THINKING AHEAD IN THE GREY ZONE

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Readers who have recently begun to consider the implications of grey zone conflict or hybrid warfare for their own companies, law firms, or other organizations could be forgiven for seeing the entire subject as startling if not downright alarming. But some of our colleagues in this issue, notably Chris Corpora and Anne Leslie, have taken pains to point out how hybrid warfare could be seen instead as merely the latest and most technologically sophisticated version of attempts to undermine other countries which go back millennia. And the specific techniques that might help your company—or law firm, municipal government, university or whatever other kind of organization you work with—respond with something more organized and proactive than a desperate "all hands on deck" reaction, to an attack that has just occurred, are not all new either. There is a case to be made that much of the necessary agenda is a logical extension of practices of conflict preparation and prevention that are now increasingly well understood, and which have become a sophisticated practice in at least some domains of corporate conflict. We will make that case here.

The organization one of us (Parker) recently retired from is a case in point. CPR, as it is commonly known, was long ago renamed as the International Institute for Conflict Prevention and Resolution. The name, of course, itself includes the essential principle: prevention of conflict comes before resolution because it is even more desirable. A large-scale practical movement built around that principle, however, has been a long time coming, beyond a few areas of conflict management work.

In 2007, one of the present authors, along with several colleagues, published an early attempt to nail down an elusive set of concerns that seem under-addressed in the conflict management field generally. The venue chosen was CPR's own newsletter, *Alternatives*[1]. Their article attempted to analyze a puzzling phenomenon: a pattern of large organizations, with predictable conflict in the offing, nevertheless routinely—or even deliberately—failing to

[1] Christopher Honeyman, Julie Macfarlane, Bernard Mayer, Andrea Schneider & Jeff Seul, *The Next Frontier is Anticipation: Thinking Ahead about Conflict to Help Clients Find Constructive Ways to Engage Issues in Advance*, 25(6) ALTERNATIVES TO THE HIGH COST OF LITIGATION 99103 (2007).

think ahead. The article reviewed the consequences of some then-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. That attempt gradually led to more developed formulations, including a book chapter by James Groton, Chris Honeyman, and Andrea Schneider in 2017[2] and another by the same authors, this time tailored to time-pressed attorneys, in 2019.[3]

But even by 2007, in certain domains, there was *already* a distinguished history of "thinking ahead" about impending conflict, with long-established streams of thinking about how to avert conflict or reduce its cost in both diplomacy and traditional labor relations. More immediately in corporate circles, one particular industry had distinguished itself by wearying of constant conflict on every job and taking proactive steps on a mass scale. That prime example was the construction industry, which had, during the previous 30 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). And use of these tools had begun to spread to other segments of business.[4] It is worth noting that CPR published much of the early literature in this area, and also that two of the authors of the 2017 book chapter had served on a CPR Committee on the matter in the late 2000's (CPR 2010). CPR now has a publicly available Library of Resources (CPR 2023) on its website containing many of these earlier writings, as well as more recent literature and tools for dispute prevention.

So, when we started to look at the implications of the existing prevention movement in the context of our fresh concerns about

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[2] James P. Groton et al., *Thinking Ahead*, in THE NEGOTIATOR'S DESK REFERENCE, VOL 2 265, 265–280 (Chris Honeyman and Andrea Kupfer Schneider eds., 2017).

[3] James P. Groton et al., *Pre-Dispute and Pre-Escalation Techniques to Improve New Business Relationships*, in NEGOTIATION ESSENTIALS FOR LAWYERS 341 (Andrea Kupfer Schneider and Chris Honeyman eds., 2019).

[4] James P. Groton and Helena Haapio, *From Reaction to Positive Action: Dispute Prevention Processes in Business Agreements*, *in* PROCEEDINGS OF THE INTERNATIONAL ASSOCIATION FOR CONTRACT AND COMMERCIAL MANAGEMENT, LONDON (2007).

grey zone conflict, it turned out there was plenty to work with. Certainly, not all of the tools developed for general "thinking ahead about conflict" purposes are well suited to the specific context of hybrid warfare / grey zone conflict. But some of them seem ripe for this new use even as they stand. Others could well be adapted to the purpose. For example, Schneider and Honeyman recently argued in an article for a New York State Bar publication that because both in-house counsel at a company and its outside law firm are likely to be called in when a crisis of any kind occurs, and because lawyers may have more freedom to ask difficult questions across multiple departments of the company than others, lawyers may de facto become the people most likely to be able to pull together multiple (and perhaps initially very defensive) corporate officials to formulate and execute a coordinated response.

By the same logic, however, a company lawyer may be well placed to adopt a role which is an adaptation of previous conflict prevention practice: the standing neutral, which in this case would not be expected to be neutral as between the company and its attackers, but could well be seen as a neutral as between the company's many internal departments and other stakeholders. To have such a figure authorized in advance and kept apprised of developments which might result in exposure to attack could provide not only the kind of institutional wisdom and preexisting familiarity that could be crucial to effective responses to an actual attack; it could help keep others aware of the possibilities and provide a point of contact for periodic reviews of potential threats, thus helping to avert them. We will say more about this below.

Here we will outline some specific tools and techniques, focusing on a limited selection drawn from the 2017 and 2019 book chapters cited. The criterion for the current selection is of course the particular tool's apparent adaptability to the new purpose.

The adaptations start with the names of three classes of such tools:

"There are three principal classes of tools that are being used to anticipate and prevent conflict: tools for Problem Prevention, Problem 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."[5] (Any otherwise unidentified quotes below are from the same source). Here, Problem Prevention and Problem Solving as

[5] Groton et al., *supra* note 2.

concepts seem to work just as well for grey zone conflict as in other contexts. But the third category becomes misleading, as it implies action to be taken directly with the "other party." Yet as other authors in this issue have amply demonstrated, the defending side in a grey zone attack may not even know with any certainty who is really behind the attack—i.e., who "the other party" actually is. Modifying the concept to something closer to "Incident Response" makes it clear that the de-escalation and resolution work will most likely be conducted among the components—departments, suppliers, customers, other stakeholders—which together make up the responding party.

We should note that a number of tool categories are omitted from the discussion here, as probably not relevant in grey zone conflict settings. A warning that Project Seshat members repeatedly invoke privately, however, is apposite here: ours is an inquiry which will teach us humility, if we don't exercise it already. We could be wrong about any of the categories we have left out. In case the reader realizes something we have overlooked, we can at least list the titles omitted from the discussion here, though we will otherwise refer the reader to Groton et al. (2017)[6] for the details: Realistic Allocation of Risks, Providing Incentives to Parties to Encourage Cooperation, Notice and Cure Agreements, Agreements that Encourage Rational Behavior, Step Negotiations, and Standing Arbitrators and Standing Mediators are all topics not discussed in these pages, but treated in our primary source.

I. 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."[7]

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[6] *Id.*

[7] *Id.*

A. *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."

Here the relevant implication is that departments and key outside players such as "outside" lawyers and insurers need a forum developed in which they really will communicate their needs and perspectives—and do so regularly. When the organization is large, ongoing assignment of specific individuals (or alternatively, whoever is occupying named roles such as "deputy general counsel") can help the group build trust, as well as avoiding confusion when an emergency arises.

B. *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."

This could be adapted to ongoing relationships and serve as the launch for the forum suggested in the previous paragraphs.

C. *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. . .."

This too hinges on the kind of forum already discussed. But it goes further: The need for particularly frequent and regularized communication between *certain* departments and outside stakeholders should be an early (and occasionally revisited) agenda item for such a forum.

II. Problem-Solving Tools

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

A. *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."

A written and signed commitment to this effect may be claimed by some participants to be superfluous because "*Of course* we will do this, and it's insulting to suggest otherwise." Shelves full of business histories, meanwhile, are replete with evidence that while such protestations are no doubt made in good faith, they may at crucial moments prove insufficient in the face of real-world business pressures, including individuals' or entire departments' need for face-saving. An explicit document not only signed, but circulated and/or posted, may help when the inevitable moment arises when a corporate official or entire department is tempted to "duck" some nasty new discovery. For more on the patterns of mind that can take over, see Dietrich Dörner's *The Logic Of Failure* (1997).[8]

We should also note that CPR has a number of tools prepared and available for dispute prevention and resolution, including a model term sheet, sample contractual provisions, and a memo explaining—and answering some objections to—the use of a standing neutral. As noted below, we think all of these could readily be adapted for the new need.

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[8] D. Dörner, The Logic Of Failure: Recognizing and Avoiding Error in Complex Situations (New York: Basic Books 1997).

B. *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:
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> - 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."[9]

All of these seem useful in preparing for grey zone conflict and may even be adaptable with little or no modification.

C. *Incident Response Tools*

> "Dispute de-escalation and 'real time' resolution tools [or as redefined here, *incident response* 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."[10]

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9 Groton et al., *supra* note 2.

10 *Id.*

D. *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 (Internet 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."

If the standing forum discussed above has been enacted, convening it in an emergency is an obvious step. But this quote is a reminder that even if such a forum has not been developed, the underlying need remains, and is now more urgent. It can be addressed at least at a beginning level on-the-fly.

E. *Use of a "Standing Neutral"*

> "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."

This concept, which was given pride of place and extensive discussion in Groton et al. (2017)[11], needs adaptation for grey zone conflict. As noted above, however, Schneider and Honeyman

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[11] *Id.*

(2023)[12] have argued for the adoption of a similar role among departments and other stakeholders, probably by one of an organization's in-house or outside attorneys. This is for two reasons: (a) because a lawyer is often in a better position than others within and around an organization to talk forthrightly with people across all departments and partner organizations, as well as at all levels; and (b) because if the problems are allowed to escalate, they will likely end up on a lawyer's desk anyway. There are many details, variations and examples of the previous uses of standing neutrals in Groton et al. (2017).[13] Also see Groton (2009)[14], and Groton and Dettman (2011).[15]

III. A Springboard to a Next Phase?

Until recently, specific programs and courses in conflict prevention have been thin on the ground in general commercial circles (though not, by contrast, in the construction industry, or even longer in international relations: traditional diplomacy may have its weaknesses, but ongoing attention to prevention work is a highlight of traditional professionalism in that domain). In 2020, however, CPR began hosting and contributing to several programs for corporate counsel and their law firms, introducing the imperative of dispute prevention in their businesses with the aim of expanding the use of these mechanisms beyond the construction industry. In early 2021, CPR launched its Dispute Prevention Pledge and a Model Dispute Prevention and Resolution Provision, both of which call for an upfront commitment by the parties to nurture their strategic relationship and their desire to avoid a value-depleting dispute. Among the commitments were an agreement to act in good faith, engage in transparent communication, and employ prevention mechanisms such as the standing neutral.

In late 2022, one of the authors (Parker) and our symposium colleague Andrea Schneider, along with another law school profes-

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12 Andrea Kupfer Schneider and Chris Honeyman, A*dvocates' and Neutrals' Roles in a New Type Of Conflict — the Private and Public Crises of Hybrid Warfare*, New York Dispute Resolution Lawyer, Vol. 16, No. 1, 34–39 (2023).

13 Groton et al., *supra* note 2.

14 James P. Groton, *The Standing Neutral: A 'Real Time' Resolution Procedure that also Can Prevent Disputes*, 27(11) Alternatives to the High Cost of Litigation 177, 181–185 (2009).

15 James P. Groton and Kurt L. Dettman, *How and Why the Standing Neutral Dispute Prevention and Resolution Technique Can Be Applied*, 29(10) Alternatives to the High Cost of Litigation 177–192 (2011).

sor, Joan Stearns Johnsen, organized and ran a two-day training for experienced mediators, law firm counsel, and in-house counsel interested in moving their conflict resolution skills upstream to become Relationship Facilitators (i.e., Standing Neutrals). Among the relevant topics were the ability to anticipate conflict and help the parties develop business solutions, as well as deeper dives into their listening and communication skills to help the parties navigate the inevitable conflicts that arise due to changed circumstances or human misunderstanding and missed cues.

Some modest adaptations could be made for a course in conflict prevention specifically geared to grey zone conflict. Such adaptations could include a segment on mindset and culture change—moving from reactive to proactive, i.e., a focus on the anticipation of risk/thinking ahead skills inherent in business relationship dispute prevention. Culture change could also focus on a recognition among the various departments charged with maintaining the integrity of the company's systems and technologies that the standing neutral (probably in-house counsel charged with this responsibility) is a trusted business partner with whom they should share information and be transparent. The course should emphasize that strategic business relationships—even internal ones—are subject to inevitable misalignments and demonstrate how such misalignments can easily lead to exposure to attack in grey zone conflict.

We look forward to helping create opportunities for follow-up designs, and actual courses, geared specifically to the new prevention direction suggested by this article, as well as by our colleagues' articles in this symposium issue.

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