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I. INTRODUCTION

The purpose of this article is to offer a brief reflection and some follow up ideas to *Managing Conflict 4.0: The New Wave of Opportunities for Businesses Around the Globe*, the symposium by the Straus Institute held on November 9-10, 2015 to which this journal edition is devoted. I attended the program as a participant and as part of the Community of Thinkers Workshop, having worked with the leaders, Professor Thomas J. Stipanowich and Dr. Alexander Insam, in connection with an earlier iteration as a workshop on the subject by Straus in September 2014. The purpose is to tie together certain of the concepts covered in the program and offer ideas—and a story—for moving forward.

I focus on the following key themes of the program:

(1) Managing disputes across cultures;

(2) The importance of relationships to conflict prevention and management, and achieving optimal outcomes when disputes occur; and

(3) Improving decision-making through (a) recognition of the application of brain science as it relates to reactions and decisions in conflict, and (b) minimizing the impact of biases through an understanding of how emotions and cognitive processes can adversely affect decisions, as well as through the use of analytical data.

I come to corporate conflict management as an attorney who was a business and healthcare litigator for over thirty years before migrating full-time to the dispute resolution field in 2010.[1] While I was certainly aware of the inefficiencies,[2] I did not fully confront the need for change until two

1. Twenty-eight years as a partner practicing business and healthcare litigation and resolution counseling at Shipman & Goodwin, LLP in Hartford, Connecticut; six years as an independent mediator, arbitrator, and resolution adviser. See www.pwbresolve.com for more information.

2. Indeed waste, embedded in prevailing resolution systems through my experience representing businesses as an advocate.

years or so into my work as a mediator and arbitrator, largely for the same kinds of cases I handled in my law practice.

I have seen all too often that cases involving business organizations enter the settlement process, whether through mediation or direct negotiation, at a late stage in the dispute after a fortune in litigation costs has been spent, positions have hardened, and parties are alienated from both each other and the court process. The primary motivation is to "get rid of the case" (in my mediations, usually whispered to me by counsel in caucus sessions) rather than find a value-oriented solution that could accomplish the business needs of the parties to the dispute. It is just too late for that when both counsel and client can be feigning confidence while practically desperate to settle so as to avoid the unacceptable risk, distraction, and expense of a trial.

That scenario is repeated over and over again, sometimes amid shouting, or at least drama and posturing, by counsel across the table. While there are instances in which a company learns from a particularly painful experience and adjusts its future strategy to avoid escalating disputes intentionally and unnecessarily, in the overall range of disputes between and among corporate entities, the late stage approach remains more the rule than the exception.[3] That is the premise, along with the admonishment that is often attributed to Eldridge Cleaver (albeit not a master of dispute resolution himself) that "if you're not part of the solution, you're part of the problem,"[4] from which I am committed to contribute to more effective means of addressing and resolving corporate conflict overall.

A basic question is why corporations on the whole do not engage more systematically and actively in efforts favorably to resolve conflict as early on as possible by means other than what I refer to as the "default to litigation." That question was the subject of a blog exchange I had with Professor John Lande of the University of Missouri Law School during the summer 2015.[5]

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3. *See* Drew Mallick, *U.S. Corporations Should Implement In-House Mediation Programs into Their Business Plans to Resolve Disputes*, HARV. NEGOT. L. REV. (Mar. 18, 2009), http://www.hnlr.org/2009/03/us-corporations-should-implement-in-house-mediation-programs-into-their-business-plans-to-resolve-disputes/ ("Because the current legal environment discourages the early settlement of disputes, society is demanding a new approach for resolving disputes more efficiently.").

4. JENNIFER SPEAKE, OXFORD DICTIONARY OF PROVERBS 291 (Oxford Univ. Press 2015).

5. *See* John Lande, *Conversation with Peter Benner About PEDR*, INDISPUTABLY (Aug. 31, 2015), http://www.indisputably.org/?p=7464. Professor Lande is the author of LAWYERING WITH PLANNED EARLY NEGOTIATION and was co-chair of the inaugural Planned Early Dispute Resolution (PEDR) Task Force created by the American Bar Association Section of Dispute Resolution, which published the User Guide for Planned Early Dispute Resolution. JOHN LANDE, LAWYERING WITH PLANNED EARLY NEGOTITION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY (2d ed. 2015); JOHN LANDE ET AL., PEDR, A.B.A. SEC. DISP. RESOL., USER GUIDE FOR PLANNED EARLY DISPUTE RESOLUTION,

Following that exchange, we have together undertaken a study to address that question, by means of interviews with in-house counsel with experience with early dispute resolution systems.[6] The purpose of this article is not to recount or forecast the results of that study, but to address the question in response to the presentations at *Managing Conflict 4.0*.

II. OBJECTIVES OF CONFLICT RESOLUTION SYSTEMS

Early and active dispute resolution initiatives reduce litigation costs, even substantially, and can eliminate the unpredictability of litigation.[7] Those costs, particularly with the expansion of discovery of electronically stored information, can be the bane of corporate law departments and are often the basis for evaluation of the performance of in-house counsel supervising litigation.[8] Over the last number of years, efforts of legal departments have focused on containing litigation costs by rigorous management of outside counsel and a more hands-on approach to cases from within the department.[9] Innovations such as fixed fee agreements are now commonplace, some working better than others to control costs without compromising quality and service.[10] What is not nearly as commonplace is an internal system designed to find opportunities for business-oriented resolutions. Early case assessment often concentrates on the strengths and

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http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/PEDR/abadr_pedr_guide.authcheckdam.pdf (last visited Apr. 9, 2016).

6. For the final results of the study, see John Lande & Peter W. Benner, *Why and How Businesses Use Planned Early Dispute Resolution*, 13 U. ST. THOMAS L.J. (2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2722664.

7. CORP. EARLY CASE ASSESSMENT COMM'N, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, CORPORATE EARLY CASE ASSESSMENT TOOLKIT 1-2 (2009), https://www.cpradr.org/Portals/0/Home/CPRECAToolkit2010.pdf; *Cost of Litigation Haunts U.S. Corporations More than Winning Cases*, INS. J.W. MAG. (Nov. 7, 2005), http://www.insurancejournal.com/magazines/features/2005/11/07/62312.htm [hereinafter *Cost of Litigation*].

8. *Cost of Litigation*, *supra* note 7.

9. MELISSA MALESKE, *GCs to Shift More Work In-House as Firms Fail to Change*, LAW360.COM (Nov. 10, 2015), http://www.law360.com/corporate/articles/725521 (discussing Altman Weil Inc.'s 2015 Chief Legal Officer survey which reported "[f]orty percent of law departments plan to cut outside counsel spending in the next year . . and seventy-six percent of those respondents plan to do it by handling more work internally.").

10. Mark A. Robertson, *Marketing Alternative Fee Arrangements*, L. PRAC. MAG. (Sept.-Oct. 2011), http://www.americanbar.org/publications/law_practice_magazine/2011/september_october/alternative_fee_arrangements.html ("The fact is, business clients are more and more demanding that their law firms look at alternatives to hourly billing as a way of translating the value of legal services as the client sees it—not as the law firm sees it.").

weaknesses of the legal positions and forecasting the potential outcome, rather than exploring development of a process directed to creative, value-based solutions. That further shift to a *process* and *value* orientation, well-planned and implemented, can accomplish deeper and more enduring cost reductions.

In addition to cost reduction, planned early dispute resolution systems more readily create win-win situations by allowing the parties to formulate mutually beneficial solutions. The adversarial nature of litigation most often leads each side to view the counterparty as "the other" with little in common, competing to win or lose in a zero-sum game.[11] This implicates the challenges presented by distinctive national and corporate cultures, since the perception of the adversary as different, or even threatening, increases across cultures.

Insights from brain and behavioral sciences about how we think, react, and decide apply directly to these problems. Structuring resolution processes such as direct negotiation and mediation, so as to overcome the natural sense of separation, or even alienation, can help compensate for the way our brains processes information about those we perceive as different from ourselves. Quicker, more value-based results can be achieved through a process structured to address what really drives the parties—i.e., their cultures and mindsets, to focus on what interests can be served, and how to reach those interests through a creative resolution. I refer to this orientation as "converting litigation from burden to opportunity," which essentially entails the kind of paradigm or culture shift exemplified in the hypothetical conversation between the Chief Executive Officer and the General Counsel in Part V.

Furthermore, business relationships can be fostered and preserved. By establishing the basis for their claims, as well as needs and objectives, through constructive discussion, whether personal or organizational, early resolution processes enable the kind of in-depth give-and-take that is absent from the adversarial process.[12] It is critical to understand that taking this approach does *not* call for early or unilateral concessions—or expressing any signs of "weakness" or lack or resolve. Rather, the framework shifts, and a process of constructive engagement, either directly between principals or

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11. LEIGH L. THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 74 (5th ed. 2012).
12. As Thompson explains:

> The gains of one party do not represent equal sacrifices by the other. For example, consider a negotiation between two collaborators on a joint project: One is a risk-averse negotiator who values cash up front more than riskier long-term payoffs; the other is more interested in long-term value than in current gains. The two may settle on a contract in which a large lump sum is paid to the risk-averse negotiator, and the other party reaps most of the (riskier) profits in the long term.

Id. (discussing that faulty assumptions about the counterparty is a detriment which leads to lose-lose situations).

together with a mediator, allows for exploring and reaching an understanding that objectives of the disputing parties are not as incongruent as initially may have appeared, presenting an opportunity for mutual gain.

These aspirational objectives seem only positive. Yet, realizing them to the extent that is within reach of most companies has been elusive. Why?

III. BARRIERS TO ADOPTING EARLY AND RELATIONAL DISPUTE RESOLUTION SYSTEMS

Managing Conflict 4.0 began with a morning of discussion on bridging relationships across cultures. Then, the afternoon included a discussion of neuroscience and the impact on decision-making and reacting, particularly when conflict is brewing or has developed. These factors of culture and neuroscience are particularly pertinent to corporate disputes.

A. Cultural Barriers

In addressing the potential for resolution of conflict in the global setting, there is no better place to start than raising up the impact of culture. After all, cultural differences are well-recognized and inevitable elements of conflict and can make a solution particularly elusive.[13]

Culture gaps that exist between organizations are generally more pronounced when those organizations are located across national borders.[14] Program speakers observed that communication difficulties, behavioral norms and underlying expectations contribute substantially to a sense of separation and lack of common objective. In my view, cross-border disputes erupt and are prolonged by the inability to create a bond sufficient to overcome the frustrations of difficult communication and adapting to the conspicuous differences in custom and style. While increasing globalization of businesses presents regular opportunities for learning adaptive techniques and may even encourage trying harder out of recognition that a feeling of separateness is a normal and surmountable aspect of the relationship, the challenges remain. Extra effort can dissolve once conflict develops and each actor may decide that the other is simply not understanding or even respecting the reasons for a widening relational gap.

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13. *See* THOMPSON, *supra* note 11, at 252.

14. *Id.* at 283 (discussing that in the context of negotiations, "[n]egotiating across cultures is a necessity for success in the business world because globalization is a major objective of most companies. Unfortunately, cross-cultural negotiations frequently result in less effective pie expansion than do intracultural negotiations.").

B. How Our Brains Process Information

Neuroscience, which has fully found its way into the conflict resolution field over the past several years, presents a fascinating study unto itself. Before this development, how often, if ever, did we consider that the way our brains are programmed to respond to certain stimuli can provide such a useful perspective into the causes of and solutions to conflict? There are tremendous implications for practitioners in the field to help in managing conflict by keeping a keen eye focused on what is happening between and among individuals simply due to the manner in which they think and react.[15]

While not addressed in depth during *Managing Conflict 4.0*, there is a direct intersection between the science that allows for an understanding of brain function on the one hand and the pervasiveness and impact of cognitive biases on the other. Behavioral science has developed to the point where the impact of biases on decision-making explains the reasons that people can so often make decisions that Nobel laureate Daniel Kahneman labels as "irrational".[16] In a 2012 interview with Charlie Rose, Kahneman gives a wonderful and self-effacing explanation for why he is not more sought after by executives interested in making better, rational decisions.[17] Basically, "you are naked" as an executive seeking advice that may lead to being second-guessed. The fear of nakedness creates "difficulties for the leadership" that impedes efforts to bring better decision-making processes to organizations.[18] Subsumed within that resistance to improved decision-making through application of cognitive and behavioral sciences are approaches to addressing conflict that organizations inevitably face, as well as how to most effectively resolve a particular dispute.

The list of biases that have received a discrete label is long.[19] Within conflict, overconfidence, confirmation and attribution biases are at the top of

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15. *See* Jeremy Lack & François Bogacz, *The Neurophysiology of ADR and Process Design: A New Approach Prevention and Resolution*, 4 CARDOZO J. CONFLICT RESOL. 33 (2012). Co-author Jeremy Lack made the neuroscience presentation at the conference.

16. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2013), for Kahneman's 2012 evocative overview of his 40+ years of behavioral research, which is revered among dispute resolution practitioners. Besides Kahneman's work, there is now a vast amount of literature reporting on the impact of biases on decision-making and the study of cognitive processes, which is directly related to neuroscience and a key pillar of decision theory. *See* Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. MAG. 1124-31 (1974). See also DANIEL KAHNEMAN ET AL., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Cambridge Univ. Press 1982) for the edited collection of the same name that followed it.

17. Charlierose, *Daniel Kahneman (02/28/12) | Charlie Rose*, YOUTUBE (Feb. 29, 2012), https://youtu.be/D0FdWvyIdGA.

18. *See id.* In another short video, Kahneman speaks of the dangers of the overconfidence, which feeds conflict. *See* Bigthink, *Daniel Kahneman: The Trouble with Confidence*, YOUTUBE (Feb. 11, 2012), https://youtu.be/tyDQFmA1SpU.

19. THOMPSON, *supra* note 11, at 191.

that list in terms of impact and the importance of understanding the negative effect they can have on finding means to resolution.[20] Loss aversion can play a particularly prominent role early in the dispute because the players simply do not want to contemplate concessions until they have to later on, particularly when concessions on each side are valued more highly than gains.[21] That phenomenon cannot be emphasized enough as an impediment to consideration of early resolution.

C. Inadequate Attention to Developing Relationships

The presentations by Debra Gerardi and Tom Stipanowich focusing on relationship-based resolution processes "upstream" in the life of the dispute dug deep into opportunities for resolution that are so often ignored. Once a conflict has developed, and particularly once lawyers have become involved, efforts to understand the conflict in the terms of a mutually breached relationship, and not just who did what to whom, customarily go by the boards because that's not the way lawyers do things. Since optimal outcomes are the objective, far more attention to how the dispute occurred within the context of a particular relationship, and how productively to restore or reset that relationship within a process specifically designed to do so, can make all the difference. Readers of this journal will be well served to spend time with those transcripts to better understand the power of a relational model.

D. Faulty Prediction and Forecasting

Oftentimes a disputant's approach to resolving conflicts, particularly in the litigation context, depends on an assessment of the strengths and weaknesses of the legal position based on the facts, and then a predication of

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20. *See* Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 571 (2013).

> Several cognitive illusions—the framing effect, the confirmation bias, nonconsequentialist reasoning, and the sunk-cost fallacy--produce intuitions in lawyers that can induce them to postpone serious settlement negotiations or to reject settlement proposals that should be accepted. Lawyers' tendencies to rely excessively on intuition exacerbate the impact of those cognitive illusions. The experiments presented in this Article indicate that the vulnerability of experienced lawyers to these cognitive errors can prolong litigation.

Id. Wistrich & Rachlinski also include an excellent collection of references to misjudgments in the settlement process caused by over-reliance on intuition. *See id.* at 583-88.

21. THOMPSON, *supra* note 11, at 75 ("Negotiators often mistake win-win negotiations for equal-concession negotiations.").

the likely range of outcomes.[22] Apart from the distorting effect of biases on these assessments and predictions, a robust body of research (again, in the behavioral science arena) has developed to demonstrate that predictions, more often than not, are wrong.[23] For example, research social scientists Dan Gardner and Philip Tetlock have published an enlightening and entertaining summary essay on this subject entitled *Overcoming Our Aversion to Acknowledging Our Ignorance*.[24] The basic premise is that experts in any field are just not that good, measured by accuracy track record, at predicting outcomes.[25] Simply put, "[d]espite massive investments of money, effort, and ingenuity, our ability to predict human affairs is impressive only in its mediocrity. With metronomic regularity, what is expected does not come to pass, while what isn't, does."[26] The reference to "human affairs" is intended to encompass just about anything for which an expert might be called upon to venture a forecast, such as the outcome of litigation.

This subject, as such, was not specifically addressed in the program. What was discussed was the use of data analytics to assist in decision-making when considering settlement alternatives, as that data can assist with objective, dispassionate analysis that minimizes the negative effects of emotions and biases in making optimal decisions. This is a tool in development, the application of which holds considerable promise in providing grounds for sound judgments in evaluating outcome options and possibilities.

That conclusion does not take away from the research findings of Gardner, Tetlock, and others. Prediction is indeed hazardous. As a mediator, I regularly say to the parties that the one thing we know for sure about the eventual litigated outcome is that we don't know, because we can't. Too many twists and turns will enter in, particularly in a courtroom, before the case is over. Anyone who has substantial experience in litigation knows that surprises, both pleasant and unpleasant, can be more the rule that the exception. As I say, we just don't know.

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22. Wistrich & Rachlinski, *supra* note 20.

23. R.L. Kiser et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUDS. 551 (2008). See RANDALL KISER, BEYOND RIGHT AND WRONG 32-86 (Springer 2010) for a subsequent, expanded version of this study.

24. Dan Gardner & Philip Tetlock, *Overcoming Our Aversion to Acknowledging Our Ignorance*, CATO UNBOUND (July 11, 2011), http://www.cato-unbound.org/2011/07/11/dan-gardner-philip-tetlock/overcoming-our-aversion-acknowledging-our-ignorance. *See also* NATE SILVER, THE SIGNAL AND THE NOISE: WHY SO MANY PREDICTIONS FAIL-BUT SOME DON'T (Penguin 2012).

25. Gardner & Tetlock, *supra* note 24.

26. *Id.*

IV. A BARRIER BUSTING FORMULATION AND CONVERSATION

By tying together key themes of *Corporate Conflict Management 4.0*—culture, brain science, relational focus and data analytics—we can forge a path toward where to go from here to advance the field of conflict management and, most importantly, devising means to assist in avoiding and resolving conflict. There is surely no single solution or prescription. There are, however, ways to look at what was covered at the program to develop tools of practical application that, with advocacy and education, can make a substantial difference in how corporations most successfully prevent, manage and resolve disputes. And this is just a summary of reflections. The hard work is in the implementation by each company or individual based on what is most well suited to their circumstance and needs.

Consider this formulation:

(1) Apply the research on brain-science cognitive processes and predictions to recognize the natural limitations, and indeed the errors, of decisions made without such awareness and assistance to overcome those limitations.

(2) Build and nurture relationships to aid in overcoming inter-organizational and international cultural barriers, and diminish the perception, which is instinctive for the brain and quite often wrong, of the potential or actual adverse party as the "other" without common values, interests, or goals. This is critical to building bridges and reconciling differences across cultures and goes hand in hand with Point 1.

(3) Understand and utilize the advances of data analytics as applied to decision-making in settlement of disputes to provide a framework for judgments that would otherwise be shaped by intuition and emotion, leading to unreliable and often faulty forecasting.

(4) With these ideas as the backdrop, treat "the process as part of the problem,"[27] and in doing so intentionally develop processes that advance each of the first three points so as to exercise better judgment and enable improved outcomes with less cost and burden. None of the first three points can be neglected for purposes of most effective process design.

While there is nothing novel about these concepts, the very fact that Tom Stipanowich and Alexander Insam took the initiative to conceive and organize a program of international dispute resolution experts centered around these notions, and entitled "4.0," speaks to the fact that we too often

27. *See* Lack & Bogacz, *supra* note 15, at 33, wherein the authors open with a quote by David Plant: "We have to start by defining the process as part of the problem." *Id.*

still operate out of old models and mindsets in which these concepts are not well integrated or implemented.

Much more can be done—and change is hard. Again, the literature on how to encourage and accomplish change proliferates. One of my favorites because the approach is so clear and practical is MADE TO STICK and its progeny, including DECISIVE, by brothers Chip and Dan Heath,[28] who have constructed a SUCCESs model for making "stick" ideas that encourage and lead to change in behavior."[29] Change requires capturing and holding attention through clear and credible concepts that evoke a degree of emotional reaction through "SUCCESs" stories.

There were several such stories told at the 4.0 program of the experiences of organization and individuals that have made notable inroads toward preventing and managing conflict that demonstrate both the feasibility of change and the tremendous advantages of placing management of conflict within the framework above. The fact is that, in making these kinds of changes, there is so much to be gained. Professor Stipanowich refers to the as yet unrealized "quiet revolution" that began what is now over three decades ago.[30] That revolution has not yet been fully realized in part because the complexities of conflict and means to resolutions; generalizations are difficult when applied across thousands of organizations and millions of individuals. Additionally, the default to litigation remains strong since the court system is our primary institutional means of seeking redress in the event of a third-party dispute, and resolution processes remain largely lawyer driven, implicating the training of the putative resolvers as well as potential conflict with personal interest.[31]

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28. CHIP HEATH & DAN HEATH, MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE (Random House 2007). *See also* CHIP HEATH & DAN HEATH, SWITCH: HOW TO CHANGE THINGS WHEN CHANGE IS HARD (Broadway, 2010); CHIP HEATH & DAN HEATH, DECISIVE: HOW TO MAKE BETTER CHOICES IN LIFE AND WORK (2013) [hereinafter HEATH & HEATH, DECISIVE], for the sequels by the same authors, the former a professor of organizational behavior at Stanford Business School and the latter at Duke, formerly at Harvard. DECISIVE is a particularly useful compendium of decision theory in practice, while being a light and entertaining read. *See* HEATH & HEATH, DECISIVE.

29. *See* CHIP AND DAN HEATH, *Made to Stick SUCCESs Model*, HEATHBROTHERS.COM (2008), http://heathbrothers.com/download/mts-made-to-stick-model.pdf (explaining that "SUCCESs" is an acronym for "Simple, Unexpected, Concrete, Credible, Emotional, Stories").

30. *See* Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 KY. L.J. 855, 930 (1993) ("The Quiet Revolution has begun in the law schools, both here and abroad. A growing number of programs feature classes on alternative dispute resolution, including advanced skills-based courses. Some schools integrate ADR concepts into 'mainstream' substantive courses. A few are experimenting with clinical programs offering mediation services."); *see also* Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUDS. 843 (2004).

31. Mallick, *supra* note 3.

V. APPLICATION OF THE HEATH METHODOLOGY

Taking a cue from the Heath-change methodology, here's how one story might go:

Atlas Corporation, a Chicago-based industrial company, has a five-year supply agreement with Vesta Ltd, an Italian parts manufacturer known for quality materials and control. Vesta's shipments to Atlas become delayed because of an unexplained materials shortage encountered by Vesta. A critical customer of Atlas begins threatening to terminate its relationship for non-performance. After efforts by Atlas' procurement team do not result in a solution, Atlas's CEO telephones her counterpart at Vesta. An argument ensues, becoming animated, and the Vesta CEO hangs up peremptorily. The Atlas CEO calls her general counsel, insisting that they teach that "hot-tempered Italian" a lesson. She then receives the news that the Atlas customer had issued a 60-day notice of termination.

Atlas has a longstanding procedure of performing an "early case assessment" whenever a dispute, particularly with an outside third party, reaches the level of potential litigation. Oversight responsibility is assigned to an attorney in the legal department to interview employees of the company who have had a hand in the matter in conflict. The responsibility includes identification and collection of relevant documents and developing an understanding of the scope of electronically stored information. Once the interviews have been completed, the documents reviewed and legal research performed (research sometimes delegated to outside counsel), a three-person team is convened. The three-person team includes the supervising attorney, a senior member of the legal department, and a non-lawyer executive. The non-lawyer executive has knowledge of the subject matter of the dispute but is not directly involved. The team reviews the analysis of the facts and law and evaluates the strengths and weaknesses of the company's position to measure the risk of an unfavorable outcome or the likelihood of a positive one.

The next step usually is something akin to the following: While one option includes retaining the matter in-house and revisiting negotiations with the other party, more often than not, the team records its assessment for purposes of referral to outside litigation counsel with the charge to develop or defend a case using the assessment as a starting point in order to gain leverage in the litigation, which all realize will lead to settlement discussions at some indeterminate time in the future.

Two to three years go by, during which outside counsel has conducted discovery and argued motions well into six-figures of legal fees. Trial date has been set and is now approaching within six months. Litigation counsel

for the opponent, sparing the need for Atlas' counsel to take that initiative, proposes mediation.

A mutually acceptable mediator is selected, a mediation session is convened, and the mediator insists on an initial joint session. Counsel posture and trade barbs with high-decibel bravado. The mediator brackets the settlement positions and proceeds to trade offers. Settlement is reached not at the face-to-face session but through back and forth phone calls with the mediator over two weeks following the mediation session. Money changes hands with no other business-oriented element or continuing relationship, and that chapter closes with the players all unhappy.

This is an abbreviated and sanitized version of a very long and tortuous story, too often repeated in similar fashion among companies around the world.

Here's what might have happened had the general counsel just returned from attending *Managing Conflict 4.0*:

Upon receiving the call from his exasperated CEO, the general counsel asks the CEO to take the time to have a face-to-face meeting as soon as it can be arranged. At that meeting, held in the quiet confines of a nearby restaurant and not in the office, the general counsel (GC) proposes to the CEO to consider implementing a course different from the standard process, describing some ideas taken away from the *Managing Conflict 4.0* program.

He counsels the CEO to consider the fact that communication about the problem has been impeded by language and cultural differences. The Italian counterpart may in fact be impetuous, or perhaps wary of Americans, which may have caused the communication to break down prematurely.

The CEO responds: "I get that, but so what? He hung up on me and now we're about to lose an important customer. We need to sue them, and fast."

The GC, undaunted, suggests refocusing the normal assessment process through a careful examination of *what the business partners have in common* in terms of overall objectives as well as goal for resolving this particular problem. What are the values of each company? How are they different, and how has that difference contributed to the problem? How might they mesh?

CEO: "Are you kidding? We need a pit bull on this!"

The GC urges giving it a try: "We can save hundreds of thousands of dollars on legal fees alone, and we can always fall back on our litigation option if it doesn't work." The CEO begins listening.

The GC expands upon the assessment process. In addition to a careful look at the existence and impact of cross-cultural differences, "we really need to understand and compensate for the biases that have influenced our reactions so far." And there could be any number of them. The GC has

brought with him copies of THINKING, FAST AND SLOW[32] and DECISIVE[33], and encourages the CEO to spend just one or two evenings reading selectively to appreciate how detrimental these biases can be to effective decision making even in the most high-functioning organizations. The GC explains: "By understanding the root causes of this impasse, we can improve our internal processes across the board, not just within my department."

The CEO scratches her head: "Why didn't I hear about this in business school?"

Emboldened, the GC goes one step further, suggesting that Atlas retain an outside "resolution adviser" at what would be minimal cost compared to the cost of litigation counsel.[34] Making the case, the GC explains that these types of services are sprouting up to assist in accomplishing the very objectives that the GC is proposing.

The GC explains that the adviser, as a new and, importantly, independent set of eyes, can serve the singular purpose of assisting in finding the best way to address the problem as it has developed, elevating the level of objectivity such that biases are reduced, if not eliminated: "We can introduce a tool that is outside the reach of the assessment process we have in place. I have heard that the return on this investment can be a factor of at least ten, or even considerably more, in saved costs and improved results." The CEO perks up and leans in more closely now.

Then laying it all on the line, the GC, explains that the adviser, whose job to guide Atlas toward an effective resolution with a multi-disciplinary, not just legal, approach, will also help with counseling and training with respect to the critical function of relationship development. The ostensible opponent can become a partner in solving problems without the cost, delay or risk of litigation—shifting the paradigm of disputes from burden to opportunity.

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32. *See* KAHNEMAN, *supra* note 16.

33. *See* HEATH & HEATH, DECISIVE, *supra* note 28.

34. *See* CATHERIN CRONIN-HARRIS, BUILDING ADR INTO THE CORPORATE LAW DEPARTMENT: ADR SYSTEMS DESIGN 60, 69-71 (CPR Institute 1997).

> Eaton established a task force that included an outside consultant to analyze existing disputes and formulate ADR recommendations. It then adopted an ADR policy statement, implemented a case management plan requiring outside counsel to consider ADR on case assignment, conducted initial ADR training for selected outside firms, tracked ADR experiences and developed a library containing a variety of resource materials. It also established a voluntary mediation and arbitration program for employee disputes on a pilot basis and built incentives to use the program into the process.

Id. at 60 (summarizing Eaton Corporation's case management plan as a notable corporate ADR program).

GC: "This idea may take some getting used to around here, but the *Managing Conflict 4.0* program convinced me once and for all that it's just good business, and certainly worth a try in de-escalating the conversation with Vesta to allow for a creative and even advantageous resolution at a fraction of the normal cost and with better and more satisfying results personally and for our company."

CEO: "OK, I'm listening. Convince me."

GC: "In addition to better internal decisions, with the assistance of the adviser, we need to focus on and structure the *process* we use in engaging and sorting out the disagreements with Vesta. There are all sorts of possibilities including a mix of direct negotiation and mediation, perhaps with technical or other experts if that would be helpful. The goal is constructing a thorough process with a business orientation to reach a resolution that is not achievable through litigation, which usually entails digging heels in to see who can gain advantage over the other in the final settlement negotiation."

CEO: "This is a lot to take in all at once. Let's say I go for it, what's the downside?"

GC: "I have given that a lot of thought, and I don't see any. We don't give up the litigation option if the alternative that is developed doesn't work, and we may well learn something along the way that would simplify or streamline a lawsuit if that is necessary. If I thought there was a downside that we could not control, I would not be suggesting this. You know me, I'm not a risk taker."

The GC continues: "There is one other point that I picked up at *Managing Conflict 4.0* is that I should mention in answer to your last question. That is, if we are do have to resort to litigation, I realize that we rely on forecasts of outcomes in making strategic litigation decisions. From my own experience, those predictions all too often turn out to be wrong, but we do them anyway. This is a discussion for another day, but there is evolving science of data analytics to enable better predictions and therefore better decisions. It's fascinating really, and something I will be looking into more fully."

As the CEO and GC stroll back to the office, the CEO expresses both gratitude and skepticism. "I really appreciate your taking the opportunity to fill me in on this, but I must admit it seems a little touchy-feely for my style. All this talk of reducing culture clash and biases through a process that encourages relationship building, well, that's a stretch for sure. I'll believe it when I see it."

GC: "With your permission, leave it to me and my staff, and I'll keep you informed at every step. My hope is that when *Managing Conflict 5.0* rolls around, you may even be a speaker." The CEO stops in her tracks, turns to the GC as if to say something, then smiles and moves on.