

**Thinking Ahead to Avert Problems:**  
the “typical” approach versus the “strategic”  
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**“TYPICAL” practice**

Start of discussion (e.g., of new business relationship)

Negotiation turned over to executives & counsel

“Future problems” thought of as “failure to deliver.” Substantive penalties negotiated, but little process.

**Agreement reached.** Includes standard ADR options (negotiation between lawyers, mediation, arbitration, etc.)

**(Later) Problem Arises**

Lawyers take charge, select mediator

Lawyers need time to learn case (“discovery”). Discovery process increases tensions.

Mediation then focuses narrowly on “the dispute”

85% likelihood of “settlement”

But most lawyers and executives don’t look further

**So, settlement is probably case-specific, confidential**

Next time: repeat sequence. If no deal, litigate or arbitrate...

... at serious expense. Even then, no rethinking of process.

**... with key relationships at risk of souring.**

**“STRATEGIC” practice**

Start of new relationship

“Future problems” treated as *probable or inevitable*, and discussion **organized**

Initial negotiation proceeds on two tracks.... including “subcommittee on managing the future”

**Agreement reached.** Includes “standard” options, but also processes for **collaborating on, anticipating, and containing future conflict**

(E.g.) explicit risk allocation; stepped negotiations; “standing” neutrals; incentives; partnering; other tools

**(Later) Problem Arises**

Pre-planned, economical tactics invoked immediately.

“Close to the scene” problem-handling leads to accepted adjustments in future operations

Lawyers in reserve, but active role limited, unless standing procedures unsuccessful

If not settled, scope of dispute is probably narrowed

Over time, low-level “conflict handlers” become more proficient

**So fewer problems become disputes, and fewer disputes become contentious**

Even then, mediation likely to refer to “the bigger picture”

High likelihood of settlement preserved

But settlement likely to include constructive changes for future

Next time: all options still preserved—but adversarial ones less likely to be needed

**... creating a “positively reinforcing” system**