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Session 2: Navigating, Building, and Strengthening Relationships

Moderator: Nancy Vanderlip

Speakers: Scott Partridge, Jeremy Lack & Debra Gerardi

Monday, November 9, 2015

Pepperdine University in Malibu, California

I. BIOGRAPHIES

Nancy L. Vanderlip is a founding Co-Chair of the Council of Distinguished Advisors for the Straus Institute for Dispute Resolution at the Pepperdine University School of Law. Vanderlip also serves on the International Institute for Conflict Prevention and Resolution Executive Advisory Committee, the Employment Disputes Committee and the Diversity Committee. She recently was Co-Editor of *Cutting-Edge Advances in Resolving Workplace Disputes* (2014). Vanderlip earned a Bachelor of Arts from the University of California, Davis and a Juris Doctor from UCLA. She is admitted to the State Bars of California and Ohio. She served as a Law Clerk for the Court of Appeals and with the Corporate Department of Kindel & Anderson. Vanderlip then held several roles for Parker Hannifin Corporation, including assistant general counsel and assistant secretary. She was the Vice President and General Counsel for ITT Corporation, MFC Group, and the Assistant Secretary of ITT Corporation. Subsequently, Vanderlip led Global Compliance for HID Global Corporation, an ASSA ABLOY Group company. She currently maintains a private law and mediation practice specializing in employment and corporate law, dispute resolution, ethics and compliance, mentoring, and consulting. She has extensive experience developing and delivering corporate programs worldwide.

Scott Partridge is vice president of global strategy for Monsanto, an agricultural company focused on applying innovation and technology to help farmers increase yields while conserving more of our world's precious resources, including water, soil, and energy. Partridge is a member of Monsanto's leadership team, oversees global competition policy, and leads the company's dispute resolution activities. He received his JD and LLM from Tulane University School of Law. After twenty-seven years in the

private practice of law with concentrations in strategic litigation, crisis management, and dispute resolution, he joined Monsanto as Chief Deputy General Counsel; led the international law, litigation, and strategy functions; and coordinated the resolution of external conflicts. In 2008, Partridge moved into a newly created business role and was appointed by Monsanto's Chair and CEO to develop a cross-functional team to build risk-mitigation programs and create integrated competition and communications strategies to guide the execution of U.S. and international freedom to operate activities. He led the development and implementation of programs that ended government investigations and resolved all significant disputes with competitors. With an innovative forward-looking focus, Partridge created policies, designed programs, and negotiated long-term agreements with competitors to govern the resolution of future disputes. The Monsanto model of relationship-based conflict avoidance and dispute resolution processes was a product of Partridge's inventive efforts.

Jeremy Lack is an independent lawyer and ADR neutral. He specializes in designing and implementing international commercial dispute prevention and resolution processes. He is a Vice Chair of the Independent Standards Commission of the International Mediation Institute (IMI), the Co-Chair of the Swiss Chamber of Commercial Mediation (Section Romande), and a panelist with AA/ICDR, CMAP, CPR, IBMS, ICC, INTA, IMI, JAMS, SKWM/CSMC/SCCM, SIMC and WIPO. He qualified as an English barrister in 1989, as a U.S. attorney-at-law (New York State and U.S. Patent and Trademark Office) in 1990-1991, and is admitted to the Geneva Bar since 2003, where he is a member of the Executive Committee of the Section of Lawyers from Foreign Bars. Lack is a Door Tenant with Quadrant Chambers in London and an Advisor to Charles Russell LLP in Geneva, Switzerland, and London, U.K. He has a MA (Oxford University) in physiological sciences and in jurisprudence from Lincoln College, Oxford University and is a cofounder of neuroawareness.com. He is the former CEO and General Counsel of Novimmune SA, a past Director and General Counsel of Meda Biotech SA, and worked as Intellectual Property Counsel and as an international commercial lawyer for Becton Dickinson, Inc. Lack also worked as an associate attorney for Fish & Neave in New York and is a former Partner of Altenburger SA (legal and tax) in Switzerland. He is a past Co-Chair of the International Section of the American Bar Association's Dispute Resolution and a former member of the Standards and Practices Committee (as past chair of the Mediation Subcommittee) of the Chartered Institute of Arbitrators (CIArb). Lack is an adjunct faculty member at the University of Geneva and at the Federal Polytechnic School of Lausanne (EPFL) in Switzerland. He handles international negotiations, mediations, conciliations, arbitrations, litigations, and mixed ADR hybrid processes in a wide range of fields and technologies.

Debra Gerardi is a healthcare conflict engagement specialist and consultant providing executive coaching, mediation and facilitation services, conflict assessment, and professional development programs to organizations internationally. The focus of her work is to remove barriers to collaboration, including ongoing conflict and miscommunication, so that health professionals can return to the work they were called to do. She has provided professional services to over 100 leading healthcare organizations including: the Agency for Healthcare Research and Quality, the Joint Commission, the World Health Organization World Alliance for Patient Safety, the American Association of Critical Care Nurses, the AMA, and over 30 medical centers. As a Hudson Institute-certified executive coach, Gerardi strives to promote the view that successful engagement in a dynamic and complex world requires that professionals “work from the inside out” by anchoring to our purpose, values, passion, strengths, and commitment to ongoing personal growth and lifelong learning. Trained at Second City and Bay Area Theater Sports, Gerardi makes use of applied improvisation as a key aspect of her work and integrates improvisation techniques and principles into her coaching and consulting services. Most importantly, she brings a spirit of fun and a creative approach to all of her work.

II. SPEAKER PRESENTATIONS¹

Scott Partridge: The company I work for makes seeds. We are occasionally at the center of controversy, particularly around genetically modified organisms, “GMO’s.” We are actually the largest seed company in the world. We were also the first mover; the first company to develop biotechnology in a commercial product to put in the hands of growers as those farmers around the world tried to improve the quality, quantity, and sustainability of our world’s food supplies. It seems that controversy has historically followed Monsanto around, even fifteen years ago when we were spun off from Pfizer, because they did not see much future for genetically modified organisms for farmers, despite the dramatic increases in yields and decrease in pesticide use. Monsanto also has a very rich history of being involved in a lot of litigation as patent laws were put into place and applied to GMO innovations. Monsanto was very vigorous in protecting those patent rights. Today, through programs we have created and instituted

1. These presentation transcripts have been modified to conform to the compositional criteria of this Volume. For the complete video of these presentations, see Pepperdine University, *Pepperdine Law: Managing Conflict 4.0 – Session 2*, YOUTUBE (Nov. 25, 2015), https://youtu.be/y4_qASC-7ek [hereinafter Panel Two Video].

at Monsanto, we have no litigation with any of our competitors. We have no litigation with multi-nationals in our space. We also have no antitrust litigation, and we have had a wealth of it in the first ten or twelve years that biotech was introduced. We have had no significant commercial litigation with any of our major customers, and this is not just in the United States, this is globally. What I would like to do with you today is share the journey that we went on to reach this point where today we have no litigation.

I have to wind the clock back almost four decades when Roundup, a non-selective herbicide, killed weeds. You all have probably seen it, and many of you have probably used it. When Roundup, in the 70s and 80s, was Monsanto's flagship product, it was used by growers and farmers around the world with great success. When Roundup was getting ready to go off patent—10 years down the road—the scientists were looking for a way to create implant solutions to do some of the things that were normally done with herbicides and done by insecticides. They thought, "Could you create a natural trait using a natural protein, or by using tissue from another plant, and put into a corn or plant to give that plant certain desirable characteristics?" For instance, could you take a piece of a tissue from a beautiful flower, like a poppy—poppies are not eaten by bugs because the bugs will die if they eat the flower—and could you put the poppy into a corn or a cotton plant? And if you did that in a fashion where the bugs that would eat that agricultural plant would die, you would also then decrease or eliminate the use of insecticides. Cool idea. Could you also do that with herbicide traits? The race was on. The six multinationals as well as a number of other companies were all in this race, and it was a huge race with tremendous dollars to try to create these implant solutions—to try and create biotechnology traits. Well, Monsanto—we won that race. We were the first to commercialize products that provided for the protection of bugs and weeds, and they were rapidly adopted by farmers throughout the United States, but not without controversy. Ninety-eight percent of the soybeans planted today in the United States are GMOs. The majority of what is planted in Brazil are GMOs, and farmers have endorsed these products, but they have not been widely and publicly accepted. There is still a good deal of controversy, even though they are the most tested food products in the history of the world, and no adverse consequences have been identified. So while these products are being brought to market, Monsanto wanted to protect its innovations and monetize them and enforce the patents. I did a great deal of the patent protection work for Monsanto. I had my first Monsanto case in 1980, and through the years before I joined the company in 2006, I ended up handling this work with my firm nationally, but again, not without controversy. Filing suits against infringing farmers was not popular; changing the way farmers managed their crops by not saving seeds

from one year to another because there is a patented gene in the seed they purchased was not popular.

As the patent fights advanced, we had a number of patent attacks from the other major nationals that came in second, third, fourth in the race. There is no prize for coming in second in this race. Those patent fights lasted about a decade, and we won those. The patent landscape was secure for Monsanto, and we all know from my German colleague, there are two logical steps that come after innovation. The first one is patent litigation and the second is anti-trust litigation. It is the classic American model. Other businesses and industries have probably seen this. When the first mover creates patent-protected products they often come under attack. If those attacks fail, there are often antitrust claims that follow.

We had these antitrust claims that were also defeated, principally because the business model that Monsanto employs is broadly licensing, including broadly licensing these innovations to our competitors. Now I will take you back to my practice in New Orleans, back in 2005—there was a weather event at the end of August 2005; it was Hurricane Katrina. We lost our house, we had five family members lose their houses, we had two teenage boys out of school, and I had the opportunity to join Monsanto a year later as the Chief Deputy General Counsel, and I did that. I moved up to Saint Louis after twenty-seven years of private practice. It scared the hell out of me to go inside a company. I always thought of corporate life as being too mundane compared to private practice, but it was fantastic.

I got there and we had one last patent fight against our most significant competitors, and for today's purposes I will identify them as Acme. They were infringing one of our flagship products just as that product was preparing to go off patent, and we found they had done some things that we found to be objectionable and we filed suit. They filed a massive antitrust counterclaim. This company was also well connected, and within forty-five days we had an investigation by Obama's Department of Justice for Antitrust Violations. Shortly thereafter, an investigation with thirty-six Attorney General's doing copycat investigations of our conduct. This went on for four years. I tried to settle a number of times. Unsuccessfully, though, the investigations by the Department of Justice and the Attorney General rattled on with huge demands by subpoenas and civil investigation demands. We were dumping millions of pages of documents on them. After not settling we went to trial, and after a month the jury returned with the third largest verdict in intellectual property in the history of the United States. One billion—with a "b"—dollars.

After several months, I contacted the president of Acme, the individual with whom I tried to settle the dispute before trial, and I offered to sit down

with him and try to settle that one billion-dollar judgment. I also offered to have a discussion about enabling them in licensing Acme to our next generation—the most modern product in the field, which they were found to have been infringing. We got together and it was tough. He had a big team, I had a big team, and we spent half a year, including sixty-eight days straight, face-to-face negotiating a resolution and a set of licenses, and we got it done. It was interesting along the way, and I reflected on it a lot this morning—on the knuckle dragging corporate disputes. What it took was breaking down barriers. You cannot imagine, and I could not at the time, what it is like to be on the receiving end of a career-ending verdict against your company. It took communication on a personal level and creating an environment of trust. I do not want to say that trust did not exist, but fear, suspicion, and hatred, both ways, was the fabric of the relationship. It started with the president and me and we broke down those barriers. There were a number of important moments where there was an opportunity to take a little advantage, and neither one of us did, and that helped with trust to flow over to the twenty person teams who were negotiating these agreements.

When it became apparent to me that we were going to get this license done, I could have easily said, “Great, a billion dollars monetized into a two billion dollar MPV license, with a five billion dollar cash flow through 2027. High five, I’m going home!” It was late one night and I said to the president of Acme, “You know we did some great work here. What do you think if we try to change how companies interact with each other going forward? We have a great foundation.” And just like that he and I pounded out a concept that started out with a relationship principles document. I will give you a couple of the high points of the document: This document was signed by us and endorsed by the CEOs. This was critical; the CEOs of both companies and the board and chairman of both companies; these are publicly traded companies. We agreed that we would resolve all of our existing disputes, or at least make an effort to. We agreed we would sit down and identify areas of potential future conflict. We agreed that if we had a fight—a legitimate fight where we needed third party assistance—we would not fight in the media or in the halls of congress. If we had a complaint about a government regulator, either one of us, the same information, the same documents, would be provided to the other party. We wanted to create some clarity and honesty. If I am going to complain to the Department of Justice, then why would I not send to Nancy at Acme the same documents if my goal is to change her behavior? If I think your behavior is violative of law, my goal should be to change your behavior, not that I want to hurt you. That was a key aspect and gives you some flavor as to how the fight four years before that was fought. If it was a legitimate dispute, we agreed that we would isolate it and try to create a private process for resolving the dispute.

I will cycle forward to today. We agreed that in all areas where it was possible we would arbitrate and do the usual: mediation, executive mediation, and arbitration. We also agreed that we wanted a forward thinking organization. The private practitioners here in dispute resolution know a lot of folks who provide access to third parties, mediators, and arbitrators. What fit our program really well was CPR. They provide the function of other organizations, but in my mind they are also forward thinking.

This process we created was owned by relationship teams; I led the Monsanto team and the President of ACME led the other team. The person that was in the room with us was an antitrust lawyer; we had a lead commercial person, we had lead scientists, researchers, the heads of government and public affairs. We met quarterly. There were three parts of the agenda: resolving existing disputes, identifying problem areas, and within the bounds of antitrust law, figuring out what can we do together to put newer tools in the hands of growers around the world. We agreed that we could combine in research and development capabilities in certain field. We agreed that if new products were developed, we would license broadly externally and go to the market place separately and compete against each other. We had antitrust guidance to make sure this kind of work was appropriate and did not run afoul of any competition laws. What was neat was that when we first started we had fifteen to twenty people at a big long table, and *we* were on one side and *they* were on the other side, and we would work through the agenda. We spent the majority of our time working on existing and potential disputes and we bumped into each other. We realized quickly these things were manageable.

So the president and I decided to create sub-teams, content knowledge folks for these disputes, lawyers for both sides, as well as commercial people, and assign them to go fix this. We said, "If you cannot, come back to us and we will see if we can." The disputes started to disappear. What happened is we would walk into these rooms, and it was not "we" on one side and "they" on the other side. We started mingling because people started to build relationships with each other that resulted in problems being solved and opportunities being created. This progressed to the point that, today, we have these relationships teams, project teams, and sub-teams. The majority of our time today is spent with scientists and business people talking about how we can collaborate. This is not just with Acme; this has been applied to different competitors and multinationals; there are different forms. There are cultural versions of it based on different sensibilities of different parts of the world. We have instituted this type of program with our major competitors and customers, and it has worked. What we spend

our time doing is looking at solutions instead of looking at problems. That has me excited. We were able to take all these disputes and have mediation, negotiation, and arbitration. There was one area that was problematic and it was the intellectual property area. I am sure practicing lawyers here, when you think of arbitrating an intellectual dispute, it probably makes you shiver. It did me. The courts have always been the place Monsanto insisted intellectual property disputes be resolved.

See if this pattern, for those of you who have done patent law, makes sense to you. Company A says, "I think Company B is infringing one of my patents, so what am I going to do about it? I think I am going to send them a letter and demand they stop. I am going to threaten to sue them and offer them to take a license." Company A's lawyers may say, "If you send that letter they may run to the courthouse and file a declaratory judgment action, so you better not send that letter." Company A says, "Well I will file suit first, and then say, 'I would like to talk to you about a license.'" I will suggest that this is not the best way to start a conversation about licensing your technology. So how do you prevent these precipitous filings? Here is what we came up with, and so far it has worked. I know it can be gamed. So far every company we have had this discussion with has agreed to it. We say, "We would like to talk to you about your activity, which we believe is infringing. We would like to talk to you about a license; we want to do everything we can to resolve this dispute, whether this is your intellectual property or our intellectual property." In the event that the parties are unable to resolve the disagreement after fulsome negotiation, whoever has the primary claim—essentially whoever has the patent—retains the right to file suit first. What this does is eliminate the precipitous filings.

Even if you go to mediation and there is a breakdown, and both sets of lawyers are saying, "Hey, we better hurry up and file suit," the beauty of it is that it has kept the dispute in the hands of the business people. Surprise, surprise! If these issues are in the hands of the business people, and not the lawyers, more of them get resolved. So, can it be gamed? Yeah, it can be gamed. Lawyers have given me a laundry list of ways to play with it, but if you play with it, what you put at risk is a hell of a lot more than one license to one technology; you are putting at risk the entire relationship that has been developed, and so far none of the companies, including mine, have been willing to risk that.

This is a summary of what we have constructed; there are different versions of it. We are growing our process and we are going to apply it to more places. We are working now on succession plans for those who will own these spaces. The role that me was created for me by the CEO and the chairman, and importantly in every one of these relationships, my CEO has owned the solution. In every instance where I have asked him, he has met with the CEO and chairperson from the other companies. We have people to

do the day-to-day work, but we need that sort of support and an organization that will support creating this umbrella or linkage that crosses offices—Chief Financial Officer, General Counsel, and the lead commercial folks. You need that creativity and ingenuity to have the necessary structure.

At Monsanto, out of 22,000 people, there are twenty of us on the leadership team, and I am one of those twenty. I am the only person who has no direct reports other than my administrator and I usually report to her. What is interesting, though, is that I have a friendly letter in my pocket that gives me the ability to put together a team with anybody from the company with the end of achieving these relationships and resolving disputes. And that works. Let me wrap up here and talk briefly about the future. For us, this works and we are going to continue it. I would be happy to talk to you who are similarly situated about to how to apply this in your world. Again, no litigation. The members of the law department at Monsanto just shake their heads. The law department litigation group has been downsized. What excites me the most is when I go to these meetings now and I see the energy and the focus of both companies being brought there to solve amazing problems; that collaborative space is important. In my area we are working hard to make more food to put in the hands of what would be two more Chinas that we will have by 2050, and do it with the same footprint and space. To see us sit across from our competitors and talk about how you create drought-tolerant corn, or how you bring products to Sub-Saharan Africa that were not there before, is amazing. I hope I have given you some food for thought. Thank you for your time.

* * *

Jeremy Lack: I started off as a patent litigator in the U.S., and my first trial was Polaroid Kodak. At the end of a ten-year trial that cost roughly thirty million dollars, I started thinking, “What was going on in the brain? Is there something helpful here when we are talking about cross-cultural work?” Because all my work is cross-cultural. I am lucky that in Switzerland there is an international center of neuroscientists. One hundred and fifty of them are focused on emotions and, as of a year ago, five of them focused just on conflict. Today I am going to share some of the research that helps to understand the patterns that exist that create conflict. The first thing to understand is that this process has an outcome on human behavior.

First, we need to understand process itself, and its effect on behavior. We also need to understand oxygen and glucose allocation in the brain, which are very limited resources. The human brain receives 20% of our oxygen and glucose, and it has to be very efficient as to how it allocates these resources. In a way, everything can be explained by this process;

oxygen and glucose are distributed by the mind into the body. For me, the brain is the whole connective system. So, all these things, including perception, understanding, and motivation, are influenced by glucose and oxygen. The way I like to do it is by analogy: your frustrating desktops or laptops that sometimes crash and you do not understand why or what to do with them. That is how the brain works by analogy. We have something called “hardware.” It is the brain. We also have three different operating systems. You know when you try to get Apple to run on Microsoft, it is difficult, or vice versa. Some machines can do it and some get glitches. That is what happens in the brain. We have our operating systems: one is emotional and one is social. This ties in with what we have been discussing today. The third is the rational or cognitive. We are going to walk one-by-one through each operating system.

The first operating system is *emotion*. What is the purpose of emotion in the human brain? The purpose of emotion is to do very rapid relevance detection. Before we can think consciously, our brain tells us where to allocate oxygen and glucose into my body. Do I need to be in fight or flight? What do I need to do? That is rapid triage. What is available to me for self-regulation? So, emotions come in quickly. If we look at our time scale we have two basic modes of response: “away,” minimizing anger, and “towards,” maximizing reward. Whether you realize it or not, within zero to 250 milliseconds your brain is already filtering all of your sensory perception. That is happening in the limbic system, and in particular the amygdala, which is very involved in rapid detection. It is not just about fear; it is also about reward. As you will see, it is also more than just emotional responses. So you have within this time frame an emotional response, which is subconscious because consciousness only happens in the 400 milliseconds range. What that means is there is no such thing as not having an emotional response; our brain filters everything through emotion unconsciously; most of the time we are unaware of it. It is only when we are aware that we can do what is called “self-regulation.” Self-regulation takes a lot of time and a lot of practice. So mindfulness is a way to improve how you self regulate when you are having a strong emotion.

To learn how self-regulation works, take a pilot who is going to learn to fly a plane. They need to learn how to react to things going wrong. The natural tendency would be to panic and then the pilot would not be able to function properly, so you have simulators. By spending hours on simulators simulating extreme moments, the pilot is able to keep going through a checklist and stay cognitive and keep oxygen and glucose to the part of the brain that needs to function cognitively. The wonderful thing about the brain, until the end of life, is that it is plastic; it allows us to create new patterns in order to self regulate. That is the good news. The bad news is that we tend to be on autopilot and we respond emotionally without being

aware. It influences our biases and cognitive thinking is often trapped by our emotional way of thinking. This is the summary of the emotional system: rapid relevance detection and where to allocate resources because they are precious commodities.

Let us move on to the second operating system, the social system, which we do not talk about enough. Culture, for me, is not so much about emotion, and I know we were talking about culture being an emotional issue. For me, culture only applies when you are talking about a group behavior. You cannot talk about culture as an individual; you can only talk about culture in a group and the group dynamics and patterns of behavior. We are very strange animals. The reason our prefrontal cortex is so big is because we have the largest group size. We are the most pro-social animals in the world, believe it or not, despite all the conflicts we create and the destruction that we ravage. Here are two fundamental steps: If you remember in emotion we had the “away mode” and “towards mode.” Here, we have two fundamental modes again: The first is called in-group behavior. When we identify with a group of people and feel in-group, we have an incredible ability to understand what we feel with one another. It does not require an explanation; we pick up on things. There is an automatic system of empathy when you are in-group. However, when you are out of group, the empathy systems in the brain are switched off.

Let me give you some examples of how this operating system is separate from emotion but affects our behavior. To give an example, let us talk about mirror neurons. You may have heard of them; it is when we see one another without realizing it, and part of our brains start to mimic what we see that person doing. If I yawn you will yawn or vice versa. Let me give you another example: Today for lunch I was rushing because I had to come and give a presentation, and I was worried about it. I saw the salad bar and I got salad, and as I bit into my salad, I did not realize there was a huge piece of lemon. I had this acid burst in my mouth and I had this kind of shock. So why do I tell you this story? Many of you are now salivating. This happened to me allegedly forty-five minutes ago, but you are still salivating now and thinking why the hell am I salivating? This is your mirror neurons working, not by observing, but by simply hearing something that I did. We have this incredible ability to connect to one another unconsciously. That is the unique thing about an in-group script.

The other thing you have probably heard about is oxytocin. It is a very primitive neuropeptide and sometimes it is mislabeled and called the trust hormone. However, oxytocin is not about trust. It is about augmenting an in-group script or an out-of-group script. When a woman is pregnant she has high levels of oxytocin. In fact, it can induce labor by giving oxytocin

and the child, when it suckles, will take in oxytocin through breast milk and that in-group script of mother and infant creates a tight bond between the mother and infant. In fact, you can also sniff oxytocin and it can affect behavior. When people were primed as opposing teams or competitors they were more aggressive and more competitive. So oxytocin is enhancing your fundamental patterns of acting in-group or out-of-group. What can induce oxytocin? Lots of things like chocolate and dopamine. There are a lot of things that can help. Touching also induces oxytocin because it is going to induce an out of group script when you feel it is not something you wanted. But when it is in-group, and the example you talked about this morning when you got your team and stood in a circle, you were triggering an in-group pattern within them. Even getting to hold hands is going to release oxytocin and create a neurochemical bonding. That is the assumption that I have that and a theory of what is going on in the brain.

But here is the most interesting thing to me: it is the fact that humans, in some way, are hard-wired to be racist. That is a very troubling thought, but it is the reality. We have a mental state attribution system in our brain as social animals that I want to explain to you. In a very rapid period of time the brain starts to look at a person and says, "Are you similar to me or are you dissimilar to me?" We can actually see in the prefrontal cortex and in different parts of the brain involved in a rapid analysis of a person who is similar and a person who is dissimilar. So it is not only when I see you and recognize you as similar or dissimilar, it is also when I think about you and mentalize you and what I assume about your behavior unconsciously and very rapidly. We know one thing: human beings are all identical because we have the same needs. If you take the Maslow pyramid, we need food, shelter, and clothing. We have identical needs, so if we look at each other as fellow human beings in this way, and if a martian came into the room we would all be feeling in-group among ourselves and feeling very alarmed by the martian because that would be out of script. There is a link here with fear of we will see because the natural inclination will be, "Stay away." That is when we are thinking of ourselves as identical. What we do with culture is the brain unconsciously asks, "What is the difference?" That is going to interfere because if something is different from me, then that person might not be the same as me. And so we are mentalizing but we can activate seeing a person for the first time in this zone if we precondition ourselves to think of them as identical.

What the danger is for both systems is that it creates biases. In the first system, when I assume the person is similar to me, I assume everything about their culture. I will assume that whatever works for me works for them, and this is unconscious by the way, and that works in-group very well. However, when I have a person who is out there, the big danger is that it leads to stereotyping. It is very difficult to hear, because I am from

Switzerland, that the Swiss Germans are like *this* and the French-Swiss are like *that*, or even some things we heard this morning that Germans are like *this* and Americans are like *that*. I do not buy into that. It is the group dynamic that is what matters and it is whether we see one another as similar or dissimilar, because the easiest thing for our brain is to make stereotypes and then perceive everything through stereotypes. It is human nature to do that so; that is the danger of how our brain functions.

To give you an example of how shocking this hardwiring is, here is a picture of a brain after being shown a picture of a friend suffering. [Referencing PowerPoint presentation.] Here is the interesting thing, see that blue part? At the time that this part was being activated, there is this part of the brain called the anterior insula that was immediately activated at the same time. It is linked to emotion but also what is fair or unfair. When you look at a stranger, you can see the difference. The red part is different and there is no anterior insula activity. What does that mean? Let us look at World War II as a difficult one. You can be a Nazi officer and love your family, go and commit atrocities because the group you are in is pushing you to do that, so it is also social conformity driving your behavior. When you are there you will not be in distress because you do not see these people as in-group—they are out of group. Look at Rwanda, the vocabulary used to describe the different racial group was vermin or cockroach. That allows you to kill because it is no longer a human being. This is one of the differences I mean between empathy and non-empathy being automatically triggered by an in-group or out-of-group script.

And to give you an idea of how the emotional and social system are interlinked and how quickly they pick up, look at this picture. [Referencing PowerPoint presentation.] These are the whites of a human's eyes. Anybody want to guess the emotion this person is feeling now? Fear? Surprise? We know this is a fraction of a millisecond just looking at this. That is fear. What is this? [New slides.] Sadness? Anger? Suspicious? Boredom? Here is the answer: happy. To determine happiness we do not rely on the whites of the eyes; we look at the facial muscles. Our brain is so quick to detect fear, but we need more information to detect other emotions. So what is going to happen is that the amygdala is conditioned to look at fear but also in a social context. It plays an interesting role both in the emotion system and the social system. To look at the social system more closely, I am going to ask you to describe this face. [Referencing PowerPoint presentation.]

Assuming you are going to mediation and you are going to pick a mediator and go through a book of pictures, here is the first person offered. [Points to PowerPoint slide.] What thoughts do you have? Rigid? Bossy?

Mug shot? Stern? Angry? Intimidating? Look at how many attributes we have given to the person in this picture. Now look at this person. [Points to PowerPoint slide.] Can you give me the attributes about this person? Stoned? Relaxed? Mellow—in the California sense? Visionary? Kind? Simple? Approachable? Here is the fascinating thing. We are told never judge a book by its cover, but that is what we are doing every second of the day when we see a new face. This is work by Todorov at Princeton and it shows that the amygdala does a rapid unconscious screening when you see a face for the first time. It calculates a sense of trustworthiness and it calculates a sense of the likelihood to dominate. Is this person going to want to dominate me? It is weird that your brain does this but it is these subconscious first impressions that your brain just does. A lot of it is environmental; it is your early socialization pattern, how people spoke in your community, and some of it is genetic. A lot of the research, by the way, is biased today because most research is done on Western Caucasians.

The two pictures you saw before were the two extremes you saw on trustworthiness. The face on the left is associated with least trustworthy and the one on the right is most trustworthy but neutral in terms of dominance in both. So you start thinking what kind of mediator do I want to pick? Are you now worried about the facial looks of the mediator? There are many things that we can do as a mutual, however, that will make us resemble one or the other more. Our posture, our stance, our behavior is going to help parties to create a sense of trust also with us. I worked with a professor of pantomime in Austria who actually teaches posture for these sorts of things. This is what is happening with the unconscious social system and the emotional system.

We talked about the first system, emotion, and the second system, social. Let us just finish with the third system, which is the cognitive one. You have probably heard of a book called *Thinking Fast and Slow* by Daniel Kahneman. We are very much talking about this sort of stuff. According to this book, this is the human brain now. We can approximate it to a hybrid car engine: the brain is happiest when it is using as least oxygen glucose as possible. That is why it is smiling in electrical mode and it is very sad when it has to use a lot of oxygen glucose because it is trying to keep it in reserve. So most of the stuff that we do is what Kahneman calls the system one, fast system, but we prefer the language of Lieberman, which is what we call the X mode. It is reflexive cognitive thinking. We are not talking about emotion and we are not talking about social behavior; we are talking about cognition. For example, if I could ask somebody to read this phrase. [Referencing PowerPoint presentation.] Any volunteer please? [Reading slide.] “I can actually understand what I’m reading.” How does that work? Our brain does not try to learn the whole word. Our brain does a very rapid way of calculating, I do the last word the first word, if I can make sense of

this, I don't need to read the rest of the letters. So that makes complete sense to us and that's our X system.

The other system is the C system—what Kahneman calls system two. It is the slower one that is more expensive in terms of oxygen and glucose. It is the real reflective one. You are not in reactive thinking, you are in deep reflective thinking. This is the one we are not used to using, so let me introduce you, for the sake of this afternoon, to the C system. I am going to ask you without using a pen, paper, or calculator, to do the following calculation in your head: what is 24 times 17? Prize for the first person to answer. I am hearing wrong answers at the moment. Four, zero, eight? Who is the lucky winner? Congratulations.

However, all of you were getting uncomfortable and were rolling your eyes. You started to really feel this cognitively. You started realizing that you really wanted your piece of paper because you are so used to your X system working and doing the columns. I would not have to think about it and keep the numbers in my mind to carry over the columns because that is how we use the X system without having to think about it cognitively. The really scary thing is that when judges and arbitrators are working it has been found that this has a huge impact on interpretation of evidence. This was done with Israeli judges doing parole. The question was what would have the most influence on whether the judge would give parole to a prisoner. They thought the most influential factors would be whether they were Arab or Jewish, or male or female, and whether it was a misdemeanor or a felony. What do you think was the most influential factor in whether they gave early release? What did judge have for breakfast and the time of day. What the judge had for breakfast affected to what would happen two or three hours later—lunch equally.

There were periods of time where the oxygen glucose levels were higher. These were the prisoners who were more likely to get released. The ones where the judge was tired would stay in status quo and not get released. Now if you asked all of them, they were convinced they had made the same quality decision at every moment of the day. But they had not. When we exercise, our muscles build up lactic acid so we know when our muscles are tired. With our brains we do not know when we have moved into X mode. We do it constantly and fatigue is an important thing, but we are unaware of when we are doing it, and yet it influences our entire ability to think about something. What does this mean for courts and trials and arbitrations? Only have a hearing three moments in the day. That does not seem to work well, does it? But you have to understand the dangers of the system.

But now let me bring it all together because I think my time is coming up. I want to put it all into a model. This is what we are doing research on

at the University of Geneva with Dr. David Sander and the group of five people I mentioned looking at conflict. We have been looking at the brain, what is happening in the brain, and these three operating systems. You remember it is a time-based system with what happens in the beginning and what goes on. The interesting thing is that these systems turned out to be modulated by the same neural correlates. In plain English that means the same parts of the brain are involved in all three systems. So when one of the systems is getting more oxygen or glucose than the other, the others are deprived. And there is a certain logic to this: Think of a very angry person. If you say to this very angry person, “Be logical,” what is going to happen? That person will just get even angrier. Why? Because the only system activated is that anger and emotional system, so asking them to please switch on cognitive thinking is impossible. Getting the oxygen and glucose to be redistributed and applied to different parts of the brain and different systems is going to take some time. So here is how the model looks.

One thing we tend to overlook, and this is what we found with the Israeli judges, is what are the baselines coming into the meeting or process? Are we tired? Have we slept enough? What did we eat? Did we get proper food or were we rushed? Did we just have an argument with our partner? Or did we have a beautiful experience walking and seeing the sunrise? Those will have the greatest impact on a meeting in those first few seconds and we tend not to think about this. How often, when organizing a mediation or arbitration, do you worry about what the parties have eaten for breakfast and whether they slept eight hours the night before? People tend to come stressed to court and the emotional and social systems are going to kick in first and use most of the glucose and oxygen. The bad news for cognition and rational thinking is that it is always last in line; it gets the crumbs that are left. The emotional and social systems have taken over.

Now let us take a look at the conflict resolution systems that we use. There are two modes we see, the *away* mode—stress and anxiety—and the *towards* mode—what feels safe. Those are different ends of the spectrum. Let us look at the social group. We saw there is out-of-group and the minutia that someone is going to dominate you, as well and the other extreme of that is in-group and feeling a sense of equality, which is cultural. It does not mean individual equality, but group equality. Then we look at the rational. We know we have preset patterns of thinking, the X system, for example, but we do not like to use the dynamic and reflective system, which is where we need to be. This system is not going to be activated if we are feeling tired or stressed and out-of-group. Creativity, for example, requires very little emotional or social attention because that is when we can use the oxygen glucose to create and co-create and envision solutions that are not available to us when we are stressed.

Now let us think of the conflict situations we normally have. Let us take a courtroom; let us look at the United Nations Human Rights Council; let us look at a human rights investigator going to report on a country. When we think of almost every single dispute resolution process that we use, we are operating in this triangular zone. We tell people to come to court. They are stressed and they are tired. We are activating the notion of the other person as out-of-group. You are “plaintiff” and they are called defendant. Opposing counsel: just think about the vocabulary we use that activates the sense of out-of-groupness. When it comes to the system that is up here, lawyers are looking for facts and applicable law. Everything else is irrelevant. If I can find the boxes to check as an arbitrator that I know this patent has been infringed then I know what I have to do. That is a very different mindset than trying to focus in on that central zone. Let us think about it. What process are we aware of that actually targets this zone? You might say some forms of mediation fit this description, but there are different types of mediation. If you are trying to build a coalition with your neutral you are probably going to be hitting anxiety, but it also creates out of group scripts with the other person because who is going to convince the mediator when it comes to making the recommendation in your favor? We need to understand how conflicts escalate from this point of view and how the process contributes.

This is something in Germany, Austria if you are studying mediation, kind of like *Getting to Yes*. It is not studied often here—I believe. But this model is made by an Austrian, and Fritzgrazl came up with this scale. [Referring to PowerPoint presentation.] People start with a disagreement, it turns into an argument, then there is no point in speaking to the other person so you move to action and normally find a lawyer. People tend to find lawyers when they are at level four. [Referring to PowerPoint presentation.] They put themselves as the good person and the other person as bad, and they are trying to create a coalition with their lawyer. Then there is the notion of loss of face when the other person does not back out, my lawyer tells me I have a good case. Now you imagine the other person as a threat; the other person is a danger you are aware of. Frustration now turns to threat management. It turns to annoyance that the other person has pushed you to action, and that you have to file a complaint. You think, “If only they didn’t make me do this. It’s their fault.” You blame them about it. Then they will respond and then things will fragment and at level nine. [Referring to PowerPoint presentation.] I have seen multinationals at this level where it does not even matter if you are going win or lose the case. They should just suffer more than you do. Let them outspend, let them destroy personal relationships with their family. That is what you are going for. Winning

and losing is this big corporate picture but we cannot stand this other company and we have to fight them to the bone. I have seen this happen where the decision to litigate and spend millions on patent litigation has nothing to do with economic value anymore. It is about human destruction itself.

So this is human nature and it explains intuitively why we tend to escalate so quickly. What is so counterintuitive for us is that we do not know how to de-escalate. De-escalation requires cognitive thinking and there is a key demarcation between step three and four [Referring to PowerPoint presentation.] If we are going bring in an evaluative neutral we are in a way contributing to further conflict escalation. It is not that you want to; it is not that you are saying, "I'm choosing arbitration because I want a real fight." You just do not know how else to do it. It is the system. What tends to happen is that you trigger escalation. By not having neutrals, it is a way to not escalate and to say we want to stay in that zone. That is the convergence of the three operating systems. So this is important because the neutral is no longer neutral the moment you are in this sort of thinking. It is coalition building and mediation can work at any state to de-escalate. Many of you have had level nine conflicts [referring to the PowerPoint presentation] and have realized that you can de-escalate and that is what the ICRC is doing in many situations around the world. Where people raped and slaughtered each other's families and yet at some stage they can put them in the room and talk about some sort of treaty—some sort of peace. How do they do this? It is a know-how; they have but forgive me if I say this but there is no cognitive understanding. Well, this worked in Darfur so let us try it elsewhere. There is no real understanding of the cultural patterns and what is happening.

Arbitration can be very productive at that stage because you don not want to rebuild the social fabric. You just want to move on and stop the suffering and end the dispute, but you are not looking holistically. This is a way you can think of process design and try to decide with the neutrals and the participants where you want to be. Do we want to limit ourselves to one of these zones called the win-win zone, the lose-lose zone, and the win-lose zone? That is an unfair question. Who wants to be in the lose-lose zone? Yet that is where most of our conflicts end up. The interesting thing about intraspace negotiation, is that it is not about power and it is not about rights or competitive coalitions. Rather, it is about interests and interests. When you think about it, people naturally gravitate towards the center, where there is the overlap of the circles because it is a reward. My interests will be met, and maybe yours as well. We are going to work together to achieve interests and so the whole *Getting to Yes* logic works so well because there is a neurobiological coherence to it that fits this model. But you have to be doing it consciously.

What it means is that there are seven critical junctures where lawyers, neutrals, and participants can think about what they want to do now. Am I going to trigger a discussion, which is basically two monologues, or am I going to create a discussion that is going to be a co-creation and exchange of information so we can get our interests met on both sides. I just want to focus on the preparation phase. What are we doing to socially condition people using the social brain? What are we doing when people come to make them trigger their in-group scripts, as opposed to their out-of-group scripts? Eric Galton, in his mediations, does not talk about the other party or opposing counsel. He talks about your partner in this negotiation. I think the language he uses makes a big difference. I want to consider them as partners because the outcome belongs to them. Galton is very conscious of the meaning of a single word. Now you may say a single word sounds a bit gimmicky. Is it going to make a difference? Let us look at an example of a single word and the difference that it makes.

Here is an experiment done in the UK. People were put in MRI machines and they were given a fifty-pound note. One group was told they could keep twenty pounds or they could gamble to keep the fifty. The other group was told they could lose thirty pounds or they could gamble to keep the fifty pound note. The only real difference between the two groups was the word “keep” or “lose.” Think about this rationally for a moment and, if you need the paper and pencil, you can do it this time. What is the difference between keeping twenty and losing thirty on a fifty-pound note? It is identical, right? So we should see the same behavior in both groups, correct? But here’s what happened: Keep is a safe word; the prefrontal cortex is activated. Oxygen glucose goes into it and this is happening before cognitive thinking is kicking in. It is a subconscious rapid thinking. You are seeing oxygen glucose being consumed very rapidly. Most people in that group do not gamble. With the other group, lose is a fear word. You can see the amygdala and the limbic system are activated. It is a different zone of the brain that starts using oxygen glucose. The result is that in that group most do gamble.

So this has a lot to do with how you frame your offers. Can you formulate your offer as a *keep* or do you formulate your offer as a *threat*? “Here is my fantastic offer, take it or leave it.” The extra words at the end undo the whole benefits. Fear is going to dominate and a sense of social exclusion will dominate unconsciously, so it is very important to understand how a single word does make a difference. We have to use them consistently in our vocabulary. “Us versus them” is a way to prime people to come to a meeting thinking as opponents, not in-group, so the words “we” and “us” are very important. Just think about the seating arrangements used

this morning: People walk into the room, saying nothing, seeing a table, and they will sit facing one another. There is an automatic social message saying we are not in the same group. Put them at a round table and mix the seats, which is what I think some of you were describing, especially where you were creating subgroups that went off together. You were creating in-group scripts, unconsciously, and people were meeting and socializing and getting along together and doing walks in the woods, or whatever exercises, and that triggers in-group behavior. We are socially plastic, so we know we can be triggering pro-social behavior or anti-social behavior.

Culture is about that. It was said perfectly this morning: it is about making explicit what is implicit. When you have got two parties the understanding is that each party will normally have its group culture, but you as a neutral also have your own culture, and if you are invisible to your own culture you are going to make your own assumptions and biases. So the ideal process is to explicit the biases and create a fourth new culture. How are you going to work together, understanding that some of us are polychromous or monochromes? Some of us are collectivists, individualists, high context, low context. Whichever theory of culture you work with you can now make an explicit and designed process around it and the implications. With that said, I hope you will see a lot of thought and reflection about the future of dispute resolution and how we can allow this knowledge to better inform our decisions when it comes to process design.

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Deborah Gerardi: I am going to start with a poem. What I would like for you to do while I am reading is just take in the poem and think about how it makes you feel, maybe thoughts or memories, places it might take you, your thoughts. I am going to ask you to share what comes up to you with one or two people next to you when we are done. Just listen to the words of Marge Piercy and we will have a conversation with our neighbors. This is called, *The Seven of Pentacles*:

*Under a sky the color of pea soup
she is looking at her work growing away there
actively, thickly like grapevines or pole beans
as things grow in the real world, slowly enough.*

*If you tend them properly, if you mulch, if you water,
if you provide birds that eat insects a home and winter food,
if the sun shines and you pick off caterpillars,
if the praying mantis comes and the ladybugs and the bees,
then the plants flourish, but at their own internal clock.*

*Connections are made slowly, sometimes they grow underground.
You cannot tell always by looking what is happening.
More than half the tree is spread out in the soil under your feet.
Penetrate quietly as the earthworm that blows no trumpet.
Fight persistently as the creeper that brings down the tree.
Spread like the squash plant that overruns the garden.
Gnaw in the dark and use the sun to make sugar.*

*Weave real connections, create real nodes, build real houses.
Live a life you can endure: Make love that is loving.
Keep tangling and interweaving and taking more in,
a thicket and bramble wilderness to the outside but to us
interconnected with rabbit runs and burrows and lairs.*

*Live as if you liked yourself, and it may happen:
reach out, keep reaching out, keep bringing in.
This is how we are going to live for a long time: not always,
for every gardener knows that after the digging, after the planting,
after the long season of tending and growth, the harvest comes.*

Just take a moment and turn to one of your neighbors and share what comes to you when you hear Marge Piercy's poem. That is the theme of what I want to share around how I think about conflict and a relational approach to conflict. I come to the legal and dispute resolution world from healthcare. I was a trauma/ICU nurse for eighteen years, so I come from a mindset of healing and wholeness, looking at the whole person's body, mind, and spirit. Not just the prefrontal cortex, but all of the person. I see conflict as an aspect of being human. Conflict emerges from our relationship to one another. It is not something that sits out here. It is not a problem to be solved. It is not a legal dispute to be analyzed and disposed of, but actual conflict itself comes from our dynamic together as a group, or as two individuals. It is just a natural part of being in relation to one another. I love the quote that comes from this book, "Presence" we have to have a better toolkit than just problem-solving if we are going to resolve human issues, and conflict is just pieces of being human. One of things I think is helpful for us is to think about the mindset from which we engage in conflict. We heard a lot this morning about conflict management, conflict resolution, and conflict prevention, and I also like to think of conflict engagement as a relationship process—an ongoing process that continues and can be very short, like the one between me and the barista at Starbucks, or very long, like a mother and child. The idea that we look at the mindset

within which I enter into or engage in the relationship or conflict may be present, determines not only the process that I may choose, but also the quality of the outcome decided by the mindset in which I enter. We are familiar with the power-based and interest-based mindsets, under the idea that if I have a power-based mindset, the outcome gets determined by the person who has the most power. We also know how escalation happens in a power-based approach. We know that rights-based is a better option, because it does not escalate to the point of war or war by other means. There are many things that we are concerned about that have nothing to do with our legal rights. So then we have fallen from the, “Wouldn’t it be great for us to negotiate?” to being able to look at an interest-based mindset. You want some things, and I some things. How do we negotiate what we both want?

But there is another layer, especially in healthcare. We have to look at this fourth level to deal with conflict in a clinical setting, and that is past the idea of a relational mindset. It is not just want I need and want, or want you need and want, for a win-win, but it is the interdynamics between us—the pattern and relationship that emerges from our unique relationship as a group or as two individuals that drives, creates, and resolves that conflict. It is very much a dialogic way of thinking. If I have a relational mindset, I start paying attention to different things than if I had a power-based or interest-based mindset.

If I think of a relational approach, I want to think of it in a broader and a more localized sense. In the broader sense, I am going to look at system and the relational dynamics within that system or that group, and train myself to look at things differently than I might if I am not looking from a systems perspective, which is that I do not want to look at standalone events. If we think about litigation, we are responding to events. In healthcare, we respond to incidents and bad outcomes, and we respond to that particular event. In systems thinking, we look at patterns that emerge from the systems themselves. In healthcare, we are doing some great research around how the quality of the relationships in the clinical environment determined whether the care was safe or not and whether the quality of the outcomes were good or not. We know that the teams that have better relationships with each other and have open communication and mindfulness, an ability to be transparent and develop trust, have better clinical outcomes and safer care.

Looking at the systems perspective, we look at patterns and relational dynamics, and ways to interrupt those patterns if they are not functional or serving the system well, and amplify better patterns instead. The aspect around culture is just that: a series of co-patterns that have been created over time. Oftentimes we do not recognize them because we are just embedded in the water swimming as fish, but those co-patterns were created over time. If the pattern is no longer serving the system well, can we interrupt it and see

what emerges from the new pattern? A lot of the leadership development I do is around how we could interrupt the dysfunctional pattern.

The next level, which I'll spend a little more time on, is interpersonal and intrapersonal. There is the system out here, but there is also the system between you and me. The systems are all dynamic. They are constantly changing like the changing of the guards. My ability to be adaptive and present and understand what is happening in that system, and respond to it in a happy way—my own resistance and adaptability—is what lets me know if I will be capable of dealing with something that I feel is very adverse in the system, like conflict or some other adversity. Whether I am very resilient in that space or not is determined by the quality of my own ability to work on myself and be able to show up in those relationships, and also my ability to have positive social connections.

We talked about emotional and social intelligence, and I like the concept of relational intelligence. These researchers are doing some work with pediatric residence to help them appreciate that their work is relational. In healthcare, healing comes from the creation of a therapeutic relationship between the clinician and the patient. That concept is one in which I am the tool of my work. That relationship is created by building trust and appreciating the power differentials and the respect that is needed for us to be able to have a therapeutic relationship. In the work with the pediatric residence to help them appreciate that *they* are the tools to their work, they began to define emotional intelligence: the ability to learn and comprehend knowledge as it relates to interpersonal dynamics, and also my capacity to connect with other people. The idea that I disconnect when I am under stress or affiliate with a group where I feel safe, in a fear state and when there is conflict present, does not necessarily mean I am staying connected to the state or group I feel connected with. So the question in emotional intelligence is, how do I stay connected during conflict? How do I manage fear when it is happening to me so I can stay in this space and stay connected? That becomes the area for developing emotional intelligence.

Three areas that I think help to define how we go about doing this: the first level is self-awareness. Am I aware of certain patterns that trigger my emotions? Am I aware of what makes me fearful? Am I aware of where or how I am reacting in the moment? Can I feel it physically in my body? Can I give a name to my emotions as I am feeling them? I'm coach a director right now and we did an emotional intelligence assessment on her, and she was technically really good. She has been in work for years and years, but has been getting a lot of pushback from executives because she is showing up in meetings and agitating people. She has some behaviors that are quite simply annoying, and she does not know how to interrupt these. In doing

the emotional intelligence assessment with her, the assessment came back that, of the range of feelings that she has easy access to, there was very little access to anger. The lowest I have ever seen. Her ability to access anger was almost zero; almost zero ability to notice when she is fearful. When I talk to her and say, "What emotion were you feeling when you decided to checkout and go to your cellphone, or when you said the sarcastic comment, what were you feeling? Where did you feel it in your body?" She could not come up with a word for the feelings. Her ability to languish and specifically understand her own emotional state is very limited. Because of that, and her assessment, there was an inability to recognize emotions accurately in others. So her empathy accuracy was very low as well. That happens to all of us when we go into a place fear. We get blinded and unable to read the faces of others as we are when relaxed. So for her, she was misreading cues and behaving from a place of anger, frustration, and anxiety, without being able to name it. She did not have good access to her own development, so now we are working on her becoming more self-aware of that. The self-attunement piece asks: can she then self-manage in those times when she is feeling anxious, frustrated, or angry, and be able to self-soothe, recognize it in the moment, do something to minimize that, and stay engaged and connected at the same time with the people that are around her?

The other piece of developing emotional intelligence is the piece of self-compassion. In healthcare, we live by the ethos of "do no harm." That is a hard one to pick for your livelihood, right? Because we have to do something, and when we do something, we create the potential for harm. So it creates a double bind for us. Every time we walk in the building we can hurt somebody, and we live with that. It is fear-inducing. We are in environments where people walk in and are in pain and fearful, they dump that onto us, and we have our own fears and concerns. So we are absorbing a lot angst and emotional energy all the time in healthcare. Since we cannot really dump it back to the patients and their families, we dump it on each other. We call it bullying, conflict, and disruptive behavior. We have all these euphemisms for it. But it is essentially an effective coping. I have no place to dump this anxiety. I find this with people who do conflict work as well who are absorbing other people's conflicts all the time, the emotions and the fears and the anxiety. If we do not have a good process for dumping that some place, we take it out on each other, which then creates shame. So within every hospital in the country, we have a lot of people who are fearful, anxious, and carrying shame. Those are your doctors and nurses. In doing conflict work in an environment like that, we cannot just do cognitive work and intraspace. We have to appreciate that all of that is in the room. We have to start to develop an ability to be compassionate with ourselves and others for all the bad behaviors and nasty ways we might have behaved toward each other, and our ability to cope and be perfect and recognize the

humanity in ourselves in order to develop some good compassion practices around that as we are growing our ability to interconnect with each other.

So one quick story and I will bring the others back up for some interaction. What does it look like to do relationship-based work in conflict? I was called into the Labor & Delivery Unit and they had an investigation by the HR department because there was a bunch of conflict happening within the unit. HR came in and investigated for some allegations of discrimination and hostile work environment – the usual two things staff says to get the attention of saying something is happening. So HR investigated and came back and said that they did not find anything, instead of using nicer words like, “We do not think there is a legal case here.” I came in and started having a listening session. William Kahn has a beautiful book called *Holding Fast* and he talks about creating resilience and care-giving organizations where we are absorbing all of the angst and fear. So, I created this holding space for a couple of weeks and let about eighty people come in and dump their frustrations. Then I put together the list of issues, and they were concerned about things the management and leadership team would not be surprised to find on the list. But I also put together the list of, “What is the impact of this work environment on you and on your patients?” The list was mortifying. It was, “I am on high blood pressure medications and I am only thirty-eight.” “I go home and take it out on my children and husband and I actually have to stop at the park on the way home to decompress before I go into the house because I am bringing so much anger.” “I throw up on my way to work because I am so stressed at work.” “I think I am going to harm somebody because the staffing is so bad and nobody wants to work extra because the environment is so bad, so everyone is calling in sick so we don’t have to be in here.” “I’m losing my hair.” And the list was three pages. These are folks that are helping moms deliver babies. Happy place? I sat down with the leadership team and told them what they were telling me, but they said, “That’s us too. We are having that problem, too.” In working with the manager when she came in to talk to me, she said, “I just wanted to check in with you because a few weeks ago I had called the Employee Assistance Program about information regarding people who are feeling suicidal and they didn’t have much information.” She started to go off on a tangent, so I asked if she was calling for herself, and she said, “Yes, I feel like I failed here.” So this is the level to which this group had gotten and the struggle they were experiencing. So I essentially switched hats to give her support and told her we do not have to go through this process if she is not up for it. If she needs to do something different, we should do that. She said, “No I want to do it, but I’m going to need support and backup.” So we created support and backup for her, and she was able to continue through the

process. During that, what came out was, she said, “I have a hard time with any staff that come to me with all this drama. When I was a kid I grew up in a family where my parents fought quite severely. All of my siblings stuck together to get through that. I remember stepping back against the wall and watching my parents like cartoons because that’s how I felt safe.” I asked, “Does that ever happen here?” She said, “All the time. When people get very angry and dramatic, I check out. The only ones I can talk to are not dramatic.” Hence the claims of favoritism and discrimination. So it was not about her culture, as it was being framed, but it was about anybody who came to her. She shut down. We eventually worked through all this by spending time together. All the management and staff came together, and over the course of a few months, they were able to have open conversations to get back on track and get the administration to get some space to be able to heal this environment. It is not your typical interest-based bargaining. It is not sitting down and negotiating an agreement. It is that relational aspect and appreciating that the environment they are in is relational type of work as well. So the idea that we use a different mindset when we engage and bring our whole self to that is the idea I want to plant with all of you. What might that look like in your own world?

II. PANEL DISCUSSION²

Nancy Vanderlip: Scott, how have you utilized arbitration in unique ways to further Monsanto’s dispute resolution initiative, if you have at all?

Scott Partridge: We have used arbitration. Frankly, it is a last resort. Our arbitration, much like litigation, is an indication that we have failed to resolve the dispute and we require a third-party to come in and assist us or make a decision. From my perspective, we like to use it as little as possible. We have reduced the amount of arbitration over the last three years to only two instances. We have done it with a single arbitrator in both instances and we have done it on the briefs. In one instance we did only with document production. Arbitration is touted as being faster, cheaper, fairer, but I will argue the contrary view on all three. I would rather make the effort to resolve it ourselves.

Nancy Vanderlip: Deb, what is the difference between emotional intelligence and relational intelligence?

Deborah Gerardi: I think of relational intelligence as the process by which we are in relation to one another. We have the idea of emotional intelligence as *my* ability to connect with, understand, and manage *my*

2. This panel transcript has been modified to conform to the compositional criteria of this Volume. For the complete video of this panel, see Pepperdine University, *Pepperdine Law: Managing Conflict 4.0 – Session 2 Q&A*, YOUTUBE (Nov. 25, 2015), <https://youtu.be/isiVYgNelSA>.

emotions. Social intelligence is my ability to manage, recognize, and work with them when I am in relationship to another. Relational intelligence, putting those two together, but also appreciating that my relation is in a bigger system, so that system may be a family or work system, it may be out at a ballgame—I am in a system there. It is not just my ability to be socially connected to you and understanding that; it is also the idea that there is a context and a system within which that relationship happens.

Nancy Vanderlip: Scott, two questions for you that are fairly similar. The first is, how can your model work between parties with unequal power? For example, the sole inventor versus Monsanto. The second question is, could you see the Monsanto dispute model applying to other organizations, such as small businesses or public organizations? In both of these cases, would something have to be done differently than the one you have developed for Monsanto with your large, competitive cohorts?

Scott Partridge: Actually it can. I focused on our major competitors – the multinationals: Dow, Dupont, BASF, Bayer, Syngenta, and Monsanto where we have relatively equal bargaining power, or at least we are all big. Relative to customers: farmers, farm organizations, and smaller seed companies, they are licensees of our technology. There is a natural tension there. We want to be paid as much as possible, and they want to pay as little as possible. But there is relative equality in bargaining power. We need them as much as they need to us. So I would submit to you, while there may be differences in relative size of entities or position of entities that are in a commercial relationship—and I will tell you, we haven't extended any of this into the tort-field, which is an entirely different planet of plaintiffs, lawyers, and types of toxic tort things –but in the business context, the business relationship, I often find it is an equipoise, even if it is a large company being the provider and a small company being the purchaser, there is a commercial relationship that is in balance. If that gets out of balance, it means that relationship itself is dysfunctional. It is the foundation of that balanced relationship that creates the opportunity for a balanced resolution process. We haven't done any of this with governments, although I used many of the same principles with the multi-state state Attorney General investigation and Department of Justice investigation. I did not mention earlier that every one of those investigations, after three and half years, closed with no action, no settlement, and no consent decree. I will not tell you how many tens of millions we spent in investigations that never should have been initiated that were all closed with a simple letter saying, “We’re closing our files and taking no action.” But I also found with regard to communication and those government entities is that there is always a person at the other end of the Department of Justice, in the White House, or

at the Federal Trade Commission; you just have to find who that person is to establish that line of communication.

Nancy Vanderlip: Jeremy, at what point in the neurobiology cycle—emotional, social, rational—can mindfulness play a role and possibly change an outcome?

Jeremy Lack: Mindfulness can play a role at all times, but I would say mindfulness is an especially useful once you are the post-conscious stage, because you are trying to be aware of yourself. Mindfulness is about your ability to be aware of everything going on inside of your social patterns, emotional patterns, your way of determining if you are in a C-mode or X-mode, ideally. What I do think, and it goes on to what Deborah was talking about, about compassion. I think there's some really useful stuff that goes outside of mindfulness that goes into conditioning before you even go into the room. When you are in the room, you are about your presence and your quality of your ability to be mindful, which is incredibly helpful – please do not get me wrong, it is vital. But what you can do beforehand, I think the compassion stuff you were talking about was hitting a nerve with me because there's a neurobiological phenomena in difference between compassion and empathy. When we are in the room and we are being empathetic, we tend to also get into negative spiraling. But if you have a stance, you do a mantra, or you do a cognitive meditation on being compassionate, you tend to ready improve your ability to interact with people in the room. There is even some evidence on a power stretch. People who do a power stretch before they go into negotiation perform better. There is that same element here, where if you go in thinking compassionately towards yourself, towards others, and not just in general – you can think specifically about that opposing counsel, you can think about that client who is so frustrating, you can think about the average person on the bus that morning, or your child, or a member of your family, normally with a reference to some person who incarnates perfect compassion – that helps inoculate you and give you a lot of positive energy where compassion is a lot better in a mediation context, for example, than empathy it seems.

Nancy Vanderlip: Deb, can you provide some insight into how to build support within an organization to get buy-in to create relationship-based models?

Deborah Gerardi: Helping the leadership have the capacity to engage with each other, to start with, in an authentic and relational way. A lot of the coaching I do involves helping executives come to that realization of, “If they are not treating each other well—if they are not engaging from a relational space—the fractal pattern of their conflict and their inability to work well together and create connections flows out into the organization.” So, it starts with the leadership team understanding and appreciating and having a relational mindset that says, “Relationships here actually matter and

our job is to foster and grow and nurture those.” That is really the starting point.

Nancy Vanderlip: Scott, when and how is the concept of a formal relationship-based process in an organization best raised? And the corollary—are there times when it is best to avoid even bringing it up?

Scott: There are. The worst time to bring it up—when it will be the death knell—is when you are in the middle of a fight. The idea that you have this vision of some utopia is going to be viewed as a Trojan horse most likely. The time to bring this up is either when there is nothing happening or, best, in connection when actually doing a deal where the barriers are down and dropped; you have actually shaken hands hopefully over a meal and gotten something done, taking it to the next step. That is the first one of these we did. It was a breakthrough. When you end a conflict, be able to capitalize on the end of that conflict to create a systematic approach. Generally peoples’ minds are more open and, emotionally, they are more capable of engaging in that discussion.

Nancy Vanderlip: Jeremy, culture is social, but can we consider the existence of a personal culture when someone develops behaviors that contrast with his or her national or regional culture?

Jeremy Lack: When you are looking at culture, you are looking at saliencies that are personal traits. It is the group dynamics that are going to bring a difference saliency and a different context. It is very difficult to talk about the culture of an individual. It is always going to be something that is going to be systemic. Going back to your approach also, Deborah, which is that the presence and the relationship with others creates and triggers in you different patterns of behavior. We see that, for example, with language. People who speak two or three languages will tend to think differently and have different personality traits when they are in their different language behaviors. Some of that is cultural, because when you learn the language there are certain codes of behavior that come with it. Some of that is also purely intuitively relational; you do not really understand why. When you go into a room and identify yourself as a lawyer to other lawyers, that is going to have a huge impact on whether you come into the room and, it is also true in your case, Deborah, because you are also a nurse. There is a completely different way of people reacting to you, how they brand and look at you and, therefore, your own behavior can be different as well. I think it is about this notion of saliency internally and it is the group dynamic that is going to affect what is going on that you cannot be in control of sometimes. It is an interactive; it is a systemic effect.

Nancy Vanderlip: Deborah, what can thoughtful leaders such as the people in this room and at this university do to promote the adoption of relationship-based processes?

Deborah Gerardi: We will do an improve exercise together to put this point home. This is called a voice mirror. Repeat what I say as I am saying it and it is the answer to this question. Repeat what I say as I am saying it. It is all about me.

It is growing your own capacity to be in relation to others. The only common denominator in our relationships is you. The better you get at that, the more you can model it, and the more you can appreciate what it is like to help others do that. That is my answer.