



## OUTSOURCING: HUMAN RESOURCES ISSUES SHOULDN'T BE AN AFTERTHOUGHT!

By **Judith Droz Keyes**

SOURCE: MORRISON & FOERSTER LLP (USED WITH PERMISSION)

**M**uch has been and is being written about outsourcing. Not a legal term, "outsourcing" refers to the arrangement whereby one company looks to another company to perform some aspect of its business operation. It's like delegating, but at an inter-company rather than intra-company level. It's like subcontracting, but of an internal corporate function rather than of a contractual responsibility.

Outsourcing is becoming increasingly common in a variety of situations. In the professional and service sectors, back office functions such as billing and photocopying/faxing are often outsourced. Administration of benefit plans (such as 401k plans and disability plans) is frequently outsourced. Many companies outsource recruiting. In large workplaces, food service is usually outsourced. In the technology and telecommu-

nications industries, customer service may be outsourced. In manufacturing, fabrication of component parts is commonly outsourced. With specialization the norm and productivity the watchword, outsourcing is an idea whose time seems to have come.

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### A Word *From Your Editor:*

Last week I was reading the book "Fast Forward Leadership" by Loudlen Essex and Mitchell Kusy. The third chapter, The Communication Exchange, suggests that many leaders have neglected to "develop a more inspirational, passionate, and, even entertaining, communication style" when using new technologies. Many times in today's environment we communicate via email and voicemail. Look for avenues in which you can use these media to inform, inspire, share, and persuade those you lead.

*Chelle*

Richelle (Chelle) Uecker, Editor  
*Court Communiqué*  
Assistant Chief Executive Officer, Chief of Staff  
Superior Court of California County of Orange  
700 Civic Center Dr., West  
Santa Ana, CA 92702-1994  
Tel: (714) 834-3141  
Fax: (714) 647-4811  
E-mail: [cuecker@occourts.org](mailto:cuecker@occourts.org)

### MEMBERSHIP UPDATE

As of April 30, 2004, NACM membership was **2,296** strong. If you enjoy the benefits of NACM and have not renewed your membership, please do so. If you know of someone who would enjoy the benefits, recommend a new member today! Regular membership in NACM is open to anyone serving in any court management, consulting, educational, or research capacity. Additional membership categories include associate, student, honorary, retired, and sustaining members. **Remember! You get one year of free membership dues for bringing in 10 new members!** You can obtain more membership information by contacting NACM c/o National Association for Court Management, NCSC, 300 Newport Avenue, Williamsburg, VA 23185-4147, Attention: Administrative Services, or call (757) 259-1841. You can also visit the NACM Web site at [www.nacmnet.org](http://www.nacmnet.org). ♦

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## COLLABORATIVE EFFORT BENEFITS PRO SE LITIGANTS

**S**elfhelpsupport.org (<http://www.selfhelpsupport.org>) is a collaborative effort between the National Center for State Courts, The State Justice Institute, Legal Services Corporation, The American Judicature Society, Zorza Associates, and Pro Bono Net. SJI funded the project, Pro Bono Net designed the software, the National Center for State Courts maintains the site on a daily basis, and the other partners contribute content and suggestions for the site.

The site is meant to be a virtual meeting place for people involved with providing pro se assistance or directing pro se and self-help programs. Through the site, the members can find and share information, create Listservs, send out mass mailings, and network with other professionals in the field. It is the projects' hope that through selfhelpsupport.org, specific improvements and developments in pro se assistance programs will benefit many courts as they get information out to other programs across the country.

The Web site is centered around a large online library of resources collected from pro se/legal service programs around the country. Scanned documents, links to articles and reports, and original content are organized into 17 subject folders for easy browsing. There are currently more than 500 items in the selfhelpsupport.org library. The "add a resource" feature to the site allows anyone, anywhere to share information on pro se/self-help programs. Membership is now close to 600. Two listservs or groups (unbundling and judicial ethics) are also available to members. Current news, events, and announcements help keep members informed on the latest developments in self-representation. Membership (free) is required to access the resources on selfhelpsupport.org. For further information, please contact Madelynn Herman at [mherman@ncsc.dni.us](mailto:mherman@ncsc.dni.us). ♦

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## Global Advisory Committee Membership

*(TAKEN FROM THE U.S. DEPARTMENT OF JUSTICE – OFFICE OF JUSTICE PROGRAMS WEB SITE.)*

**T**he Global Advisory Committee (GAC) was assembled by the U.S. Attorney General to advise the U.S. Department of Justice (DOJ) on the ongoing pursuit of inter-jurisdictional and multidisciplinary justice information sharing. The GAC acts as the focal point for justice information sharing activities and includes representatives from local, state, tribal, federal, and international agencies.

COSCA/NACM are key players in the Global Justice Information Sharing Initiative. The efforts of the Global Justice Information Sharing Initiative (Global) Advisory Committee (GAC) have direct impact on the work of more than 1.2 million justice professionals. The importance of the organization's mission, however, positions Global to impact citizens of the United States, Canada, and beyond. Global's mission—the efficient sharing of data among justice entities—is at the very heart of modern public safety and law enforcement.

Global is a "group of groups," representing more than 30 independent organizations spanning the spectrum of law enforcement, judicial, correctional, and related bodies. Member organizations participate in Global out of shared responsibility and shared belief that, together, they can bring about positive change in inter-organizational communication and data sharing.

The GAC advises the nation's highest-ranking law enforcement officer, the U.S. Attorney General. Global aids its member organizations and the people they serve through a series of important initiatives. These include the facilitation of the Global working groups; development of technology standards, such as the Global Justice XML Data Model, Version 3.0; creation of white papers on data sharing issues, such as

the National Criminal Intelligence Sharing Plan; and the dissemination of information via the Global Web site.

The work of the GAC has implications of the highest importance—making it the foremost voice for justice information sharing.

Every day, within the justice community, judgments are made that affect the life, liberty, property, and safety of our citizens. The quality of these decisions is a direct consequence of the quality and amount of information available at the time a decision is made. Making better decisions improves public safety and results in the efficient use of public resources. Having the right information, in the right place, at the right time, results in better decisions. Information sharing is what enables the delivery of that information. Introducing justice and public safety practitioners to information sharing and technology integration is important to the future of the justice arena. Not only do practitioners need to understand why information sharing is important, but exposure to examples and real world case studies shows how practitioners fit into the overall information sharing scheme locally, nationally, and internationally.

Leaders of GAC are elected every two years by fellow committee members. Superintendent Melvin J.

Carraway, Indiana State Police, representing the International Association of Chiefs of Police on GAC, is currently serving as GAC chairman. Gerry Wethington, chief information officer, state of Missouri, representing the National Association of State Chief Information Officers on the GAC, serves as the GAC vice chairman

Global Advisory Committee working groups are comprised of committee members and other subject matter experts who expand the GAC's knowledge and experience. These groups are formed around timely issues impacting justice information sharing and meet as often as necessary.

NACM (National Association for Court Management) and COSCA (Conference of State Court Administrators) play a key role in these initiatives. NACM board member Chelle Uecker and COSCA member David Byers represent their respective associations on the committee. They, along with Tom Henderson and Scott Fairholm from the National Center for State Courts, bring issues forward at this federal level for the court. The Global Advisory's committee is also an ideal setting to share many of the initiatives of the COSCA/NACM Joint Technology Committee (JTC).

To find out more about the GAC initiatives, take a look at the Web site: [www.it.ojp.gov/global.com](http://www.it.ojp.gov/global.com). ♦

## RACE AND ETHNIC FAIRNESS INITIATIVE DEBUTS DATABASE

The Race and Ethnic Fairness Initiative of the National Center for State Courts recently compiled an electronic database containing the findings and recommendations issued by judicial branch commissions and task forces on racial and ethnic fairness. The database can be accessed through the Internet, and is available free of charge. The new database serves as a recognition of the accomplishments of the National Consortium on Racial and Ethnic Fairness and a way to commemorate the 50<sup>th</sup> Anniversary of the U.S. Supreme Court's decision in *Brown v. Board of Education*.

"Beginning with a New Jersey report in 1984 and extending most recently to a 2004 Maryland report, the judicial branches of the majority of state courts have recommended concrete steps that remove racial and ethnic bias from their courtrooms, procedures and policies, and employment practices," said David Rottman, the Initiative's chairman. "Those recommendations, and the detailed research and analysis that underlie them, are a remarkable resource of insights and practical guidance. Now, for the first time, the work of the 29 task forces and commissions can be examined in one place through simple search commands."

The database can be searched by state, topic, or a combination of both. Topics include access to justice, judicial selection and discipline, juries, and hiring and promotion policies. The database is located on the NCSC Web site at [www.ncsconline.org/Projects\\_Initiatives/REFI/reb.htm](http://www.ncsconline.org/Projects_Initiatives/REFI/reb.htm) and on the National Consortium's Web site at [www.ncsconline.org/consortium/news](http://www.ncsconline.org/consortium/news).

NCSC's Race and Ethnic Fairness Initiative was created in 2003 to identify and create knowledge and practices that help courts implement strategies promoting race and ethnic fairness in the courts and in the justice system overall. Specific objectives include helping courts that wish to follow the recommendations put forward in the Conference of State Court Administrator's (COSCA) position paper on State Courts' Responsibility to Address Issues of Racial and Ethnic Fairness; helping the state courts obtain the value of work undertaken by the National Consortium on Racial and Ethnic Fairness in the Courts; and make NCSC a key participant in scholarly and practitioner efforts to create new knowledge and methodologies relating to fairness in the courts.



## **TWO AVENUES TO OUTSOURCING**

There are two basic ways that outsourcing arrangements get started from a personnel perspective: one, where existing employees of the source company become employees of the vendor company; and the other, where the vendor company brings its own employees to the arrangement, and the employment of source company employees is terminated. Either way, a plethora of employment law and employee relations issues are presented. Too often these issues are considered late in the deliberation and negotiation process – and sometimes, hardly at all. This is a risky and unnecessary mistake.

While not a comprehensive list, the following are among the considerations that should be addressed early on in the process of outsourcing.

### **HUMAN RESOURCE CONSIDERATIONS**

**Union Issues.** If some or all of the affected employees are represented by a union, labor responsibilities need to be addressed. If labor costs are a factor, before the decision is made, the union must be notified. Regardless of whether employees will be hired by the vendor, the union must be given an opportunity to bargain regarding the effect of the outsourcing on employees. Part of this bargaining will involve whether the vendor company has an obligation to recognize the union and what that means for wages and benefits.

**Notice Issues.** Whether there is likely to be any federal or state WARN Act obligation, and if so, whether any such obligation will belong to the vendor or the source company, must be determined. Regardless of the WARN obligation, care must be taken not to give misleading information or false assurances to any potentially affected employee or applicant once an outsourcing decision has been made or is in the offing. Management must be instructed as to how to respond to the inevitable rumors, and it should be determined early on when, where, how, and by whom information will be conveyed and the announcement made.

**Retention Issues.** If it is important to retain key employees either until outsourcing comes to fruition or afterward, retention agreements should be developed, offered, and obtained. These agreements need to be carefully constructed (do not rely on a template!) so as to allow the requisite flexibility while achieving the desired goal of stability.

**Separation Pay Issues.** Regardless of whether source employees will be laid off or will become vendor employees, they will cease being employees of the source company. Accordingly, whether there is an obligation to pay severance pay under source company plans or handbooks must be determined. How accumulated vacation pay or other paid time off will be handled must be resolved, especially in California,

where vacation and PTO cannot be forfeited and must be fully paid out on termination. Eligibility for bonuses of all stripes must also be evaluated.

**Hiring Issues.** Changing employers will have an impact on employees even if they are hired by the vendor. Concerns about reporting relationships and career paths will exist regardless of whether the vendor's pay and benefits are the same or even are better. Careful thought must be given to these intangible issues – and if retention is a concern, retention agreements should be considered. Before employment offers can be made, it must be determined not only what pay and benefits the vendor will provide, but also whether employees will be given credit for time employed by the source company for such purposes as vacation accrual and benefit vesting. If some but not all source employees will be offered positions with the vendor, how the selection will be made and by whom should be very carefully considered. The privacy rights of employees may be breached if well-meaning (or otherwise) source company managers share information about individual employees with vendor management. Personnel records of employees who are fired or are being considered for hire by the vendor should be disclosed or provided to the vendor only with permission from the employees involved. Accommodations made to disabled employees should not be negative factors in the hiring equation, and their continuing reasonableness must be objectively determined. Employees on protected leave at the time of transition must be handled with particular care with respect both to notification and to eligibility for employment with the vendor.

**Transition Issues.** If source company employees become vendor employees midyear, the impact of tax withholding and cafeteria plan (125 plan) balances needs to be assessed and communicated to employees. COBRA notification must be given where benefit eligibility is impacted.

**Supervision Issues.** Once the transition has been made, there will be a close and ongoing relationship between source company management and employees, and employees of the vendor company. To avoid a “joint employer” relationship, the source company must relinquish control and decision making to the vendor. This will be more or less difficult depending on the work site of the now-vendor employees. While the source company's ongoing evaluation of the quality of the vendor's effort is both warranted and essential, evaluating individual vendor employee performance is risky. It is the vendor company that will be obligated to ensure its employees are not subjected to discrimination or harassment on the basis of an impermissible consideration (age, pregnancy, religion, sex, race, etc.) and are not retaliated against for whistle blowing or engaging in other protected activity. It is incumbent

on the vendor employer to ensure the proper classification of employees as exempt versus nonexempt (or sometimes as independent contractors), and to pay employees properly under federal and state wage/hour laws. In the case of nonexempt employees, this includes maintaining accurate time records, paying for overtime properly, and, in California, mandating the taking of meal periods and permitting the taking of rest breaks. Fulfillment of these important obligations requires the cooperation of the source company, and that requirement should be clear in the outsourcing contract.

#### **Asset Protection Issues.**

Vendor employees – including those who were once source company employees – should commit to protecting the source company's trade secrets and confidential information to the same extent as source company employees. Agreements prohibiting unfair competition (non-solicitation of employees and clients and non-competition, where permitted) by vendor employees should also be negotiated at the outset of the outsourcing arrangement.

**Separation Issues.** The outsourcing relationship may not last forever. The respective rights of the source company and the vendor company with respect to hiring employees, ownership of inventions and ideas, and competition should be determined at the beginning of the relationship, not put off until the time of dissolution.

In 2004, companies must be more productive, cost-effective, and nimble than ever before. At the same time, employment laws are more protective of workers, including the "contingent" workforce, than at any time in history.

Outsourcing may well be a good solution to the challenge of achieving corporate goals. Employment laws and human resource issues need not be an impediment to outsourcing – but neither should they be an afterthought. ◆

## NACM Mid-year Heads for the Gulf Coast

Join NACM Feb. 13-15, 2005, at the beautiful Beau Rivage Resort and Casino in Biloxi, Mississippi. In addition to NACM's usual informative educational sessions, you'll be surrounded by miles of resort casinos, golf courses, restaurants, and cultural attractions. Come to Mississippi and enjoy Southern hospitality at its finest! Call (888) 383-7037 for reservations. ◆

## ANECDOTES

### *It couldn't be done*

Somebody said that it couldn't be done. But he with a chuckle replied that maybe it couldn't, but he would be one who wouldn't say so "till he tried." So he buckled right in with the trace of a grin on his face. If he worried, he hid it. He started to sing as he tackled the thing that couldn't be done, and he did it.

Somebody scoffed: "Oh, you'll never do that, at least no one ever has done it." But he took off his coat and took off his hat and, the first thing he knew, he'd begun it. With the lift of his chin and a bit of a grin, without any doubting or "quiddit," he started to sing as he tackled the thing that couldn't be done, and he did it.

There are thousands to tell you it cannot be done, there are thousands to prophesy failure; there are thousands to point out to you, one by one, the dangers that wait to assail you. But just buckle right in with a bit of a grin, then take off your coat and go to it; just start in to sing as you tackle the thing that cannot be done, and you'll do it.

### *Effective Manager-to-Employee Communication*

Research indicates that managers spend somewhere between 50 percent and 80 percent of their total time communicating in one way or the other. This isn't surprising, since communication is so critical to everything that goes on in an organization. Without effective communication there can be little or no performance management, innovation, understanding of clients, and coordination of effort. And, without effective communication, it's difficult to manage the expectations of those who are in a position to make decisions about your fate. But, you may be fostering poor communication and never even know it.

You may see the symptoms, but unless you are looking carefully, you may not identify your own involvement in the problem. What can you do about it? Effective organizational communication, regardless of form, requires three things:

- **First**, all layers must have the appropriate skills and understanding to communicate well. Communication is not a simple process, and many people simply do not have the required depth of understanding of communication issues.
- **Second**, effective organizational communication requires a climate or culture that supports effective communication. More specifically, this climate involves trust, openness, reinforcement of good communication practices, and shared responsibility for making communication effective.

- **Third**, effective communication requires attention. It doesn't just happen, but develops as a result of an intentional effort on the part of management and staff. Too often, communication, whether it is good or bad, is taken for granted.

We can define your role in improving communication with respect to each of these.

- **First**, if you want to improve communication, you will need to ensure that you and staff have the skills and knowledge necessary to communicate effectively. This may mean formal training is in order, or it may mean that you coach staff and provide feedback so that they can improve.
- **Second**, you play a critical role in fostering and nurturing a climate that is characterized by open communication. Without this climate, all the skills in the world will be wasted.
- **Finally**, you must bring communication to the forefront of organization attention. If you make the effort to improve communication, your staff will recognize that it is important. If you ignore it, so will your staff.

-Adapted from THE INSTITUTE FOR CONFLICT PREVENTION

## NATIONAL ASSOCIATION FOR COURT MANAGEMENT

c/o THE NATIONAL CENTER FOR STATE COURTS  
300 NEWPORT AVENUE  
WILLIAMSBURG, VA 23185-4147



## CONGRATULATIONS TO THESE COURT MANAGERS

**Frank Maiocco** has moved to Washington State, as the superior court administrator for Kitsap County Superior Court. He started his new position in January 2004 after serving as deputy court administrator in Flagstaff, Arizona.

**J.W. Brown**, communications director for the trial courts of Arizona, in Maricopa County, has been elected president of the international Conference of Court Public Information Officers (CCPIO). Brown manages the Office of Community and Media Relations for the court and is responsible for all court publications.

**Douglas H. Johnson** formerly the district court administrator in Bismarck, North Dakota, has taken a new position as district court administrator in Omaha, Nebraska.

Mr. Douglas H. Johnson, *District Court Administrator*  
District Court of Nebraska  
4<sup>th</sup> Judicial District  
Hall of Justice, 5<sup>th</sup> Floor  
1701 Farnam Street  
Omaha, NE 68183-0410  
Phone: (402) 444-7004 • Fax: (402) 444-4550  
Email: dhjohnson@co.douglas.ne.us ◆

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