

# Pre-Dispute and Pre-Escalation Techniques to Improve New Business Relationships

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## Introduction

In several domains of conflict—construction, international relations, and US labor relations—there are by now highly sophisticated and widely adopted techniques for reducing future conflict. These techniques cannot ensure outright that there will be only few such conflicts. But they make it more likely that the conflicts that inevitably follow the formation of a new relationship will 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. This chapter argues for broader adoption of these tools, and is based on J. GROTON, C. HONEYMAN, & A.K. SCHNEIDER, *Thinking Ahead*, in 2 THE NEGOTIATOR'S DESK REFERENCE 265–281 (Honeyman & Schneider eds, 2017). The full references in that chapter can be found at [www.ndrweb.com/chapter-70--public.html](http://www.ndrweb.com/chapter-70--public.html).

## Why This Concept Might Change Your Thinking

Smart companies, particularly in the construction industry, have been using with great success sophisticated tools for improving business relationships. These not only prevent and de-escalate problems and potential disputes, but sometimes achieve almost instantaneous resolution of them. The same tools also improve efficiency and business processes.

Through use of techniques such as these in any commercial relationship context, it is entirely possible to have a business relationship which strengthens over time, which fixes problems instead of fixing blame, and which never experiences a formal mediation, let alone an arbitration or litigation.

The availability and advantages of these “thinking ahead” techniques should by now have come to the attention of competent transactional lawyers who advise clients about commercial relationships. And it should be expected that those transactional lawyers would customarily make them known to their clients and advise them about such techniques.

Furthermore, “thinking ahead” advice is by now well enough known that in future it could be argued that a transactional lawyer's failure to provide such advice to a client who is about to enter into a commercial relationship would be a breach of the lawyer's duty to the client.

## Action Plan—What You Can Do Differently Tomorrow

When discussing the formation of a new business relationship, the parties should anticipate that the business will experience future conflict. Representatives charged with negotiating an initial agreement should have the parties agree in advance to deal with each other in future in an organized and collaborative way, setting up a dispute control system that uses *problem-prevention* tools, *problem-solving* tools, and *dispute de-escalation and “real-time” resolution* tools to deal with future problems.

After the dispute control system has been incorporated into the contract that sets up the business relationship, the individuals who handled the negotiations for dealing with future problems should *continue to monitor* the collaborative problem-solving and conflict-mitigation process, to make sure that these processes and tools are implemented whenever a problem arises.

Among the specific thinking-ahead and problem-prevention tools that the parties’ representatives could consider when establishing the dispute control system are the following:

### Problem-Prevention Tools

- Good, open communications
- Realistic allocation of risks to the party best able to manage, control, or insure against particular risks
- Joint initial analysis of the potential for disputes during the course of the relationship
- Consideration of incentives that could enhance cooperation between the parties
- Establishing a “partnering” cooperative relationship

### Problem-Solving Tools

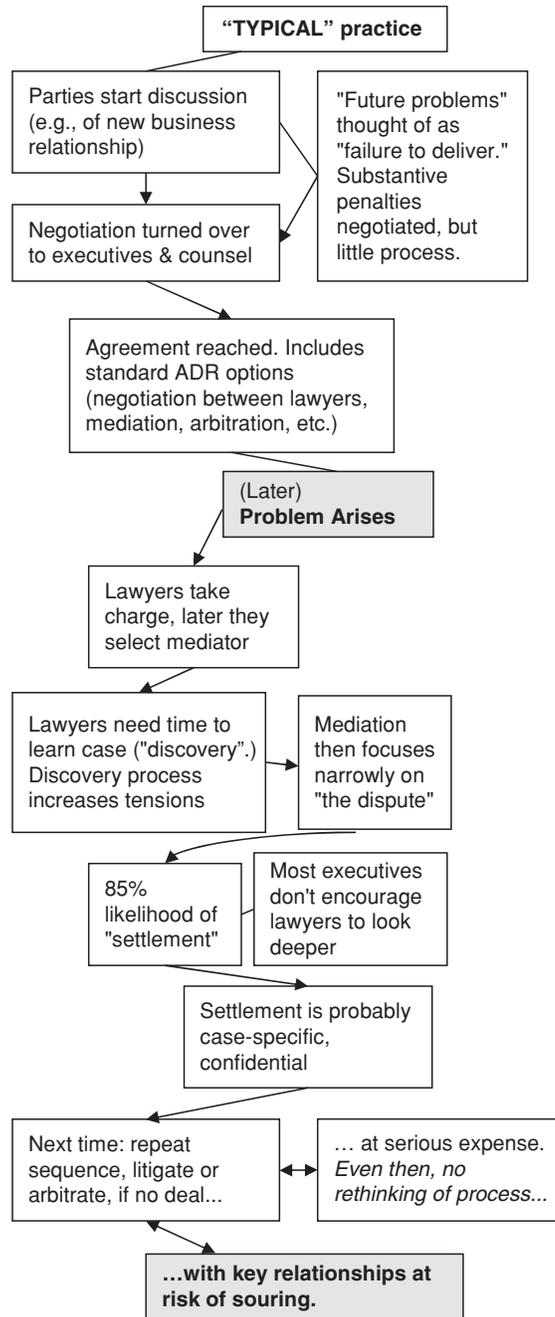
- Notice and cure agreements
- Covenant of good faith and fair dealing
- Agreements that encourage rational behavior
- Internal tools in each organization that encourage problem solving

### Dispute De-escalation and “Real-Time” Resolution Tools

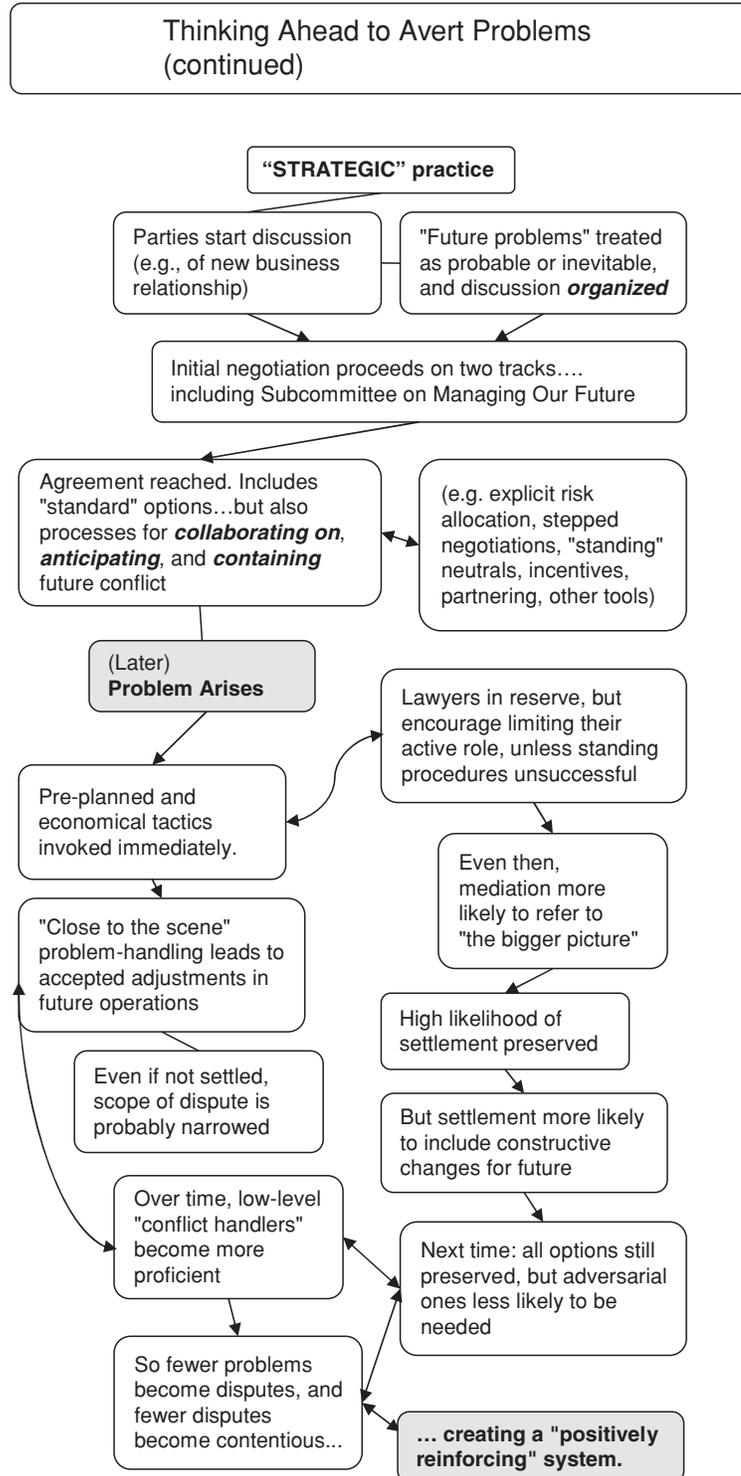
- Negotiations and step negotiations
- Selection of an expert, trusted person to be a “standing neutral” (who can be readily available to provide impartial advice if the parties cannot immediately resolve a problem)

How these strategic practice tools work together both to reduce and to handle serious disagreements is graphically illustrated in the following flowchart. It contrasts the strategic approach with the

Thinking Ahead to Avert Problems:  
The "Typical" Practice vs the "Strategic" Practice



typical or “business as usual” approach that, unfortunately, obtains in most business relationships:



## **Modifiers, Caveats, and No-Go Areas— When This Advice Just Won't Apply**

This does not apply, of course, to truly one-time transactions. That may appear to be a very large category. Note, however, that many relationships start with a single transaction that on its surface looks to be one-time. The parties may be well-served by erring on the side of expecting more interaction in future, in which case this chapter applies, after all. In fact, with this kind of planning, future interactions are more likely.

### **Conclusion**

Using the proactive “up-front” techniques and principles that are outlined here and more fully described in our chapter in *The Negotiator's Desk Reference* is just as important for relationship-building and success-building as it is for avoiding, de-escalating, and preventing disputes. This is increasingly recognized: at the worldwide Global Pound Conferences on the future of dispute resolution (2016–2017), voting overwhelmingly favored prioritizing the use of “pre-dispute or pre-escalation processes to prevent disputes” over all other dispute resolution processes.

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#### **This Ties in With:**

Borbély & Caputo, Ch. 44, Organizations; Amsler, Ch. 45, DSD; Love & Stulberg, Ch. 46, Mediation