

Organizational Integrity Group

Solving The Whole Problem™

First Principles
*Employ A
Legal Pre-Mortem*



Hindsight Is 20/20

“How could we not have seen that coming?” This question has plagued sophisticated organizations (and their law departments) since the invention of the nightly news. Everything seems so obvious in hindsight. Compliance gaps are clearer. Internal control inadequacies are obvious. Problematic personnel stare you right in the eyes. You (and your employees, shareholders, and customers) are incredulous that you could have been so blind.

As they say, hindsight is 20/20. But some very smart people in the social sciences have developed a way to convert some of that hindsight into foresight. It’s called “prospective hindsight,” and Sheppard Mullin’s Organizational Integrity Group uses it to help clients solve problems before they materialize. We do this by kicking off appropriate projects with what author Gary Klein dubbed a “pre-mortem.”

“Prospective hindsight can increase the ability to identify future outcomes by 30%.”

What Is A Pre-Mortem?

Most of us are familiar with a post-mortem, the process through which doctors determine why a patient died. Over time, the term has come to describe any after-the-fact effort to glean “lessons learned” from a (usually) unsuccessful project.



A “pre-mortem” is like a post-mortem, but it takes place at the outset of a project rather than after. During a pre-mortem, the participants contemplate a scenario in which the project was a spectacular failure — think contract breach, law suit, government investigation, shareholder suit, and the consequent public relations nightmare. The participants then aggressively brainstorm what they “could have done” to prevent the disaster from occurring.

As Klein described it in the *Harvard Business Review*, “Unlike a typical critiquing session, in which project team members are asked what might go wrong, the pre-mortem operates on the assumption that the ‘patient’ has died, and so asks what did go wrong.” The research upon which Klein’s vision is based suggests that “prospective hindsight—imagining that an event has already occurred—increases the ability to correctly identify reasons for future outcomes by 30%.”

Sheppard Mullin’s Organizational Integrity Group employs *legal pre-mortems* — under the protection of the Attorney Client Privilege — at the outset of appropriate projects as a means of identifying risks early in a project’s life-cycle. But we don’t just focus on legal risk. Decision-makers don’t care if a risk is “legal” or not. Risk is risk. We structure our legal pre-mortems to help identify risks that flow not only from an organization’s policies and practices, but from its personnel, infrastructure, and culture. And then we can help craft solutions that are consistent with the organization’s mission, vision, and values. All of which, at the end of the day, come together to reduce legal risk.

Elements Of An Effective Legal Pre-Mortem

- **Involve a diverse collection of stakeholders.** The pre-mortem should involve at least legal, finance, sales, HR, ethics/compliance, and perhaps others.
- **Set out the scenario.** Assume the total failure of the project, and give details to emphasize scope.
- **Establish clear ground rules.** Set boundaries at the outset, such as no reasons off limits, everyone’s ideas matter, and no personal attacks.
- **Maintain the language of hindsight.** Don’t ask “what might happen?” Ask “what did happen?”
- **Think broadly.** Encourage creativity. Facilitate broad participation.
- **Collect “lessons learned.”** You will analyze these in Part II of the session.
- **Engage the Law Department.** Conduct the session in connection with a law department-driven legal risk review to preserve the Attorney Client Privilege.



“A properly structured pre-mortem can help reduce risk.”

For more information regarding Sheppard Mullin’s Organizational Integrity Group or to learn more about how we work with our clients to craft multi-disciplinary solutions to complicated problems, please visit us at www.sheppardmullin.com/OIG.

Visit our blog at www.organizationalintegrity.com

About Sheppard Mullin’s Organizational Integrity Group

Sheppard Mullin formed the Organizational Integrity Group because most problems facing sophisticated organizations cannot be solved by legal analysis alone. Complicated problems are solved through a thoughtful, deliberate, and holistic approach; an approach that seeks to identify the root causes of problems and to craft solutions that are practical, effective, and sustainable. We look at the bigger picture. We ask questions that transcend a traditional, stove-piped legal analysis. Is the problem one of compliance, or is there an underlying institutional or cultural issue at its core? Are there business imperatives or reputational risks that must be considered before moving forward with a solution? If we attack the manifestation of the problem, will we actually cure the root cause of the problem? What does the organization’s mission, vision, and values tell us about how we should respond?