

Thinking Ahead

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Editors' Note: In several distinct domains of conflict—heavy construction, international relations and U.S. labor relations—there are by now highly sophisticated and widely-adopted techniques for anticipating future conflict. If not ensuring outright that there will be only minimal such conflicts, these techniques at least encourage the conflicts which inevitably follow the formation of a new relationship to be handled with a minimum of time, cost and stress to all involved. For the most part, the evidence is that these systems work. Surprisingly, however, most other industries and domains have yet to adopt anything comparable. The authors analyze the history and the sources of resistance, and offer a new strategy toward wider adoption and adaptation of these proven tools.

In 2007, two of the authors of this chapter, with three other colleagues, wrote an article that attempted to analyze a puzzling phe-

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nomenon: a pattern of large organizations, with predictable conflict in the offing, nevertheless routinely—or even deliberately—failing to think ahead. (Honeyman et al. 2007) That article reviewed the consequences of recent failures to anticipate or prepare for events, analyzed causes and explanations of these failures, reviewed the resources that make it possible to do strategic anticipatory planning, and outlined possible ways in which appropriate skills can be brought to bear to advance the field of conflict anticipation and management. The article also argued that it was time that our field developed a new professional specialty, of assistance to companies and other organizations to encourage them to take the proactive steps necessary in their organization's medium- and longer-term interest.

Even at that time there were already in existence some well-established examples of parties doing exactly what we were suggesting: successful uses of proactive steps to anticipate and manage conflict. A prime example was the construction industry, which had, during the past 40 years, developed a sophisticated suite of tools for preventing, solving, de-escalating, and achieving almost instantaneous resolution of problems and potential disputes. (CPR 1991; CII 1995) Other examples of similar tools existed in the fields of labor relations and international relations. And use of these tools had spread to many segments of business. (Groton and Haapio 2007)

The value of such tools should have been widely appreciated, for they exemplify time-honored “best practices” that have become legend: “An ounce of prevention is worth a pound of cure.” “A stitch in time saves nine.” “Fortune favors the prepared mind.” “Blessed are the peacemakers.”

Yet it must be admitted that in the decade since that original article, there has been less to show as new development in this area than we would have liked. There has also been recent evidence, particularly in the financial industry in its conduct before and since the 2008 financial crisis, that some elements in business and government—and even in the dispute resolution professions—see it as antithetical to their interests for conflict to be handled, as we might put it simply, better and less expensively. [NDR: Nolan-Haley, *Agents*]

We believe the time is now ripe for industrial, commercial and other relationships to benefit from demonstrated successful experience with these tools. This chapter will illustrate how existing tools for conflict anticipation and management can be used in a wider variety of business and public service contexts, and then advocate how dispute professionals can adjust their thinking and practices to advance a new “anticipation and prevention movement.”

There are three principal classes of tools that are being used to anticipate and prevent conflict: tools for Problem Prevention, Prob-

lem Solving, and Dispute De-escalation and “Real Time” Resolution. They are most effective if they are mutually agreed upon by contracting parties *before* any conflicts or disputes have arisen.

Problem Prevention Tools

Problem Prevention Tools are implemented during the planning stages of a business relationship, and structure the relationship in ways that avoid many problems that are otherwise almost inevitable. Some specific practices and techniques follow.

Good, Open Communications

The best business relationships are maintained through good communications between participants in the relationship or transaction, so that any incipient problems can be identified, brought out into the open, discussed, and solved before they can become serious problems. Channels need to be developed to open up dialogue between all participants. The “red” phone that directly linked the U.S. and the Soviet Union, even at the height of the Cold War, is one international example.

Realistic Allocation of Risks

One of the most powerful ways to prevent and control disputes between contracting parties is to allocate risks rationally, by assigning each potential risk of the business relationship to the party that is best able to manage, control or insure against the particular risk. Conversely, if a party with superior bargaining power forces a misallocation of risks, the result is usually retaliatory behavior that ends up in conflict. (Groton and Smith 2010)

Unfortunately, this fundamental principle of good business management and dispute prevention is not widely recognized or understood. In particular, if lawyers involved in contract negotiations for their clients seek zealously to obtain the “best possible deal” by shifting all possible risks to the other party, they can sometimes create problems of a far greater magnitude than any temporary benefit or satisfaction gained by “winning” the “battle” of the contract negotiations. Indeed, one early proponent of the field of preventive law urged that lawyers focus more attention on legal audits and legal autopsies, to both prevent disputes and learn from disputes. (Brown 1965)

Risks that cannot be effectively handled or even insured against by *either* party, however, have to be dealt with through bargaining. The results of that bargaining will likely be reflected in the economic terms of the deal—at least approximating some kind of fairness.

Joint Initial Analysis

At the inception of any business relationship it is helpful for both parties to conduct a joint analysis of the potential for disputes in the relationship, to use this analysis to anticipate potential future problems, and to design systems that will be suited to resolve the kinds of problems that are likely to occur.

The Construction Industry Institute, as the result of a study into the causes of construction disputes and whether certain characteristics of construction projects are more likely than others to generate disputes, developed for construction projects a predictive tool (called the “Disputes Potential Index” or “DPI”—a test that identifies the presence of dispute-prone characteristics on a project, evaluates them, and reports the results to project team members so they can take action to correct them *before* they actually generate problems. (Diekmann, Girard and Abdul-Hade 1994) (CII If the DPI is administered at the beginning of the project, the test results enable project leaders to take action in any weak areas to minimize the risk of project disputes. The DPI in effect is a “cholesterol test” of the health of a construction project. Similar tools could be developed for other types of business relationships and transactions.

Providing Incentives to Parties to Encourage Cooperation

Where a business is contracting with a number of different organizations which have diverse interests, and where the cooperation of these organizations with each other and with the business is important to the success of a transaction or business objective, it is often helpful to structure a system of incentives to encourage such cooperation. Well-conceived positive incentive programs can be an effective means of aligning the goals of all of the participants, can encourage superior performance, and can discourage conflict. Such incentives can take many forms.

One example is the leader of the enterprise creating a bonus pool which, upon attainment of specific goals, will be shared among all of the organizations with whom the leader contracts. Under such a system, the bonus is payable only if *all* of these participants meet the assigned goals; the bonus is paid either to every organization, or to none. This provides a powerful incentive to the participants to work cooperatively with each other, and reduces conflicts which can occur in a common enterprise when every participant might otherwise be motivated solely by its limited perception of its own short-term interests, rather than the success of the enterprise as a whole.¹ On construction projects such “bonus pool” arrangements have been used successfully to convince subcontractors to work together cooperatively as a project team. (CPR 2010)

And in international relations, those incentives exist as well. The willingness to abide by the rulings of the World Trade Organization is with the understanding that countries will realize increased trade benefits over time. Even when it might be in a nation's short-term interest to ignore a court ruling, the long term's incentives of compliance generally result in adherence to the ruling.

Establishing a Partnering Relationship

Partnering is a team-building effort in which the parties establish cooperative working relationships through a mutually-developed, extra-contractual strategy of commitment and communication. It is typically an "aspirational," good faith process. But it can be contractually reinforced by a mutual commitment of fair dealing and good faith.

In any common business enterprise, if individual parties are left to their own devices in trying to achieve their own goals, they are likely to be guided primarily by narrow self-interest, which is likely at some point to conflict with the narrow self-interests of other participants. This conflict can be a breeding ground for disputes. In partnering, the parties develop and share mutual goals to the extent possible. Sharing mutual goals encourages the formation of synergistic relationships, leveraging the whole process to the advantage of all.

Partnering can be initiated on an *ad hoc* basis, or by language in the contract. It can be used for long-term relationships, or on a transaction-specific basis. "Long term" partnering is typically a mutual commitment between two business organizations which are in a long-term relationship or which engage in repeated transactions, for the purpose of achieving specific business objectives through a strategic alliance which maximizes the effectiveness of each participant's resources.

When used on a transaction-specific basis, partnering is usually instituted at the beginning of the relationship by holding a retreat among all personnel involved in the transaction who have leadership and management responsibilities. In that format the participants, assisted by an independent facilitator, become acquainted with each other's objectives and expectations, recognize common aims, develop a teamwork approach, initiate open communications, and establish nonadversarial processes for resolving potential problems, such as a mutual agreement that it is more important to "fix the problem" than to "fix the blame." (CII 1996; Carr 2010)

A good example of these provisions in action on the international level is in Peru, regarding how it handles international investment disputes. Because international investment requirements are decided at the federal or national level, but then often implemented (and violated) at the local level, inter-agency partnering is crucial for

dispute prevention. Peru has created a system to inform sub-local, local, and municipal entities about any requirements taken on at the federal level regarding international investment and trade. And as disputes arise, there is a lead coordinator among government entities to respond to the investor early and with full information. (UNCTAD 2010)

Partnering is now gaining increasing acceptance by groups of businesses or organizations that can benefit from teamwork with each other. One example: A large company had several different divisions which were operating independently, unwilling to give up power, and behaving like a dysfunctional family. A partnering facilitator was brought in, the leaders and key employees in all of the divisions participated in partnering exercises, and the result was an alignment of interests between all divisions, for the overall good of the company. Similar partnering has been used in mergers and acquisitions, where the leaders and key employees of previously independent entities, with different cultures and histories, have been brought together.

Another example began when the United Auto Workers and the Big Three auto companies, starting in the 1980s, established a pattern of labor-management cooperation, which involved a radical rethinking of the historical animosity between these parties. Conflict by no means ended; but the demonstration that it was actually possible for labor and management teams to work together constructively *most of* the time spread well beyond its industry of origin, and may have been instrumental indirectly in still other industrial arrangements that were less formalized.

Problem-Solving Tools

Problem-Solving Tools involve the use of various contract and negotiation techniques to deal constructively with problems that can actually arise.

Notice and Cure Agreements

A useful provision to include in any agreement is a requirement that each party who experiences a problem must immediately give notice to the other party and propose a good faith solution, in writing; and that the other party must reciprocate with a good faith written response. The concept of “notice and cure” clauses, meanwhile, is analogous to typical wording in the early stages of a labor contract’s grievance procedure, in which a clear and prompt (and usually, expressly time-limited) opportunity to raise a problem triggers a clear (and often time-limited) obligation to make an explicit response. Ducking the issue is thus not permitted on either side. Similarly again, open sharing of basic information is a requirement built into

many grievance procedures, as well as the underlying labor law. As noted above, Peru's international investment "alert" system also tries to do this.

Covenant of Good Faith and Fair Dealing

Although many legal systems already require this, it is useful for any business agreement to contain an explicit covenant that each party will act in good faith and engage in fair dealing.

Agreements that Encourage Rational Behavior

When drafting contracts that deal with future economic conditions, consider using devices such as a "buy/sell" agreement (where one party establishes a price and gives the other party the option to buy or sell), or a "baseball" arbitration agreement (which requires the arbitrator to make a binary choice of alternatives proposed by the parties), to encourage rational behavior. It is also possible to outline damages for breaches in advance. (Hardaway 1997: 175)

In-House Problem Solving Tools

There are a number of steps which an organization can take to "keep the peace" within the organization and encourage good prevention practices:

- Appoint an Ombuds to deal confidentially with employee and internal problems. An Ombuds can clear up communication problems or misperceptions of an employee's relationships with the organization or fellow employees.
- Charge the transaction costs of a dispute to the budget of the department that generated the dispute, so that managers are made aware of the true costs of the dispute.
- Institute sensible document-preparation and retention policies that can be useful in case disputes occur or escalate. For example: Preserve evidence that you acted reasonably. If an employee writes a "bad memo" which could be interpreted as injurious to the company, it is good preventive practice to write other memos that put the earlier memo in perspective, and correct the errors in the bad memo.
- Consider and organize in advance how the organization would handle various possible crises.
- Conduct a corporate legal audit regularly to help foresee where problems might occur. (Brown 1965)

Dispute De-Escalation and “Real Time” Resolution

Tools

Dispute de-escalation and “real time” resolution tools that level the playing field provide transparency, defuse conflict, or provide prompt resolution of pending disputes. These measures can also prevent disputes that do arise from becoming intractable.

Encourage the open sharing of basic information

Create a level playing field and provide transparency for all participants by establishing a common web site or other system for full sharing of important information about the business enterprise or transaction. ICANN (International Corporation for Assigned Names and Numbers; the governing body of the Internet) is an example of this on the international stage, where the allocation of web addresses and other important functions have been handled through a common web site with clear policies and procedures posted. Comments and blog posts have been collected and publicized. ICANN’s use of social media has also tried to provide transparency.

Negotiation

Negotiation is of course the time-honored method by which parties try to resolve disputes through discussions and mutual agreement. There are many different techniques of negotiation, as discussed throughout this book; what deserves emphasis here is simply that negotiation is not only a stand-alone process, but also a useful adjunct to every other dispute resolution technique.

Step Negotiations

A variant of negotiation is the “step negotiation” procedure, a multi-tiered process that can often be used to break a deadlock. If the individuals at the lowest level in each organization who are involved in the dispute are not able to resolve a problem at their level promptly, their immediate superiors, who are not as closely identified with the problem, are asked to confer and try to resolve the problem; if *they* fail, the problem is then passed on to higher management in both organizations. Because of an intermediate manager’s interest in keeping messy problems from bothering higher management, and in demonstrating to higher management the manager’s ability to solve problems, there is a built-in incentive to resolve disputes before they ever have to go to the highest management level.

Stepped negotiations are in fact a hallmark of collective bargaining, dating back long before the technique’s introduction into the construction industry (and, perhaps, the inspiration for its use there, given the prevalence of unionization in large construction.) Typically,

grievances under labor contracts in the U.S. are first raised either by the individual employee with an individual supervisor, or by (or in the presence of) a first-level shop steward. The progressive rise in the level of successive steps, as unsettled grievances become the province of higher level union and management officials, operates for precisely the same reasons articulated above in the section on construction, and the effects have also been similar. The vast majority of grievances are resolved at low levels in most such procedures, with little time lost, relatively little acrimony, and little transaction/economic cost.

One difference from the construction pattern, however, is that the most typical final step in these contracts is binding arbitration, usually before an arbitrator selected via an independent public or private agency such as the Federal Mediation and Conciliation Service or the American Arbitration Association. This does not offer the advantage enjoyed by the construction industry's standing neutrals (see below), of deep familiarity with the problems of the job site on the part of the neutral. On the other hand, it offers in exchange the possibility of a fresh face, with no necessary prior or continuing relationship with either party. In a setting which has had more than its share of meta-conflict on a class, political and social level, this has its advantages.

Use of a “Standing Neutral”

Because the Standing Neutral is probably the least widely understood but potentially most useful dispute prevention and resolution tool of all those that have been developed, we will give it more space here. One of the most innovative and promising developments in controlling disputes between parties who are involved in any type of continuing or long-term relationship (such as a joint venture, construction project or outsourcing arrangement) is the concept of having a highly qualified and respected pre-selected or “standing” neutral to serve as a monitor or dispute resolver *throughout the course of the relationship*. A single neutral or a board of three neutrals (designated variously as a “standing neutral,” “mutual friend,” “referee,” “dispute resolver,” or “dispute review board”) is selected mutually by the parties early in the relationship; is briefed on the nature of the relationship; is furnished with the basic documents describing the relationship; routinely receives periodic progress reports as the relationship progresses; and is invited to meet occasionally with the parties in the absence of any immediate dispute, simply to maintain a feel for the dynamics and progress of the relationship.

The standing neutral is expected to be available on relatively short notice to make an expert recommendation to the parties to assist them in resolving any disputes that the parties are not able to resolve promptly themselves. It is important to the effective working

of this process that the parties be mutually involved in the selection of the neutral, and that they have confidence in the neutral's integrity and expertise. Typically the neutral's role, if called in to help resolve a dispute, is to render an impartial but *nonbinding* decision (not a compromise proposal) on the dispute. (Vorster 1993; Groton 2009; Hafer 2010; Groton and Dettman 2011)

Although the standing neutral's decisions are typically not binding, experience has shown that on those relatively rare occasions where a dispute is referred to the neutral, the neutral's decisions have generally been accepted by both parties, without any attempt to seek relief from any other tribunal. This result is enhanced where there is a contract stipulation that in the event of any subsequent arbitration or litigation, the decisions of the standing neutral will be admissible in evidence. When used in accordance with the guidelines advocated by the Dispute Resolution Board Foundation and carried forward in the AAA Dispute Review Board Procedures, this technique has been remarkably successful; in practice, 95% of all disputes actually referred to a DRB are resolved without arbitration or litigation. (DRBF 2007)

It bears repeating that three critical elements are essential to the success of the standing neutral technique: (DRBF 2007)

- Early mutual selection and confidence in the neutral
- Continuous involvement by the neutral
- Prompt action on any submitted disputes.

This is because the existence of a pre-selected neutral, already familiar with the business relationship between the parties and its progress, avoids many of the initial problems and delays that are involved in selecting and appointing neutrals after a controversy has arisen. Similarly, the ready availability of the neutral, the speed with which he or she can render decisions, and particularly the fact that this neutral will hear every dispute which occurs during the history of the relationship, all provide powerful incentives to the parties to deal with each other and the neutral in a timely and frank manner. The combination discourages game-playing, dilatory tactics, and the taking of extreme and insupportable positions. And the evaluative but non-binding nature of the standing neutral, available if necessary to provide a "dose of reality" to the parties, encourages them to be more objective in their dealings with each other. At the same time, by giving the parties an opportunity to construct their own solutions to problems, it tends to strengthen the relationship between the parties and create trust and confidence between them.

In practice, the nature of this process is such that the mere existence of the neutral generally results in minimizing—and often totally eliminating—the number of disputes that have to be presented

to the neutral. In effect the standing neutral serves not only as a standby dispute *resolution* technique but also as a remarkably successful dispute *prevention* device.² Even though some expense is involved in the process of selecting, appointing, initially orienting, and periodically reporting to the neutral, the costs are relatively minimal, even when the neutral is called on to resolve disputes.

There can be many variations of the standing neutral process. For example, in the case of a closely-held corporation where there might be deadlocks between equal owners, there are techniques that can be employed in drafting the corporate charter and by-laws that can avoid the later paralysis of a deadlock, by using one or more outside directors as standing neutrals:

- 1) One technique is for the stockholders who have evenly-divided interests to elect as a director a neutral outsider who is knowledgeable about the business and has a reputation for integrity. (An example of such a person could be the dean of a local business school.) This outside director is paid a significant director's fee, is furnished the key management reports that are provided to other directors, and is expected to attend all board meetings, ask questions, participate in discussions, and get a good perspective on the affairs of the company. However, this outside director has a vote only in the case of a disagreement among the "inside" directors, in which case the outside director has the deciding vote.
- 2) Another technique where there are two stockholders with equal ownership, and a concern about possible deadlock, is to establish a five-person board of directors, two of whom represent the evenly-matched "insiders" and three of whom are highly-respected independent "outside" directors. They all function as a real board, and each director has a vote. The advantage of the arrangement is that in any case where the two inside directors disagree, it takes the votes of at least two of the three outside directors to carry the vote.
- 3) In a business where there are two stockholders with a great disparity in ownership interests, and a concern that the majority stockholder will ride roughshod over the minority stockholder to the detriment of the company, the by-laws could provide for a five-person board of directors, two of whom are appointed by the majority stockholder, one of whom is appointed by the minority stockholder, with two more highly-respected independent "outside" directors appointed jointly by both stockholders together. Under this system, the majority needs the vote of only one independent director, while the minority needs the vote of both independent directors. But in a case where the majority is acting

abusively, the independent directors are likely to perceive the potential for abuse, and both are likely to vote with the minority stockholder.

In all of these situations, because the independent outside director(s) can control the outcome, there is an incentive for all directors to exercise good judgment and act reasonably for the best interests of the company. (For additional elements of prevention practices tailored specifically for corporate governance, see IFC 2011; O’Neal 1978)

Standing Arbitrator

A variant of the standing neutral process is to give the neutral the power to render binding decisions, thus acting as an arbitrator. A certain percentage of labor contracts, particularly in industries such as basic steel, have employed umpires, or continuing arbitrators, known sometimes as “permanent” arbitrators despite the adage that “there’s nothing as temporary as a permanent arbitrator.” Some of these arrangements have used the arbitrator in the same quasi-judicial capacity as most ad hoc arbitrators, few of whom are encouraged to mediate by the parties. Others have accepted and even encouraged a mediating role, sometimes including an expectation that the neutral is to apply a larger view with the object of helping the parties avoid repetitive cases; these arrangements come closest to the construction industry practice with standing neutrals.

Standing Mediator

Another variant of the standing neutral process is the designation by the parties of a mediator, at the commencement of the relationship, to assist the parties in resolving disputes. The concept behind a standing mediator has worked for institutions. The United Nations Secretary General often acts a mediator in international conflicts. Ombuds within government agencies or universities or business also can serve the role of mediator (or funnel the disputes to other mediators) and can move quickly to intervene before the conflict worsens. South Korea, for example, has created an ombuds office in its investment promotion agency, accountable directly to the Prime Minister, in order to help foreign investors navigate any issues that might arise while doing business in Korea.

A New “Anticipation and Prevention” Movement?

Dispute resolution professionals, of all people, should inherently recognize that the essence of ADR is its innate flexibility and adaptability to the needs of the public; that the disputes field is constantly changing; and that invention and creation are part of the lifeblood of

ADR. New ideas and innovative processes for anticipation of conflict, and dispute prevention, are essential for the growth and sustainability of the field. (Brown 1965) And it is simply in their own career interest, as noted by Bernard Mayer, for dispute resolvers to think more broadly about the uses of their skills. [NDR: Mayer, *Allies*; for more detail, see Mayer 2004. See also Barendrecht and Honeyman 2014.]

Skills and specialties in conflict management have been growing in recent decades, and the recognition and uses of these skills have also been growing rapidly. Up until now these skills have been used mainly on conflict that has already happened. But the anticipatory/preventive/proactive concept provides a philosophical frame for a different way of thinking about conflict in advance, and should become the basis for advancing a new “anticipation and prevention movement” throughout the business and public service communities.

Dispute professionals should be able to adjust their focus and learn that many types of problems which become conflicts could be either averted entirely, or handled at minimum cost, if the necessary skills are applied further “upstream.” [See also, NDR: Amsler, *System Design*] We believe dispute resolution professionals are well placed, and should be encouraged, to develop their skills further to become dispute anticipation and prevention professionals, specifically adding “problem anticipation and dispute prevention” techniques to their professional credentials. Individual dispute prevention professionals, by studying these new concepts and conducting further research into how they can best be adapted for use in all kinds of business contexts, can use these new skills to broaden the horizons of their prevention and resolution repertoires.

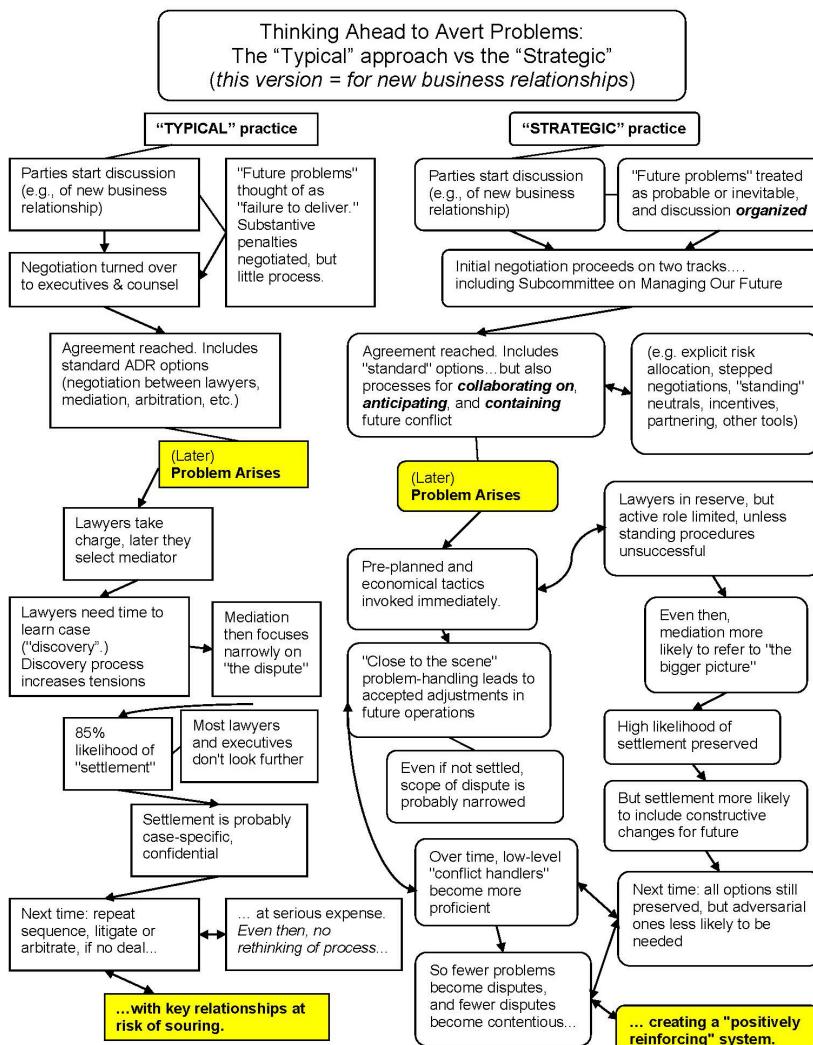
Yet the core elements of any new prevention movement must come from the affected companies and other organizations themselves. In-house corporate counsel, and far-sighted members of top management, have long talked a good game about the need to move toward just such proactive methods and systems. Perhaps the availability of cross-comparisons between such dissimilar yet successful existing users of “thinking ahead about conflict” as construction, international relations and labor relations will encourage them to actually commit their organizations to move forward.

There has very recently emerged one promising development in the field of anticipating and managing conflict: The delegates at the first seven Global Pound Conferences (so far, in the year 2016) have heavily favored, as tools that should be *prioritized* to improve the future of dispute resolution, “pre-dispute and pre-escalation processes to prevent disputes.” It will be interesting to see whether the delegates to the approximately 33 further Global Pound Conferences will follow this promising trend, and whether the Final Report of the

GPC (to be issued in late 2017) will encourage greater participation in the anticipation and prevention movement.

We will close with a tool beloved of many in corporate management, a flowchart. This one is a hard-headed effort to compare the type of system we propose with the typical conflict-handling system which, whether admitted or not, obtains in most relationships. The left column of the flowchart illustrates typical existing conflict-handling practices; the right column illustrates the kinds of advanced practices that are consistent with the new anticipation and prevention movement.

Do you really want *your* organization to live its life in the left column?



Notes

¹ The bonus pool is, in effect, a commercial adaptation of the traditional reward structure of the collaborative arts. See, e.g., Rachel Parish's description of the process of collaborative theater (Honeyman and Parish 2013). In these settings, a failure to collaborate—among artists with typically very strong individual will!—has publicly conspicuous and financially painful consequences to all concerned. This area of conflict research is in its infancy; further study of the collaborative arts may yet reveal other parallels—and perhaps some not-so-obvious techniques which could be adapted for other domains.

² The same is true for the very process of sitting down to resolve the details of the preventive techniques that will be employed. Perhaps in the end the single most effective technique shared between labor relations and the construction industry is employed long before any specific agreement. It is virtually universal at least in U.S. labor relations practice, for instance, for there to be a substantive and sometimes lengthy discussion, in the course of hammering out the first collective bargaining agreement between an employer and a new labor organization, of how to handle disputes that arise under that agreement. The fact that stepped negotiations are the typical result obscures the tailored process by which that result is reached, which include a myriad of considerations of how many steps, who is to be involved at each stage, how long should be allowed for each category of response or higher-level claim, what recourse should be made to third parties, etc. These discussions have relationship-building as well as procedural and substantive content and effects.

A (non-labor) experience of one of the authors may help explain one of the effects of “hammering out” an agreement: In the late 1990s this author was retained as an advisor to a consortium of electric power companies establishing for the first time a mediation and arbitration system to handle disputes over power distribution issues on the grid. This advisor was charged with recruiting a particularly high-level group of professionals for two panels, of mediators and arbitrators, to deal with high-pressure and high-dollar cases among parties who traditionally had fought these issues with zeal before a Federal regulator (with a characteristic disregard of transaction costs and time wasted.) This advisor proceeded to round up many famous names in the field. The entire slate passed review and was empaneled.

Several years later, our author one day encountered one of the most famous panelists in person, who complained that he had never been asked to serve on a case. The author also noted that he himself, though listed on one of the two panels, had never gotten a case either. The author then inquired of the panel administrator what had happened with the elaborate dispute resolution system that had been set up. The panel administrator replied ““Oh, there haven’t been any cases.”” It developed that the utilities, in the course of the knock-down, drag-out discussions that produced the agreement to create the panel, had come to understand each other’s corporate traditions, expectations, cultures and needs so much better than they had in the past that the preliminary stages leading up to a request for a hearing or mediation had been sufficient to resolve every single case that had arisen.

(Another observation: Perhaps the parties’ awareness that their behavior in any intractable dispute would immediately become known to a trusted and expert mediator or arbitrator may have helped persuade them to behave rationally - similar to “The Hawthorne Effect”, which applies in the Standing Neutral context: Parties who know they are being - or might soon be - observed, generally behave more constructively.)

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