS. MGMT., *supra* note 11; *2018 Response Rate by Agency*, *supra* note 12; U.S. OFFICE OF PERS. MGMT., *supra* note 9; *2017 Response Rate by Agency*, *supra* note 10.

¹⁴ *Agency Report, Executive Office of the U.S. Attorneys and U.S. Attorneys’ Office*, BEST PLACES TO WORK IN THE FED. GOV’T (2019), <https://bestplacestowork.org/rankings/detail/DJ09#scores> (concerning U.S. Attorney subcomponent scores).

¹⁵ *Id.*

an engagement score of 73.8 (as compared to 64.6 for all sub-components).¹⁶



What occurred in 2018 that led to an increase in both response rates and engagement scores?¹⁷ The Attorney General’s Advisory Committee (AGAC), under the leadership of the U.S. Attorney for the Southern District of Alabama, Richard Moore, led a concerted effort focused on employee engagement across the U.S. Attorney community. In addition to strategic communication efforts by leadership at the highest levels, individual U.S. Attorneys conducted “SWOT” analyses whereby they identified strengths, weaknesses, opportunities, and threats within their districts. U.S. Attorneys also received individual briefings on district specific FEVS results. After starting with this “diagnostic” approach, a number of U.S. Attorneys established Leadership Councils—employee advisory boards devoted to communication and continuous improvement within the district. Finally, district offices had access to a variety of resources and training developed by leadership and management consultants from both within the community and in the private sector.

¹⁶ *Id.*
¹⁷ *Id.*

V. Conclusion—sustainability is the key to success

With the foundation for improved employee engagement firmly established, it is critical that the efforts described above are sustained to ensure continued success. The nature of the USAOs is that there will be new leadership every few years. With that model—how do you sustain a culture of high employee engagement? According to management consultants Dr. Patrick Leddin and Shawn Moon, you change the mindset from “leaders are a select few in the organization” to “everyone can and should be a leader.”¹⁸ According to Leddin and Moon, there are five highly effective practices that lead to success: Leaders must be able to (1) find the “voice” of the organization (also known as, lead with purpose); (2) execute with excellence; (3) unleash the productivity of people; (4) inspire trust; and (5) engender loyalty with all stakeholders.¹⁹

Once employees have begun to experience a culture of engagement, and career managers and supervisors have seen the numerous benefits, as outlined above, it will be less likely that an organization will return to a “pre-engagement” state.

About the Author

Shawn O. Flinn is the Chief Human Resources Officer for the Executive Office for United States Attorneys. Shawn previously served as the Executive Director, Human Capital Policy and Programs for the Department of Homeland Security (DHS). He has over 30 years of human resources management experience and has served on active duty in the United States Marine Corps. Shawn has a Master of Public Administration and a Bachelor of Science in Public Administration from George Mason University.

¹⁸ PATRICK R. LEDDIN & SHAWN D. MOON, BUILDING A WINNING CULTURE IN GOVERNMENT 1.

¹⁹ *Id.* at 38.

The Value of Continuing Management Education

Dayle Elieson

Chief Counsel

Drug Enforcement Administration

All professionals—lawyers, doctors, accountants, engineers, etc.—must find appropriate ways to stay current in their professions and improve their skills and understanding. As a lawyer, what will you read? What conferences will you attend? With whom will you talk about these things to reinforce your growth and understanding? How will you seek out feedback? What process will you follow to reflect on your successes and failures to understand why positive outcomes were achieved and where improvements can be made? No matter your current role, you should persistently look for ways to be better at it.

I. Lawyers as managers

Most lawyers are required to participate in continuing legal education (CLE) each year to retain their bar membership. Additionally, the Department of Justice (Department) has mandatory professionalism requirements, which include regular training on important topics like professional responsibility, ethics, and discovery law.

There are important reasons for these legal education hours: They keep us up to date with changes or nuances in the law, help us apply legal principles by analyzing others' experiences, and remind us of the high standards required of Department lawyers and Assistant United States Attorneys (AUSA). CLE does more than teach the law; it teaches and reinforces principles of action and application.

But CLE courses have limited utility when one is acting as a manager of others. So, how will a manager of lawyers learn and grow in that responsibility?

It is often assumed that a great lawyer can teach others to be great lawyers. We, however, have all seen examples where this assumption is not true—a great lawyer becomes a supervisor but never fully learns or performs the new job duties, continuing to do the same attorney functions with a few administrative tasks sprinkled on top. While there can be overlap, the job of a lawyer and the responsibilities of a manager are not the same.

Therefore, how does a lawyer become a good manager of other people? What if managers were required to participate in continuing management education each year to teach and reinforce management principles and their application?

II. Ongoing management education is essential

Opportunities already exist to help lawyers develop and improve their management skills. The Department has some valuable courses that all managers should take. But what happens when you get back to the daily work of managing your group and you must integrate challenging personalities and deal with demanding deadlines set by judges?

No one training course has all the answers. People are different and are always changing. What works with one group or person does not necessarily work for another. Regular learning and practice is essential. While there is more than one way to accomplish this, here are a few suggestions that have been successful.

A. Develop a habit of weekly reading

Years ago, I joined a management reading group that focuses on the latest management and leadership literature. Every week, the group leader sends an email outlining a handful of articles from the *Harvard Business Review*, a bi-monthly publication. Sometimes the reading stimulates comments or discussion with another group member, but not always. Not every article relates to my current management challenges or leadership needs, but this reading material becomes a valuable resource, and when challenges arise, I frequently remember a previously article or idea that is applicable.

While not every article relates to my current industry, the articles always make me think. And as I regularly read, I always get ideas that do relate to my particular circumstances. This regular, weekly email reminds me to pause and reflect on what I can do to become a better leader for my team, to achieve our goals more effectively and efficiently, and to provide a better service to our community.

The publication I read is a good source for education, but it is not the magic source for advice and learning. A system that promotes regular and consistent learning is the magic.

A former U.S. Attorney believed in a management approach that he found a certain book captured well. He bought copies of the book for

every member of the management team. Each week the team would read a chapter and discuss its application to their office. This consistent and unified approach yielded great benefits to the entire office, making it one of the highest functioning offices I have seen.

Of course, this office had its own challenges, as every group of humans does, but as one member of the team explained to me, when a problem arises, we know how to approach it, we deal with it quickly, and we move on. This group figured out how to manage its challenges successfully. This U.S. Attorney was a great leader and, through regular management education and discussions, taught his team to row in the same direction toward greater success and contentment. Notice that this U.S. Attorney did not just tell his team what to do; he mentored their understanding and application through their collective study and discussions.

Different teams use variations of this approach. One office management team reads and discusses a management-related article each month, selecting topics that address their immediate challenges and needs. Another team watches a TED talk, video, or other presentation each quarter and discusses its potential application to their office.

The key is to be proactive and consistent. It's like physical exercise—a person becomes more physically fit when they regularly act on principles of good health. When they fail to take action, physical abilities diminish. That is a law of the human body, and I suggest the same intentionality is required to become a more effective leader of people. Regularly studying and applying leadership principles will yield great benefits. Including your management team in that process can yield even greater rewards.

B. Include team discussions

To ensure that a team discussion is productive, be observant. In any group, some people will be more extroverted than others; these people are often quick to express their thoughts. But these folks do not necessarily have more value in a group conversation than introverts or those slower to express themselves. Research shows that in the most effective groups, the discussions are balanced with each member speaking about the same amount of time. A wise leader will find ways to draw out comments from the more introverted members, not let the more vocal personalities dominate a discussion, and help each person appreciate the perspective of other group members. Research also shows that a team with diverse backgrounds—gender, ethnicity,

culture, geography, personality, etc.—will generate better ideas and be more productive than homogenous teams.

Discussing ideas as a group helps a leader to understand the staff, their strengths and challenges, and how to help them progress. Who on the team is a creative thinker? Who is a linear thinker? Who is a gifted problem-solver? Who thinks strategically? Who is detail-oriented? How do each of these talents work together to yield greater results and achievements? Use discussions as an opportunity to learn more about the strengths of team members. Group discussions can also highlight team dynamics and gaps in understanding of the group goals; this is valuable, indirect feedback for any leader.

Team discussions highlight opportunities observant leaders can utilize to take advantage of what their colleagues can contribute. Effective managers do more than give assignments and receive reports. Through discussions, appropriate assignments, and coaching, great managers empower individuals and teams to grow and make even greater contributions.

III. Choose to become a leader

Every manager comes to the job with strengths and weaknesses. By choosing to regularly read management literature and apply the principles learned thereby, a lawyer is choosing to improve his or her self-awareness, to look for new approaches for difficult situations, and to improve the emotional intelligence skills that are inextricably intertwined in successfully leading a team.

Lawyers don't become good at their craft because the bar issues them a license to practice law. It takes *practice*. And so it is with managers. It takes continued learning and practice. Continuing management education should be a routine part of every manager's professional development, just like CLE is for lawyers.

No matter what your current role, learn how to be a good colleague and effective team member. Exercise humility to be hungry for ever-greater knowledge and understanding. Accelerate your progress by being open to the wisdom of others, by reading management literature, and by listening to your colleagues. As you are invited to assume management responsibilities, recognize that it requires an additional skill set and find ways to enhance those skills.

About the Author

Dayle Elieson is Chief Counsel at the Drug Enforcement Administration and former U.S. Attorney for the District of Nevada. She also served as the Assistant Director at the Executive Office of United States Attorneys, responsible for the Evaluation and Review Staff; Counsel to the United States Senate Committee on the Judiciary; and an AUSA in the Northern District of Texas.

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Flame Out: Preventing Burnout in the Legal Profession

Dr. Diana Uchiyama
Executive Director
*Lawyers' Assistance Program*¹

As a clinical psychologist working directly with judges, lawyers, and law students, I often see people who are unable to quantify the malaise they are experiencing related to the work they are doing. They often tell me they no longer like what they do, they feel more negative and pessimistic than before, they feel helpless and hopeless that things can change, they dislike the practice of law, and all of these feelings are impacting the work they are doing. What I also discover in the assessment process is that these feelings have been there for an extended period and continue to increase over time, leading them to feel depressed, anxious, and sometimes suicidal. Oftentimes, they combat these troubling feelings with alcohol, prescription medications, or other substances to minimize the discomfort and stress these feelings are causing in their lives. When talking to them, there is a great deal of shame and embarrassment over their livelihood and work causing them such distress and acute fatigue. They often feel angry and resentful that they are experiencing loss or problems in other areas of their life including relationships, social connections, and overall physical and mental health.

Unfortunately, these feelings are not unusual in the legal profession. Judges, lawyers, and law students experience mental health and substance use issues at unusually higher rates than the general population. In a survey conducted by the American Bar Association and the Betty Ford/Hazelden Treatment Center and published in 2016, self-reported numbers were staggering. With almost 13,000 lawyers responding, 28% of lawyers reported having depression, 19% reported having an anxiety disorder, 23% reported

¹ The Lawyers' Assistance Program's (LAP) mission is to help, protect, and educate our legal community about substance use, mental health, and wellness. If you or someone you know needs support with mental health or wellbeing, do not hesitate to contact LAP or your state bar. LAP services are cost-free and 100% confidential. You can contact LAP at gethelp@illinoislap.org, via phone at (312) 726-6607, or online at illinoislap.org.

experiencing chronic stress, and almost 21% reported having a substance use disorder.² How can it be that highly educated and respected professionals have such significant issues?

In May 2019, the World Health Organization (WHO) expanded the definition of “burnout” in its medical diagnosis handbook, the International Classification of Diseases, known as the ICD-11, and recognized it as an “occupational phenomenon.” While it is not classified as a medical condition, it is legitimized as a “factor influencing health status or contact with health services.”³ WHO defined burnout as “a syndrome conceptualized as resulting from chronic workplace stress that has not been successfully managed.”⁴ Further, it characterized burnout as having three dimensions:

- (1) Feelings of energy depletion or exhaustion;
- (2) Increased mental distance from one’s job, or feelings of negativism or cynicism related to one’s job; and
- (3) Reduced professional efficacy.⁵

The implication of recognizing burnout as a workplace hazard is a step in the right direction and adds legitimacy to the emotions that so many people experience in the workplace but particularly in the field of law. As legal professionals, we must recognize the fatigue and depletion that can result from the work that we do. Of course, mental health professionals must first rule out that a mood disorder, anxiety, or other stress-related disorders are not present but may also consider burnout as a huge contributor to some of the mental health symptoms that are being manifested, particularly when associated with our relationship with work.

Given the statistics from the 2016 ABA/Hazelden study suggesting that legal professionals are already struggling with significant mental health and substance use issues, it is critical that we first recognize that our work can be hazardous to our overall health. Stress in the profession is considered a norm. But when one out of four attorneys

² Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 51 (2016).

³ *Burn-out an “Occupational Phenomenon”*: International Classification of Diseases, WHO (May 28, 2019), https://www.who.int/mental_health/evidence/burn-out/en/.

⁴ *Burnout*, INTERNATIONAL CLASSIFICATION OF DISEASES (11th ed. 2018).

⁵ *Id.*

indicate they are experiencing chronic stress, this must be recognized as a huge problem for our profession, one that can lead to a deterioration in overall physical and mental health functioning. Additionally, stigma remains one of the top barriers for legal professionals and prevents individuals from getting help for their struggles. The ABA/Hazelden study also determined that few lawyers get help, despite acknowledging and recognizing they have significant problems.⁶ Legal professionals feel a tremendous amount of shame for needing help and often their work environments do not support them slowing down or even getting help. People who experience symptoms of burnout may minimize these feelings initially and then worry about taking time off to remedy what they are experiencing. Often, they work harder to try to combat these feelings.

Legal professionals have often referred to acknowledging mental health or substance use problems or treatment in the workplace as “career suicide.” Judicial applications, bar applications, and obtaining higher security clearance for certain jobs are often jeopardized if a person acknowledges a history of mental health or substance use issues or treatment. The WHO’s recognition that burnout is legitimate may be the first step to change, which is clearly necessary in our legal community. Legal professionals are fearful that obtaining help for their problems may make them look “weak” or diminish their ability to “climb the corporate ladder.” We must diminish and dismantle the belief that burnout is uncommon, not serious, and a sign of human frailty and weakness.

Burnout, once recognized, must be addressed by the person experiencing it. This is the first step to recovery. Having symptoms of burnout is not a sign of human frailty, but rather a sign of a dedicated, committed worker who has prioritized his work at the expense of his own personal health and wellbeing. We must prioritize self-care in our lives because it will lead to a belief that we have more control and self-efficacy over what happens in our lives. We often put off taking care of our needs in order to meet the demands and needs of the work force and others in our world, which increases the likelihood that burnout will result.

Legal professionals often experience unreasonable demands from the workplace, clients, and the profession. Managing the demands placed on us is critical to staying healthy and avoiding burnout. As

⁶ Krill, *supra* note 2.

problem-solving, high-achieving, compassionate people, we need to recognize that this sets the trap for burnout to develop. Working harder or longer is not the answer. This leads to a lack of perspective related to the work we are doing and how we define success. We must begin to recognize that oftentimes the workplace, and we as individuals, place unreasonable demands and expectations on ourselves and create a false identity associated with success. Money, power, title, and prestige as barometers for success, happiness, and life satisfaction often lead to feelings of dissatisfaction instead.

After recognizing there is a problem, self-care is the second step toward recovery. Adequate sleep and rest are critical for the brain to “recover.” Exercise and good nutrition help minimize the symptoms of burnout. We often cut corners in our self-care routine so that we have more time and energy for our work. Yet studies have shown that eating poorly and a lack of exercise increase maladaptive behaviors and increase physical and mental health functioning problems.

The third step toward recovery is increasing social connections with family, friends, and colleagues. Humans are socially connected beings and require positive support from others. The tendency toward isolation increases as burnout develops, and our feelings of depletion and exhaustion lead to the desire to avoid others, creating a perfect storm for more maladaptive behaviors, such as increased substance use, increased mental health symptoms, and sometimes suicidal thoughts. Every 40 seconds, we lose a person to suicide in this country. This is a horrific statistic that keeps increasing. Isolation increases the tendency for people to feel hopeless and helpless. By encouraging connection among legal employees and professionals and providing resources to them in times of need, it inherently gives permission for people to reach out for help and assistance without fear of repercussion.

Employers also need to take inventory of their workplaces and cultures. They need to determine if they are setting unreasonable expectations related to work hours, work expectations, and the overall health and wellness of the employees. Unfortunately, many legal settings talk about health and wellbeing in the abstract, without reviewing and changing their own internal policies, expectations, and cultures. Creating mentor/mentee relationships, a sense of community, a collegial work environment, a healthy work-life balance, and a sense of passion and purpose, and encouraging and promoting individual learning and growth, are all some ways employers can

increase health and wellbeing in their workforce. A workplace culture can be changed and can be built on a sense of community and shared purpose, leading to higher levels of resiliency among workers.

As legal professionals, we can no longer accept pushing through our distress as the solution. We need to take ownership—both individually and collectively as legal professionals—to minimize and decrease unhealthy behaviors and high levels of chronic stress in our work environments. As individuals, we need to seek help when we recognize early warning signs of deterioration, both personally and professionally. We need to be honest that our own internal barometers for success are not accurate and may be increasing burnout symptoms. We need to actively seek help and support from a mental health professional or human resource professional when individually we are not able to manage our symptoms.⁷

As an employer and profession, we need to recognize the serious health consequences from burnout and become engaged in proactive change within our work settings. Performance is not the ultimate criteria for success. We must look to individual and overall organizational health as the barometers for a healthy work culture. Encouraging legal professionals to thrive at work while meeting the demands of their job and knowing they have the support of their employer and peers, leads to higher levels of job satisfaction, an organizational culture of community and meaningful work, and more personal autonomy.

About the Author

Dr. Diana Uchiyama is the Executive Director of the Illinois Lawyers' Assistance Program (LAP). Prior to joining LAP, she was the Administrator of Psychological Services for DuPage County where she oversaw a DASA licensed outpatient substance use treatment program, including a Mentally Ill Substance Abuse (MISA program) and Seeking Safety program for individuals with substance use problems, who were also trauma survivors. While at DuPage County she also ran a 26-week Domestic Batterer Intervention Program for a court mandated population of clients.

Dr. Uchiyama has also worked for the Kane County Diagnostic Center, as both a Staff Psychologist and Juvenile Drug Court

⁷ LAP is always available to help in these situations and is confidential with immunity under Illinois Supreme Court Rule 1.6.

Coordinator, and has an extensive background doing court ordered evaluations including psychological, sanity, fitness, fitness to parent, and sex offender evaluations. She is a licensed sex offender evaluator in the State of Illinois. Dr. Uchiyama also conducts therapy with adults and adolescents. She has implemented numerous changes to court ordered programs both in Kane and DuPage County and is a SAMSHA certified trauma informed care trainer. She also has an Advanced Mindfulness Training Certificate in an effort to increase wellbeing among her clients.

Prior to obtaining her masters and doctorate in Clinical Psychology, Dr. Uchiyama was an Assistant Public Defender in Cook County working in various felony courtrooms at 26th and California in Chicago for over a decade. She obtained her law degree from Pepperdine University School of Law.

Leader or Manager—Appreciate the Difference

Bradley E. Tyler

Assistant United States Attorney

Executive Office for United States Attorneys

Evaluation and Review Staff

Commenting on the differences between being a leader and a manager, Erika Andersen, a founding partner of the executive coaching firm, Proteus International, wrote:

Management is too often dismissed as a soulless and number-crunchy exercise in hounding people about details and making them fill out forms, while leadership is lionized as “big picture thinking” and “inspiring the troops.”¹

Ms. Andersen believes that leading is more about who you are as a person. People want leaders who feel “followable,” viewing you as far-sighted, passionate, courageous, wise, generous, and trustworthy. Conversely, management is more of a skill-based craft, requiring you to make the best of the resources at hand.

It is rare for a supervisor in a U.S. Attorney’s Office (USAO) to be only one or the other. We are a mixture of the two. How do you view yourself through this lens? Are your strengths based on the leadership qualities identified by Ms. Andersen? If so, how do you demonstrate your vision, passion, courage, wisdom, generosity, and trust to your team? Could you do more? What management strengths do you possess? Are you skilled in the use of the Department of Justice’s (Department) management tools? How well do you know your people? How are you supporting their professional progression?

¹ Erika Anderson, *Manage or Lead? Do Both.*, FORBES (Apr. 10, 2012), <https://www.forbes.com/sites/erikaandersen/2012/04/10/manage-or-lead-do-both/#10ab71e6b2e7>. Erika Andersen is the founding partner of Proteus, a coaching, consulting, and training firm that focuses on leader readiness. Over the past 30 years, she has developed a reputation for creating approaches to learning and business-building that are tailored to her clients’ challenges, goals, and culture. She and her colleagues at Proteus focus uniquely on helping leaders at all levels get ready and stay ready to meet whatever the future might bring.

As an Executive Office for United States Attorney's (EOUSA) Evaluation and Review Staff (EARS) evaluator/team leader over the past 20 years, I have learned that there is fairly widespread confusion within the USAO community as to the differences between being a leader, as opposed to being a manager. This confusion is understandable, as these responsibilities are often discussed interchangeably.² In an effort to dispel some of the confusion, my intention here is to suggest some significant differences between the two and how appreciating those differences will help you be a better leader and/or manager.

In his popular book, *Start With Why*, Simon Sinek posits that every leader must realize that their power to influence human behavior confers a choice between manipulating behavior or inspiring it. He recommends that

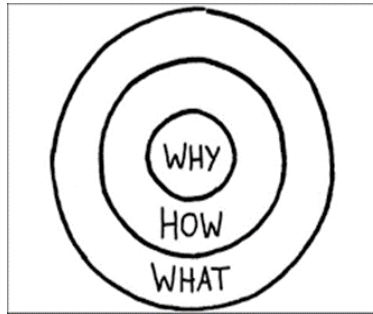
Great leaders . . . are able to inspire people to act. Those who are able to inspire give people a sense of purpose or belonging that has little to do with any external incentive or benefit to be gained. Those who truly lead are able to create a following of people who act not because they are swayed, but because they were inspired.³

Sinek believes that organizations do not ask the right questions in determining how best to motivate. Using what he calls the *Golden Circle*, he postulates that every organization knows WHAT it does, and the people within each organization know the HOW of WHAT they do. Nevertheless, leaders of many organizations do not, at the

² See Abraham Zaleznik, *Managers and Leaders: Are They Different?*, HARVARD BUSINESS REVIEW (Jan. 2004), <https://hbr.org/2004/01/managers-and-leaders-are-they-different>. Abraham Zaleznik taught at the Harvard Business School for four decades. He authored 16 books and over 40 articles. Beginning in the 1960s, he studied at the Boston Psychoanalytic Society and Institute. Zaleznik served on corporate boards, consulted to many businesses, and was an early contributor to the formation of the International Society for the Psychoanalytic Study of Organizations.

³ SIMON SINEK, *START WITH WHY* (Portfolio/Penguin 2009). Described as “a visionary thinker with a rare intellect,” Simon Sinek teaches leaders and organizations how to inspire people. He is the author of multiple bestselling books including *Start With Why*, *Leaders Eat Last*, *Together is Better*, *Find Your Why*, and *The Infinite Game*.

first opportunity, effectively formulate or communicate the WHY the organization does WHAT it does, that is, what is the organization's purpose, cause, or belief?



Within the USAO community, the “whys” for what we do are usually communicated in general terms: public safety; “to do justice”; ensure victims’ rights; serve the community. If you follow Sinek’s theme, however, effective inspiration cannot be based upon general terms, as they do not personally resonate. Rather, inspiration comes when the organization leaders genuinely and regularly communicate the specific purpose, cause, and beliefs of the office to serve the USAO’s particular community.

So how do you communicate to each of your staff colleagues their specific purpose? How do you acknowledge their role in, and contribution to, the office’s mission? What do you do to reinforce their belief in serving the community? Try this: Create a journal for each staff member, detailing specific actions each has taken that clearly shows her purpose, contribution, and service to your district and the nation. Then share these thoughts one-to-one. Look for opportunities to reinforce the specific “why” of what they do.

Marcus Buckingham, management consultant and author, tells us that to excel as a leader, a manager, or both, you must be aware of the very different skills each role requires. On that difference for a manager, he wrote:

[T]he job of a manager . . . is to turn one person’s particular talent into performance. Managers will succeed only when they can identify and deploy the differences among people, challenging each employee to excel in his or her own way. . . . Great managers know and value the unique abilities and even the eccentricities of their employees, and they learn how

best to integrate them into a coordinated plan of attack.⁴

Consequently, here is a manager's call to arms: *What problems have to be solved, and what are the best ways to achieve results so that people will continue to contribute to this organization?*

Between the two roles, Erika Andersen believes that there is common ground, that is, shared skills and behaviors that make for the most effective leader/manager. This should come as no surprise. In order to be successful as a supervisor, you need to possess both leadership and management traits. Assess your strengths and weaknesses as a supervisor. Identify those areas in which you want to grow and ask your own supervisor to help you develop them. For those you supervise, demonstrate every day that you listen well, you are curious, you manage your self-talk (control your inner voice—you are part of a team), and you hold yourself accountable.

One last thought: Our mission is defined by national goals and priorities set by the Attorney General, as well the goals and priorities tailored by the senior management team in each of the USAOs. Our day-to-day purpose is not static, but ever changing and very fluid. This suggests that our leaders and managers must become familiar with and apply “situational leadership,” an idea first developed by Paul Hersey⁵ and Ken Blanchard,⁶ who highlighted the need to adapt

⁴ Marcus Buckingham, *What Great Managers Do*, HARVARD BUSINESS REVIEW (Mar. 2005), <https://hbr.org/2005/03/what-great-managers-do>. Marcus Buckingham is a global researcher and thought leader focused on unlocking strengths, increasing performance, and pioneering the future of how people work. Building on nearly two decades of experience as a Senior Researcher at Gallup Organization, he currently guides the vision of ADP Research Institute.

⁵ Paul Hersey was a Distinguished Professor of Leadership Studies at Nova Southeastern University. He had been a faculty member of Northern Illinois University, California State University, Chico, University of Arkansas, and Ohio University. Hersey served as Project Director for the Industrial Relations Center of the University of Chicago, Training Director at Kaiser Aluminum & Chemical Company, and Department Head at Sandia Corporation.

⁶ Kenneth Hartley Blanchard's writing career includes over 60 published books. His most successful book, *The One Minute Manager*, has sold over 13 million copies and has been translated into many languages. He is the Chief Spiritual Officer of The Ken Blanchard Companies, an international

our leadership style to the changes in our particular organization and community.⁷ We should not wed ourselves to a particular leadership or management style due to its success, but rather perceive the need to shift our style to fit a situation and the capabilities of our staff to respond.

From my experience as a USAO manager and an EARS evaluator, and with some support from private sector management wisdom, one of the most pervasive “must have” qualities for any leader or manager is personal day-to-day engagement with your team, in whatever form it takes. Being genuine in your expression of care and respect, inspires performance and pays tremendous dividends.

About the Author

Bradley E. Tyler is currently the EARS Criminal Program Manager. He has served in that role since 2016. From 1979–1984, he served as a litigation associate with a New York law firm. From 1984–1986, he was an Assistant United States Attorney in the Western District of New York, where he prosecuted white collar and general crimes. He worked with OCDETF from 1986–1990. In 1990, he became the Branch Chief for the Western District of New York. Thereafter, from 2006–2016, he prosecuted white collar and cybercrimes.

management training and consulting firm that he and his wife, Marjorie Blanchard, co-founded in 1979. Blanchard is known for the quote: “None of us is as smart as all of us.” *Ken Blanchard*, WIKIPEDIA, (Sept. 22, 2019), https://en.wikipedia.org/wiki/Ken_Blanchard#cite_note-3.

⁷ PAUL HERSEY, KENNETH H. BLANCHARD & DEWEY E. JOHNSON, *MANAGEMENT OF ORGANIZATIONAL BEHAVIOR: UTILIZING HUMAN RESOURCES*, (Prentice Hall, 7th ed. 1996). In 1982, the Situational Leadership® Model was first published in the business school classic textbook *Management of Organizational Behaviour: Utilizing Human Resources*. The concept has become perhaps the best known of all the Situational/Contingency models.

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Managers' Bill of Rights

Jay Macklin

General Counsel

Executive Office for United States Attorneys

Managing employees is often more of an art than a skill. Regardless of how it is classified, however, it can be very challenging for managers to deal with difficult issues involving their employees. As a result, managers in U.S. Attorneys' Offices (USAOs) and in the Executive Office for United States Attorneys (EOUSA) need to use every tool available to help them properly manage employees' performance, take effective action in the event of employee misconduct, and improve the productivity and efficiency of the federal workforce. In many instances, managers are unaware of the tools they have available. As a result, the General Counsel's Office (GCO) for EOUSA regularly reminds USAO and EOUSA managers of the full spectrum of tools they can utilize when engaging with their employees. These tools can be referred to as a manager's Bill of Rights because federal courts and administrative adjudicators have routinely upheld the right of managers to take these actions. Consequently, this article will discuss the full range of rights available to USAO and EOUSA managers in dealing with their employees and ensuring that their offices can more effectively accomplish their mission and that of the Department of Justice (Department).

I. Just the two of you

Managers have the right to meet with an employee without the presence of their attorney or other representative.

Occasionally an employee will adopt the attitude that they will not talk with a manager without their attorney or representative present. For example, an employee might say, "Don't tell me, tell my attorney." Except for a few excepted circumstances, a manager has the right to meet with an employee and speak with him in normal, routine work discussions without the involvement of a third party. Simply put, employees have no entitlement to a third party interjecting themselves into a discussion between a manager and an employee; thus, a manager can direct an employee to meet with them without anyone else present.

This issue also arises when the Office of the Inspector General (OIG) or the Office of Professional Responsibility (OPR) investigate a possible violation of law, bar rules, or policy. In such instances, employees are required to cooperate fully with the investigation under penalty of disciplinary action.¹ Because an employee has a duty to cooperate with the investigation under possible penalty of discipline, the employee may believe he can invoke the right not to incriminate himself and to have representation. That, however, is not the law. The Supreme Court dealt with this issue in *Garrity v. New Jersey*.² In *Garrity*, the Court held that a public employee cannot be forced to provide a statement to his employer and then have that statement used against him in a criminal proceeding.³ From the reasoning set out in *Garrity*, there are five basic rules. First, a manager can order an employee to cooperate in an internal administrative investigation and to provide statements related to the employee's conduct. Second, such statements made pursuant to an order to cooperate and respond cannot be used against the employee in any criminal proceeding. Third, an employee may not refuse to answer specific job-related questions. Fourth, an employee can be disciplined or terminated for refusing to cooperate with an administrative investigation. Finally, in order for the statement to be protected by *Garrity*, it must be ordered or coerced by the need to comply with a workplace investigation.

¹ The Department has a specific policy on cooperation, codified at 28 C.F.R. § 45.13, Duty to cooperate in an official investigation, which states that,

Department employees have a duty to, and shall, cooperate fully with the Office of the Inspector General and Office of Professional Responsibility, and shall respond to questions posed during the course of an investigation upon being informed that their statement will not be used to incriminate them in a criminal proceeding. Refusal to cooperate could lead to disciplinary action.

28 C.F.R. § 45.13; *see also* Soc. Sec. Admin. v. Steverson, 111 M.S.P.R. 649, 653 ¶ 8 (2009) (employee is obligated to perform all official duties with candor, which includes the duty of candor during official investigations to assist the agency in reaching the common goal of understanding the employee's conduct).

² 385 U.S. 493 (1967).

³ *Id.* at 497–98.

If a supervisor or other agency official compels an employee to provide a statement under threat of possible discipline, the *Garrity* case law confers on the employee what is known as use immunity.⁴ It stands to reason that since *Garrity* immunizes the statements of the employee, the employee has no right to representation when speaking with her supervisor during the course of an investigation.

The employee generally has the right to representation when she speaks with her manager or supervisor in three specific circumstances. First, when an employee is a member of a workplace union, the investigative interview may raise a limited right of representation.⁵ These so-called *Weingarten* rights are applicable only in narrow instances. The right arises only in investigatory situations where the employee requests representation, and the employee reasonably believes the investigatory discussion may result in disciplinary action.⁶ It does not apply in routine work discussions.⁷

In addition, an employee has a right to representation in several employment action situations where the manager takes on a role other than that of supervisor. For example, when a manager assumes the role of deciding official during the course of a disciplinary action and the employee is entitled to respond to the manager's proposal for discipline or when a manager acts as a grievance official under the terms of the Agency Grievance Procedure,⁸ the employee is entitled to representation. If, however, the manager is simply informing the employee of the disciplinary or grievance decision, there is no right to

⁴ See *Kastigar v. United States*, 406 U.S. 441, 458–59 (1972).

⁵ *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 256–57 (1975).

⁶ *Id.* at 257.

⁷ The court in *Quality Manufacturing Company* stated,

We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.

Quality Mfg. Co., 195 N.L.R.B. 197, 199 (1972).

⁸ *Human Resources (HR) Order—DOJ 1200.1 pt. 3(b)(4)*, U.S. DEP'T OF JUST., (last updated June 15, 2015), <https://www.justice.gov/jmd/hr-order-doj-12001>.

employee representation.⁹

Finally, an employee is entitled to representation as part of the Equal Employment Opportunity (EEO) complaint process when he appeals a disciplinary action to the Merit Systems Protection Board (MSPB), or when he files a claim with the Office of Special Counsel (OSC). But this entitlement to representation only applies during the course of the actual EEO, MSPB, or OSC proceedings. It does not entitle the employee to representation during normal manager-employee work place discussions that are not part of the litigation process.¹⁰

II. You can't handle the truth

You have the right to receive truthful explanations.

When meeting with an employee on workplace related matters, a manager has the right to require employees to answer questions and explain behavior. Employees must tell the truth when they speak with their manager. If the employee refuses to answer or responds with a lack of candor, he may be subject to disciplinary action.

A charge of making false statements is proven when it is demonstrated that an employee's statement is knowingly made with the intention of deceiving or defrauding the manager.¹¹ In proving this charge, the employee's state of mind may be inferred from the totality of the circumstances of the discussion.¹²

⁹ See *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1166 (5th Cir. 1980).

¹⁰ See *Pedicini v. United States*, 480 F. Supp. 2d 438, 453 (D. Mass. 2007) (Plaintiff's EEO representative was prevented from attending informal discussion of regular work duties. Plaintiff's supervisor told him that he did not need to respond to any questions that Plaintiff felt involved his EEO claims.).

¹¹ See *Naekel v. Department of Transp.*, 782 F.2d 975, 977 (Fed. Cir. 1986).

¹² See *Mooney v. Department of Def.*, 44 M.S.P.R. 524, 526-27 (1990); *Forma v. Department of Justice*, 57 M.S.P.R. 97, 103-04 (1993) (plausible explanations are to be considered in determining whether the incorrect information was supplied intentionally); *Stein v. U.S. Postal Serv.*, 57 M.S.P.R. 434, 438 (1993) (the issue of an employee's intent to deceive must be resolved from the totality of the circumstances).

III. Live—not taped

You have the right to meet with an employee without being tape-recorded.

The introduction of recording devices into the work place elevates simple employment discussions into unpleasant confrontations and prevents open communication. For this reason, courts have recognized a manager's right to ban such devices from work place conversations. For example, in *Peterson v. West*, the court held that a charge of misconduct for insubordination for surreptitiously recording a supervisor meeting was legitimate and nondiscriminatory.¹³ When visible, a manager who is meeting with an employee can direct the employee to cease recording and put the recorder away. Alternatively, management can establish a written policy or inform employees that such use is prohibited, thereby preventing the recording of office communications. Federal employees are required to comply with valid directions and follow the orders of supervisory officials.¹⁴ Employees do not have the discretion to disobey or ignore valid management orders.¹⁵ Should an employee disobey proper orders, they do so at the risk of being found insubordinate and subject to disciplinary action, up to and including removal.¹⁶

A valid order by a manager prohibiting the recording of conversations is based on a manager's inherent right to maintain a productive, efficient, and orderly workplace. This right is not dependent on whether state law permits surreptitious recordings.

The recording of conversations in the work place may also implicate various professional ethics considerations. For example, in 1974 the American Bar Association (ABA) opined that Rule 1-102(A)(3) of the ABA's Code of Professional Responsibility prohibited an attorney from recording a conversation without consent from all parties to the

¹³ 17 F. App'x 199 (4th Cir. 2001) (not precedential).

¹⁴ See *Hubble v. Department of Justice*, 6 M.S.P.B. 553, 554, 6 M.S.P.R. 659, 661 (1981).

¹⁵ See, e.g., *McPartland v. Department of Transp.*, 13 M.S.P.B. 155, 158, 14 M.S.P.R. 506, 511 (1983), *aff'd* 795 F.2d 1017 (Fed. Cir 1986) (unpublished table decision).

¹⁶ See *Nagel v. Department of Health and Human Servs.*, 707 F.2d 1384, 1387 (Fed. Cir. 1983); *Bellamy v. Department of the Navy*, 12 M.S.P.B. 93, 94, 13 M.S.P.R. 526, 528 (1982).

conversation.¹⁷ In 2001, however, the ABA Committee on Ethics and Professional Responsibility reversed course and issued Formal Opinion 01-422, which modified the earlier guidance of Opinion 337 in providing that a lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules of Professional Conduct.¹⁸ A review of various state bar opinions since 2001 reveals that the guidance regarding surreptitious recording by attorneys and their clients varies among the states. For example, it may be permitted in Arizona and Iowa, but it may not be in Colorado, South Carolina, and Virginia.¹⁹

Whether prohibited by management direction or state bar rules, managers have the right to direct employees not to record a conversation. If the employee fails to follow the manager's instruction, the manager has the right to impose disciplinary action.

IV. We're from the government . . .

You have the right to qualified immunity for your actions as a federal manager.

Managers make difficult decisions every day. They can best accomplish the mission of the Department if they can make these difficult decisions without fear of being sued. Managers should be confident that if an employee sues them for actions they took that were within the scope of their managerial duties, and it is in the interest of the United States, they will be defended by the United States.²⁰

¹⁷ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 337 (1974). Formal Opinion 337 contained an exception allowing a law enforcement officer or attorneys acting under the direction of the Attorney General or such principal prosecuting attorneys to record a conversation without all parties' consent.

¹⁸ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

¹⁹ See CHARLES DOYLE, CONG. RESEARCH SERV., R42650, WIRETAPPING, TAPE RECORDERS, AND LEGAL ETHICS: AN OVERVIEW OF QUESTIONS POSED BY ATTORNEY INVOLVEMENT IN SECRETLY RECORDING CONVERSATION (2012).

²⁰ See 28 C.F.R. § 50.15.

The protections afforded a manager from suits in tort are founded on legislation passed in 1988. The *Federal Employees' Liability Reform and Tort Compensation Act of 1988*²¹ confers qualified tort immunity on federal employees for common law torts committed within the scope of their employment. The legislation is commonly called the Westfall Act because it was passed in response to the Supreme Court's decision in *Westfall v. Erwin*,²² which restricted the scope of immunity available to federal employees. The Westfall Act has proven to be an effective shield for federal managers accused of committing tortious wrongdoing by their employees.

In addition, if a manager is sued in state or federal court for actions arising from alleged violations of Title VII, or similar discrimination claims, such claims are preempted and the manager must be dismissed from the action.²³

If a manager is sued in federal or state court by an employee for managerial acts and the United States is not substituted as the proper defendant, the manager may request representation by the Department pursuant to 28 C.F.R. § 50.15. The Constitutional and Specialized Torts Branch in the Department's Civil Division will make the decision whether to grant representation based on the manager's request for representation, whether the manager was acting within the scope of their employment, and whether it is in the interest of the government.

V. You just THINK those are yours

You have the right to review files, including computer files, and search the workplace.

In *O'Connor v. Ortega*, the Supreme Court recognized a “governmental interest justifying work-related intrusions by public employers . . . [in] the efficient and proper operation of the workplace.”²⁴ The Supreme Court affirmed that the operational realities of the workplace limit an employee's reasonable expectation

²¹ 28 U.S.C. § 2679.

²² 484 U.S. 292 (1988).

²³ See *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 829–32 (1976); *Hampton v. Internal Revenue Serv.*, 913 F.2d 180, 183 (5th Cir. 1990) (a plaintiff cannot circumvent Title VII's remedial scheme by suing supervisor directly).

²⁴ 480 U.S. 709, 717, 723 (1987).

of privacy.²⁵ Thus, when a manager wishes to review files, search an office, or view computer files of the employee, the manager is required to balance the employee's expectation of privacy with the work-related nature of the search. For example, where the employee has a substantial and legitimate expectation of privacy, such as with the employee's purse, brief case, or locked box, a manager must show a compelling work-related justification for a search. Case files stored in or on an employee's desk or in the office file room, however, require only a minimal showing of work-related justification because there is no reasonable expectation of privacy in such storage places.

Managers should be aware of the *Electronic Communications Privacy Act of 1986*,²⁶ which generally prohibits employers from accessing certain forms of electronic communication, such as email, voice mail, phone calls, and internet activity. The Act, however, provides two exceptions. Managers may monitor their employees' electronic communications when the employee gives consent (actual or implied), and managers may conduct a search as part of the ordinary course of business.

Courts have held that warning messages displayed on government computers providing notice that the government may access the computer in the ordinary course of business, or electronic search policies published by agencies, are sufficient to overcome any claim of an employee's expectation of privacy. Such warning messages, known as computer banners, and written agency policies have played a significant role in court decisions.²⁷

²⁵ *Id.* at 725. The *O'Connor* Court established the benchmark for analyzing government work-related searches by ruling that such searches should be analyzed by a two-part test: (1) one must ascertain whether the employee has a reasonable expectation of privacy with respect to the area or thing searched; and (2) upon an affirmative finding, then one must determine whether the search was reasonable. The second part of this test is analyzed under the totality of circumstances and is the focus of most state and federal court decisions. The question of reasonableness turns on the work-related nature of the search. *Id.* at 726.

²⁶ 18 U.S.C. §§ 2510–23.

²⁷ *See, e.g.*, *Muick v. Glenayre Electronics*, 280 F.3d 741 (7th Cir. 2002) (ruling that an employee has no reasonable expectation of privacy in laptop files where employer announced it could inspect laptops it provides to employees); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000) (holding that a CIA division's internet usage policy eliminated a reasonable

When an EOUSA or USAO manager seeks to access an employee's electronic files, he should contact GCO to ensure he complies with the approval requirements set out in DOJ Order 2740.1A, *Use and Monitoring of Department of Justice Computers and Computer Systems*.²⁸ Managers should be aware that if the employee is engaged in litigation against the Department, the employee's electronic files may contain correspondence or communications with her attorney or legal representative. In that event, such electronic files are protected by the attorney-client privilege and care should be taken to ensure that the privilege is not violated. It may be advisable in these circumstances to have someone other than the manager conduct the search in order to build a firewall between the employee's information and the manager.

VI. This is a direct order!

You have the right to order someone to do or not do anything.

Inherent in the position of manager is the right to direct work and behavior in the workplace. Direction of work and behavior is an exercise of the agency's management right to assign work.²⁹ A majority of interactions between a manager and employees are informal. There are times, however, when a manager needs to be more direct and formal. In these situations, it becomes necessary to order an employee to do, or not do, a specific task. An order may be in writing, through email, or through verbal interaction. For an order to be considered valid and enforceable, the employee must actually receive the order and be aware of its mandatory nature. Accordingly, a statement that expresses a simple desire for action is not an order but rather a mere request. A manager should not state "I'd like you to . . ." Instead, the manager should state "You must . . ." or "I direct you to . . ." A manager's order must have a connection to the job and must be lawful. For example, a manager may not order an employee to

expectation of privacy concerning file transfers, all website history, and all email); *United States v. Bailey*, 272 F. Supp. 2d 822 (D. Neb. 2003) (finding that an employee has no reasonable basis to believe activities on work computer were private "when, through company's screen notification, they have actual knowledge that the computer can be searched").

²⁸ Dep't of Justice, *DOJ 2740.1A, Use and Monitoring of DOJ Computers and Computer Systems* (2010), <https://www.justice.gov/jmd/file/642871/download>.

²⁹ See 5 U.S.C. § 7106(a)(2)(B).

“paint my house,” or “lie to investigators.” Refusal to obey a manager’s order is a serious matter; indeed, discipline for refusal to obey an order has been upheld by the MSPB when charged as either a failure to follow instructions or insubordination. A charge of failure to follow instructions does not require proof that the failure was intentional.³⁰ “Insubordination . . . is a willful and intentional refusal to obey an authorized order”³¹ Refusal of a supervisor to obey an order from their manager has been considered an especially grave matter by the MSPB, which recognizes that supervisors may be held to a higher standard of conduct than non-supervisory employees.³²

Moreover, even if the employee believes that the order was improper, unlawful, or unwise, he does not have the right to disregard it. Rather, an employee is required to first comply with the order, and then register his complaint or grievance. The only exception to this requirement is where obedience would place the employee in a clearly dangerous situation or where complying with the order would cause irreparable harm.³³

VII. Y’all come back

You have the right to cancel or deny annual leave.

A manager has the right to cancel or deny annual leave; cancellation of leave is an exercise of management’s right to assign work.³⁴ Guidance issued by the Office of Personnel Management provides that an employee’s right to take annual leave is subject to the right of the

³⁰ See *Hamilton v. U.S. Postal Serv.*, 71 M.S.P.R. 547, 555–57 (1996).

³¹ *Phillips v. Gen. Servs. Admin.*, 878 F.2d 370, 373 (Fed. Cir. 1989) (emphasis omitted).

³² *Caster v. Department of the Army*, 62 M.S.P.R. 436, 441 (1994).

³³ See *Cooke v. U.S. Postal Serv.*, 67 M.S.P.R. 401, 407–08 (1995), *aff’d* 73 F.3d 380 (Fed. Cir. 1995) (unpublished table decision).

³⁴ See 5 U.S.C. § 7106(a)(2)(B); *American Federation of Government Employees Local 1900 (Union) and U.S. Department of Army, Forces Command Fort McPherson, Georgia (Agency)*, 51 F.L.R.A. 133, 135 (1995) (“Management’s right to assign work encompasses the authority to determine when work will be performed.” (citing *Service and Hospital Employees International Union Local 150 (Union) and Veterans Administration Medical Center Milwaukee, Wisconsin (Agency)*, 35 F.L.R.A. 521, 524 (1990))).

supervisor to schedule the time at which annual leave may be taken.³⁵ It further provides that supervisors are responsible for the overall planning, coordination, and approving of their employees' annual leave so that the agency's mission and employees' needs are met.³⁶ Thus, when an employee makes a timely request, the manager must either approve it or, if that is not possible because of project-related deadlines or the agency's workload, schedule it for some other time.

Since supervisors must balance the work of the agency against the interest of the employee in using annual leave, supervisors may find it necessary from time to time ask employees how they will use the requested annual leave so that the supervisors may make informed decisions about scheduling the leave.³⁷ In such cases, employees are not required to provide the supervisor with this information, but should understand that in the absence of such information, their request for annual leave may be denied based on project related deadlines or the workload of the agency.³⁸ Before canceling leave, managers should ensure they have a legitimate business reason related to the mission of the agency. The manager should also determine if there is an alternative course of action that would accomplish the same mission without the need for canceling or denying leave. When a manager determines that cancellation of leave is necessary to accomplish the work of the agency, a manager is required to notify the employee of the cancellation of his leave. If an employee does not receive notice and takes his scheduled leave, a manager may not discipline the employee.³⁹ Consequential damages (that is, non-refundable tickets) cannot normally be reimbursed by the agency for cancelled annual leave, so managers should act reasonably and exercise caution before cancelling an employee's leave.

³⁵ *Pay & Leave: Leave Administration Fact Sheets*, OFF. OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/#url=Fact-Sheets> (last visited Dec. 12, 2019).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *Herbert v. Department of Transp.*, 17 M.S.P.R. 62 (1983).

VIII. # % & \$!

You have the right to stop threatening, disruptive, or disrespectful speech or conduct.

The law is clear. “Disrespectful conduct as manifested by the use of abusive language is unacceptable and not conducive to a stable working atmosphere[]”⁴⁰ Thus, a manager has the right to stop any speech or conduct that is threatening, disruptive, or disrespectful. In fact, a manager actually is responsible for stopping such behavior.⁴¹ In *In re Glover*, the MSPB held that the “proper performance of government business requires that employees treat each other with a minimum degree of courtesy in their daily contacts.”⁴²

Although employees have a right to protest unlawful discrimination, the law does not allow insubordinate speech or nonproductive behavior as a form of employee protest.⁴³ Thus, federal appellate courts have held “that disruptive or unreasonable protests against discrimination are not protected activity under Title VII and therefore

⁴⁰ *Wilson v. Department of Justice*, 68 M.S.P.R. 303, 310 (1995). When considering discipline for inappropriate comments a manager should take into consideration the context of the communication. *See, e.g.*, *Larry v. Department of Justice*, 76 M.S.P.R. 348, 358 (1997) (comments made during psychotherapy); *Armstrong v. U.S. Postal Serv.*, 28 M.S.P.R. 45, 50 (1985) (comments made during a sexual harassment training session in which the instructors encouraged comments and feedback); *Farris v. U.S. Postal Serv.*, 13 M.S.P.B. 200, 204, 14 M.S.P.R. 568, 574 (1983) (noting that employees generally may not be discharged for rude and impertinent conduct in the course of presenting grievances).

⁴¹ *See Bree v. Department of Health & Human Servs.*, 49 M.S.P.R. 68, 72 (1991) (“Physical altercations at the work-site directly affect the agency’s obligation to maintain a safe workplace, and, by their very nature, are disruptive to the efficiency of the service.”); *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 287 (1987) (agency should not be required to assume the risk that one of its employees would jeopardize the safety of its other employees).

⁴² 2 M.S.P.B. 71,72, 1 M.S.P.R. 660, 663 (1980).

⁴³ *Matima v. Celli*, 228 F.3d 68, 78–79 (2d Cir. 2000) (“The law protects employees in the filing of formal charges of discrimination as well as in the making of informal protests of discrimination But not all forms of protest are protected For instance, Title VII ‘does not constitute a license for employees to engage in physical violence in order to protest discrimination.’”) (internal citations omitted).

cannot support a retaliation claim.”⁴⁴

Managers may need to restrict the speech of employees regarding matters that might disrupt the mission of the agency. When doing so, they may need to consider the employee’s free speech right under the First Amendment. In *Pickering v. Board of Education*, the Court stated that the First Amendment does not extend to protect false statements when there was evidence that a public employee knew such statements were false, or made them with reckless disregard for their truth.⁴⁵ The *Pickering* Court also said that the First Amendment does not protect insubordinate remarks, comments that create workplace disharmony, or public criticisms of an immediate superior that seriously undermine the effectiveness of the working relationship.⁴⁶ When employees make statements as employees of the United States, the employees are not speaking as citizens with full First Amendment protections. The leading case in this area is *Garcetti v. Ceballos*.⁴⁷ In this case, the Supreme Court held that “the Constitution does not insulate their [government employee] communications from employer discipline.”⁴⁸ In *Garcetti*, the Supreme Court considered whether the First Amendment protected Deputy District Attorney Ceballos’s memorandum about misrepresentations contained in an affidavit used by police to obtain a search warrant. The Court identified two relevant factors that determine the extent of the employee’s right to speak.⁴⁹ The first factor is whether the speech occurs in the workplace, and the second is whether the speech concerns the subject matter of the employee’s job.⁵⁰ If the answer to both factors is in the affirmative, the government may limit the speech. If the answer to only the second is in the affirmative, the government may limit the speech if the speech is closely tied to the subject matter of the employee’s job.⁵¹

⁴⁴ *Id.* at 79 (citation omitted).

⁴⁵ See 391 U.S. 563, 574 (1968).

⁴⁶ See *id.* at 569–70.

⁴⁷ 547 U.S. 410 (2006).

⁴⁸ *Id.* at 421.

⁴⁹ See *id.* at 420–21.

⁵⁰ *Id.*

⁵¹ See *id.* at 421.

IX. It's not my job . . .

You have the right to assign work that is not in the position description or is not during preferred office hours.

Most Department support positions have a position description that describes the basic duties of that specific job. In addition, all position descriptions have a provision at the end that provides that the employee may have to perform “other duties as assigned.” Similarly, although Assistant United States Attorneys (AUSAs) do not have position descriptions, the scope of their duties encompass the same principle of general availability for assignment of tasks associated with accomplishing the mission of the Department. As a result, the agency has the absolute right to assign work related to its mission and a manager has the right to assign work that is not in an employee’s position description.⁵²

The employee may choose to grieve the assignment of work; once a manager directs an employee to perform a task, however, the employee must treat it as any other lawful order and perform the task. The employee may grieve the order only after she performs it. Unless the order is illegal, the MSPB considers a refusal to perform that order to be “defiance of authority.”⁵³ Accordingly, an employee is not justified in disobeying a manager’s order to perform a defined task based on her belief that the order was improper or outside their position description.⁵⁴

Just as a manager may have to adjust the job assignments of the employee, the manager may also have to change the work schedule of the employee. The manager has the discretion to change an employee’s work hours so long as there is no loss of pay or other harm to the employee.⁵⁵ The MSPB does not interpret harm to an employee to mean inconvenience or disruption of life activities. Harm is a concept that stems from a manager’s abuse of discretion due to non-work-related reasons for a change of schedule or refusal to accommodate a disabled employee in such a manner that physical or

⁵² See 5 U.S.C. § 7106(a)(2)(B).

⁵³ See *Ballew v. Department of the Army*, 36 M.S.P.R. 400, 401–02 (1988) (upholding a charge of defiance of authority).

⁵⁴ See *Howarth v. U.S. Postal Serv.*, 77 M.S.P.R. 1, 7 (1997) (“[A]n employee must obey the agency order, even if he believes it to be improper, and protest the propriety of the order later.”).

⁵⁵ *Smith v. U.S. Postal Serv.*, 62 M.S.P.R. 417, 423 (1994).

emotional harm may result.⁵⁶

Managers should be aware of restrictions regarding the assignment of attorney work duties to individuals not hired to perform attorney duties. Managers should also be careful about assigning duties to support staff that are above their position classification and that might result in promotions based upon accretion of duties.

X. Your place or mine

You have the right to reassign an employee to a different location or position at the same grade and pay, even if it requires relocation.

The agency has the absolute right to assign work related to its mission.⁵⁷ The assignment of work encompasses the right to determine the location at which an employee will be required to perform the assigned work; this determination must be based on a legitimate management reason. A legitimate management reason, however, can range from workload or staffing business reasons to attempting to relocate an employee who is creating disharmony or not performing properly. When a manager decides to reassign or relocate an employee, the manager must give the employee adequate notice of the reassignment.⁵⁸ Hardship, inconvenience, and subjective dissatisfaction are not sufficient reasons for refusing a reassignment based on legitimate management reasons.⁵⁹

Department managers should be aware that employees ordered to relocate outside their normal commuting area are entitled to relocation expenses. In addition, when a manager requires the relocation of an AUSA, EOUSA is required to consult with the Office of Attorney Recruitment and Management (OARM) before the employee is required to relocate.

XI. Conclusion

On May 25, 2018, when Executive Order 13,839 (the EO) was issued, federal managers were reminded that “merit system principles call for holding federal employees accountable for performance and conduct” and that “employees should maintain high standards of integrity,

⁵⁶ See *Rose v. U.S. Postal Serv.*, 77 M.S.P.R. 139, 146 (1997).

⁵⁷ See 5 U.S.C. § 7106(a)(2)(B).

⁵⁸ *O'Connor v. Department of the Interior*, 21 M.S.P.R. 687, 688 (1984).

⁵⁹ *Else v. Department of Justice*, 3 M.S.P.B. 475, 476, 3 M.S.P.R. 397, 399 (1980).

conduct, and concern for the public interest.”⁶⁰ The EO made it clear that the “[f]ailure to address unacceptable performance and misconduct undermines morale, burdens good performers with subpar colleagues, and inhibits the ability of executive agencies . . . to accomplish their missions.”⁶¹ When considering this responsibility to address unacceptable performance and misconduct, USAO and EOUSA managers should keep in mind the full spectrum of tools they can use when engaging with their employees. Whether true or not, several prominent individuals, including Voltaire, Winston Churchill, and both President Roosevelts, have allegedly used the phrase “where there is great power there is great responsibility.” As set forth above, however, the power of a manager also comes with the right to take certain actions. Federal managers should consider all of the actions available in this Manager’s Bill of Rights to ensure that their offices can more effectively accomplish their mission and that of the Department.

About the Author

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⁶⁰ Exec. Order No. 13,839, 83 Fed. Reg. 25343 (2018).

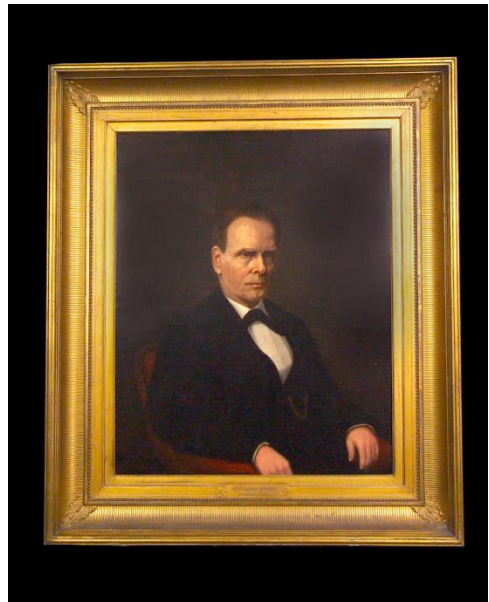
⁶¹ *Id.*

Fighting Domestic Terrorism and Creating the Department of Justice: The Extraordinary Leadership of Attorney General Amos T. Akerman

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I. Introduction

Most federal prosecutors are familiar with the Judiciary Act of 1789, which established the federal court system, an “attorney for the United States” in each judicial district, and office of the Attorney General.¹ Most prosecutors, however, are unfamiliar with the early history of the Department of Justice (Department) and the first Attorney General to preside over the Department. They have never heard of Amos Tappan Akerman, the Thirty-First Attorney General of the United States and one of the most consequential leaders in the Department’s history. Historian William S. McFeely argues that no Attorney General “has been more vigorous in the



**Portrait of Amos T. Akerman
painted by artist Freeman Thorp
in 1875.**

¹ The Act is “officially titled ‘An Act to Establish the Judicial Courts of the United States[]’ [and] was signed into law by President George Washington on September 24, 1789.” *Primary Documents in American History, Judiciary Act of 1789*, LIBR. OF CONGRESS, <https://www.loc.gov/rr/program/bib/ourdocs/judiciary.html> (last visited Sept. 26, 2019).

prosecution of cases designed to protect the lives and rights of black Americans,”² and acclaimed biographer Ron Chernow describes Akerman as “the greatest ornament of [President Grant’s] cabinet and one of the outstanding attorneys general in American history.”³ Very little has been written about him and his story has largely been lost to history.

Although he served as Attorney General for less than 18 months, Akerman helped frame the newly created Department of Justice. He also spearheaded the investigation and prosecution of the worst outbreak of domestic violence in American history to date and the first organized domestic terrorist threat on American soil, the Ku Klux Klan (KKK).⁴ During his tenure as Attorney General, federal grand juries brought 3,384 indictments against KKK members and associates, resulting in 1,143 convictions.⁵ Several hundred pleaded guilty in exchange for suspended or relatively light sentences. Sixty-five Klansmen served time at the federal penitentiary in Albany, New York. Equally important, the Department’s prosecution of the KKK continued after Akerman’s departure. The retreat from Klan prosecutions came later.⁶

In order to appreciate this important chapter in the Department’s early history, it is necessary to begin with a review of Amos Akerman’s background and professional experience. A reported slaveholder, who may have owned up to 11 slaves and who fought for the Confederacy, Akerman was the only former Confederate soldier to serve in President Grant’s cabinet. This relatively unknown Georgia lawyer was instrumental in the fight for freedmen civil rights following the Civil War.⁷

² William S. McFeely, *Amos T. Akerman: The Lawyer and Racial Justice*, in REGION, RACE, AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD 395, 395 (J. Morgan Kousser & James M. McPherson eds., 1982).

³ RON CHERNOW, GRANT 711 (2017).

⁴ See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 454, 457–58 (1988).

⁵ *February 23, 1821—Birth of Amos T. Akerman, Reconstruction Era Attorney General*, LEGAL LEGACY (Feb. 23, 2019), <https://legallegacy.wordpress.com/2019/02/23/february-23-1821-birth-of-amos-t-akerman-reconstruction-era-attorney-general/>.

⁶ See CHERNOW, *supra* note 3, at 708–11.

⁷ See, e.g., *Amos T. Akerman—Cartersville, GA—Specific Veteran Memorials*, WAYMARKING (Sept. 29, 2015),

II. Amos T. Akerman's background and early history

Amos T. Akerman spent his formative years in the North. Born in Portsmouth, New Hampshire in 1821, he was the ninth of 12 children. Akerman began his schooling in Portsmouth and later transferred to Phillips Exeter Academy in 1836, where he remained for three years. He was admitted to Dartmouth College as a sophomore in 1839 and graduated in 1842. After college, Akerman opened a school and taught briefly in Murfreesboro, North Carolina, before moving to South Carolina. Eventually, he settled in Georgia, where he tutored the children of former U.S. Senator, former judge, and former U.S. Attorney General, John Berrien. While tutoring the Berrien children, Akerman began his study of the law under their father. After a brief stint living near his sister and studying law in Peoria, Illinois, Akerman returned to Georgia where he was admitted to the Georgia Bar in 1850. During the remainder of the decade, he practiced law and operated a farm with slave laborers.⁸

Akerman opposed Georgia's involvement in the secessionist movement and did not immediately join the Confederate Army when

http://www.waymarking.com/waymarks/WMPP0Z_Amos_T_Akerman_Carterville_GA; Guy Parmenter, *Amos T. Akerman*, ETOWAH VALLEY HIST. SOC'Y (July 24, 2019), <https://evhsonline.org/archives/48134>. The Slave Schedule of the 1850 U.S. Federal Census does not list Amos T. Akerman as a slave owner, but the list is not definitive.

⁸ McFeely, *supra* note 2, at 399 (Not all historians agree that Akerman owned 11 slaves. Professor William McFeely notes that Akerman's letters reference a work force contrary to what Akerman "would choose for inclination." The professor surmises that this was a cryptic reference to slave labor "whether hired or owned is not clear."). In a September 6, 2019 telephonic interview with Professor McFeely, he indicated that he had not identified firm evidence that Akerman actually owned slaves. Several secondary sources refer to Akerman's slave owning. *Amos T. Akerman (1821–1880)*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/news-wires-white-papers-and-books/akerman-amos-t-1821-1880> (last visited Sept. 26, 2019) (citing McFeely, *supra* note 2, at 395–415); *Amos T. Akerman*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Amos_T._Akerman (last visited Sept. 26, 2019); *see* Parmenter, *supra* note 7 (providing a detailed account of Akerman's life, prepared with the assistance of some of his descendants and does not reference slave ownership).

the war broke out.⁹ In August 1863, however, he joined the Third Cavalry for the State Guard as a private. He later served in the quartermaster department as an ordinance officer and as assistant quartermaster of the militia division under General Gustavas Smith.¹⁰ Akerman participated in the defense of Atlanta in 1864 and in the gradual retreat following General Sherman's famous "March to the Sea."¹¹

When hostilities ended, Akerman resumed practicing law and farming. In a letter to his sister, written in August 1866, he commented that "[w]hen the end came, though a heavy sufferer, I was not shocked or enraged; for I had apprehended the result for two years."¹² In a letter he wrote some 11 years after the war, Akerman shed light on his perspective as Georgia entered the Reconstruction Era:

Some of us who had adhered to the Confederacy . . . felt it to be our duty when we were to participate in the politics of the Union, to let our Confederate ideas rule us no longer. . . . In the great conflict, one party had contended for nationality and liberty, the other for state rights and slavery. We thought that our surrender implied the giving up of all that had been in controversy on our side, and had resolved to discard the doctrines of state rights and slavery. Regarding the subjugation of one race by the other as an appurtenance of slavery, we were content that it should go to the grave in which slavery had been buried.¹³

After the war, Akerman became more deeply involved in Georgia politics and reconstruction efforts. He was one of 166 delegates elected to attend a constitutional convention charged with rewriting the Georgia state constitution.¹⁴ He emerged as one of the principal

⁹ Parmenter, *supra* note 7.

¹⁰ *Id.*

¹¹ *Id.*

¹² McFeely, *supra* note 2, at 402.

¹³ *Id.* (quoting John A. Logan to his wife on March 8, 1877, John A. Logan Papers, Library of Congress; New York *Tribune*, August 9, 1877; Ben Wade to Zachariah Chandler, August 9, 1877, Zachariah Chandler Papers, Library of Congress).

¹⁴ Parmenter, *supra* note 7.

leaders of the convention, which began on December 9, 1867, in Atlanta and continued until March 1868. He is credited with drafting the section that created the modern Georgia judicial system embodied in the constitution. Akerman later resigned from the constitutional convention because of his strong disapproval of the insertion of clauses into the draft constitution, which would permit the repudiation of all previous private indebtedness.¹⁵ The U.S. Congress later removed the repudiating clauses when the new Georgia state constitution was submitted for congressional approval.¹⁶

Akerman supported Grant in Grant's first race for President in 1868 and served as a Grant elector. During that time, Akerman expressed strong disapproval when black members of the Georgia state legislature, who had been elected under the new constitution, were expelled from the state house in autumn 1868. Akerman argued for the readmission of black legislators in a case ultimately resolved by the Georgia Supreme Court, *White v. Clements*.¹⁷

III. *White v. Clements*: Were the newly enfranchised eligible to hold office?

An important window into the mind of Amos Akerman, after the approval of Georgia's new constitution, but before his service as Attorney General, is Akerman's argument to the court in *White v. Clements*.¹⁸ The case involved a number of legal issues, but the most significant issue was whether Richard W. White, whom a jury found to be "a person of color, having one-eighth of African blood in his veins," could hold elected office under the new Georgia state constitution.¹⁹ The facts and legal issues of the case are complicated but, in sum, the case involved the April 1868 election for Superior Court Clerk in Chatham County, Georgia. The two candidates were

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 39 Ga. 232 (Ga. 1869).

¹⁸ See CAN A NEGRO HOLD OFFICE IN GEORGIA?, ARGUMENTS OF COUNSEL, WITH THE OPINIONS OF THE JUDGES, AND THE DECISION OF COURT IN THE CASE OF RICHARD W. WHITE V. WM. J. CLEMENTS 65–79 (Phonographically reported by Eugene Davis 1869) [hereinafter WHITE V. CLEMENTS: ARGUMENTS OF COUNSEL].

¹⁹ *White*, 39 Ga. at 238.

Richard W. White and William J. Clements. White won the election and was commissioned to serve as the Clerk of Court.²⁰

Following his defeat, Clements filed an information with the court, claiming that White was ineligible “by reason of his having in his veins one-eighth or more of African blood” and that he, Clements, was eligible to serve as Clerk of Court.²¹ Clements also petitioned the court to issue a quo warranto, inquiring by what right White held the office and, if found ineligible, that White be compelled to vacate the office, with Clements himself to serve in his place.²² White, in turn, filed a demurrer, urging “that the fact of one having one-eighth or more of African blood, was not, according to the laws of Georgia, a disqualification for office.”²³

Akerman’s argument to the Georgia Supreme Court was direct and to the point. He began his presentation with a question: “[A]re colored men eligible to office in Georgia?”²⁴ He proceeded to systematically dismantle the argument raised by White’s detractors that African Americans “having been disqualified under the ancient institutions of the State, . . . remain disqualified unless qualified by distinct and positive enactment.”²⁵ Akerman went on to state that “[t]his argument ignores the revolutionary deluge which has swept over the land, and assumes that the ancient polity of the State is still our polity, that the present government is a continuation and not a new creation. This assumption is a fundamental error.”²⁶

According to Akerman, the Georgia government had not been “amended, repaired, or remodeled, but *reconstructed*; that is, wholly built anew.”²⁷ Akerman’s argument focused on the express language of the 1868 Georgia state constitution: “citizenship, and a certain age, residence and professional standing” were required for service in some specific offices in government.²⁸ The state constitution also provided for specific disqualifications of government service, including “unpardoned felony and larceny, holding public money unaccounted

²⁰ *Id.* at 240.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ WHITE V. CLEMENTS: ARGUMENTS OF COUNSEL, *supra* note 18, at 65.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 66.

²⁸ *Id.*

for, dueling, treason, embezzlement, malfeasance in office, bribery, idiocy and insanity.”²⁹ Nowhere in the Georgia state constitution was there any reference to blood qualification: “Black and white are not words found in the instrument.”³⁰ For Akerman, the Georgia state constitution made clear that “all are qualified who are not expressly disqualified.”³¹

But “whom do I mean by *all*?” Akerman went on to answer his own rhetorical question.³² “All” included all voters. In the voters “resides the sovereignty.”³³ The newly enfranchised African-Americans were clearly voters.

In the absence of positive disqualifications, the right to vote includes eligibility to hold office; the capacity to select includes the capacity to be selected; a capacity to be a principal includes a capacity to be an agent; a capacity to depute includes a capacity to be deputed. If colored men are part of the fountain, why are they not part of the stream that flows from the fountain?³⁴

Citing English common law, Akerman noted that the capacity to elect and to be elected were originally considered the same and used interchangeably.³⁵ Akerman expressly rejected the reasoning of the trial judge in the case below that placed eligibility for public office above suffrage.³⁶ Relying again on the English common law, Akerman emphasized that “[e]quality of right under this government is to be presumed in favor of all who participated equally in the formation of it.”³⁷ The newly enfranchised voted on the question of whether there should be a Georgia constitutional convention; voted for the delegates who served at the convention; served and deliberated as delegates to the convention; and voted to ratify the new Georgia state constitution. As a result, “[t]he present government was made by men of both

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 67.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 68.

racess.”³⁸ Finally, Akerman argued that if African Americans “can hold office under the Constitution of the United States, they can do so under the Constitution of Georgia.”³⁹

In a 2–1 decision, the Georgia Supreme Court agreed with Akerman. By its own terms, the Georgia state constitution provided that all residents of the state were eligible to hold elected office unless prohibited by law.⁴⁰

IV. Amos T. Akerman becomes a federal prosecutor

As a result of Akerman’s support for Grant’s presidential campaign and his advocacy for equal rights under the law, President Grant appointed Akerman as District Attorney for Georgia, and Akerman began his service in December 1869.⁴¹ One of his primary responsibilities was to prosecute violators of the Civil Rights Act of 1866.⁴² This was the first federal law to affirm that all American citizens are equally protected under the law.⁴³ Akerman, however, had little time to execute his duties. Barely six months after being appointed to the chief federal law enforcement office in the state of Georgia, Akerman traveled to Washington to assume his new role as Acting Attorney General.⁴⁴

Akerman’s relative obscurity and unfamiliarity with Reconstruction Era politics worked to his advantage. Attorney General Ebenezer Rockwood Hoar was asked to resign in late spring or early summer 1870 and tendered his resignation in November 1870, in part because of his allegiance to Senator Charles Sumner, Grant’s opponent on the issue of annexation of the Dominican Republic. Akerman emerged as the perfect southern lawyer to assume responsibility for the newly

³⁸ *Id.*

³⁹ *Id.* at 77.

⁴⁰ *White v. Clements*, 39 Ga. 232, 262–63 (Ga. 1869).

⁴¹ Parmenter, *supra* note 7.

⁴² McFeely, *supra* note 2, at 404.

⁴³ See FONER, *supra* note 4, at 243–47, 250–51 (Congress overwhelmingly passed the Civil Rights Act of 1866, but the Act was vetoed by President Andrew Johnson a few weeks later. For the first time in American history, the Congress overrode the President’s veto of a major piece of federal legislation.).

⁴⁴ Parmenter, *supra* note 7.

created Department of Justice. He took the oath of office in June 1870 and became the Acting Attorney General. He was confirmed by the Senate in the autumn. The remainder of 1870 afforded him time to concentrate on transportation issues and other matters far removed from the controversies of Reconstruction.⁴⁵ Congressional enactment of the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871, however, created a sea change in American jurisprudence, especially in the South.⁴⁶

V. The Enforcement Acts of 1870 and 1871

Before the passage of the Fourteenth Amendment, the U.S. Constitution provided only limited protection for civil and political rights. Persons claiming deprivation of their rights by state authorities were limited to seeking recourse through their state constitutions.⁴⁷ Adoption of the Fourteenth and Fifteenth Amendments altered this scheme. These two amendments afforded legal protections from state-imposed acts that abridged equal protection, due process of law, and the privileges and immunities of American citizens.⁴⁸ The Fifteenth Amendment also prohibited states from disenfranchising voters “on account of race, color, or previous condition of servitude.”⁴⁹

As legal scholars have noted, implementation of these two amendments created serious challenges for lawyers and the courts. What constituted state action? Did the Fourteenth Amendment

⁴⁵ McFeely, *supra* note 2, at 405; *see also* Richard Dotor Cespedes, “Errors of judgment, not of intent”: The Southern Policy of Ulysses S. Grant 200–01 (2015) (unpublished Ph.D. thesis, University College London); *Amos T. Akerman (1821–1880)*, NEW GA. ENCYCLOPEDIA <https://www.georgiaencyclopedia.org/articles/history-archaeology/amos-t-akerman-1821-1880> (last edited July 29, 2013). Note that there is some confusion over the chronology of the early Department. Attorney General Ebenezer Rockwood Hoar was asked to resign in June 1870 and Akerman was appointed Attorney General on June 23, 1870. Hoar, however, did not officially resign until November 1870, when Akerman was confirmed by the U.S. Senate.

⁴⁶ McFeely, *supra* note 2, at 405–06.

⁴⁷ Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 EMORY L.J. 921, 930 (1984).

⁴⁸ *Id.*

⁴⁹ U.S. CONST. amend. XV, § 1.

incorporate the Bill of Rights' guarantees as restraints on state governments? Akerman visited Washington shortly after Grant's election and "observed that while the postwar amendments had made the federal government 'more national in theory,' he had observed 'even among Republicans, a hesitation to exercise the powers to redress wrongs in the states'" persisted.⁵⁰ With his many years as a practicing attorney and reform-minded leader in the American South, Akerman was convinced that "unless the people become used to the exercise of these powers now, while the national spirit is still warm with the glow of the late war, . . . the 'state rights' spirit may grow troublesome again."⁵¹

Increasing violence by members of the KKK against African Americans, especially in the South, led to a series of legislative proposals designed to ensure that the constitutional protections of the Fourteenth and Fifteenth Amendments were enforceable under federal law. The Enforcement Act of May 1870 prohibited individuals from banding together "or to go in disguise upon the public highways, or upon the premises of another" with the intention of violating citizens' constitutional rights.⁵² When this Act proved ineffective, the Congress passed two more Acts known as the Ku Klux Klan Acts. The Second Force Act became law in 1871.⁵³ It placed the administration of national elections under control of the federal government and empowered the federal courts and U.S. Marshals to supervise local polling places.⁵⁴ The Third Force Act, the Ku Klux Klan Act of April 1871,⁵⁵ authorized the president to use the military to combat persons who conspired to deny equal protection of the law and to suspend habeas corpus, if necessary, to enforce the law.⁵⁶ This was the first time that Congress had designated crimes committed against

⁵⁰ FONER, *supra* note 4, at 454.

⁵¹ *Id.* at 454 & n.79 (quoting Letter from Amos T. Akerman to Charles Sumner, April 2, 1869, SUMNER PAPERS; CONG. GLOBE, 42d Cong., 1st Sess. 820 (1871)).

⁵² Enforcement Act of 1870, 41st Cong., 2d Sess. ch. 114.

⁵³ Second Enforcement Act of 1871, 41st Cong., 3d Sess. ch. 99.

⁵⁴ *See id.*

⁵⁵ Ku Klux Klan Act of 1871, 42d Cong., 1st Sess. ch. 22, 17 Stat. 13.

⁵⁶ *Landmark Legislation: The Enforcement Act of 1870 and 1871*, U.S.

SENATE,

<https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm> (last visited Oct. 2, 2019).

individuals' civil rights as offenses punishable by federal law. Federal prosecutors were provided with the statutory authority to prosecute "[c]onspiracies [intended] to deprive citizens of the right to vote, hold office, serve on juries, and enjoy equal protection [under] the law."⁵⁷

VI. Creation of the Department and prosecution of the KKK

The Enforcement Acts were the primary tools by which Amos T. Akerman and the newly created Department prosecuted the KKK. Indeed, the Department came into being on July 1, 1870, for the express purpose of enforcing the Reconstruction Amendments.⁵⁸ Prosecution of the KKK was not Akerman's primary focus when he took the reins at the Department. When Akerman assumed command, the hope persisted that the rule of law could be restored in the southern states and that civil rights for the newly enfranchised African Americans would be achieved through voluntary compliance with the law. Hence, most of Akerman's first year as Attorney General focused on transportation issues and reorganization of prosecution responsibilities.⁵⁹ Akerman's energies were directed primarily to legal issues involving railroad expansion.⁶⁰

By spring 1871, however, Akerman was convinced that voluntary compliance with federal laws intended to ensure the civil rights of former slaves was a chimera. Enforcement, he came to believe, would require an aggressive campaign of vigorous prosecution.⁶¹ The increasing violence and intimidation of the newly enfranchised citizens in the South necessitated a prompt response to quell growing civil unrest.

⁵⁷ FONER, *supra* note 4, at 454–55; *see, e.g.*, HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION, 526–30 (1973); *See generally* ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION pt. VI (1971).

⁵⁸ *See* CHERNOW, *supra* note 3, at 700.

⁵⁹ McFeely, *supra* note 2, at 404–05 (Prior to the creation of the Department, private lawyers were retained at considerable expense by cabinet departments when the federal government became involved in litigation.).

⁶⁰ *Id.* at 505.

⁶¹ *Id.* at 405–07.

A hotbed of KKK activity and increasing lawlessness precipitated federal intervention in South Carolina. The 1868 election was the first election after South Carolina's readmission into the Union and marked the emergence of the KKK in that state. Following the implementation of the new state constitution and establishment of black suffrage, marauding gangs of Klansmen began attacking blacks and whites sympathetic to racial equality and carried out whippings, assassinations, and midnight raids. By 1870, Klansmen and their supporters were instigating riots and carrying out well-organized assaults, especially in the northern counties of South Carolina. During the winter of 1870–1871, pitched battles were regularly occurring in Laurensville, Unionville, and Chester. Governor Robert K. Scott described the counties of Spartanburg and York as “under a ‘reign of terror.’”⁶² In Union County, on January 4 and February 9, 1871, hundreds of Klansmen seized control of Unionville and executed black prisoners being held in the local jail.⁶³

During the evening hours of March 6, 1871, former Confederate Major James William Avery and at least 40 Klansmen instigated violence and butchery throughout York County. Their first victim, James Rainey, was a black Republican who supported the county's growing Republican Party and who was an officer in an all-black militia. After a brutal beating, the Klansmen murdered Rainey by hanging him from a tree. The perpetrators continued their rampage, beating and whipping other black militiamen and their families. Similar campaigns emerged elsewhere in the South, led by hooded riders who invoked “white terror.”⁶⁴

As a result, General Alfred Terry of the Department of the South, and the army's commanding general, William Tecumseh Sherman, ordered cavalry units into the state. Shortly thereafter, four companies of the U.S. Seventh Cavalry arrived to serve alongside five

⁶² Richard Zuczek, *The Federal Government's Attack on the Ku Klux Klan: A Reassessment*, S.C. HIST. MAG., Jan. 1996, at 48–49 (citing Gov. Robert K. Scott to Gen. Alfred Terry, Jan. 17, 1870, Senate Executive Document No. 28, Serial Set 1440, 41st Cong., 3d Sess. 1–2).

⁶³ *Id.* (citing TESTIMONY TAKEN BY THE JOINT SELECT COMMITTEE TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, Vol. I, 558, Vol. III, 336 (1872); South Carolina Department of Archives and History, files in the Office of the S.C. Adjutant and Inspector General, Letter Book 52).

⁶⁴ Hall, *supra* note 47, at 924–25 (citing TRELEASE, *supra* note 58, at 362–80).

companies of the Eighteenth Infantry, already deployed in South Carolina.⁶⁵

In May 1871, President Grant ordered Major Lewis Merrill and a detachment of troops to York County to restore order. Merrill and his men began to make arrests, but local law enforcement officials thwarted their efforts by turning the names of informants over to Klan leaders. In July, following a federal investigation, congressional investigators recommended strong action. Akerman concurred and advised Grant that the upcountry counties of South Carolina were in rebellion and recommended suspension of habeas corpus.⁶⁶ Grant, in turn, suspended the writ of habeas corpus in nine counties in October 1871, and Merrill's troops began a "massive round-up of suspects."⁶⁷ Perhaps some 2,000 Klansmen fled the state.⁶⁸ Suspension of the writ of habeas corpus assured that Klansmen could be incarcerated prior to trial and not released by local judges.⁶⁹ This presidential action at the request of the Attorney General, led to military officers acting as federal marshals arresting, interrogating, and holding federal defendants. It was the most criticized of Akerman's decisions and established a disturbing precedent.⁷⁰

The number of arrests for Klan-associated violence in South Carolina was astonishing. Well-coordinated cooperation between the U.S. Marshals and their military escorts resulted in dozens of arrests within a few days. By the end of November, arrests exceeded one hundred. In his January 1872 report, U.S. District Attorney Corbin informed Akerman that 472 persons had been arrested. By April 1872, the number had grown to 533.⁷¹

The Attorney General personally directed the government's legal strategy. By autumn 1871, Akerman had become convinced that suppression of the Klan required "extraordinary means." Akerman believed that "[t]hese combinations . . . amount to war and cannot be

⁶⁵ Zuczek, *supra* note 62, at 49–50.

⁶⁶ FONER, *supra* note 4, at 457; McFeely, *supra* note 2, at 408; Cespedes, *supra* note 45, at 199.

⁶⁷ Hall, *supra* note 487, at 925.

⁶⁸ FONER, *supra* note 4, at 457–58.

⁶⁹ McFeely, *supra* note 2, at 408.

⁷⁰ *Id.* (The nine counties of the upcountry of South Carolina was the only location where Grant suspended the writ of habeas corpus.)

⁷¹ Zuczek, *supra* note 62, at 55.

effectually crushed on any other theory.”⁷² By all accounts, Akerman was an activist Attorney General. He allowed those who confessed and identified Klan leadership to receive minimal sentences, while bringing several dozen of the most serious offenders to trial, oftentimes before predominantly black juries. Akerman worked “closely with United States District Attorney Daniel T. Corbin and his assisting special counsel, South Carolina Attorney General Daniel H. Chamberlain.”⁷³

Federal prosecutors across the South sought indictments, relying upon the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871.⁷⁴ The former made bribery of election officials and intimidation of voters a federal crime and also criminalized all conspiracies to prevent citizens from exercising any constitutional right or privilege. The latter authorized the president to intervene in any of the former rebel states that attempted to deny “any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws.”⁷⁵ The latter was not enacted until *after* many of the alleged civil rights violations had occurred. Prosecutors Corbin and Chamberlain argued that the 1871 Act was applicable, “because the acts committed *before* its passage were . . . part of a larger, on-going conspiracy.”⁷⁶

The sheer volume of these trials beggars the imagination. Major Merrill captured more than 400 suspected Klansmen. “As many as 1,000 remained at large” and perhaps twice that number had already fled from South Carolina.⁷⁷ During one seven-week trial term, Corbin

⁷² FONER, *supra* note 4, at 457 (citing Letter from Amos T. Akerman to Foster Blodgett, November 8, 1871; Letter from Amos T. Akerman to B. Silliman, November 9, 1871, AMOS T. AKERMAN PAPERS).

⁷³ Hall, *supra* note 47, at 928–29.

⁷⁴ See generally WILLIAM C. HARRIS, THE DAY OF THE CARPETBAGGER: REPUBLICAN RECONSTRUCTION IN MISSISSIPPI 399–400 (1979); JOSEPH G. DAWSON III, ARMY GENERALS AND RECONSTRUCTION: LOUISIANA 1862–1877, (1982), 150–53; Ross A. Webb, *Benjamin H. Bristow: Civil Rights Champion, 1866–1872*, 18 CIV. WAR HIST. 39 (1969).

⁷⁵ *Historical Highlights: The Ku Klux Klan Act of 1871*, HISTORY, ART & ARCHIVES, UNITED STATES HOUSE OF REPRESENTATIVES (Apr. 20, 1871), <https://history.house.gov/HistoricalHighlight/Detail/15032451486?ret=True>.

⁷⁶ Hall, *supra* note 47, at 929–30.

⁷⁷ *Id.* at 936.

and Chamberlain secured over 100 guilty pleas.⁷⁸ The government also obtained either guilty verdicts or courtroom confessions in the five cases that proceeded to trial. The stiffest sentences were up to five years in prison and a \$1,000 fine.⁷⁹

In addition to the extraordinary number of trials, the South Carolina Klan prosecutions—like most prosecutions across the South—marked a profound change in American jurisprudence. The presence of black grand and petit jurors, black witnesses—both men and women—and newly complex legal issues involving the Fourteenth and Fifteenth Amendments, all represented a significant departure from federal practice prior to the Civil War. Jury verdicts and federal prison sentences, however, could only go so far. “Though rejoiced at the suppression of Ku Kluxery,” wrote Akerman, “I feel greatly saddened by this business. It has revealed a perversion of moral sentiment among the Southern whites, which bodes ill to that part of the country for this generation. Without a thorough moral regeneration, society there for many years will be . . . certainly very far from christian.”⁸⁰

Estimates vary, but between 1870 and 1872, Department lawyers won approximately half of their cases.⁸¹ By autumn 1871, however, Akerman realized the practical constraints of limited time, funds, and

⁷⁸ *Id.* at 941.

⁷⁹ *Id.* Calculating the precise number of indictments and convictions in the Klan prosecutions is daunting. Reports vary and the numbers are not consistent. Richard Zuczek contends that when the Columbia trial term closed in early 1872, only 54 men had been convicted and sentenced. Of these, only five were convicted at trial while 49 pleaded guilty. The court’s April term in Charleston included a carryover of 278 cases, involving more than 400 defendants. During the April term, 18 men were found guilty, while hundreds of cases remained on the docket. Zuczek, *supra* note 62, at 56. Near the end of 1872, Corbin reported that of the 1,355 indictments brought, the government convicted 27, while 75 pleaded guilty. Two weeks later, then-Attorney General Charles Williams reported 1,207 cases pending under the Enforcement Acts, while only 96 cases had been terminated. In late January of 1873, Williams provided another estimate, placing the number of cases at 1,188 involving 831 defendants. *Id.* at 63.

⁸⁰ Hall, *supra* note 47, at 950 (citation omitted).

⁸¹ Cespedes, *supra* note 45, at 202. See generally, ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876 83 (First Fordham Univ. Press 2005).

prosecutors. A severe shortage of U.S. marshals also limited suspect apprehensions and detentions. Many suspects were released, and many prospective cases were never concluded. Because most of the federal indictments contained conspiracy offenses rather than substantive crimes of violence (which were typically state offenses), the penalties were relatively light. A five-year prison sentence was the longest sentence obtained during the Columbia, South Carolina Enforcement Acts prosecutions.⁸²

VII. Akerman's resignation as Attorney General

Akerman resigned as Attorney General on December 12, 1871, effective January 10, 1872. Before leaving office, he commented on the declining Northern interest in civil rights in the South. Writing to a friend during the closing days of 1871, Akerman observed that “such atrocities as Ku Kluxery do not hold their attention. . . . The Northern mind, being full of what is called progress runs away from the past.”⁸³

Clearly, not everyone in the Grant Administration shared Akerman's determined focus on elimination of Klan-related violence in the South. In the latter part of 1871, Secretary of State Hamilton Fish wrote of one Cabinet meeting: “Akerman introduces Ku Klux—he has it ‘on the brain’—he tells a number of stories—one of a fellow being castrated—with terribly minute & tedious details of each case—it has got to be a bore, to listen twice a week to this same thing.”⁸⁴

Historians generally agree that Akerman's ouster had less to do with his campaign against the Klan than his rulings regarding certain railroad land grants, which displeased influential Grant supporters affiliated with the railroad interests.⁸⁵ The record, however, is not entirely clear what led to Akerman's untimely departure. Certainly, Secretary of State Fish's diary accounts suggest that some members of the Grant Administration had grown weary of the Attorney General's

⁸² Zuczek, *supra* note 62, at 57.

⁸³ *Id.* at 59 (citing Akerman to Benjamin Conley, Dec. 28, 1871, Akerman Letter Books, Book 1 (University of Virginia)).

⁸⁴ Cespedes, *supra* note 45, at 202 (citing Diary of Hamilton Fish, “Fish Papers,” Library of Congress (Oct. 31 & Nov. 24, 1871)).

⁸⁵ FONER, *supra* note 4, at 458; *see also* Parmenter, *supra* note 7.

continuing campaign against the KKK in the South and wanted him gone.⁸⁶

Prosecutions against Klan violence and intimidation continued under Akerman's successor, Attorney General George H. Williams. Indeed, Williams brought three times as many cases and reported four times as many convictions against Klansmen in 1872 than Akerman obtained in 1871, and Williams did even better in 1873.⁸⁷ The difference was one of focus: Williams was less engaged than Akerman in direct supervision of the Klan prosecutions, with more credit going to the federal prosecutors actually bringing the cases in the federal courts.⁸⁸

VIII. Akerman's later years

After his service in Washington, Amos T. Akerman returned to Cartersville, Bartow County, Georgia where he practiced law until his untimely death at the age of 59 in 1880, following a bout of rheumatic fever. He left a widow and seven children, ranging in age from a few months to 14 years. At the time of his death, residents of Bartow County were actively campaigning to obtain an appointment for Akerman to the federal bench.⁸⁹

Akerman left two important legacies. The first was his extraordinary family. His eldest son Benjamin became a mining engineer in Mexico. Walter was a World War I veteran, a teacher, a U.S. Marshal, and the Cartersville postmaster for 22 years. Alexander became a lawyer and the U.S. District Attorney for the Southern District of Georgia before being appointed a federal district court

⁸⁶ See McFeely, *supra* note 2, at 410–11; *cf.* NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789–1990* 24–25 (1992).

⁸⁷ CHERNOW, *supra* note 3, at 708, 711 (Again, estimates as to the number of Enforcement Act prosecutions vary. Chernow records that Akerman's Department brought 3,384 indictments and obtained 1,143 convictions); CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* 139 (2008). Compare Legal Legacy, *supra* note 5, with McFeely, *supra* note 2, at 410 (relying on his research and the work of earlier historians, states that Attorney General Williams obtained 456 convictions in 1872, 469 in 1873, and 102 in 1874, as compared to Akerman's 32 in 1870 and 128 in 1871).

⁸⁸ McFeely, *supra* note 2, at 410–11.

⁸⁹ Parmenter, *supra* note 7.

judge in the Southern District of Florida. Joseph became an obstetrician and a professor of obstetrics at the University of Georgia. Charles became a lawyer in Macon, Georgia. Alfred was the State Forester for the State of Massachusetts, a professor of forestry at the University of Georgia, and chair of the Forestry Department at the University of Virginia. Clement served as a lieutenant on General Pershing's staff during World War I and assisted the War Department in compiling a history of the war before serving as a professor of economics at Reed College.⁹⁰

For the Department, Akerman left an enduring legacy of courageous leadership during challenging times. He was able to move past controversies that preceded and encompassed the Civil War and to commence the fight to protect and defend the rights of the newly enfranchised African Americans, especially in the South. He worked closely with federal prosecutors in the field to target KKK leaders, encourage pleas and cooperation, and effectively break the cycle of race-related violence. He achieved all this with severely limited law enforcement and prosecution resources and with federal criminal statutes that did not carry heavy penalties or sanctions. As Attorney General, Akerman recognized that many Americans wanted to put the brutality of the Civil War years behind them and that not everyone shared his passion for eradication of racial injustice. The window of opportunity for dynamic and effective Klan prosecutions was a narrow one, and Akerman made the most of it.

What must never be forgotten is the courageous leadership of Akerman, his agents and prosecutors, and the judges, witnesses, and jurors who persisted in the face of race-related violence. If the achievements of justice in the Reconstruction Era were short-lived, they were nonetheless significant and impactful. They were transformative, not only for the newly created Department, but for the character of the Republic.

About the Author

Gretchen C.F. Shappert is the U.S. Attorney for the U.S. Virgin Islands. Previously, she was the Assistant Director for the Indian, Violent, and Cyber Crime Staff at the Executive Office for United States Attorneys (EOUSA). Ms. Shappert served as the U.S. Attorney for the Western District of North Carolina from 2004–2009.

⁹⁰ *Id.*

She was also an Assistant U.S. Attorney from 1990–2004 and specialized in violent crime and outlaw motorcycle gang prosecutions.

The author wishes to thank members of the Department's Library Staff for their invaluable assistance with research. She would also like to thank Professor William McFeely and Professor Bradley Proctor for their excellent suggestions and insights. Finally, she would like to thank Katheryn M. Wenger, University of California-Hastings law student and extraordinary summer intern in the Virgin Islands U.S. Attorney's Office, for her outstanding research and exceptional assistance. The author also expresses her deep appreciation to colleague and friend, Seth Adam Meinero, National Violent Crime and Narcotics Coordinator at EOUSA, for introducing her to the extraordinary legacy of Amos T. Akerman.

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The Power of Delegation

Bradley E. Tyler

Assistant United States Attorney

Executive Office for United States Attorneys

Evaluation and Review Staff

First, a bit of candor. As a U.S. Attorney’s Office (USAO) branch office supervisor for 16 years, managing 12 line Assistant U.S. Attorney’s (AUSAs), I tried to do everything myself. In addition to all the basic administrative tasks such as leave requests, performance appraisals, and parking, I assigned cases, approved pleas, recommended civil settlements, maintained a caseload, second chaired trials, and chaired monthly staff meetings. I was in the office first and was often the last to leave. Although the pace could be invigorating, and certainly interesting, it wore me down. What I did not realize then, and have come to appreciate fully over many years as an Evaluation and Review Staff (EARS) evaluator, is that USAO managers, legal, and administrative, *need* to delegate—not just to manage their time more effectively, but also to advance the staff’s professional progress and productivity.

USAO managers will say how busy they are, yet admit to not taking advantage of the opportunities to delegate. They give in to what Jeffrey Pfeffer, a Professor at the Stanford University School of Business, calls the “self-enhancement bias.”¹ That is, managers believe that it is easier to do the task themselves instead of delegating to those who report directly to them, that their work is better, or that delegation will detract from their stature in the office. These biases must be resisted. As Professor Pfeffer notes that the biases may not be true, and clearly stifle effective delegation.²

Take a moment with this simple exercise. Write down all the specific tasks you delegated this week. Then list all the tasks you personally performed. Be specific. Now look at your second list, and cross off those tasks that no one else had authority to do. Are there tasks

¹ See Amy Gallo, *Why Aren’t You Delegating?*, HARV. BUS. REV. (July 26, 2012), <https://hbr.org/2012/07/why-arent-you-delegating>. Amy Gallo is the author of the *HBR Guide to Dealing with Conflict*, co-host of the *Women at Work* podcast, and a contributing editor at the *Harvard Business Review*, where she writes about workplace dynamics.

² See *id.*

remaining? Could you have delegated more? Were there others, who could have taken the task? Would any of the tasks have helped with someone's professional development? Upon realizing that you and your direct reports are not being effectively productive, and you are not advancing your staff's professional development, identifying delegation opportunities is your first step toward correcting these deficiencies.

In their Harvard Business Review classic, William Oncken, Jr. and Donald L. Wass categorize the different sources of demands on our time.³ Those demands, with illustrations relevant to a USAO, are as follows:

- Boss-imposed: Attorney General calls for a new Project Safe Neighborhoods program → U.S. Attorney tasks the First Assistant U.S. Attorney or Criminal Chief → Criminal Chief tasks to the Violent Crime section chief.
- System-imposed: Department of Justice annual reporting requests or compliance updates. Annual training requirements. Court-imposed deadlines. Organized Crime Drug Enforcement Task Force conference → Criminal Chief tasks the Administrative Officer with logistics.
- Self-imposed: Tasks only you can do or that you agree to → your caseload; caseload assignments; approvals; caseload balancing; performance or conduct issues.
- Staff-imposed: Tasks imposed by direct reports. "We have a problem."⁴

In most cases, boss-imposed and system-imposed time demands cannot be delegated. And while there may be some opportunity to delegate self-imposed tasks, it is the staff imposed demands that are your best opportunity to delegate and develop the skills of your direct

³ William Oncken, Jr. & Donald L. Wass, *Management Time: Who's Got the Monkey?*, HARV. BUS. REV. Nov.–Dec. 1999, <https://hbr.org/1999/11/management-time-whos-got-the-monkey>. The late William Oncken, Jr. was chairman of the William Oncken Corporation, which has for 60 years been a leader in corporate leadership consulting. Donald L. Wass was the president of the William Oncken Company when the article first appeared. He now heads the Dallas–Fort Worth region of The Executive Committee (TEC), an international organization for William presidents and Chief Executive Officers (CEOs).

⁴ *Id.*

reports. Put another way, by defining individual responsibilities and authority for each staff position, you can identify delegation opportunities.

As Oncken and Wass warn, staff imposed demands on your time need to be resisted—not adopted by you, but rather managed.⁵ It is better for you to determine the nature of any problem or task, suggest how the direct report can deal with it, and be accountable for the result. In short, delegate and coach. Art Markman, a Professor of Psychology and Marketing at the University of Texas, puts it this way:

As a manager, a central part of your job is to train and develop people. This includes people who want to move into management roles, similar to yours, one day. When you take on the mindset of a trainer—instead of a manager delegating work—you will naturally look for ways to give a little more responsibility to the people [you work with]. And those people who put in effort, and show an aptitude for the work, should be given more opportunities to try new, challenging tasks.⁶

There is a tendency to fear that by delegating you are viewed as dumping your work. This reaction can be avoided by explaining why you are delegating, and then following your direct report's progress on the task. On these terms, delegation can be an act of inclusion toward the shared success of your team.

There is no question that training and developing people takes time. A regular practice of being engaged with your direct reports, getting to know their abilities and professional expectations, and taking advantage of teachable moments, however, will empower your team's independent performance, boost their morale, and leave you more time for the tasks that cannot be delegated. In essence, you need to be more *essential* and less *involved*, which requires being involved in varying degrees, depending on the task and the capabilities of each staff member.

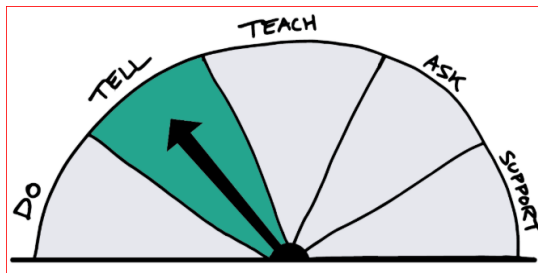
⁵ *Id.*

⁶ Art Markman, *How to Stop Delegating and Start Teaching*, HARV. BUS. REV. (Oct. 18, 2018), <https://hbr.org/2018/10/how-to-stop-delegating-and-start-teaching>.

Amy Gallo, in her article *Why Aren't You Delegating?*, offers these practical delegation guidelines:

- Choose the right people: Who has the right skills and is motivated to do it right?
- Integrate delegation into what you already do: Develop a delegation plan for each staff member, then support their progress as part of your everyday routine.
- Ask others to hold you accountable: Encourage direct reports to call you out when you do not delegate tasks that you could/should.
- Really let go: After you delegate, observe and support.
- Learn from experience: Pay attention to results. Learn from mistakes. Be patient.⁷

“CEO Coach” Sabina Nawaz recommended a slightly different and more granular approach:⁸



Sabrina Nawaz's Delegation Dial

- Do: Show how the work needs to be done. Invite your colleague to shadow as you do the task. Work through a task or project together.
- Tell: Be explicit. Explain your approach to the task. Encourage your colleague to think through/explain the task—to synthesize learning in a way that is personally meaningful.
- Teach: Share your perspective as to why a task needs to be done in a certain way—provide a greater understanding for how they

⁷ Gallo, *supra* note 1.

⁸ Sean Conner, *Sabrina Nawaz's Delegation Dial*, MEDIUM (Apr. 6, 2018), <https://medium.com/unexpected-leadership/sabina-nawazs-delegation-dial-dca8dbb7956>.

will do the work. Develop the staff member's ownership of the process.

- Ask: Strive to cede increasing autonomy to your team member—ask what they have learned.
- Support: Continue to check in on the work delegated. Make it known—you are available to support as needed.⁹

By either approach you will naturally interact with each of your staff members on a personal level, building a bond of trust for the shared responsibility of every team member to perform as effectively as possible. On this point, I have one practical recommendation. During my management stint, staff-imposed time was the most frequent and distracting. Often staff within the branch office would come to me for a quick answer, which from their point of view made sense, as I had been around the longest, and I never said “no.” After some trial and error, I started to implement the “last resort rule,” by which I would say that after you have tried to find the answer yourself without success, then I am your last resort. It worked like a charm and, if I remembered to follow up, I would learn something myself (after all, I often did not know the answer).

Remember, you cannot do everything yourself. Build a trusting relationship with each member of your team, engage through each teachable moment, then enjoy the result.¹⁰

⁹ Sabina Nawaz, *For Delegation To Work, It Has To Come with Coaching*, HARV. BUS. REV. (May 5, 2016), <https://hbr.org/2016/05/for-delegation-to-work-it-has-to-come-with-coaching>. Sabrina Nawaz, the principal CEO of Nawaz Consulting, LLC and Nawaz Executive Coaching, Ltd., advises executives in 22 countries around the world.

¹⁰ For additional information, consider reviewing the following resources: Maura Thomas, *4 Ways Leaders Can Protect Their Time and Empower Their Teams*, HARV. BUS. REV. (July 18, 2018), <https://hbr.org/2018/07/4-ways-leaders-can-protect-their-time-and-empower-their-teams> (Maura Thomas is an award-winning international speaker, trainer, and author on individual and corporate productivity and work-life balance. She is the most widely cited authority on attention management.); Jesse Sostrin, *To Be a Great Leader, You Have to Learn How to Delegate Well*, HARV. BUS. REV. (Oct. 10, 2017), <https://hbr.org/2017/10/to-be-a-great-leader-you-have-to-learn-how-to-delegate-well> (Dr. Jesse Sostrin is a nationally recognized leadership expert who writes, speaks, and consults about the elusive challenges of getting great work done. He is the author of *The Manager's Dilemma, Beyond the Job Description* and *Re-Making Communication at Work*).

About the Author

Bradley E. Tyler is currently the EARS Criminal Program Manager. He has served in that role since 2016. From 1979–1984, he served as a litigation associate with a New York law firm. From 1984–1986, he was an AUSA in the Western District of New York, where he prosecuted white collar and general crimes. He worked with OCDETF from 1986–1990. In 1990, he became the Branch Chief for the Western District of New York. Thereafter, from 2006–2016, he prosecuted white collar and cybercrimes.

The Actual Job of a USAO Manager

*David M. Gaouette
Executive Assistant U.S. Attorney
District of Colorado*

So, you have just been named a manager by your U.S. Attorney. Great! Congratulations! But what now? Has anyone sat you down and told you how to do your new job? What your new duties are? What the U.S. Attorney expects of you? Do you know the skills you will need to be successful in your new job? Are they the same skills you currently have or will you have to learn new ones? Moreover, what tools are available to help you as a manager in a U.S. Attorney's Office (USAO)?

Many of us in the USAO community become managers for a variety of reasons. Over the past year, the Evaluation and Review Staff (EARS) has been offering management training to USAO management teams around the country. We often begin our training by asking current managers how they got their jobs. Many said it was because their U.S. Attorney asked them. Others told us that they were interested because it meant a pay raise, a larger office, and perhaps a parking space. Still others admitted it was really not their choice; they were "drafted!" Whatever path led you to become a manager, it was probably not the fulfillment of a life-long dream that started when you were sitting in your law school contract's class. You probably didn't say to yourself, "I can't wait to graduate so I can be a manager in a U.S. Attorney's Office!" Nevertheless, here you are. You are a manager. What does the job entail?

Let's start with what your job is *not*. It is not the same as your previous job, whether that job was being at a different level of management or, more likely, as a very successful and productive litigator and advocate for the government. Each level of management within a USAO has different duties and responsibilities. The job of a section or unit chief is different from that of a deputy division chief, which is different from a division chief, and from a First Assistant. Supervisors at all levels should sit down with their subordinate managers to determine the duties, responsibilities, and expectations of each manager. Once this is accomplished and agreed upon, each manager should stay in their own "lane," meaning if you were once the

Organized Crime Drug Enforcement Task Force (OCDETF) Chief and now you are the Criminal Division Chief, you have new duties and responsibilities, you need to let your new OCDETF Chief do her job. Empower your people, rather than micro-manage them. This empowerment principle applies to all levels of management. Just as a division chief empowers her deputies or section chiefs, a First Assistant should empower the division chiefs. But, remember, empowerment still requires accountability from those you supervise.

Now that your new duties and responsibilities have been defined, what are some of the challenges you might face in the not too distant future? Again, during various management training sessions across the country, when managers are asked what the most difficult part of their job is, the overwhelming majority said it was dealing with people. People with difficult personalities, people who are under-performing, people with low morale, and people who are not performing at a satisfactory level and must be disciplined. How do you as a manager handle this? As one new manager said, “Almost nothing I learned as an AUSA has prepared me to be a manager.” So, what skills *do* you now need to be a successful manager?

Take a look at the below chart:¹

¹ KEVIN M. ZACHERY, THE LEADERSHIP CATALYST: A NEW PARADIGM FOR HELPING LEADERSHIP FLOURISH IN ORGANIZATIONS 11 (2013).

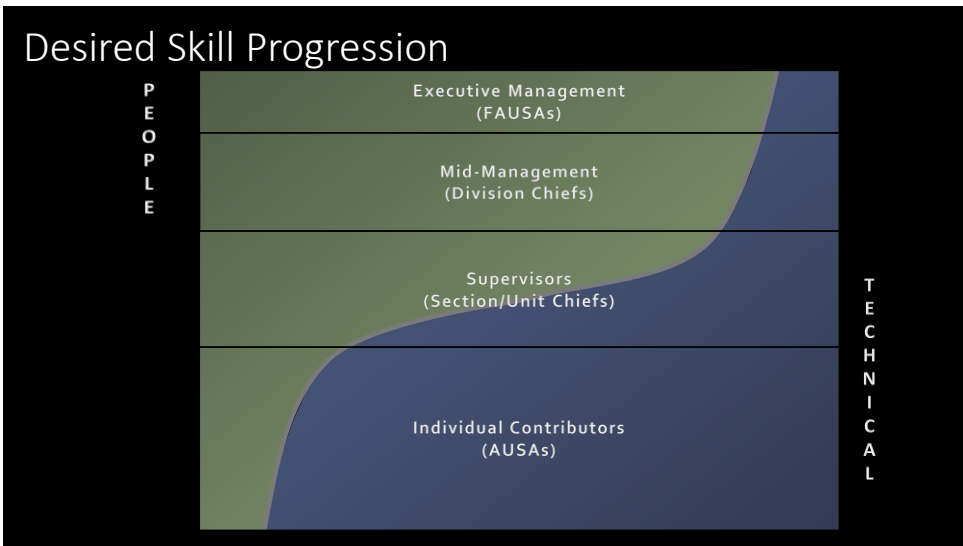


Chart adapted from *Leadership Catalyst: A New Paradigm for Helping Leadership Flourish in Organizations* by Kevin M. Zachery, University of Pennsylvania, May 2011

On the left side are the people or “soft” skills. The right side represents the technical or “hard” skills. As you can see, each managerial level requires a mixture of both hard and soft skills, but the mixture or blend changes with the type of managerial position you occupy. Line Assistant United States Attorneys (AUSAs) need a lot of technical skills. They need to know how to draft an indictment, write an appellate brief, or respond to a lawsuit filed against the government. They still need the people skills to get along with opposing counsel, law enforcement agents, judges and others, but it may not be the largest part of their job.

Once you become a manager, your need to develop more and better people skills increases dramatically. You are now consistently interacting with a variety of people and personalities from both inside and outside of the office. As you rise to division chief level and above, the majority of your job involves interacting with a whole host of people and issues. Yes, there is still a need to possess technical skills and knowledge, but your job has evolved from being a technical expert in handling cases, to becoming someone who manages people. No longer can a manager be only concerned with their own cases, appellate briefs, or depositions. All managers must dedicate themselves to the cases, briefs, and lawsuits of other AUSAs. Managers are no longer solely focused on the quality of their own

work, but on the work of their section, division, and, perhaps, the entire office. And, if that is not enough, managers also need to resolve conflicts, motivate employees, perform case reviews, write performance evaluations, and, perhaps, in some cases, discipline a former co-worker.

With all of that said, is this whole management thing worth it? Is the corner office worth it? Can you make a difference as a manager? Do managers even matter?

In 2015, Laszlo Bock wrote, *Work Rules!: Insights From Inside Google That Will Transform How You Live and Lead*.² Mr. Bock was Senior Vice President of People Operations at Google.³ Early on, the folks at Google bitterly complained about their supervisors.⁴ They called their managers a necessary evil and at worst just a layer of bureaucracy.⁵ Many felt their supervisors were micro managing them and slowing them down in their work.⁶ After hearing all of the complaints, the founders of Google said enough!⁷ They took away all of the managers.⁸

This turned out to be a complete disaster in a very short period of time. So, Google, a data-based decision making company, asked the question: If managers are essential, what traits, or characteristics are found in the company's very best supervisors?⁹ To find out, in typical Google fashion, they turned to data.¹⁰ The company interviewed their managers and came up with the top 10 characteristics that were key to being a good manager.¹¹ Below, in order of importance, is what they found:

- (1) Good coach;
- (2) Empowers team, doesn't micro-manage;
- (3) Creates an inclusive team environment/shows concern for individual success and well-being;

² LASZLO BOCK, *WORK RULES!: INSIGHTS FROM INSIDE GOOGLE THAT WILL TRANSFORM HOW YOU LIVE AND LEAD* (2015).

³ *Id.*

⁴ *Id.* at 190.

⁵ *Id.*

⁶ *See id.*

⁷ *See id.*

⁸ *Id.*

⁹ *See id.* at 194.

¹⁰ *Id.*

¹¹ *Id.* at 195.

- (4) Communicates well/listens and is transparent;
- (5) Focuses on productivity and is results oriented;
- (6) Supports career development and discusses individual performance;
- (7) Has a clear vision or strategy;
- (8) Possesses technical skills to help advise;
- (9) Collaborates across the entire organization; and
- (10) Is a strong decision maker.¹²

Nothing on the list is too surprising, except, perhaps, that possession of technical skills came in at number eight. This is at odds with what EARS teams hear from USAO managers. Many managers believe they must keep a sizeable caseload in order to maintain credibility (your “street cred”) with the people you supervise. If you refer back to our chart, technical knowledge is indeed important, but as Google found, it certainly is not as important as many other traits.

Google determined that, not only do managers matter, they are essential to the success of an organization.¹³ Individuals with great managers are happier and more productive.¹⁴ On the other side of that coin, individuals often leave an organization not because of the organization itself, but because of a bad manager or overall bad management. So, how can we be the best managers possible? Let’s try to answer the question posed earlier, which was, what skills do we need? Now, let’s add, what tools are available to assist us?

Building relationships with those you supervise is crucial. To accomplish this, a manager must have or must develop “soft” skills, those skills that involve how you relate or interact with your people. Spending time outside of your office and away from any device that either sends or receive emails is an essential first step. Such things as walking around, talking to people, spending time listening to your folks is invaluable. Remember, your focus now as a manager is your people and their work, not your cases. It is definitely not time wasted.

Ask what they are working on, how a particular project is progressing. Are they overloaded, or do they have the capacity to take on more or a different kind of assignment? What kind of professional development or training do they want or need? Can you, as their supervisor, align their individual needs and goals with those of your

¹² *Id.*

¹³ *Id.* at 194

¹⁴ *See id.*

section, division, and office? You might even ask what they did over the weekend! It all boils down to communication, not by email or written documents, but by person-to-person conversations.

Show your people that you support them. Many times on office evaluations, the EARS team hear from employees that my boss “doesn’t have my back,” “doesn’t advocate for me,” or “doesn’t stand up to the judges for me.” While showing support is important, it is not one-sided. Your employees must support you by doing good work that furthers the goals and mission of the office. Only then should they reasonably expect you to have *their* back.

That leads to managing your people, not only with soft skills, but utilizing some hard skills or tools as well. The first of these is the *effective* use of performance work plans (PWP), as well as results and expected outcomes (REOs). How many of us have returned to our office to find our PWP on our chair with a sticky note instructing us to “sign here”? Or have had supervisors come into our office and say, “Here’s your PWP, you can read it if you want, but I need it signed right away so I can turn it in today.” We probably have all seen something similar and, perhaps, done it ourselves. Whether at the start of the rating cycle, the mid-year progress review or the end of the year performance evaluations, that obviously is not the best way to manage, nor is it *effectively* using the PWP or REOs to motivate, develop, or acknowledge the work of your employee. Good managers spend time preparing for these extremely important conversations. They utilize all of the knowledge they have learned about each employee through the time they have spent building relationships, and they use that knowledge to customize and tailor each PWP and REO to each employee.

Semi-annual (or more frequent) case reviews can be another way to personally connect with each employee. Obviously, the purpose of these reviews is to determine the status of each case, but it can also be a great opportunity to do so much more. Is the employee ready to work on more complex cases? Perhaps, different kinds of cases? If the cases aren’t moving, explore and talk about the reason why. Is additional training or mentoring needed? Each case’s review should establish clear goals and deadlines for the employee to keep the cases moving.

Up to this point, we have focused on managing “people,” using both soft and hard skills, however, we all do work in a USAO. We are responsible for prosecuting crimes, defending the United States in lawsuits and handling appellate work, so, managing *cases* is also an important part of a manager’s job. Some of the ways supervisors manage cases is through case assignment, review, approvals, and oversight. At first blush, these duties may appear to be more on the technical or “hard” skills side of management, however, *how* you accomplish these tasks require much greater people skills than you might think. Again, utilizing the relationship you have built with each of your people, you can personalize case assignments to fit within the goals you have established for your employee. The same is true for review, approvals, and oversight. Where does the employee need improvement? What does the employee need for their own professional development?

Finally, in the area of managing cases using “hard” skills, or some nuts and bolts tools, managers should use things such as the USA-5, PEP reports, CaseView, the Data Analysis Dashboard, the U.S. Sentencing Commission, and the Administrative Office of the U.S. Courts. Each of these resources can provide objective data and information in areas such as AUSA overtime, case disposition efficiency, case management, productivity, and national comparisons.

Thus far, we have explored using both soft and hard skills to manage your people and their cases. But really, the bottom line in becoming a good manager is to “know your people, grow your people.”

Knowing your people takes time, effort, and a willingness towards everyone you supervise. You need to “know” their individual strengths, weaknesses, how best they receive feedback, what their goals are for the future, and where they may need additional training or coaching. This knowledge is built by frequent personal communication in addition to face-to-face discussions about their PWP, REOs, midyear reviews, case reviews, and the like.

Growing your people is also rooted in frequent communication, but also includes assessing training needs, setting clear and identifiable goals, giving constructive feedback, and engaging in learning or coaching moments when reviewing and approving work product.

So, what *is* the *actual* job of an USAO manager? We know it's a much different job than we previously had. We know that it takes a specific skill set in order to be successful. We also know that it takes a dramatic shift from focusing on your own cases, to dedicating yourself to knowing and growing people to make them and your office better.

When it comes right down to it, isn't that why you are a manager?¹⁵

About the Author

David M. Gaouette became an AUSA for the District of Columbia in 1984. While in Washington, D.C., he worked in both the Superior Court and District Court Division before moving to the District of Colorado U.S. Attorney's Office in 1989. He has held a number of managerial positions including the lead OCDETF attorney, Chief of the Drug Task Force Division, Deputy Chief of the Criminal Division, First AUSA for four United States Attorneys, the Executive AUSA for five United States Attorneys, and the U.S. Attorney for the District of Colorado. He has been an evaluator for the Evaluation and Review Staff (EARS) for the past 25 years and has participated in over 80 USAO evaluations. He is currently on detail with EARS as a Criminal Program Manager at the Executive Office for United States Attorneys (EOUSA).

¹⁵ Marcus Buckingham, *What Great Managers Do*, HARVARD BUSINESS REVIEW (Mar. 2005), <https://hbr.org/2005/03/what-great-managers-do>; Carol A. Walker, *Saving Your Rookie Managers from Themselves*, HARVARD BUSINESS REVIEW (Apr. 2002), <https://hbr.org/2002/04/saving-your-rookie-managers-from-themselves>.

Building Community in the Workplace—An Essential Skill for Leaders

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Today, there is an increasingly common concern expressed by leaders of all types of organizations—private and public. Employees are disengaged. They lack passion and avoid commitment to the organization. After being trained and mentored, they feel no attachment to the organization and are as likely to leave as they are to stay. The concept of “team” that was once so important in organizational life is no longer valued. In his article, *Rebuilding Companies as Communities*, Henry Mintzberg discusses what has caused this crisis in American organizations: people do not feel they belong, and they are not engaged to care for something larger than themselves.¹ Social disconnection in the workplace has reached epidemic levels.² People in the workplace relate to their machines but not necessarily to one another. What relationships they do have with others in the office often feel superficial and inauthentic.³ Employees feel isolated and alone. They don’t feel that the organizational culture supports them and what they do.⁴ A recent survey found that 64% of employees feel like they do not have a strong work culture.⁵ This

¹ Henry Mintzberg, *Rebuilding Companies as Communities*, HARV. BUS. REV. (July–Aug. 2009).

² Michael Stallard, *America’s Loneliness Epidemic: A Risk to Individuals and Organizations*, GOVERNMENT EXECUTIVE (June 18, 2019), <https://www.govexec.com/management/2019/06/americas-loneliness-epidemic-risk-individuals-and-organizations/157805/>.

³ *See id.*

⁴ *See id.*

⁵ Forbes Coaches Council, *15 Best Ways to Build a Company Culture that Thrives*, FORBES (Jan. 29, 2018), <https://www.forbes.com/sites/forbescoachescouncil/2018/01/29/15-best-ways-to-build-a-company-culture-that-thrives/#767285321b96>.

social isolation in the workplace results in “poorer task, team role and relational performance.”⁶

Future trends in the workplace do not hold any promise for improvement. As the role of artificial intelligence in the workplace increases so will the level of social isolation.⁷ As we become more connected online and to our devices, the less connected we become to each other.⁸

In the article, *How Airbnb, Verizon, and WeWork Build Community And the Employee Experience*, Veresh Sita states, “Eighty-five percent of employees are not engaged at work. Fifty-one percent are looking for another job. Those numbers indicate a crisis when you calculate the cost of lost productivity and turnover.”⁹ Sita argues that this crisis is not limited to just millennials; baby boomers and Gen-Xers are also looking for purpose-driven and meaningful work and not finding it in their present jobs.¹⁰ Whether it is a private company or a government organization such as a United States Attorney’s Office (USAO), the impact can be dire and threatens the quality of the work of the office.

The good news, however, is that the antidote is simple: increase the social connection by creating community in the workplace and giving employees the belief that they are part of something much larger than themselves—that they are in it together with their colleagues.¹¹ Social connection can be “a ‘superpower’ that makes individuals smarter, happier and more productive.”¹²

As Mintzberg writes, “We are social animals who cannot function effectively without a social system that is larger than ourselves. This is what is meant by ‘community’—the social glue that binds us together for the greater good.”¹³ Mintzberg continues, “community means caring about our work, our colleagues, and our place in the

⁶ Stallard, *supra* note 2.

⁷ *See id.*

⁸ Abby Baumann, *Importance of Community in the Workplace: 3 Ways to Build Community at Your Company*, URBAN BOUND (Aug. 27, 2018) <https://www.urbanbound.com/blog/importance-of-community-in-the-workplace>.

⁹ Veresh Sita, *How Airbnb, Verizon, and WeWork Build Community and the Employee Experience*, WEWORK (June 4, 2019), <https://www.wework.com/ideas/build-workplace-community>.

¹⁰ *See id.*

¹¹ *See* Stallard, *supra* note 2.

¹² *See id.*

¹³ Mintzberg, *supra* note 1.

world, . . . and in turn being inspired by this caring.”¹⁴ Mintzberg quotes Ed Catmull, the president of Pixar, who credits the success of his company to a “vibrant community where talented people are loyal to one another and their collective work, everyone feels that they are part of something extraordinary, and their passion and accomplishments make the community a magnet for talented people coming out of schools or working at other places.”¹⁵

Douglas R. Conant, the CEO of Campbell Soup Company, writes, “In my experience, to activate and engage the passions of an entire group of people you must transform the group into a highly functioning community of individuals who want to be their best, who feel exceptionally valued, and who celebrate one another’s successes.”¹⁶

But building community is not easy.¹⁷ As Sarah Robinson writes in her article *Building a Community Starts with Employees*, “[b]uilding community is like raising children. You need a compelling reason to get you through the difficulties.”¹⁸ There are compelling reasons to build community. The benefits of community are significant. Michael Stallard writes in *America’s Loneliness Epidemic: A Risk to Individuals and Organization*, that “cultures of connection convey several performance advantages upon organizations including higher employee engagement, tighter strategic alignment, superior decision-making, greater innovation and more adaptability to cope with rapid change taking place in the world today.”¹⁹ Stallard continues:

Connection matters. Organizations should be intentional about developing and sustaining cultures of connection that provide the structures and needed psychosocial support to foster inclusion and teamwork, minimize stress and reduce error—all of which will promote superior organizational outcomes. The net

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Douglas R. Conant, *3 Things Leaders Must Do To Build Meaningful Communities*, CONANT LEADERSHIP, <https://conantleadership.com/3-things-leaders-must-build-meaningful-communities/> (last visited Nov. 1, 2019).

¹⁷ See Sarah Robinson, *Building a Community Starts with Employees*, BUSINESS TOWN (last visited Oct. 1, 2019), <https://businesstown.com/shows/sarah-robinson/building-community-starts-employees/>.

¹⁸ *Id.*

¹⁹ See Stallard, *supra* note 2.

benefit amounts to better employee and organizational health, resilience and performance.²⁰

In her article, *3 Ways to Build a Better Sense of Organizational Community*, Lynette Reed, writes about the importance of building community: “Building community within your organization gives you the groundwork to support human capital in a way that is not unlike reinforcing the foundation of a house.”²¹ She compares building community to adding rebar to the concrete foundation. Without the rebar the concrete foundation may fracture and “[w]ithout an active community showcasing proper behaviors and building an ideal culture, you increase your risk of fracture within the organization.”²²

The importance of community in the workplace should not be underestimated. In *How to Create a Workplace Community*, Mika Lo writes, “[c]ohesive workplaces are more productive than their dysfunctional counterparts.”²³ Lo continues, “increased workplace morale makes employees more willing to give extra effort during normal operations. It also makes it more likely that they will stick with the company through tough times.”²⁴ Alexis Crowell, in *How FiveStars is Creating a Community-based Workplace*, quotes a top company executive: “Powerful employee experiences give way to healthy communities. Communities engage team members. Highly engaged employees have a strong sense of purpose. A strong sense of purpose produces results.”²⁵ In his article, *Don’t Build Just a Great Company Culture: 7 Ways to Build a Real Community*, Jeff Haden writes: “[a] community allows employees to feel a sense of belonging, that they’re part of something larger than themselves, which gives

²⁰ *Id.*

²¹ Lynette Reed, *3 Ways to Build a Better Sense of Organizational Community*, BUSINESS.COM, <https://www.business.com/articles/building-workplace-community/> (last visited Nov. 1, 2019).

²² *Id.*

²³ Mika Lo, *How to Create a Workplace Community*, CHRON.COM, <https://work.chron.com/create-workplace-community-17037.html> (last visited Oct. 1, 2019).

²⁴ *Id.*

²⁵ Alexis Crowell, *How FiveStars is Creating a Community-based Workplace*, CULTUREAMP, <https://www.cultureamp.com/blog/> (last visited Oct. 1, 2019).

meaning to their work, and their lives as a whole.”²⁶ He continues, “[p]erhaps most importantly, community is sustainable.”²⁷

There appears to be no question that community is essential to the success of an organization, but how does a leader build it? In her article, *5 Ways to Create Community in your Organization*, Andrea Nazarian writes, “In order to feel as though we’re valued, respected, and making a contribution, we need to feel like we’re part of a community. . . . [b]uilding a strong sense of community brings clarity of purpose to the groups we belong to.”²⁸ Nazarian continues, “best-in-class communities have a shared sense of value. They plan events, organize team members, and set goals. These communities have high degrees of leadership participation and a commitment to feedback. They’re also very attentive to the needs of new community members.”²⁹ In his article, *Creating a New Workplace: Making a Commitment to Community*, Greg Zlevor outlines what he believes are the four stages of building community:

The Dysfunctional stage . . . is characterized by politics and pain. In the Functional stage, people are basically left alone as long as they do their job. The Formative stage, however, is where people begin to cooperate and share their personal thoughts. Finally, Community is a place of safety in which diverse views and individuals are accepted.³⁰

The following are some suggestions for building community from several of the leading writers in this area. All of the suggestions may not transfer equally from a private company setting to a government

²⁶ Jeff Haden, *Don’t Build Just Great Company Culture: 7 Ways to Build a Real Community*, INC, <https://www.inc.com/jeff-haden/dont-just-build-a-great-company-culture-7-ways-to-build-a-community-instead.html> (last visited Oct. 1, 2019).

²⁷ *Id.*

²⁸ Andrea Nazarian, *5 Ways to Create Community in Your Organization*, JOSTLE, <https://blog.jostle.me/blog/5-ways-to-create-community-in-your-organization> (last visited Oct. 1, 2019).

²⁹ *Id.*

³⁰ Greg Zlevor, *Creating a New Workplace: Making a Commitment to Community*, THE SYSTEMS THINKER, <https://thesystemsthinker.com/creating-a-new-workplace-making-a-commitment-to-community/> (last visited Oct. 1, 2019).

office setting, but together, they provide a framework for building community in any organization. One note of caution before we begin; the private company and the government organization operate under different sets of rules. Before implementing any of the suggested strategies below, it is a good idea that senior leadership in the USAO contact the General Counsel's Office (GCO) and seek an opinion on any potential ethics or fiscal issues.

I. Start with a mission statement

Choose your mission statement. In her article, Lynette Reed suggests that the first step in building community is to “[c]onstruct a clear statement of the behavior you want to see within your organization.”³¹ She suggests “[t]o establish this behavioral foundation, choose two or three adjectives that relate to behaviors you can control”³² and include those words in your mission statement. She maintains that “[e]mployees who align with these words help to improve your organization as they share the same behavioral values as the company and bring continuity to the actions of the organization.”³³ In her article *How to Build a Sense of Community in a Company*, Monica Patrick puts it more directly, give the employee something “to become passionate about.”³⁴

Some suggestions for a USAO may include, “Do Right—Do Justice” or “Serving the Community—Serving Justice.” Reed maintains that “your company’s foundation strengthens as each person within the organization maintains actions aligned with these intentional mission words.”³⁵ As Jeff Haden urges in his article to

[d]efine values based not only on what your company aspires to, but also what employees value, the impact they want to have on customers and the world, and what they strive for. This not only creates a more

³¹ Reed, *supra* note 21.

³² *Id.*

³³ *Id.*

³⁴ Monica Patrick, *How to Build a Sense of Community in a Company*, CHRON.COM, <https://smallbusiness.chron.com/build-sense-community-company-22613.html> (last visited Oct. 1, 2019).

³⁵ Reed, *supra* note 21.

powerful sense of commitment and ownership, but it also aids in accountability.³⁶

The mission statement sets the standards and expectations for the office. Make it strong.

II. Engage your middle managers

Once you have your mission statement, the next step is to engage your senior leadership and middle managers. The senior leadership of the USAO must buy-in to the importance—the necessity—of building community in the USAO. And leaders need to understand the appropriate role of senior leadership. Senior leadership sets the expectations, but it is up to the middle managers to carry the flag and ensure those expectations are met. Engage your middle managers to grow community within your organization. As Jeff Haden points out in his article, in a large organization it is impossible for the top leaders to build and maintain community, so it is necessary to push that responsibility down to the mid-level managers; “team leaders can guide smaller communities within the larger context, all based on the same philosophies and guiding values” established by the top leadership.³⁷

In his article, *Rebuilding Companies as Communities*, Henry Mintzberg writes, “We make a great fuss these days about the evils of micromanaging—managers’ meddling in the affairs of their subordinates. Far more serious is ‘macroleading’: the exercise of top-down authority by out-of-touch leaders.”³⁸ Mintzberg argues that the correct level of leadership is engaged and distributed management where “a community leader is personally engaged [with the employees] in order to engage others, so that anyone and everyone can exercise initiative.”³⁹ Mintzberg concludes, “So maybe it’s time to wean ourselves from the heroic [senior] leader and recognize that usually we need just enough leadership—leadership that intervenes when appropriate while encouraging people in the organization to get on with things.”⁴⁰ Mintzberg recommends that “[p]erhaps it’s time to rebuild companies not from the top down or even the bottom up but

³⁶ Harden, *supra* note 26.

³⁷ *Id.*

³⁸ Mintzberg, *supra* note 1.

³⁹ *See id.*

⁴⁰ *See id.*

from the middle out—through groups of middle managers who bond together and drive key changes in their organization.”⁴¹ “Significant numbers of these people tend to be highly knowledgeable about the enterprise and deeply committed to its survival. . . . Senior managers, not to mention the middle managers themselves, need to recognize the power of this dedication.”⁴² The top leadership needs to establish the guiding values, but the middle managers need to make it happen in their day-to-day contact with the team members.

Delegating responsibility down to middle managers or ensuring that employees have authentic voice in the organization requires building trust—trust in the middle managers and trust in the employees. Community depends on trust, and trust depends on developing a relationship between the middle managers and the employees. Developing that relationship starts when the new employee first walks into the office.

III. Onboarding new employees

The onboarding of the new employee is when building the relationship and trust necessary for community must begin. Alexis Crosswell writes in *How FiveStars is Creating a Community-based Workplace*,⁴³ about how the company focuses on building community in the onboarding process. She quotes an employee of FiveStars: “During our onboarding process, new hires at FiveStars spend time focused on revealing their authentic and best self. We’ve designed programs to help coaches [middle managers] and team members to get to know each other on a deeper level.”⁴⁴ Crosswell quotes another employee of FiveStars speaking about the benefits of including community in onboarding:

I think this approach not only makes people feel like they belong to something bigger, but it connects them to FiveStars, their purpose, and how they can contribute to the company in the most effective way possible. This

⁴¹ *See id.*

⁴² *See id.*

⁴³ Crosswell, *supra* note 25.

⁴⁴ *Id.*

in turn creates a highly engaged community that is working together towards a goal.⁴⁵

At the Mayo Clinic, the onboarding process includes “extensive training in professionalism and communications, and assessments to help [the new hires] develop emotional intelligence which is instrumental to connecting with others.”⁴⁶ The “[p]hysician leaders [middle managers] are selected, developed and assessed based on their ability to connect, which includes listening, engaging, developing and leading other physicians.”⁴⁷

WeWork went as far as to appoint a Director of Workplace Connections.⁴⁸ That director’s “role ensures WeWork’s new employees feel like they’re part of the community from day one.”⁴⁹ In her article *Building a Community in Your Workplace*, Andie Burjek stressed that during the onboarding process, the company can discover the new employee’s interests and make an immediate connection between the manager and the employee based on what they have in common.⁵⁰

Once the new employees are on board and the process of building trust and a relationship has started, it is important to maintain regular contact with them to continue to build on that foundation.

IV. Return to regular team meetings

In today’s office, many supervisors have abandoned the regular team meeting and in its place use emails to communicate with the people they supervise. This is a mistake. As Abby Baumann writes, “getting everyone who is responsible for a project or section of the company in one room can greatly improve productivity. . . . [Meetings] can help spark creativity.”⁵¹ She continues, “Additionally, physical interaction can help build a sense of trust and honesty amongst teammates. A simple handshake at the morning meeting will help

⁴⁵ *Id.*

⁴⁶ See Stallard, *supra* note 2.

⁴⁷ See *id.*

⁴⁸ See Sita, *supra* note 9.

⁴⁹ See *id.*

⁵⁰ Andie Burjek, *Building a Community in Your Workplace*, WORKFORCE (Dec. 19, 2017), <https://www.workforce.com/2017/12/19/building-community-workplace/>.

⁵¹ See Baumann, *supra* note 8.

produce more connected employees.”⁵² It can also help the supervisor to identify the disgruntled or stressed employees through non-verbal cues.⁵³ Every middle manager has heard the grouching from employees about how meetings are a waste of time. Ignore the complaining. Make the meetings as substantial as possible, but understand there is an underlying reason for the meeting beyond the stated purpose, and that reason is building community. Regular meetings, however, are only part of the supervisor-employee contact necessary to build relationship, trust, and community. The second piece of that equation is the check-in.

V. Checking in

In his article, Jeff Haden addresses the importance of the weekly check-in. Each week the coach (mid-level manager) should check-in with each employee. Haden writes, “[T]he 5-minute check-in involves a quick overview of the week’s accomplishments, next week’s priorities, any challenges or issues, and lessons learned, questions or areas for improvement.”⁵⁴ Haden argues that the organization’s leadership must

make it a priority to remove roadblocks that prevent your team from doing their best work. Use 1:1s as an opportunity to discuss challenges, obstacles and issues, and do whatever it takes to clear those. Ask for [the employee’s] input and suggestions on how these might be resolved and consistently work together to remove those barriers.⁵⁵

In her article in *Human Resource Executive*, *How to Build Community Among Your Workers*, Jen Colletta reports the results of a recent study that showed “[c]heck-ins were more popular for building belonging at work than activities such as public recognition, inclusion in out-of-office events and face time with senior leaders. This approach was the method of choice across all age groups”⁵⁶

⁵² See *id.*

⁵³ See *id.*

⁵⁴ Haden, *supra* note 26.

⁵⁵ See *id.*

⁵⁶ Jen Colletta, *How to Build Community Among Your Workers*, HUMAN RESOURCE EXECUTIVE (Nov. 19, 2018), <https://hrexecutive.com/how-to-build-community-among-your-workers/>.

The check-in should not be limited to business. As Monica Patrick writes, “[i]nvolve yourself in the cares and concerns of your employees. Learn how to ask appropriate [personal questions] Be personable without being inappropriately personal.”⁵⁷ Be authentic, and show you care.

Regular team meetings and check-ins are two of the essential elements in connecting with the employees, but there is a third—encouraging interruptions.

VI. Encourage interruptions

While regular team meetings and weekly check-ins are crucial, they are far from the end of building trust and the relationship. It is equally essential that the leader encourage interruptions from the team members during the workday. Douglas R. Conant recognizes the hectic nature of today’s workplace with the constant flood of “relentless meetings, emails, text messages, questions to answer, problems to solve, fires to put out”⁵⁸ At times, it feels as though another “interruption” from a team member is the last thing the leader can handle. Conant, however, believes that “[y]ou can build a lasting community, one moment at a time, by *showing up* for your stakeholders in an authentic way when they need you.”⁵⁹ Conant continues that [by adopting this approach to ‘interruptions’ you can dramatically increase your ability to lead effectively, clarify strategy, build trust, and forge meaningful relationships.”⁶⁰ Conant concludes that by taking the time to offer your help when interrupted by a team member, it “sends the message that you have their backs, that you value their time as much as you value your own, and that you are ready and willing to roll up your sleeves and help them fight the good fight for your community.”⁶¹

Those are the three elements of connecting with the employee to build community: regular team meetings, checking-in, and encouraging interruptions. But they are, however, only a start down the road. To continue building community, the leader needs to

⁵⁷ See Patrick, *supra* note 34.

⁵⁸ Conant, *supra* note 16.

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See *id.*

encourage community-building activities within and outside of the office.

VII. Encouraging community-building activities within the office newsletter

If you want the employees to feel that the organization is their home, then you need a hometown newspaper. You need a top-quality office newsletter. A quality newsletter can provide a strong sense of community to the organization. Provide the office news: who is new to the organization, who is leaving the organization, who had an anniversary in the organization, who had a significant life event such as a marriage, a birth, or even a death in the family. Add photos of inside and outside activities: the office's softball game, a volunteer day feeding the homeless, and the recent awards ceremony. Share employees' bios and stories.⁶² Include a calendar of upcoming office events. In short, include anything that provides a sense of being part of the organization's community to the employees. Again, however, remember to start with a discussion with the Executive Office of U.S. Attorney's (EOUSA's) GCO to learn what you can and cannot include in a newsletter.

VIII. Celebrate achievements and milestones

In his article, Douglas R. Conant, wrote about the crucial importance of honoring others:

The harder you work to make people feel valued, the harder they will work for the enterprise. And, when you thank people for meeting or exceeding agreed upon goals, you are also reinforcing the high standards of your organization in a thoughtful way. Meaningful gratitude is at the heart of any effectively thriving community!⁶³

Show gratitude as often as possible. Connect, and say thank you. As Abby Baumann writes,, "Hearing that you appreciate the work [the employees] are doing will make your employees more eager to do that

⁶² See *supra* note 25.

⁶³ Conant, *supra* note 16.

work.”⁶⁴ “Making recognition a standard part of your modus operandi will help create a sense of belonging and appreciation which is a great foundation for building workplace community.”⁶⁵ The leader in the USAO has several means of celebrating the achievements of the employees. Trial victory or significant case event get-togethers are one. Monthly team meetings where birthdays, anniversaries, and team members either joining or leaving the organization are recognized is another. And highlighting employee achievements inside and outside of the office in a newsletter is another. Quarterly award celebrations are a good way to bring your team together to celebrate the achievements within the team. There are numerous ways to celebrate the achievements, large and small, of the team. The important point is that you don’t fail to celebrate them. As important as it is to celebrate current achievements, it is equally important to celebrate past achievements.

IX. Respect the organization’s past

Honoring the past of an office sends the message to the employees that what they do is important to the leadership. Simply posting the photographs of all of the past U.S. Attorneys in the district helps very little in building a sense of community. Instead, honor the entire team. In one USAO, the office holds a formal dinner every year and the photographs from those dinners grace the walls of the office. In another office, every year the team takes a “family photograph” of everyone in the office and displays the picture on the office walls. You can walk down the hall and see generations of attorneys and staff who contributed to making the office what it is today. Respecting the past of the office says to the current employees: (1) you are part of something much bigger than the present office; and (2) we will continue to respect you after your time here is gone. Another office holds a “family reunion” during the holidays every year. Prior members are invited back to socialize and “catch-up” with current members of the office. Other offices have informal “retirees clubs” where current leadership joins past members for lunch at a local

⁶⁴ Baumann, *supra* note 8.

⁶⁵ *5 Ways to Develop Strong Workplace Community on Any Budget*, FLAREHR (Aug. 1, 2018), <https://www.flarehr.com/blog/develop-a-strong-workplace-community-on-any-budget/>.

restaurant. All of these measures signal to the current employees that their time here is valued, remembered, and appreciated.

X. Design the workplace to build community

“It’s important to provide your employees with spaces to come together socially . . . throughout the office. Your people need to be able to chat . . .”⁶⁶ whether it is about their lives or their work. The research clearly shows that the physical design of the workplace can increase community in an office.⁶⁷ Although as the leader of the USAO, the U.S. Attorney may likely not be able to go as far as AirBnB, which offers healthy meals and on-site group exercise classes,⁶⁸ there are simple steps to improve the workplace design that can aid the building of community. The simplest is to adopt an open-door policy for the entire office. Unless the team member is out of the office or needs privacy, her door is open. If her door is shut, there is likely a sticky note on the door explaining why, such as, “interviewing a witness,” “on a phone call,” “out of the office until ___,” or “meeting a deadline.” The open-door policy invites communication between team members and between the team members and the leaders. It encourages the “interruptions” discussed above.

Another community-encouraging office design is informal seating in the common areas of the office. Providing seating in hallways or outside of offices fosters people stopping and talking together. Make sure the break room has sufficient comfortable seating so that when an employee stops by for a cup of coffee or a soda, he is encouraged to spend a few moments talking with others in the breakroom. Open up the conference rooms to lunch-time book clubs or other informal groups within the office to gather and talk. Create “team rooms” where Assistant United States Attorneys (AUSAs) and others working on an investigation or an upcoming trial can work together. People that work in an office environment that encourages communication report higher levels of community.⁶⁹ Sarah Robinson suggests making

⁶⁶ *Id.*

⁶⁷ Eleanor Forster, *Community Spirit in the Workplace*, WORKDESIGN MAGAZINE (Mar. 23, 2017), <https://www.workdesign.com/2017/03/community-spirit-workplace/>.

⁶⁸ See Sita, *supra* note 9.

⁶⁹ See FLAREHR, *supra* note 65.

some of these common places no-tech zones: “You have to set up no-tech zones otherwise, people are not going to stop hiding behind their technology; instead, you have to create a void. It sounds juvenile, but if you don’t force people to give up their technology, they just won’t.”⁷⁰ Although there are certainly limits on building community through office design in a USAO, simple and affordable steps can go a long way.

XI. Building community outside of the office

A. Sports teams

“One of the most obvious ways to create a sense of workplace community is to [organize] [voluntary] events outside of work, enabling your people to get to know each other on a more personal level. Regular social events help create bonds within the team and boost employee morale.”⁷¹ Organizing office sports teams is one of the time-tested methods of developing community with out-of-the office activities. Although not everyone may want to play, there is always a role for everyone to help support the team on the sidelines or in the stands.⁷² Filling your newsletter with photos of the teams and the supporters increases the feeling of community. Again, check with GCO to make sure you know the rules before you organize a team.

B. Working in the community

“Volunteering for a worthy cause is a great way to cement your workplace community spirit. Taking part in volunteering events encourages both the company and employees to give back to the community, while promoting the causes your people care about.”⁷³

In her article, Monica Patrick suggests choosing two annual events in the community to support.⁷⁴ She urges to “[r]ally the employees to turn out and help out making your community goals become a reality. Choose, for example, feeding the homeless during the Thanksgiving holidays or dropping off toys at a local charity hospital.”⁷⁵

⁷⁰ Robinson, *supra* note 17.

⁷¹ FLAREHR, *supra* note 65.

⁷² *See id.*

⁷³ *Id.*

⁷⁴ *See* Patrick, *supra* note 34.

⁷⁵ *Id.*

Employees who desire to participate in these volunteer activities could organize teams of office volunteers to participate in the community activities and encourage friendly competition between the teams with a prize for the winner. Give recognition to the team that wins. “But it’s important to take an employee centric approach to volunteering. Rather than specifying which particular [organizations] you will support, find out what causes matter most to your people and support individual efforts or group decisions.”⁷⁶

This is a particularly tricky area, however, when it comes to following the standards of conduct for government employees.⁷⁷ In particular, USAOs must not appear to be endorsing any particular cause or organization, nor can USAO employees use official USAO resources for such volunteer activities. Rather, individuals may provide notice in USAO common areas of opportunities in which USAO employees may voluntarily serve and then work at such opportunities on their own time.

Consult GCO before you take any steps in this direction. There is most likely no problem in simply notifying employees of opportunities to assist with community events in their personal capacities and on their own time, but even then, you need guidance on how you communicate these opportunities to the office. Start with GCO.

C. Encourage employees to connect to the larger Department family

When new AUSAs arrive in the USAO, they may feel that their new “family” is limited to that office. As the new AUSAs attend courses at the National Advocacy Center (NAC) and meet and work with other AUSAs across the nation, they will come to understand that their family includes everyone in the U.S. Attorney community and EOUSA. And then as they develop further as AUSAs, they discover that, in fact, their family is the entire Department family, which includes all the different parts of the Department. As Claire Huish writes in *How to Build a Sense of Community in the Workplace*:

[I]t can . . . be extremely helpful to encourage staff to connect to their industry as a whole. . . . As well as being part of a company, integrating employees into part of the wider industry allows them to more easily

⁷⁶ FLAREHR, *supra* note 65.

⁷⁷ See 5 C.F.R. § 2635.101.

understand where they fit in, [sic] the grand scheme of things.⁷⁸

Encourage staff and attorneys to attend courses at the NAC, join blogs that touch on the work that they do, serve on working groups, serve as evaluators, and when appropriate, serve on details. EOUSA does an excellent job of starting this by bringing all new AUSAs to Main Justice and providing them with an overview of the Department. New AUSAs spend two days in the Department's ancestral home—the Great Hall—and hear from the Department's leaders. Not only do they get a view of what all of the components do, but they also get a chance to network with newer AUSAs from across the districts. And hopefully they return to their districts understanding that they are part of something much bigger than themselves or their USAO. They are part of a community with a long and respected history that has played a vital and important role in American history and, as it always has, stands for certain values and beliefs that are worthy of their passion and dedication.

XII. Conclusion

Douglas R. Conant, summarizes the value of building community in the workplace:

My experience leading people has taught me that employees want to do meaningful work in a place where they can have an extraordinary and palpable sense of community, a place that has high standards, a place that cares deeply about them on an individual level, and a place where they can learn and grow. It is absolutely in our power as leaders to create communities that accomplish these mandates.⁷⁹

But beware. Simply working the program will not produce results. As Greg Zlevor writes, it is a myth that a community-building program will create community. “Programs or initiatives do not create community, people’s desires and actions do.”⁸⁰ He continues, “[d]eveloping healthier relationships takes time, energy, and

⁷⁸ Claire Huish, *How to Build a Sense of Community in the Workplace*, TRAINING JOURNAL (May 15, 2018), <https://www.trainingjournal.com/articles/features/how-build-sense-community-workplace>.

⁷⁹ Conant, *supra* note 16.

⁸⁰ Zlevor, *supra* note 30.

commitment. It is better to start small and build momentum than to create high expectations and be disillusioned.”⁸¹ So how will the leader know when their efforts at building community are working? Sarah Robinson suggests, “You will know [when] you have a loyal community when the majority feels pride, trust, and passion” in the work of the organization.⁸² She continues, “At the end of the day, all [community-building] tactics are designed to feed pride, trust, and passion. If you can give someone that sense of community of belonging to something bigger than ourselves, they will stay with you forever.”⁸³ And isn’t that what we all want—dedicated, passionate employees fully engaged with the goals of the organization and committed to staying in the office and achieving those goals. Good luck in this endeavor; it is worth the work.

About the Author

Tate Chambers joined the USAO for the Central District of Illinois in 1984. There he has served in several capacities including Associate U.S. Attorney, Appellate Chief, Organized Crime Drug Enforcement Task Force Lead Task Force Attorney, Violent Crime Chief, and Branch Chief. During his time with the Department, he has served four details to EOUSA: Project Safe Neighborhood National Coordinator (2007–2010); EARS Criminal Program Manager (2010–2011); Editor-in-Chief of the Department of Justice Journal of Federal Law and Practice (2016–2019), and EARS Criminal Program Manager (2019–present).

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⁸¹ Zlevor, *supra* note 30.

⁸² Robinson, *supra* note 17.

⁸³ *Id.*

Stop Avoiding Difficult Conversations and Learn How to Be More Successful With Them

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The biggest management issue for most U.S. Attorney Offices (USAOs) is supervisors who are reluctant to have difficult but important conversations with their staff or superiors. It is ironic that attorneys who are well trained and experienced to do battle in the courtroom, often become shrinking violets when faced with the prospect of sitting down with a colleague and addressing workplace concerns. Problems are allowed to fester before needed conversations take place, driving up the stakes, consequences, and emotions for those involved. By waiting, conversations become even more difficult and success becomes more unlikely.

The ability to have honest and candid conversations with your employees or supervisors is a fundamental part of any manager's job. But many of us are not very good at conversations when stakes are high. We are afraid that we will fail, make the situation worse, damage relationships, or even mar our own reputations.

It is not just a problem for USAOs; it is a well-researched area in the self-improvement and organizational management fields. Experts have filled shelves with books, articles, courses, and workshops on handling these situations. Whether they are called challenging, critical, crucial, difficult, fierce, hard, or tough, we have all experienced conversations that mattered and involved disagreement, emotions, and consequences. One of the seminal books on the topic is *Crucial Conversations*.¹ The book has several good ideas—and I will touch on some—but many of these books and articles share broad themes. Luckily for us, most expert advice can be distilled into some simple, common-sense steps.

¹ KERRY PATTERSON ET AL., *CRUCIAL CONVERSATIONS: TOOLS FOR TALKING WHEN STAKES ARE HIGH* (2d ed. 2012).

I. The goal

Let's start with the obvious: The more information we have, the better. Our goal in a difficult conversation should be to collect as much relevant information as possible from every player. This does two things. First, the more information we assemble, the better any decision is likely to be. Second, the more people contribute, feel heard, and feel understood, the more they are likely to abide by any decision made and are more fully engaged in the resolution. Because we are talking about a conversation, and not a lecture, we are seeking buy-in and collaboration.

Getting everyone to show all his cards at the table is key. *Crucial Conversations* uses the term “pool of shared meaning” to describe all the information that we are trying to collect.² The book breaks down the information further into *facts* and *story*.³ “Facts” are the objective truths. “Story” is the inferences, assumptions, opinions, intent, and conclusions that we make. We can also think of the facts as the conversation's intelligence quotient, “IQ,” and the story as the conversation's emotional quotient, “EQ.” This is a helpful distinction which allows us to examine what we actually know and what we believe. Think of the objective facts as dots and our subjective beliefs as how we connect the dots to create a picture.

II. Emotions

Here's the part where we usually stumble. We do not know how to deal with emotions (theirs or ours) that may be present. When emotions run high, reason can suffer. Instead of thinking with our heads, we react with our hearts or shut down. Fear can invoke a “fight or flight” physiological response, limiting our ability to fully listen, engage, and process. None of us are Spock, so we cannot eliminate emotions entirely, but we do not need to and probably do not want to. We simply need to reduce the emotional voltage so that nobody gets shocked. Fortunately, there are several ways to manage the electricity.

Relationship. A healthy relationship is the best insulator. What is the nature of your relationship with the person? Is it based on mutual trust and respect? Is she likely to question your motives? Do you

² See *id.* at 21.

³ See *id.* at 105.

question hers? It helps to know and understand the people involved in the conversation, including ourselves. How can you present things in a way they can best hear it? One way to ground ourselves, according to *Crucial Conversations*, is to ask: What do I really want for myself, for them, and for the relationship?⁴

Psychological safety. If the person involved in the conversation feels safe to express his thoughts and emotions, the emotional current can flow without shocking anyone. If not, he will hold back or possibly even disrupt the discussion. Remember, you are trying to get as much information on the table as possible. How psychologically safe does the other person feel with you? And you with the other person?

What can you do to build psychological safety? Start by reducing the potential for anxiety. Tell the person what you would like to discuss with him before you meet. That gives him notice and a chance to prepare as well. It also demonstrates your good faith.

Next, keep an open mind. If the other person thinks your mind is made up, why should he engage with you? Realize that you probably do not have all the facts and may have drawn some inaccurate or incomplete conclusions. Understand that you have something to learn from the conversation and hearing his side of the story. Even if it does not change your mind, it might affect your approach to the solution. Let the person know what he says matters to you. You seek to understand. Sincerely conveying an open mindset does wonders for making the other person feel safe enough to honestly share his views.

Empathic listening is another tool that promotes psychological safety. This concept asks you to step out of your own shoes and into the shoes of the other. The more you can demonstrate that you are making an effort to see things from his perspective, the more trust you will build. As the conversation unfolds, reflect back to him what you have heard them say. This technique is an element of “reflective listening” and builds understanding and comprehension for all parties. Remember, acknowledging his point of view does not mean you agree with it.

Candor. Candor can be used as a circuit breaker to shut down disruptive emotional current. Kim Scott, the author of *Radical Candor*, identifies two characteristics that allow people to hear

⁴ See *id.* at 34.

criticism effectively: caring personally and challenging directly.⁵ The more people believe we care about them, the more they can hear what we have to say. The preparation and approach you take to the conversation is one way to demonstrate the level of your care for the other person. Honesty is the other factor in Ms. Scott's paradigm. Just because we care, does not mean that we are always completely honest. Often we are afraid to hurt someone's feelings. We pull our punches or even engage in actions that sabotage or undermine our intended message. Ms. Scott argues that supervisors have a *moral imperative* to be honest with their people.⁶

So spend a moment examining the level of candor you have shown to the person in the past. Have you sent him mixed signals? Have you already done that for this issue? Do you own any responsibility for the issue? How candid are you prepared to be with them in this conversation?

III. Preparation

In considering emotions, we have already done a lot of preparation for our conversation. A few key elements remain.

Frame the issue. Deciding what you want the conversation to be about is one of the most important steps you can take to prepare. Keep it simple. If there are multiple issues to discuss, break them into separate conversations unless there is a unifying theme or root cause that binds the issues together. Spend time distilling the issue down to its core. Most issues can be framed in a single sentence or two.

Identifying the issue allows you and the other person to stay on topic and avoid distractions. You cannot stay on point if you do not know what the point is. If the other person raises another topic, you can acknowledge it but more easily defer it until the present issue is resolved.

Gather information. With difficult conversations, we can anticipate that our assumptions or conclusions may be challenged. It is helpful to gather as many facts as possible. The more specific and thorough we are in this process, the more credible our perspective becomes. It also helps us identify gaps in our own knowledge and where we might

⁵ Kim Malone Scott, *Radical Candor—The Surprising Secret of Being a Good Boss First Round Review*, YOUTUBE (Feb. 11, 2016), <https://www.youtube.com/watch?v=nQHpvviDY5Hs>.

⁶ *Id.*

benefit from hearing from the other party. Once we start looking at what we know, we can separate our facts from our story. If possible, it is best to gather facts from objective sources or our own observations. If you rely solely on what others have told you, you might get sucked into a tangential discussion of other people, their credibility, and biases.

Plan. Dwight D. Eisenhower said “plans are worthless, but planning is everything.”⁷ Planning what you want to say and cover will help you make your conversation more successful and less stressful.

Start by considering the participants. Who should be present? Depending on the conversation and how critical it is, you might want to seek guidance from the General Counsel’s Office (GCO). Who is necessary to the conversation? Who is the decision maker?

Next consider the location and timing. Think about using a location or setting to help influence a successful outcome or make the other person feel safe. Be mindful of when to have the conversation. Is there a particular time in the day or the week when the person can best hear the message?

Have an agenda. Most difficult conversation models share similar characteristics. They involve providing opportunities for all parties to contribute to the pool of information and collaborative problem solving. The National Advocacy Center has created a model for feedback called the three I’s—Issue, Impact, and Improvement.⁸ Many of our critical conversations can follow this approach. Make sure your plan includes framing the issue and identifying the impact the issue has for you, the other person, and/or the office. Ask for the other person’s perspective. Leave room for discussion of everyone’s facts and story. Do not be afraid to test assumptions or inferences. Avoid judgements or conclusions until all the information is on the table. After that, move to resolution and ask for the other person’s help and collaboration with finding a solution. Finally, sum up. Clearly state the conclusion reached, including any follow up or action plan.

⁷ Dwight D. Eisenhower, *Remarks at the National Defense Executive Reserve Conference., Nov. 14, 1957, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, DWIGHT D. EISENHOWER 818 (1957).*

⁸ The 3-I Feedback Model was developed by the Department of Justice’s Faculty Development Institute to provide constructive and reinforcing feedback to others, particularly when providing feedback regarding presentation/communication.

Practice. Most of us would not think of giving an opening, closing, or oral argument without practicing it several times before we deliver it in court. We know that practice makes perfect, but we often spend little time rehearsing our consequential conversations. Practicing what you want to say and how you want to say it for this specific audience will improve the effectiveness of your approach. Ask your management team colleagues to help you, and use the practice as an opportunity for your own professional development. Even the most sensitive personnel matters can be shared with the appropriate supervisor. Try to find individuals who know all the parties involved. Their feedback can help you tailor your presentation and improve the likelihood that your message will be heard and understood.

IV. The talk

Now it is time to put your plan or agenda into action. Begin by restating the issue and letting the person know you need her help in understanding and resolving it. Tell her what you think and why, but leave room for her side of the story. Hear her out, reserving judgment. Seek to understand her point of view. Remain open, honest, and curious.

Invite her to help you construct a solution after all the information has been collected. Make it collaborative.

If there is a problem, slow down and listen. Find common ground. What do you both want? If hurdles remain, don't be afraid to pause the conversation and come back to it later. You both may need more time to reflect on what has been said, or you may benefit from seeking additional counsel.

Once the conversation is done, provide a conclusion. Identify how the issue will be resolved or addressed and what steps, if any, will be taken going forward. If appropriate, let the person know that you will send them an email or a memo summarizing the issue, resolution, and any anticipated follow up. If the issue involves a performance or conduct issue that might require further action if not resolved, make sure you document it.

V. Closing thoughts

The more willing that you are to have difficult conversations, the better you will get at them. And you will be more likely to address issues when they are still molehills—before they become mountains. By approaching tough conversations with the proper time, effort, and

mindset you can demonstrate your care and concern for the other person and the relationship. You will increase honesty and respect. And you will help address the biggest management issue in USAOs today.

VI. Additional reading

- DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (2010).
- Joel Garfinkle, *How to Have Difficult Conversations When You Don't Like Conflict*, HARV. BUS. REV., May 24, 2017.
- Judy Ringer, *We Have to Talk: A Step-By-Step Checklist for Difficult Conversations*, *MEDIATE*, <https://www.mediate.com/articles/ringerJ1.cfm> (last visited Oct. 16, 2019).
- KIM SCOTT, *RADICAL CANDOR: BE A KICKASS BOSS WITHOUT LOSING YOUR HUMANITY* (2017).
- Bev Attfield, *7 Ways to Create Psychological Safety in Your Workplace*, *JOSTLE: BLOG*, <https://blog.jostle.me/blog/7-ways-to-create-psychological-safety-in-your-workplace> (last visited Oct. 16, 2019).
- Monique Valcour, *8 Ways to Get a Difficult Conversation Back on Track*, HARV. BUS. REV., May 22, 2017.
- Delores Bernardo, *You Just Had a Difficult Conversation at Work. Here's What to Do Next*, HARV. BUS. REV., May 29, 2017.
- NEIL KATZ & KEVIN MCNULTY, *REFLECTIVE LISTENING* (1994).

About the Author

Gregg Sullivan is a criminal Assistant United States Attorney (AUSA) in the Eastern District of Tennessee, who is currently on detail to the Evaluation and Review Staff (EARS). He has been with the Department for over 32 years and worked as an AUSA in the District of Massachusetts and the Eastern District of Tennessee. For 15 years, Gregg held various USAO management positions—Branch Chief, Deputy Criminal Chief, Criminal Chief, Executive Assistant United States Attorney, First Assistant U.S. Attorney, and Acting U.S. Attorney. He has also viewed management in other offices, having been involved with the EARS program for 20 years, with 10 years as a team leader.

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Submarining in the Workplace: How to Dive Deep and Better Know Your Co-Workers

Gentry Shelnett
Deputy United States Attorney
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A call comes in from an FBI supervisor; she tells you about a breaking investigation. It requires immediate attention and long-term Assistant United States Attorney (AUSA) guidance. She wants a smart, aggressive AUSA assigned. If this case develops as described, it will be high-profile. You have 10 AUSAs in your section. How do you make the assignment?

The simple approach would be to draw a random name. That will get you an AUSA with no favoritism shown in the selection. Another approach would be to give it to the next AUSA on your case assignment list. Again, a fair and unbiased approach that spreads the work around. You could also look at CaseView and figure out who has the least number of cases. All valid options.

The problem is that none of these methods accomplish what you should be doing as a leader, supervisor, or manager. And that is pausing to consider what you know about the case and marrying it with what you know about the gifts and graces of the AUSAs in your unit.

Knowledge about your team is your greatest asset. Knowledge about the case is important, of course, but what you know about your people is paramount. Here are six tips and guidelines for knowing your team better.

- (1) Be honest. Nothing undermines a relationship faster than being dishonest or dis-ingenuous. The people you supervise must know that you will tell them the truth.
- (2) Be vulnerable. If you have trouble admitting your own mistakes or weaknesses, then supervision might not be for you. Team members need to know that they don't have to be perfect. Being vulnerable about your own mistakes can help them understand that.
- (3) Listen. If you ask a question, listen for the answer. You've probably met someone who asks a question for the sole

purpose of answering it for himself. Take time to hear others out, and make sure they know they are heard.

- (4) Value others' ideas. A condescending tone can put a swift end to any chance of real communication. Whether speaking to the youngest member of the team or a supervisor, speak to others as equals and value their ideas and opinions.
- (5) Engage beyond the surface. When you interact, make sure you encourage team members to share. If your idea of small talk generally stops with the weather, try asking a more meaningful question, one that makes room for a more valuable conversation.
- (6) Coach and mentor. Too often people come to a supervisor with a problem and leave with a "do this" or "do that" answer. You want to grow your staff, and you do that by coaching. Ask them what they think they should do. Guide them on the right approach and help them figure out how to work through problems on their own.

By getting to know your people, you are also establishing trust. In his book *Leaders Eat Last*, Simon Sinek talks about the "Circle of Safety."¹ This is safety between supervisor and staff that's built on trust and necessary for an organization to succeed.

Going back to the high-profile case assignment, it is important in choosing the right AUSA that you have someone you can trust. The AUSA taking the assignment needs to know that you have faith in him. This trust is built over time by investing in knowing your team better and helping them get to know you.

The key to knowing your team and their knowing you is getting out from behind your desk. Your office is a perfectly appropriate location to have serious conversations, but to really get to know people, it helps to go where they feel comfortable. For example, when you have finished reviewing that memo, don't just put it in your outbox. Walk it back. This gives you a chance to personally give your stamp of approval and interact face-to-face outside of your office.

If you see someone having a particularly stressful time, ask them to take a walk outside with you. Invite the team members you know the least out to lunch or coffee and make it a point to not talk shop. You'll

¹ SIMON SINEK, *LEADERS EAT LAST* (2019).

be surprised how many opportunities for interaction arise simply by walking around the office.

Getting to know your team is not hard, but it does take intentional effort. Knowing the gifts and graces of the people you supervise is vital to their success, your success, and ultimately, the mission of the office.

About the Author

Gentry Shelnett is the Deputy United States Attorney for the Northern District of Georgia. He is currently on detail to the Evaluation and Review Staff at the Executive Office for United States Attorneys. Gentry joined the Northern District of Georgia in 1987. He served as an AUSA in the Violent Crime Section and became Chief of that section in 1995. In 1997, he became Chief of the Criminal Division and served as Criminal Chief until 2018, when he became Deputy United States Attorney. Before joining the U.S. Attorney's Office he served four years as the Chief Assistant Solicitor in Dekalb County Georgia. For 26 years of his career, he has been directly involved with helping line prosecutors make decisions about their cases.

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Five Titles for the Leader's Bookshelf

Tate Chambers

Criminal Program Manager

Evaluation and Review Staff

Executive Office for United States Attorneys

Leaders read. It is essential. In his book on leadership, *Call Sign Chaos: Learning To Lead*, General Jim Mattis wrote that “[i]f you haven’t read hundreds of books, learning from others who went before you, you are functionally illiterate—you can’t coach and you can’t lead.”¹ He continues, “History lights the often dark path ahead; even if it’s a dim light, it’s better than none.”² He concludes, “If you can’t be additive as a leader, you’re just like a potted plant in the corner of a hotel lobby: you look pretty, but you’re not adding substance to the organization’s mission.”³ Engaged and effective leaders need to read. Here are five books that are worth picking up for your weekend read.

A note about the selection of titles for this review. In gathering these five titles, I went to leaders within the Department who were involved in training others to lead and asked for their recommendations. These are only a few of the recommendations I received. I selected these five titles because they cover a wide range of strategies and leadership philosophies and were written by authors from diverse backgrounds and experience. Trust me, dozens, or as General Mattis writes, hundreds of books would have fit under the mantle of “Titles for the Leader’s Bookshelf.” I hope this review will whet your appetite to read beyond these five titles. One final note before we begin: These reviews are simple snapshots of these five books, thumbnail sketches of the principal leadership or management theory of the author. They are all easy reads. If the theory strikes a chord with you, pick up the book and see how the author develops that theory. Now, the books.

¹ JIM MATTIS & BING WEST, *CALL SIGN CHAOS: LEARNING TO LEAD* 237 (Random House 2019).

² *Id.*

³ *Id.* at 237–38.

1. *Humble Inquiry*⁴

Schein foresees a major challenge in the leadership of future organizations. He writes, “In an increasingly complex, interdependent, and culturally diverse world, we cannot hope to understand and work with people from different occupational, professional, and national cultures if we do not know how to ask questions and build relationships that are based on mutual respect and the recognition that others know things that we may need to know in order to get a job done.”⁵ Schein’s solution to this challenge is for leaders to develop the skill of asking questions of subordinates. This is the skill Schein calls “Humble Inquiry.” He notes, “Humble Inquiry is the fine art of drawing someone out, of asking questions to which you do not already know the answer, of building a relationship based on curiosity and interest in the other person.”⁶ Schein believes that Humble Inquiry is the first step that higher-ranking leaders must learn to create a climate of openness.⁷ Schein argues, “For everyone to do their part [in the organization] appropriately requires good communication; good communication requires building a trusting relationship; and building a trusting relationship requires Humble Inquiry.”⁸

Schein devotes a chapter of his book to distinguishing Humble Inquiry from three other forms of questioning: diagnostic inquiry, confrontational inquiry, and process-oriented inquiry.⁹ Diagnostic inquiry is when the leader uses questions to steer the conversation.¹⁰ The leader is basically forcing the conversation to go where they want by forcing the subordinate to move the conversation where the leader wants it to go.¹¹ This form of inquiry pushes the subordinate into the leader’s line of thinking instead of allowing the leader to explore the subordinate’s line of thinking.¹²

⁴ EDGAR H. SCHEIN, *HUMBLE INQUIRY* (Berrett-Koehler 2013).

⁵ *Id.* at 1–2.

⁶ *Id.* at 2, 21.

⁷ *Id.* at 4.

⁸ *Id.* at 5.

⁹ *Id.* at 39–51.

¹⁰ *Id.* at 43.

¹¹ *Id.* at 43–46.

¹² *Id.* at 44–45.

Confrontational inquiry is when the leader inserts his own ideas into the conversation but does so in the form of a question.¹³ Schein writes that “[w]hen we talk about rhetorical questions or leading questions, we are acknowledging that the question is really a form of telling.”¹⁴ This form of inquiry “often arouses resistance in others and makes it harder to build relationships with them because they have to explain or defend why they aren’t feeling something or doing something that you [the leader] proposed.”¹⁵

Process-oriented inquiry occurs when the leader stops the conversation and asks about the process of the conversation. Those are questions such as, “Is this too personal?” or “Have I upset you?”¹⁶ Schein maintains that process-oriented inquiry can support Humble Inquiry because “it focuses on the relationship itself and enables both parties to assess whether their relationship goals are being met.”¹⁷ Schein warns that “[u]sed with humility this kind of inquiry is probably also the most difficult to learn because our culture does not support it as normal conversation.”¹⁸

To avoid the other three forms of inquiry and use Humble Inquiry, Schein counsels the leader to “try to minimize your own preconceptions, clear your mind at the beginning of the conversation, and maximize your listening as the conversation proceeds.”¹⁹ Above all, be sincere. “[T]he most important diagnostic that the other person will use to decide whether or not you are interested is not only what you ask but also how well you hear the response.”²⁰ Schein points out that “[y]our attitude and motive will then reveal themselves in your further questions and responses as the conversation proceeds.”²¹

It is not as easy as simply learning to ask the right kind of questions. Schein sees several cultural roadblocks that hinder leaders from learning the art of Humble Inquiry.²² One roadblock is that we

¹³ *Id.* at 46.

¹⁴ *Id.*

¹⁵ *Id.* at 47.

¹⁶ *Id.* at 48–51.

¹⁷ *Id.* at 49.

¹⁸ *Id.*

¹⁹ *Id.* at 41.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 8.

live in a culture where telling, not asking, is valued.²³ We expect our leaders to tell their subordinates the direction they want to move the organization and not to ask their subordinates for their view.²⁴ Our culture tells us that to ask “is to reveal ignorance and weakness.”²⁵ But as Schein points out, telling puts the subordinate down, where asking temporarily empowers the subordinate by making the leader vulnerable.²⁶ That vulnerability leads to improvement of the communication and trust between the leader and the subordinate, and thus the development of the relationship between the leader and the subordinate.²⁷ Schein calls this “here-and-now” humility, which he defines as the position of the leader when they open themselves up and express their dependency on the subordinate.²⁸ By asking the Humble Inquiry, the leader is saying to the subordinate that I am dependent on you to get this task accomplished and I am willing to make myself vulnerable to build the relationship that we need to get the task accomplished.²⁹

Schein maintains that another cultural impediment to Humble Inquiry in today’s society is class-rank. Schein writes, “The degree to which superiors and subordinates can be humble differs by the basic assumptions of the culture they grew up in.”³⁰ He continues, “The more authoritarian the culture, the greater the sociological distance between the upper and lower levels of status or achievement, and, therefore, the harder it is for the superior to be humble and learn the art of Humble Inquiry.”³¹ It is often not seen as socially acceptable for the higher ranked leader to seek out help from the lower ranked subordinate. That prevents the leader from making the Humble Inquiry, which in turn prevents the development of the relationship between the leader and the subordinate necessary to accomplish the task.³² Schein writes, “To build this social mechanism—a relationship that facilitates relevant, task-oriented, open communication across

²³ *Id.*

²⁴ *Id.* at 7–9.

²⁵ *Id.* at 58.

²⁶ *Id.* at 8–9.

²⁷ *Id.* at 9.

²⁸ *Id.* at 12–13.

²⁹ *Id.* at 13–14.

³⁰ *Id.* at 54.

³¹ *Id.*

³² *Id.* at 13–14.

status boundaries—requires that leaders learn the art of Humble Inquiry.”³³ Schein continues, “The most difficult part of this learning is for persons in the higher-status position to become Here-and-now Humble, to realize that in many situations they are de facto dependent on subordinates and other lower-status team members.”³⁴ Schein acknowledges that “[t]his kind of humility is difficult to learn because in achievement-oriented cultures where knowledge and the display of it are admired, being Here-and-now Humble implies loss of status.”³⁵ Schein maintains “[y]et this is precisely the kind of humility that will increasingly be needed by leaders, managers, and professionals of all sorts because they will find themselves more and more in tasks where mutual interdependency is the basic condition.”³⁶

Schein also maintains that it is important that the leader work to overcome these challenges. He summarizes the importance of Humble Inquiry: “the world is becoming more technologically complex, interdependent, and culturally diverse, which makes the building of relationships more and more necessary to get things accomplished and, at the same time, more difficult.”³⁷ He continues, “Relationships are the key to good communication; good communication is the key to successful task accomplishment; and Humble Inquiry, based on Here-and-now Humility, is the key to good relationships.”³⁸

At the end of his book, Schein offers several practical steps for the leader to follow in employing Humble Inquiry.³⁹ While the entire book is valuable, these pages are worth several re-reads by the leader trying to understand how Humble Inquiry can benefit them. Overall, Schein’s book is an excellent manual for leaders and provides a good balance of theory with nuts and bolts applications tips.

³³ *Id.* at 17.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 62.

³⁸ *Id.*

³⁹ *Id.* at 99–110.

2. *The Outward Mindset: Seeing Beyond Ourselves*⁴⁰

The authors of *The Outward Mindset* argue that the biggest leadership lever for change in today's organization is "a fundamental change in the way one sees and regards one's connections with and obligations to others."⁴¹ The authors write:

Leaders who succeed are those who are humble enough to be able to see beyond themselves and perceive the true capacities and capabilities of their people. They don't pretend to have all the answers. Rather, they create an environment that encourages their people to take on the primary responsibility for finding answers to the challenges they and their facilities face.⁴²

The importance of shifting responsibility from the leader to the people they supervise is "[w]hen people are free to execute what they see, rather than simply to enact the instructions of the leader, they can change course in the moment to respond to ever-changing situation-specific needs."⁴³

The authors write that leaders commonly see their employees with an inward mindset: what can I do to cause them to benefit me. The outward mindset, on the other hand, is what I can do to benefit them.⁴⁴ Instead of seeing people as objects, the leader with the outward mindset sees her employees as people with needs, objectives, and challenges.⁴⁵ The cost to the organization of the inward mindset is high, "[w]hen people focus on themselves rather than on their impact [on others], lots of activity and effort gets wasted on the wrong things. The absence of collaboration results in low levels of innovation. And employees disengage due to boredom inherent with inward-mindset thinking and working."⁴⁶ The answer is to develop an outward mindset.

⁴⁰ THE ARBINGER INSTITUTE, *THE OUTWARD MINDSET: SEEING BEYOND OURSELVES* (2016).

⁴¹ *Id.* at ix.

⁴² *Id.* at 9.

⁴³ *Id.* at 11.

⁴⁴ *Id.* at 29–30, 46.

⁴⁵ *Id.* at 30.

⁴⁶ *Id.* at 58.

The leader with an outward mindset not only applies that mindset to those who report to her but also to her customers, peers, and managers.⁴⁷ The outward mindset leader “see[s] the needs, objectives, and challenges of others,” “adjust[s] their efforts to be more helpful to others,” and “measure[s] and hold[s] themselves accountable for the impact of their work on others.”⁴⁸

The authors believe that outward mindset requires personal contact between the leader and the employees. They strongly encourage a return to the periodic, regularly scheduled meetings that are no longer in the landscape of many organizations and replacing the emails and video teleconference (VTC) meetings with real, in-person meetings. This allows the leader several benefits, including seeing others face-to-face; being able to listen to the employees’ needs, objectives, and challenges; and being able to ask them questions about those needs, objectives, and challenges.⁴⁹

When it comes to adjusting the effort of the leader to address the needs, objectives, and challenges of others in the organization, the authors write, “real helpfulness can’t be made into a formula.” They explain “it means that when people see the needs, challenges, desires, and humanity of others, the most effective ways to adjust their efforts occur to them in the moment. When they see others as people, they respond in human and helpful ways.”⁵⁰

The authors maintain that it is important to measure the impact of the leader’s efforts, “[i]f we don’t measure the impact of our efforts on the objectives of those we are serving, we will remain blind to important ways we need to adjust and will end up not serving others well.”⁵¹

One of the largest impediments to a leader changing her mindset from inward to outward is that she believes she needs to wait for others in the organization to do the same.⁵² The authors warn that is a mistake. They write, “[S]o while the goal in shifting mindsets is to get everyone turned toward each other, accomplishing this goal is possible only if people are prepared to turn their mindsets toward others with

⁴⁷ *Id.* at 69.

⁴⁸ *Id.*

⁴⁹ *Id.* at 81–84.

⁵⁰ *Id.* at 87–88.

⁵¹ *Id.* at 91.

⁵² *Id.* at 94.

no expectation that others will change their mindsets in return.”⁵³ The authors note that “[t]he most important move consists of my putting down my resistance and beginning to act in the way I want the other person to act. . . . This kind of unilateral change is the essence of true leadership.”⁵⁴

The customary approach in organizations is for the leader to plan and for the employee to execute those plans.⁵⁵ Employing an outward mindset changes that. The authors write, “With an outward mindset, leaders position people to be fully responsible. This means that they empower their people with the responsibility both to execute and to plan their work.”⁵⁶

One essential aspect of the outward mindset is that the leaders must work to shrink distinctions between herself and her subordinates.⁵⁷ The authors call these distinctions the “trappings of difference.”⁵⁸ These trappings include the corner office with the view, the reserved parking spot, the private restroom, and others that draw distinctions between the leaders and those they lead. The authors define these distinctions as the “outward manifestations of status that only the preferred can enjoy.”⁵⁹ They argue that the most important leadership essential is humility and “any practice or policy that communicates to others that they don’t really matter like we do can end up creating barriers to building an outward organization.”⁶⁰ The authors write, “leaders who minimize the privileges they enjoy compared to their people inspire far greater levels of devotion than those who love their privileges.”⁶¹

The final area the authors address in moving an organization and its leaders to an outward mindset is the pitfalls of what the authors call “a forced-distribution system.”⁶² This is an organization where there are only so many outstanding ratings permitted during performance appraisals or only so much money for bonuses or

⁵³ *Id.*

⁵⁴ *Id.* at 96.

⁵⁵ *Id.* at 121.

⁵⁶ *Id.*

⁵⁷ *Id.* at 133.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 134.

⁶² *Id.* at 145.

whatever limited pool of benefits are available. The authors argue that this forces the employees not to model their leader's outward mindset, but instead forces them to adopt an inward mindset where they compete for the scarce resources. The authors maintain that this is a recipe for disaster. Their solutions are, first, if there are resources available do not limit them to "encourage" competition between the employees. Or, second, if there are not sufficient resources, then make certain that the employees understand that they will be rewarded based on their work, including their outward mindset corroboration with others, and will not be in competition with their co-employees.⁶³

The *Outward Mindset* is an easy book to read. The authors rely heavily on the use of stories to illustrate their points. In fact, they rely so heavily on the use of stories that often the points they are trying to make get lost in the pages of stories. I found myself having to go back and reread a chapter two or three times to separate the authors' leadership strategies from their entertaining stories. The authors, however, provide an excellent summary of those strategies in the last chapter of the book.⁶⁴ The reader may consider reading that chapter first before they read the rest of the book in order to get a clear roadmap of where the authors are going.

3. Good to Great and the Social Sectors

In the early 2000s, Jim Collins leadership book, *Good to Great*, became a standard on leadership reading lists. Although written for the private company leader, many leaders in the public world read it and attempted to transfer its strategies to the public sector. Often, the results were far from optimum. Jim Collins's answer to this problem was to take a fresh look at the public sector world of leadership and write the monograph for public sector leaders: *Good to Great and the Social Sectors: Why Business Thinking is Not the Answer*.⁶⁵ The monograph is short—36 pages. But, it is packed full of leadership wisdom and strategies based on Collins's years of research.

⁶³ *Id.* at 145–52.

⁶⁴ *Id.* at 153–61.

⁶⁵ JIM COLLINS, *GOOD TO GREAT AND THE SOCIAL SECTORS: WHY BUSINESS THINKING IS NOT THE ANSWER* (2005).

In his monograph, Collins works to answer the question: how does a social sector organization become great.⁶⁶ To answer that question, Collins looked at five issues:

- (1) Calibrating Success without Business Metrics;
- (2) Getting Things Done within a Diffuse Power Structure;
- (3) Getting the Right People on the Bus within the Social Sector Constraints;
- (4) Rethinking the Economic Engine without a Profit Motive;
and
- (5) Building Momentum by Building the Brand.⁶⁷

Addressing those five issues provides the framework for Collins's monograph.

Collins's position is that defining success in the social sector means not looking at money as an indicator of success. He writes that "[t]he confusion between inputs and outputs stems from one of the primary differences between business and the social sectors."⁶⁸ He continues, "In business, money is both an input (a resource for achieving greatness) *and* an output (a measure of greatness). In the social sectors, money is *only* an input, and not a measure of greatness."⁶⁹

Instead, greatness in the social sector is defined as "[a] great organization is one that delivers superior performance and makes a distinctive impact over a long period of time."⁷⁰

Collins recognizes the difference in power structures between private and public organizations. Where in a private organization, the leader may have absolute power of decision, in a public organization; the power of decision is often very diffuse.⁷¹ Instead of using raw power or authority to move a public organization, the public leader must rely on other sources of power such as "the power of inclusion, and the power of language, and the power of shared interests, and the power of coalition."⁷²

Getting the right people in the organization, getting the wrong people out of the organization, and getting the right people in the

⁶⁶ *Id.* at 2.

⁶⁷ *Id.* at 3.

⁶⁸ *Id.* at 5.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 9–10.

⁷² *Id.* at 10.

right places, can all be a challenge in the public sector organization. Often, salary is limited, which makes it difficult to bring the right people in. Public sector rules and policies may make it difficult to get the wrong people out of the organization and to place the right people in the right jobs.⁷³ Collins suggest the first step is to find the right people, “those who are productively neurotic, those who are *self-motivated* and *self-disciplined*, those who wake up every day, compulsively driven to do the best they can because it is simply part of their DNA.”⁷⁴ Collins warns the public sector leader not to focus on money as a motivator for hiring or keeping the right people. He states, “[T]he social sectors have one compelling advantage: desperate craving for meaning in our lives. Purity of mission . . . has the power to ignite passion and commitment.”⁷⁵

It is essential that the public sector leader rethink how to use the economic engine that does not run on a profit motive. Instead of focusing on making money, the public sector leader should focus on finding sufficient resources to fuel the economic needs of the social organization: “The critical question is not ‘[h]ow much money do we make?’ but ‘[h]ow can we develop a sustainable resource engine to deliver superior performance relative to our mission.’”⁷⁶

The final issue Collins addresses is building momentum in the social sector organization by building the brand. As you create success, that success builds additional success, to which Collins writes, “Success breeds support and commitment, which breeds even greater success, which breeds more support and commitment”⁷⁷

Collins concludes his monograph with a discussion of the difficulty of building success in the social sector. He recognizes the many unique challenges the leader will find there. His advice is to work within the system and work to change it if you can. Often, however, you cannot change the system, so you need to make it work for you.⁷⁸ Collins writes, “You must retain faith that you can prevail to greatness in the end, while retaining the discipline to confront the brutal facts of your current reality.”⁷⁹ He continues, “[W]e can find pockets of greatness in

⁷³ *Id.* at 13–15.

⁷⁴ *Id.* at 15.

⁷⁵ *Id.* at 16.

⁷⁶ *Id.* at 18.

⁷⁷ *Id.* at 24.

⁷⁸ *Id.* at 30–31.

⁷⁹ *Id.* at 30.

nearly every difficult environment.”⁸⁰ Collins concludes, “Greatness is not a function of circumstance. Greatness, it turns out, is largely a matter of conscious choice, and discipline.”⁸¹

At 36 pages, the monograph is a quick read—perfect for the wait at an airport. But it is full of solid strategies and most likely, the first read will lead to slower, much longer subsequent reads.

4. *The Obstacle is the Way*

Who would have thought that a book based on the writings of Roman Emperor Marcus Aurelius in A.D. 170 regarding his personal leadership philosophy would become a significant leadership guide here in the 2000s? But, it has. More than just a book on Aurelius’s leadership philosophies, Ryan Holiday has used Aurelius’s writings to explore the leadership philosophies of leaders throughout history, such as Ulysses S. Grant, Thomas Edison, Margaret Thatcher, Amelia Earhart, Erwin Rommel, Dwight D. Eisenhower, Theodore Roosevelt, Steve Jobs, Barack Obama, and many others.

Everyone faces obstacles. It is these obstacles that provide an opportunity to learn and grow. Aurelius wrote, “[t]he impediment to action advances action. What stands in the way becomes the way.”⁸² Holiday points out that Aurelius “truly saw each and every one of these obstacles as an opportunity to practice some virtue: patience, courage, humility, resourcefulness, reason, justice, and creativity.”⁸³

Overcoming obstacles is based on three disciplines: perception, action, and the will.⁸⁴ Perception is “how we see and understand what occurs around us—and what we decide those events will mean.”⁸⁵ Holiday writes that “you will come across obstacles in life—fair and unfair. And you will discover, time and time again, that what matters most is not what these obstacles are but how we see them, how we react to them, and whether we keep our composure.”⁸⁶ Holiday continues:

⁸⁰ *Id.*

⁸¹ *Id.* at 31.

⁸² RYAN HOLIDAY, *THE OBSTACLE IS THE WAY* xiv (Penguin Group 2014).

⁸³ *Id.* at xiv–xv.

⁸⁴ *Id.* at 9.

⁸⁵ *Id.* at 11.

⁸⁶ *Id.* at 16.

Just because your mind tells you that something is awful or evil or unplanned or otherwise negative doesn't mean you have to agree. Just because other people say that something is hopeless or crazy or broken to pieces doesn't mean it is. We decide what story to tell ourselves. Or whether we will tell one at all.⁸⁷

The first step in developing the correct perception is to remain calm.⁸⁸ The next step is to look at the situation objectively.⁸⁹ Holiday notes that an objective outlook “[g]ive[s] yourself clarity, not sympathy—there’ll be plenty of time for that later.”⁹⁰ Then, alter your perspective. Choose how to look at things.⁹¹ “[W]hen you can break apart something, or look at it from some new angle, it loses its power over you.”⁹² Holiday writes, “Focus on what is in front of you, right now. Ignore what it ‘represents’ or it ‘means’ or ‘why it happened to you.’”⁹³ Now, look for the opportunity within the obstacle.⁹⁴ Holiday explains that obstacles provide “[a] unique opportunity to experiment with different solutions, to try different tactics, or to take on new projects to add to your skill set.”⁹⁵ “Blessings and burdens are not mutually exclusive.”⁹⁶ Holiday maintains that “[t]he extent of the struggle determines the extent of the growth. The obstacle is an advantage, not adversity.”⁹⁷

Now that your perspective is correct, the next discipline is action.⁹⁸ And the first step in action is to start.⁹⁹ That is what leaders do, “[t]hey start. Anywhere. Anyhow. They don’t care if the conditions are perfect or if they’re being slighted. Because they know that once they get started, if they can just get some momentum, they can make it

⁸⁷ *Id.* at 23.

⁸⁸ *Id.* at 24–31.

⁸⁹ *Id.* at 32–35.

⁹⁰ *Id.* at 35.

⁹¹ *Id.* at 36–39.

⁹² *Id.* at 36.

⁹³ *Id.* at 48.

⁹⁴ *Id.* at 55.

⁹⁵ *Id.* at 56.

⁹⁶ *Id.* at 57.

⁹⁷ *Id.*

⁹⁸ *Id.* at 63.

⁹⁹ *Id.* at 72–73.

work.”¹⁰⁰ After you start, be persistent.¹⁰¹ In describing the success of General Grant and Thomas Edison, Holiday points out, “it was the slow pressure, repeated from many different angles, the elimination of so many other more promising options, that slowly and surely churned the solution to the top of the pile. Their genius was unity of purpose, deafness to doubt, and the desire to stay at it.”¹⁰²

The third discipline is will.¹⁰³ Holiday writes, “If Perception and Action were the disciplines of the mind and the body, then Will is the discipline of the heart and the soul.”¹⁰⁴ This is the most difficult of Holiday’s three disciplines to capsulize. Far beyond an approach to leadership, it is an approach to life in sum. Holiday notes that “[t]rue will is quiet humility, resilience, and flexibility.”¹⁰⁵ Will needs to be developed. Holiday further states, “We must prepare for adversity and turmoil, we must learn the art of acquiescence and practice cheerfulness even in dark times.”¹⁰⁶ Holiday focuses heavily on Abraham Lincoln and his approach to the adversity of the Civil War and his personal bouts of depression. Lincoln embodied the will of a leader to “[b]ear and forbear. Acknowledge the pain but trod onward in you task.”¹⁰⁷ Holiday argues that we must build that “Inner Citadel, that fortress inside of us that no external adversity can ever break down.”¹⁰⁸ Holiday urges that we must maintain “[c]heerfulness in all situations, especially the bad ones.”¹⁰⁹ As Holiday points out: “We don’t get to choose what happens to us, but we can always choose how we feel about it.”¹¹⁰ And that brings us back around to the first discipline perspective.

Holiday’s book is well written, though not especially well edited. There are a number of typos. If you are looking for a book of practical how-to instructions on leadership, this is not the book for you. If,

¹⁰⁰ *Id.* at 71–72.

¹⁰¹ *Id.* at 80.

¹⁰² *Id.* at 79.

¹⁰³ *Id.* at 125.

¹⁰⁴ *Id.* at 130.

¹⁰⁵ *Id.* at 125.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 131.

¹⁰⁸ *Id.* at 137.

¹⁰⁹ *Id.* at 153.

¹¹⁰ *Id.* at 154.

however, you are looking for an overall life view to help develop your leadership philosophy, this book may well work for you.

5. Call Sign Chaos: Learning to Lead

General Jim Mattis is well known as a military leader and former Secretary of Defense. Here, he focuses on his military career and how his experiences there developed his leadership theories. He divides the book into three areas: Direct Leadership, Executive Leadership, and Strategic Leadership. Full of personal stories from his days in the military, the book is an entertaining read.

Mattis believes that every leader must be a “player-coach.”¹¹¹ Essential to that “coach” relationship is trust. Mattis writes, “Trust is the coin of the realm for creating the harmony, speed, and teamwork to achieve success at the lowest cost. Trusted personal relationships are the foundation for effective fighting teams, whether on the playing field, the boardroom, or the battlefield.”¹¹² The difference between trust and lack of trust is stark:

When the spirit of your team is on the line and the stakes are high, confidence in the integrity and commitment of those around you will enable boldness and resolution; a lack of trust will see brittle, often tentative execution of even the best-laid plans. Nothing compensates for a lack of trust.¹¹³

In his words, “operations occur at the speed of trust.”¹¹⁴ Mattis writes, “Credit those below you with the same level of commitment and ability with which you credit yourself. Make your intent clear, and then encourage your subordinates to employ a bias for action. The result will be faster decisions, stronger unity of effort, and unleashed audacity throughout the force”¹¹⁵ Personal contact is vital to developing trust.¹¹⁶ Mattis encourages leaders to stop using email and start spending time with those they lead.¹¹⁷ He believes in George

¹¹¹ JIM MATTIS & BING WEST, *CALL SIGN CHAOS: LEARNING TO LEAD* 151.

¹¹² *Id.* at 240.

¹¹³ *Id.* at 240.

¹¹⁴ *Id.* at 156.

¹¹⁵ *Id.* at 156.

¹¹⁶ *Id.* at 201.

¹¹⁷ *Id.* at 240.

Washington's approach to leadership: listen, learn, help, and then lead.¹¹⁸

Mattis also strongly encourages the leader to place and keep "maverick thinkers" in their organizations. "[A]ny competitive organization must nurture its maverick thinkers. You can't wash them out of your outfit if you want to avoid being surprised by your competition."¹¹⁹ Mattis writes that "calculated risk taking is elemental to staying on top of our competitive game."¹²⁰ He states, "Because maverick thinkers are so important to an organization's adaptability, high-ranking leaders need to be assigned the job of guiding and even protecting them, much as one would do for any endangered species."¹²¹

He encourages leaders to welcome challenges, "If you don't like problems, stay out of leadership. Smooth sailing teaches nothing"¹²² He also encourages leaders to make reevaluation a constant:

A leader must be willing to change and make change. Senior staffs sometimes need pruning. It's easy to get into a bureaucratic rut where things are done a certain way because they're done a certain way. . . . Every few months, a leader has to step back and question what he and his organization are doing.¹²³

Mattis emphasizes the importance of recruiting and retaining subordinates who will give you, the leader, non-political advice.¹²⁴ He writes he told his subordinates that they "had to be capable of articulating necessary options or consequences, even when unpopular."¹²⁵ Subordinates must give their advice "straight up, not moderating it"¹²⁶ and avoid the treacherous curtain of deference.¹²⁷ Mattis quotes former Secretary Shultz's comment before Congress

¹¹⁸ *Id.* at 202.

¹¹⁹ *Id.* at 242.

¹²⁰ *Id.* at 243.

¹²¹ *Id.*

¹²² *Id.* at 158.

¹²³ *Id.* at 175.

¹²⁴ *Id.* at 184.

¹²⁵ *Id.* at 183.

¹²⁶ *Id.*

¹²⁷ *Id.* at 183–84.

that “to do our jobs well, we should not want our job too much.”¹²⁸ In his appendix, Mattis includes a memo outlining the importance of reader to the leader and offering an extensive recommended reading list for the leader.

As I mentioned above, Mattis’s book is an entertaining read. But it also provides several substantive suggestions for working with teams as a first-level leader, a mid-level manager, and an executive leader. It is worth your time.

* * *

Those are snapshots of five excellent leadership books. The reader may notice that in each book the gravamen of the author’s strategy is how the leader interacts with those they lead. In *Humble Inquiry*, Edgar Schein argues that leaders need to learn an entire new way of asking questions of their employees with the goal of showing their vulnerability to their employees and developing trusting relationships with those employees. In *The Outward Mindset*, the authors maintain that leaders need an entire new world view; instead of focusing on how employees can benefit the leader, the leader must learn to focus on how they can understand the needs, objectives, and challenges of the employees and take action to benefit the employee. In *Good to Great and the Social Sectors*, Jim Collins suggests that the leader must learn to recruit employees in the social sector not with the conventional package of money and benefits, but instead by appealing to their passion and sense of purpose. In *The Obstacle is the Way*, Ryan Holiday argues that the leader must develop the proper perspective in dealing with the employee; the leader needs to look beyond minor and even major frustrations and see the good in every relationship. Finally, in *Call Sign Chaos*, General Jim Mattis believes that the relationship between the leader and the follower must be that of a coach and a player and that the relationship must be built on trust between the two; he maintains that the leader must learn to see the follower as someone equally committed to the success of the organization and give him the free reign to work toward that success. Interestingly, nothing in any of the five books contradicted another author’s leadership philosophy. All agree that the quality of the leadership is directly dependent on the quality of the relationship between the leader and those she leads.

¹²⁸ *Id.* at 184.

These books are perfect weekend reads. Pick one up, dig into the author's leadership strategy, and reflect on your own. I hope these books serve as a springboard for your future leadership reading.

About the Author

Tate Chambers joined the U.S. Attorney's Office in the Central District of Illinois in 1984. Since then he has served in several capacities in the office and on detail with the Executive Office of United States Attorneys (EOUSA). He recently completed a stint as Editor-in-Chief of the Department of Justice Journal of Federal Law and Practice and is currently on detail to EOUSA's Evaluation and Review Staff program.

Note from the Editor-in-Chief

Great leadership helps define the U.S. Department of Justice. But having spent nearly two decades as a supervisor, I know firsthand that my law school education didn't prepare me for the challenges of being a supervisor. Fortunately, as you can see by the articles in this issue, all from recognized leaders, there is a wealth of superb information available on this subject. Use it on your journey to becoming an effective, respected, and successful leader.

Thanks go out to former Director of the Executive Office for United States Attorneys, Jim Crowell, and our former colleague in the Office of Legal Education, Tate Chambers, for developing this issue. Sarah Nielsen made sure that there was a seamless transition to Addison Gantt, our new managing editor, before she left to pursue other opportunities. Addison quickly came up to speed and put this issue to press. And thanks to our expert editorial staff—Gurbani Saini and Phil Schneider—who always make my job easier.

Chris Fisanick
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