Thinking Ahead to Avert Problems: the “typical” approach versus the “strategic” (basic version, © Christopher Honeyman 2008, used by permission)

“TYPICAL” practice

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

Negotiation turned over to executives & counsel

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

85% likelihood of “settlement”

Settlement is probably case-specific, confidential

... with key relationships at risk of souring.

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

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

“STRATEGIC” practice

Start of new relationship

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

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

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

(Later) Problem Arises

Pre-planned, economical tactics invoked immediately.

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

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.

... creating a “positively reinforcing” system

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

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