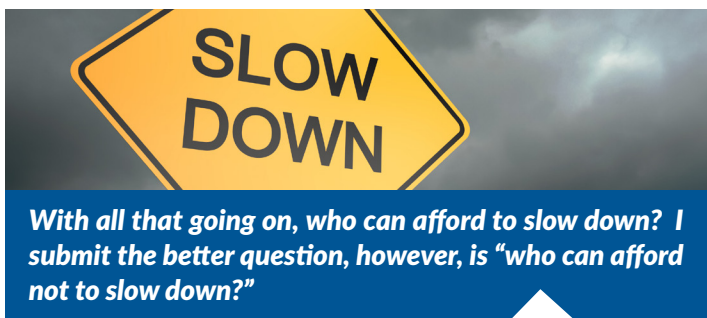


## Using “Prospective Hindsight” To Identify And Mitigate Risks During A Crisis

By Jonathan Aronie



In 1657, mathematician Blaise Pascal commented in a letter to his church leaders “I have made this longer than usual because I did not have time to make it shorter.” More than 100 years later, another Frenchman, Napoleon Bonaparte, offered a similar remark to his valet as he prepared to head out for battle. “Dress me slowly,” he said, “I’m in a hurry.” The irony of the quotations makes people smile, but few quibble with their underlying truthfulness. Often, the more in a hurry you are, the more you need to slow down.



Over the past six weeks, businesses across the country have been in a hurry. Sales leaders are rushing to find innovative ways to preserve revenue in the face of a shuttered economy courtesy of COVID-19. Contracts Managers are dusting off terms and conditions they had all but forgotten about prior to the pandemic. HR teams are figuring out how to deal with unplanned furloughs and/or layoffs. And in-house counsel are working nonstop to make sense of an endless stream of new statutes, executive orders, regulations, directives, and guidelines from federal, state, and local officials.

With all that going on, who can afford to slow down? I submit the better question, however, is “who can afford not to slow down?”

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 Afghan and Iraqi wars of the early 2000s, the Wall Street Bailout of 2008, and the H1N1 public health emergency of 2009 all presaged such a trail. And we already can see the enforcement authorities readying themselves for the end of the current emergency.

- Attorney General Barr directed all federal prosecutors “to prioritize the investigation and prosecution of Coronavirus-related fraud schemes.”
- 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 already have taken up the call by standing up their own COVID-19 prosecutorial task forces.
- The federal Office of Inspector General community is gearing up for a fight. The HHS OIG already rolled out a dedicated online portal focusing on COVID-19 fraud.

- The Pandemic Response Accountability Committee (“PRAC”), made up of 21 inspectors general from across the federal government, now has a leader and is ready for action.
- Congress stood up a five-member Congressional Oversight Committee to oversee CARES Act spending, and increased funding to the Government Accountability Office to the same end.

And, of course, there is the brand new Inspector General focusing specifically on the pandemic recovery effort, the *Special Inspector General for Pandemic Recovery* (SIGPR). SIGPR will be housed within the Department of Treasury and has been given a \$25 million budget and subpoena authority to root out fraud, waste, and abuse.



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But this all represents just one part of the enforcement equation. Whistleblower law firms have begun circling just waiting for their chance to swoop in at the first whiff of blood. One well-known whistleblower attorney recently had this to say to a reporter: “When trillions of dollars are involved, the potential for fraud is almost endless. . . .” You can practically hear the drool. The National Whistleblower Center has announced a Coronavirus Accountability Campaign. It has called upon the Attorney General to launch a Coronavirus fraud task force and on Congress to pass legislation enhancing whistleblower protections and increasing whistleblower incentives.

Sadly, trying times do 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 that the nets the enforcement community cast entangle well-intentioned actors as well as bad ones.

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. 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 the scene” and *think* is a worthwhile endeavor.

Think about what, you ask? Anything and everything. But primarily, about how your actions today will look to those sitting in judgment tomorrow.

Obviously, it would be wonderful if we could hop in our time machines and take a peek at how our actions will be viewed — and judged — weeks, months, or years down the road. Alas, unless we are Michael J. Fox (and I recognize I’m dating myself with the *Back To The Future* reference), such a journey is unlikely. 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 slowing down the scene, if only for a moment, and conducting what author Gary Klein has dubbed 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.



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A “pre-mortem” is like a post-mortem, but it takes place *before* the crisis rather than after. During a pre-mortem, the participants contemplate a scenario in which something has gone spectacularly wrong — think contract breach, law suit, OIG investigation, congressional inquiry, shareholder

action, and the public relations nightmare that follows. The participants then “look back” and openly brainstorm what they “could have done” to prevent the disaster from occurring.

As Klein described it to the *Harvard Business Review*, “[u]nlike 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 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 pre-mortems — under the protection of the 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.



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An effective legal pre-mortem 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 pre-mortem can look broadly at business risks that can result in legal consequences and still retain its privileged status. Thus, an effective legal pre-mortem 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 pre-mortem 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.

## **A Recent Pre-Mortem**

*At the request of a federal customer, one of our clients lent its considerable resources to help the Government in its COVID-19 pandemic response. The effort had a large team of in-house lawyers and project managers working from early morning to late evening for weeks on end taking on all sorts of critical tasks.*

*Notwithstanding the daily fire drills, we recommended the company take a momentary breather and conduct a legal pre-mortem. We explained we would present the participants (all decision-makers) with this question: “It’s 6 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 the \*&%\$ went wrong?!” And then, we explained, 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 pre-mortem the next day. It was fantastically effective. We kicked off the meeting by briefly presenting our “disaster” scenario, and we energized the participants by offering a few known concerns right off the bat. Over the course of the discussion, we were able to identify a number of risk areas the company had not thought about – or that simply had been lost to the hustle and bustle of the daily fire drills. The whole process took about an hour. It was conducted under the 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 the scene” and to ask the questions that were not being asked because everyone understandably was in such a hurry. (As an aside, it also made the Law Department and the Ethics Department look great by demonstrating their forward-thinking and innovative approach to problem solving – even in situations where the problems had not materialized yet.) As a result of the effort, the client is implementing new protections that will better protect the Company, its employees, and its shareholders as its efforts continue.*

As one of the co-founders of the Sheppard Mullin Organizational Integrity Group, I'm an enthusiastic advocate of "slowing down the scene" and conducting pre-mortems even in the midst of a crisis — indeed, especially in the midst of a crisis.

There are enumerable variations on what a legal pre-mortem 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 pre-mortem should involve, where possible, legal, finance, sales, HR, 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 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. Ask the Law Department to identify the potential legal risk so as to ensure you can protect the privileged nature of the pre-mortem.

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.

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When Blaise Pascal more than 350 years ago penned his now-famous excuse for writing a long letter because he lacked the time to write a shorter one, he knew nothing of COVID-19. And he knew nothing about whistleblower lawsuits, Inspector General Investigations, DOJ prosecutions, and shareholder actions. But he knew that good things often come from slowing down. As the national

response to COVID-19 continues apace, we all should take that message to heart. Sometimes it's worth putting our pencils down, stepping back, and taking a breath. And on that note, I will take the same advice and put my own pencil down. To quote Benjamin Franklin, "I have already made this paper too long, for which I must crave pardon, not having now time to make it shorter."

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### **About The Author**



**Jonathan Aronie** is a partner in Sheppard Mullin's Washington, DC office. He leads the firm's Government Contracts and Internal Investigations Practice Group, and is the co-founder of the firm's Organizational Integrity Group. Jonathan 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. His full bio can be accessed at <https://www.sheppardmullin.com/jaronie>.