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Conduct a legal premortem to identify and mitigate risk before a crisis

By Jonathan Aronie

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More than 2,000 years ago, a Jewish sage living in Jerusalem compiled a book of wisdom today known as *Ecclesiasticus*.^[1] The book was translated from Hebrew to Greek by the author’s son around 130 BC, and much later, the book was translated into English. Among the aphorisms that find their origin in this ancient text is one we’ve all heard before: haste makes waste. In the late 1700s, Napoleon Bonaparte is said to have remarked to his valet as he prepared for battle, “dress me slowly; I’m in a hurry.” We don’t know whether Napoleon had read *Ecclesiasticus* (Napoleon generally is regarded as having been rather skeptical of religion, so it’s quite possible he had not), but he certainly understood the underlying truthfulness of the adage: the more in a hurry you are, the more you need to slow down.

Since the introduction of the terms “SARS-CoV-2,” “coronavirus,” and “COVID-19” into our collective lexicon in early 2020, businesses across the globe have certainly been in a hurry. Sales leaders rushed to find innovative ways to preserve or rebuild revenue in the face of a shuttered economy. Contracts managers dusted off terms and conditions they had all but forgotten about prior to the pandemic. Human resources teams struggled to deal with unplanned furloughs and layoffs. And in-house counsel worked nonstop to make sense of an endless stream of new statutes, executive orders, regulations, directives, and guidelines from federal, state, and local officials. Many of these stressors continue to this day and will likely continue into the foreseeable future.

With all that going on, who can afford to slow down? A better question may be, “Who *cannot* afford to slow down?”

Learning from the past

If there is one thing businesses have learned from past crises and emergencies, it is that, without fail, they leave a trail of audits, investigations, and lawsuits in their wake. The Persian Gulf War of the 1990s, the Afghanistan and Iraq wars of the early 2000s, the Wall Street bailout of 2008, and the H1N1 public health emergency of 2009 all presaged such a trail. The COVID-19 pandemic is no different:

- Attorney General Barr directed all federal prosecutors “to prioritize the investigation and prosecution of Coronavirus-related fraud schemes.”^[2]
- Deputy Attorney General Jeffrey Rosen directed each U.S. Attorney “to appoint a Coronavirus Fraud Coordinator to serve as the legal counsel for the federal judicial district on matters relating to the Coronavirus, direct the prosecution of Coronavirus-related crimes, and to conduct outreach and awareness.”
- Various U.S. attorneys’ offices quickly took up the call by standing up their own COVID-19 prosecutorial task forces.

- The federal Department of Health & Human Services (HHS) Office of Inspector General (OIG) community quickly suited up for a fight as well. The HHS OIG was one of the first to roll out a dedicated online portal focusing on COVID-19 fraud.
- The Pandemic Response Accountability Committee, made up of 21 inspectors general from across the federal government, was given a new leader and readied itself for action.^[3]
- Congress stood up a five-member oversight committee to oversee Coronavirus Aid, Relief, and Economic Security (CARES) Act spending, and increased funding to the Government Accountability Office to the same end.^[4]
- And, of course, the relatively new inspector general is focusing specifically on the pandemic recovery effort as the special inspector general for pandemic recovery, housed within the Department of the Treasury, and has been given a \$25 million budget and subpoena authority to root out fraud, waste, and abuse.^[5]

Additionally, whistleblower law firms began circling overhead even before Congress passed the CARES Act,^[6] just waiting for their chance to swoop in. Indeed, in March 2020, the National Whistleblower Center announced the creation of a formal Coronavirus Accountability Campaign.^[7] Among the campaign’s key elements are “whistleblower protections and incentives” in coronavirus spending bills and providing “whistleblowers with the information and tools they need [to report fraud], including access to qualified legal counsel.”

Sadly, trying times can bring out the worst in some people, and few would argue that oversight is important—perhaps even more important—in times of crisis. But we all know the nets cast by the enforcement community and whistleblowers entangle well-intentioned actors as well as bad ones.

Running with blinders on

These entanglements often are followed by a CEO, general counsel, or board member asking the following question: “How did we not see that coming?” Everything seems so obvious in hindsight; compliance gaps are clearer, internal control inadequacies are obvious, and problematic personnel stare you right in the face. You (and your employees, shareholders, and customers) are incredulous that you could have been so blind. But when you’re running a mile a minute, single-mindedly focusing on the needs of your customers, it’s easy to miss what seems obvious in hindsight. Which is why taking a moment to slow down and *think* is a worthwhile endeavor, primarily about how your actions today will look to those sitting in judgment tomorrow.

Obviously, it would be wonderful if we all had our own Dickensian ghost to give us a glimpse of how our actions will be viewed—and judged—in the future. Alas, unless we are Ebenezer Scrooge, such a journey is unlikely. But some smart people in the social sciences have developed a way to convert hindsight into foresight. It’s called “prospective hindsight,” and Sheppard Mullin’s Organizational Integrity Group^[8] uses it to help clients solve problems before they materialize. We do this by slowing down the scene, if only for a moment, and conducting what author Gary Klein has dubbed a “premortem.”^[9]

Using a legal premortem to identify risk

Most of us are familiar with a postmortem, the examination 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.

As the term suggests, a “premortem” takes place *before* the crisis rather than after. During a premortem, the participants contemplate a scenario in which something has gone spectacularly wrong—think contract breach, lawsuit, OIG investigation, congressional inquiry, shareholder action—and the public relations nightmare that follows. The participants then reflect and openly brainstorm what could have been done to prevent the disaster.

As Klein described it to the *Harvard Business Review*, “Unlike a typical critiquing session, in which project team

members are asked what might go wrong, the premortem operates on the assumption that the ‘patient’ has died, and so asks what did go wrong.” The research upon which Klein’s approach 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 premortems^[10]—under the protection of attorney–client privilege—as a means of identifying risks early in a project’s life cycle. The same tool can be used to help businesses shed the blinders they often inadvertently don in the midst of an emergency to see the risks that may be lurking around even the best-intentioned corners.

Risk is risk

An effective legal premortem doesn’t focus narrowly on legal risk, though. Decision–makers don’t care if a risk is “legal” or not. Risk is risk. Yet, because business risks invariably carry legal consequences, a legal premortem can look broadly at business risks that can result in legal consequences and still retain its privileged status. Thus, an effective legal premortem is structured to help identify risks that flow not only from an organization’s policies and practices, but from its personnel, infrastructure, and culture. The results of the premortem then are used to 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.

As one of the cofounders of the Sheppard Mullin Organizational Integrity Group, I’m an enthusiastic advocate of “slowing down the scene” and conducting premortems even in the midst of a crisis—indeed, especially in the midst of a crisis.

There are enumerable variations on what a legal premortem might look like. While there is no rule book for such sessions, I submit the following elements will help make it most effective:

- Involve a diverse collection of stakeholders. The premortem should involve, where possible, legal, finance, sales, human resources, ethics/compliance, and perhaps others.
- Set out the scenario. Assume a total crisis, and give details to emphasize its scope.
- Establish clear ground rules. Set boundaries at the outset, such as no reasons are 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 two 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. Ask the law department to identify the potential legal risk to ensure you can protect the privileged nature of the premortem.

Of course, these guidelines will only work if the participants are interested in making it work—and if the organization’s leadership really wants to know the answers to the questions asked.

Conclusion

The previously shared pearl of wisdom penned 2,000 years ago in Jerusalem, “Haste makes waste,” is still in common usage today because it reminds us to slow down and take a breath—even when circumstances seem to impel us to hurry. The original text from which the proverb derives (no doubt somewhat corrupted by multiple translations) is this: “There is one that laboreth, and taketh pains, and maketh haste, and is so much the more behind.” There is no question that the COVID-19 pandemic—like the crises that preceded it—caused the global business community to labor with great pain and to feel a strong urge to make haste. But there also should be no

question that, if we do not take time to slow down and think, even during a crisis, that painful labor will put us even further behind.

A real-life example of a legal premortem

At the request of a federal end user, one Fortune 500 company lent its considerable resources to help the government in its COVID-19 pandemic response. The effort had a large team of in-house lawyers, project managers, government affairs professionals, and sourcing specialists working long hours for weeks on end taking on all sorts of critical tasks.

Notwithstanding the constant state of hurry, we recommended the company take a momentary pause and conduct a legal premortem. We explained we would present the participants (all decision-makers) with this question: "It's six months down the road, and we now have a congressional inquiry, two grand jury subpoenas, and a letter of concern from a debarment official. What went wrong?" We then explained that we would engage in a rigorous debate as to "what went wrong" in a privileged setting.

The client jumped at the idea, and we conducted the premortem the next day. It was fantastically effective. We opened the meeting by briefly presenting our "disaster" scenario, and we fueled the discussion by offering a few known concerns of our own. Over the course of the discussion (about one hour), we were able to identify a number of risk areas the company had not thought about or those that simply had been lost to the hustle and bustle of the daily grind. It was conducted under attorney-client privilege, and was followed up with a detailed privileged memorandum that identified each risk area and the steps the company had taken or needed to take to mitigate each risk.

The client team was thrilled with the process and the result. It forced them to slow down and ask the questions that weren't being asked because everyone understandably was in such a hurry. (As an aside, it also made the law and ethics and compliance departments look great by demonstrating their forward thinking and innovative approach to problem-solving, even in situations where the problems have not materialized yet.)

As a result of the premortem, the client is implementing new protections that will better protect the company, its employees, and its shareholders as its efforts continue.

About the author

Jonathan Aronie is a 1993 graduate of Duke University School of Law. In 2013, in connection with his internal investigations practice, Jonathan was appointed by the United States District Court for the District of Louisiana to serve as the federal monitor over the New Orleans Police Department Consent Decree.

Takeaways

- Audits, investigations, and litigation routinely follow significant national and international crises.
- Complex organizations operating in an “emergency” setting often don’t contemplate how their actions will be perceived once the crisis comes to an end.
- An application of “retroactive hindsight” in the form of a “legal premortem” can help businesses shed their blinders and more effectively identify future risks and more effective risk-mitigation strategies.
- Social science research tells us that “prospective hindsight ... increases the ability to correctly identify reasons for future outcomes by 30%.”
- The premortem should be thoughtfully planned, administered by the law department under attorney-client privilege, and conducted as part of a broader ethics and compliance program.

1 Mary Wilder Tileston, “The Wisdom of Jesus, the Son of Sirach, or, Ecclesiasticus” (Cambridge: Press of John Wilson & Son: 1878).

2 Department of Justice, Office of Public Affairs, “Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud,” news release, March 20, 2020, <https://bit.ly/2Vd6iPz>.

3 Jace Lington, “President Trump removes head of the Pandemic Response Accountability Committee,” Ballotpedia News, April 13, 2020, <https://bit.ly/3h55nLo>.

4 John Kamensky, “Where’s the Money? Keep an Eye on the CARES Act,” Government Executive, April 2, 2020, <https://bit.ly/30o4G9O>.

5 Jonathan S. Aronie, “Using ‘Prospective Hindsight’ To Identify And Mitigate Risks During A Crisis,” *Antitrust Law Blog*, Lexology, last accessed June 9, 2020, <https://bit.ly/2MFSFEG>.

6 Coronavirus Aid, Relief, and Economic Security Act, H.R. 748 § 4018, March 27, 2020, <https://bit.ly/2AENzFU>.

7 National Whistleblower Center, “National Whistleblower Center Launches Coronavirus Accountability Campaign,” news release, March 20, 2020, <https://bit.ly/2Y9DoCG>.

8 Organizational Integrity Group, “First Principles: Slow Down The Scene,” Sheppard Mullin, 2020, <https://bit.ly/3gXEOaG>.

9 Gary Klein, “Performing a Project Premortem,” *Harvard Business Review*, September 2007, <https://bit.ly/377caz7>.

10 Organizational Integrity Group, “First Principles: Employ A Legal Premortem,” Sheppard Mullin, 2020, <https://bit.ly/2BvhYqu>.

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