

## 6 Dispute Prevention Steps As Lawsuits Rise Amid Pandemic

By **Janice Sperow**

As the unprecedented global pandemic has disrupted businesses and lives worldwide, prevention may be the best legal as well as medical remedy. The onslaught of pandemic-related litigation has already begun with more looming on the horizon, and they run the gamut from consumer debt collection, employment, force majeure, insurance coverage, business disruption, supply chain, manufacturing, construction and myriad other disputes.



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The disputes expand beyond the courthouse and into our streets as police brutality, racial disparity, destructive rioting and civil unrest also plague us. As we try our best to resolve these conflicts fairly, efficiently and cost-effectively in order to return to business quickly, what can we learn from them to prevent their return?

### **Proactive Advance Planning**

Good businesses know how to control costs, quality, productivity and safety. But what steps do businesses take to prevent disputes and all their attendant costs, like business disruption, legal fees, discovery costs, expert fees, time off mission and damaged relationships? With careful advance structural, contractual and strategic planning, businesses and communities can prevent dispute escalation.

#### ***1. Understand the dispute cycle.***

Disputes typically start with a minor issue or concern. The minor issue develops into a problem, which creates a difference of opinion. The difference of opinion damages the relationship and escalates into a dispute. The dispute solidifies position-taking and blossoms into a full-blown legal conflict necessitating legal action.

#### ***2. Break the cycle earlier.***

Classically, counsel, neutrals, managers, executives and other decision-makers jump in to fix the dispute at the end of this cycle — when legal action has already begun. Instead of figuring out how best to resolve a conflict after it occurs, business leaders are now starting to invest in measures explicitly designed to break the dispute cycle earlier and to de-escalate them as they form.

They know prevention is the best conflict solution. Corporate clients increasingly express their preference for maintaining relationships and avoiding the cost and disruption of litigation. Particularly now, with the pandemic-driven economic crisis, businesses cannot afford costly and protracted litigation. Instead, investment in prevention can reap huge economic savings.

Prevention is the planning, monitoring and early intervention necessary to stabilize a business, employment, community or other relationship when issues first emerge before they solidify into hardened positions or escalate into a formal claim. Accordingly, they implement tools at the start of the relationship or business deal specifically designed to address the inevitable pitfalls before and as they arise.

Businesses are uniquely positioned at the start of the deal or relationship to control how they will handle issues, problems and disputes in the future because the parties are at their most cooperative at the beginning of a new venture, project or relationship before any disputes have occurred.

Many other businesses, however, squander this opportunity because they narrowly view it as merely the time to insert a favorable arbitration provision or other boilerplate language into their contract. While companies should include excellent mediation and arbitration provisions in their contracts, they should not limit themselves to resolution-only focused clauses.

Instead, they should include issue management, conflict prevention and dispute resolution clauses and protocols and give them the same careful consideration as the deal points driving the venture, because these are the provisions that will save the relationship, the deal and money down the road.

The parties can use this opportunity to include win-win relationship-building provisions that help avoid and lessen problems. They can capitalize on this optimal time to invest in the relationship by including directly into their contract forward-looking provisions.

For example, each party to the deal can appoint a designated contact person whose duties include fielding issues, questions or concerns from the deal partner. Similarly, the parties can establish a quarterly check-in, where the designated representatives discuss the deal, the progress and the relationship automatically every quarter — or monthly — without one of the parties having to raise a concern.

### ***3. Adopt preventive measures suited to the business.***

Preventive measures can take many forms. They can be contractual, procedural, communicative, structural and substantive. Businesses will want to tailor prevention techniques and methodologies to best suit their company's culture and landscape. A few proven measures to consider include:

- Front-end planning systems to address anticipated issues;
- Contractual prevention clauses;
- Preestablished procedure for quickly processing any issues on which the parties disagree;
- Alignment of relationship interests at the start of the deal;
- Business-oriented, rather than legal-oriented, remedies written into the parties' agreement;
- Project management oversight with a designated representative from each business;
- Point persons designated to manage the relationship, separate from project management;
- Realistic risk allocation written into the contract;

- Advance project delivery methodology with preselected alternatives and backups;
- Built-in financial incentives to encourage and promote cooperation;
- Anonymous hotline with assigned follow-up;
- Joint contractual and project goals and milestones;
- Stepped negotiations and internal escalations before external resolution;
- Standby neutrals familiar with the businesses, relationship, contract, subject matter and projects to advise before formal action;
- Real-time dispute resolution onsite;
- Parallel litigation and negotiation paths;
- Using litigators and other experts as problem solvers at the transactional deal-making level to foresee pitfalls likely to lead to conflict;
- Relationship-based conflict avoidance tools;
- Preestablished channels of open communication at differing levels of decision-making authority within each business;
- Senior management prioritization of and insistence upon prevention and cooperation; and
- A preselected dispute neutral, board or arbitrator for larger, longer duration, or ongoing projects and relationships.

Investing in some or all of these preventative measures can reap huge rewards in reduced conflict resolution and litigation costs.

#### ***4. Partner with experts.***

Many businesses turn to experts after a conflict erupts: They use lawyers, mediators, arbitrators, negotiators, outside investigators, subject matter experts and more. Yet, many of these experts have the training and skill to assist businesses in developing issue identification and anti-conflict systems at the outset and in neutralizing problems onsite in their infancy. Why not deploy them earlier and more cost-effectively?

Neutrals and practitioners are problem solvers; they have spent their lives resolving conflict. The full set of negotiation skills is powerful and capable of more than settling lawsuits. With this skill set, neutrals, litigators and businesspeople can intervene at the stage of mere disagreements, friction, or simple misunderstandings by initiating a preplanned or contemporaneous process to address and resolve the tension constructively and preserve, rather than further fracture, business relationships.

A few leaders in the conflict resolution business have understood and mastered the importance of prevention. For example, the International Institute of Conflict Prevention and Resolution, or CPR, pioneered prevention as the ultimate resolution when it first began

working on the issue over a decade ago.

This year, in response to the pandemic and disruption of business worldwide, CPR in April launched its new Dispute Prevention Panel of Distinguished CPR Neutrals, comprised of practitioners skilled in facilitating conflict management and solving business problems before they become full-blown legal matters, and its Dispute Prevention Committee is poised to release a suite of model prevention clauses and contractual provisions crafted to avoid problems and de-escalate conflict before the classic resolution phase.

And the CPR is not alone. The American Bar Association Dispute Resolution Section, together with the American Arbitration Association, CPR, JAMS, and other distinguished groups and speakers, including general counsels from Bayer AG, Mastercard Inc. and Bechtel Corp., just hosted a town hall on June 30 on the "Imperative of Prevention." An interactive virtual meeting, the town hall featured breakout sessions and panel discussions on the skills needed, tools required, value added by, and corporate preference for prevention.

The town hall featured several important takeaways for corporate leaders on the spectrum of intervention. For example, several experts and general counsels emphasized the value of having a neutral in place at the start of a deal who can steer the parties back toward their joint objectives when issues arise. They stressed the importance of early communication to ferret out and clear up small issues of nonperformance or noncompliance that will damage the relationship over the long term if left to fester.

One corporate model includes an annual strategy day at which outside counsels are invited so they can become part of the discussion. Another uses alternative billing models to reward counsel for early resolution. They all believe in the imperative of prevention.

### ***5. Turn the dispute cycle into a prevention circle.***

Many businesses — in fact most of us — want to move on as quickly as possible after conflict resolution. With that behind us, we can get back to business.

Instead, take a moment to reflect on the path and causes that led to the conflict. Without blame casting, truly figure out how and why the original issues developed into full-blown legal action. Outside counsel and neutrals should offer candid feedback after the conclusion, settlement or resolution of a dispute to improve business practices. These lessons learned can form the next steps for a future prevention model.

By learning what caused the conflict, introspective businesses can help prevent the next one. And, with the inundation of lawsuits resulting from the pandemic, now is an opportune time for the implementation of prevention.

### ***6. Play it forward.***

Protests constitute a regular aspect of a democratic society. But, as we have seen recently, they can sometimes cross over from peaceful demonstrations to civil unrest. Even largely nonviolent protests can end in arrests, property damage and violence.

Many prevention experts are expanding the use of their skill sets outside the corporate world and into our communities. Putting their money where their mouths are, they are working on prevention strategies to help increase trust building, engage diverse stakeholders and improve cross-cultural communication, access, racial equality, police

relations and civil harmony.

Corporate leaders and their advisers can use preventive steps not only to improve their business-to-business relationships but to help their local and global communities by implementing their own harmonious workplace and corporate citizenship strategies. After all, an ounce of prevention is worth a pound of cure.

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*Janice Sperow is an arbitrator, mediator and prevention facilitator. She serves on the CPR's dispute prevention panel, as a neutral and judge pro tem for the San Diego Superior Court, and a neutral for the American Arbitration Association, the International Institute for Conflict Prevention & Resolution, the Financial Industry Regulatory Authority, the Forum, the World Intellectual Property Organization, the National Futures Association, and the Better Business Bureau.*

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