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The Benefits of Dispute Prevention

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"An ounce of prevention is worth a pound of cure."

Prevention can play a significant role in handling legal and business disputes. Business partners, government contractors, and alternative dispute professionals should use prevention as the first and foremost tool in their conflict resolution arsenal. This article examines how to implement prevention techniques before, during, and after a dispute.

I. The Dispute Cycle and Conflict Escalation

The parties need to understand the dispute cycle to implement effective prevention techniques. Disputes typically start with a minor issue or concern. The concern begins to generate tension, frustration, and budding distrust. The parties start to experience an actual or perceived gap in their respective needs, goals, and communication. Without quick resolution, the minor issue creates a difference of opinion, which develops into a problem.

The conflicting parties harden their positions; they gradually become fixed on their own approaches until the difference of opinion damages the

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relationship and escalates into a dispute. The dispute further solidifies position-taking and blossoms into a full-blown legal conflict necessitating legal action.

II. The High Cost of Disputes

The transactional costs of resolving commercial disputes and claims in the United States easily exceeds $306 billion in the United States and $870 billion globally according to a United States Chamber of Commerce Institute for Legal Reform study.[1] The American Arbitration Association has measured the cost of awaiting court resolution rather than arbitral resolution alone to exceed $180 million per month (at trial) and $330 million per month (on appeal), respectively.[2]

Dispute costs typically come in three types: direct, indirect, and intangible. Direct costs represent the most obvious out-of-pocket costs: fees for lawyers, accountants, consultants, the tribunal, court reporters, paralegals, experts, and for every other third party involved in the resolution of the dispute. Indirect costs represent the parties' in-house costs to handle the conflict: in-house counsel, IT staff, company representatives and witnesses, involved employee salaries, and associated overhead. While indirect, these costs are measurable and tangible.

Intangible costs reflect the very real but much harder to quantify costs of disputes: damaged relationships and lost associated profits, time spent off mission, failed business objectives, resource and time diversion, mental and emotional fatigue, and opportunity costs. Intangible costs can also include industry and media scrutiny if the public becomes aware of the dispute. Such scrutiny can often lead to shifts in stock prices and changes in market reaction. They also result in the parties' loss of control over the problem as arbitrators, judges, or juries become the decisionmakers.

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[1] *See* U.S. Chamber of Commerce, *International Comparisons of Litigation Costs* (June 2013), https://instituteforlegalreform.com/wp-content/uploads/media/ILR_NERA_Study_International_Liability_Costs-update.pdf.

[2] American Arbitration Association, *Measuring the Costs of Delays in Dispute Resolution*, https://go.adr.org/impactsofdelay.html (citing Micronomics, *Economic Impact of Delay: Micronomics Final Report* (2017)).

All these costs, of course, fall on top of any damages and fees awarded in the dispute plus possible pre- and post-judgment interest. Litigation consumes time, and time is money. Take a Massachusetts court case as an example. With a 12% statutory pre-judgment interest rate and an average five-year time to trial, even before the coronavirus, a million-dollar judgment easily becomes a $1.6 million hit, without counting the five years of direct, indirect, and intangible costs.

Good businesses know how to control costs, quality, productivity, and safety. Such control measures should also include ways to prevent or at least minimize disputes and their attendant costs as part of organizational strategic planning. Likewise, the costs of the prevention tools themselves must be appropriately tailored to the costs in dispute.

III. Prevention Versus Resolution

Classically, counsel, neutrals, managers, executives, and other decisionmakers jump in to fix a dispute at the end of its lifecycle—when the parties have already begun legal action. Instead of figuring out how best to resolve a conflict near the end of its lifecycle, dispute prevention examines measures explicitly designed to break the dispute cycle earlier and to deescalate problems as they form before they solidify into formal legal action.

"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, whereas "resolution" is the conclusion of a dispute after it has fully emerged between the parties.

Parties 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 large economic savings. After all, preempting a problem before it blossoms into formal proceedings ***is*** the best conflict solution because it minimizes and often avoids many, if not most, of the direct, indirect, and intangible costs associated with proving, processing, and resolving a claim.

IV. Advance Planning Prevention Tools—Pre-Dispute Prevention

Realistically, every business relationship involves problems and unplanned events. Every problem inherently carries with it the potential to become a conflict. Successful prevention does not mean that the business relationship will never experience problems, but it does means that not every business problem will develop into a legal dispute. Savvy business partners know that the start of their relationship presents the best time to implement successful prevention tools because the parties can maximize their effectiveness and benefits. Accordingly, they implement tools at the outset specifically designed to address the inevitable pitfalls before 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 cooperate the most at the beginning of a new venture, project, or relationship before any disputes have occurred. Pre-dispute prevention techniques, whether they involve expertise, contractual clauses, or even emerging technologies, all share one common feature: proactive steps to anticipate and manage problems.

A. Using Expertise

To begin, the parties will want to jointly and separately assess at the start of the deal the problems likely to arise down the road. They can use this analysis to anticipate potential future problems and then build into their deal systems and protocols means for resolving them.[3] For example, instead of relying on counsel only to negotiate the most favorable deal points, use counsel to analyze the likely legal challenges. Or, try something novel and jointly hire independent counsel—someone without a stake in the deal—to review the contract for potential shortcomings and report the findings to all parties. Parties always use transactional lawyers to help them broker

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[3]The construction industry uses the initial assessment tool very effectively. The Construction Industry Institute developed an index that identifies dispute-likely project aspects so project teams can correct them before they generate actual problems. James P. Groton et al., *Thinking Ahead*, *in* 2 *Negotiator's Desk Reference* 265 (Chris Honeyman & Andrea Schneider eds., 2017), http://jimgroton.com/wp-content/uploads/2017/06/D1-C70V2-Groton-Thinking-Ahead.pdf (with looseleaf pagination starting at 1, not 265).

the deal, but now parties should also use litigators—whom they typically underuse if at all at the deal stage—to help the parties understand how the deal will play out in the event of a dispute and how to structure the contract to minimize those risks.

Access the parties' in-house team and outside experts to think ahead and identify potential problems and pitfalls from a business, tax, supply, manufacturing, design, or other aspect. Call the experts each party will inevitably have to call at trial now instead and invest in a few hours' time to get their assessment of the possible complications. Hire the neutral the parties will have to select to resolve their legal dispute now instead of later to obtain an objective view on the parameters and risks of the project.

For example, litigants frequently call upon arbitrators, judges, and juries to determine contract damages under the foreseeability test. These decision-makers will award damages under a contract if they were foreseeable as a probable result of breach at the time the parties entered into the contract.[4] While the parties cannot impanel a jury, they can hire an arbitrator or other neutral at the start of the contract to advise them of the foreseeable damages likely to flow from breaches of various contractual duties.[5] Armed with that advance information, the parties can try to forestall the harm, establish backup plans to mitigate the damages, and even allocate the damages to a particular party for a specific type of breach or cap them at a specified amount—or they can allocate a percentage of the likely foreseeable damages to each party consistent with their contractual goals.

B. Using Prevention-Focused Contractual Clauses

Many businesses squander the opportunity presented at the start of a new deal 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, well-crafted mediation and arbi-

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[4] *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854) first articulated this standard still in effect in many jurisdictions. *See generally* Restatement (Second) of Contracts § 351 (1981) (damages not recoverable unless foreseeable). Even in tort cases, foreseeability often defines the issues of duty and proximate cause.

[5] The International Institute for Conflict Prevention & Resolution (CPR) has a specialty roster of arbitrators who are dispute prevention specialists, which includes the author.

tration provisions in their contracts, they should not limit themselves to resolution-only–focused clauses. Instead, they should include prevention-focused clauses that address issue management, conflict prevention, de-escalation, and yes, dispute resolution protocols. More importantly, they should give them the same careful consideration as the deal points driving the venture because these provisions will save the relationship, the deal, and the profits down the road. The parties can use this opportunity to include win-win relationship-building provisions, which help avoid and lessen problems. They can capitalize on this optimal time to invest in the relationship by including forward-looking provisions in their contract.

1. Communication and Issue-Spotting Clauses

For example, each party to the deal can contractually appoint a designated contact person by title or position, a "relationship manager," whose duties include fielding issues, questions, or concerns from the deal partner as they arise. Good communication between participants means the parties openly discuss, identify, and solve issues as they emerge.[6] The relationship managers would not oversee the business deal or venture itself, as they are not the project managers; but instead, they focus on maintaining a smooth working relationship among the parties. A separate relationship manager can also help calm any bubbling issues stemming from the deal or project team itself.

In addition, the parties can establish a pre-scheduled relationship managers' check-in or "chat." Depending on the longevity and nature of the deal, the communications link can occur automatically weekly, monthly, or quarterly. The parties can write the regularity and discussion points right into the contract if they wish. During these regular check-ins, the designated representatives discuss the deal, the progress, and the relationship automatically without one of the parties having to raise a "concern." Each representative reviews a pre-set list of open-ended questions to ask the other,

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[6] As Jim Groton, a pioneer in the prevention field, explained, the "red phone" between the United States and the Soviet Union at the height of the Cold War exemplifies the importance of a direct line of communication to conflict prevention. *See Thinking Ahead*, *supra* note 3, at 267.

such as: “where are we on the timeline,” “have the prerequisites to the next step occurred,” “do we anticipate any delays, problems, issues with regard to X in the next week, month, quarter, phase,” or “what pitfalls are on the horizon.” And of course, each can raise new issues as they unfold.

The advantages of a regular agenda of questions are myriad. A pre-set list of check-in points helps establish a routine of relationship and project introspection without blame or hostility building up; and it provides a regular outlet for airing and forecasting potential problems. When part of the agenda deliberately includes a forward-looking series of questions, such as “what do you see on next quarter’s horizon” or “does any of the likely legislation impact our direction,” then the parties can anticipate issues and start working on contingencies and resolutions before they materialize.

The parties can also employ open communication clauses built into the contract structure to promote transparency. For example, the parties could share a project website or online tool to which everyone involved in the deal on all sides has access and can post information. The relationship managers can then serve as the moderator or host of the communication platform.

2. *Financial and Positive Incentive Clauses*

Deals involve at least two—and often multiple—parties, each with its own interests and goals in entering into the relationship. Goal identification and alignment can offer another dispute prevention tool. If the parties openly discuss their goals, they can usually agree upon a set of joint goals, which they draft directly into their contract. The parties can then structure the contract and relationship to achieve and reward their joint goals.

For example, the deal leaders can create a bonus pool, which all parties will share upon completion of contractual milestones or goals. But they only share the bonus pool if all parties achieve the joint goals or their assigned goals. The bonus pool helps foster collaboration and prevent disputes because the incentive clause creates an all or nothing proposition: either every party shares the bonus or no one does. Accordingly, the contract financially

incentivizes the parties to work well together and vests all parties with a greater stake in the deal's key milestones and success as a whole.[7]

3. Risk Managers and Allocation Clauses

Powerful tools to prevent later disputes include effective use of risk managers to help structure strong, well-crafted allocation-of-risk clauses. Every business venture involves potential risk. Consequently, businesses need to identify, assess, understand, anticipate, evaluate, and manage risk. But, instead of simply having counsel draft a strong indemnification clause designed to protect only one party to the contract, the parties may want to use their in-house or outside risk managers' expertise to protect the deal, the relationship, and all parties to the enterprise.

Risk managers deal with risk assessment every day; it is their job. Risk managers identify, measure, and evaluate different types of risks that can affect a business. They look at what could go wrong, they evaluate the impact of what could go wrong on the business, and they come up with strategies to minimize and even eliminate the risk.

They also know about the industry they operate in, so they can identify industry-specific risks. The parties can use their in-house risk managers or jointly employ an outside risk manager to use their analytical expertise to help them minimize the risks associated with their venture and help counsel craft realistic risk allocation clauses less likely to cause later friction between the parties.

For example, a comprehensive business deal may currently present a win-win for all parties, yet later changes, such as technological advances or new competitors in the market, can quickly affect a well-thought-out enterprise. A strategic risk manager can assist the parties at the start of the relationship to create a contingency plan to adapt to such changes. Likewise, a compliance risk manager can ensure that the deal complies with all the relevant laws and regulations and, importantly for dispute prevention purposes, prepare for impending and future compliance issues. A compli-

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[7]Partnering clauses represent another great prevention tool. In such clauses, the parties express their desire to work together in good faith toward joint goals.

ance risk manager remains always up to date with proposed legislative and regulatory changes and can help the parties to structure their deal and contract now to address contingencies and risk allocation should those changes materialize.

The parties must not only assess the potential risks they may face, but they must then assign each risk to the party best able to handle, minimize, control, prevent, eliminate, benefit from, bear the cost of, or insure against it. Every risk has associated and often unavoidable costs, which have to be assumed within the deal structure. If neither party can effectively manage or insure against a particular risk, then the parties will have to bargain the best, rational allocation among them given the economics of the particular deal. A risk manager can help the parties allocate each particular risk in way designed to reduce the deal's overall risks and associated costs, thereby helping them protect the venture and relationship as a whole.

4. Notice and Cure Clauses

Businesses can also model prevention-focused notice and cure clauses on a labor grievance process. Typically, in the early stages of a labor dispute, the contract requires one side to clearly, promptly, and expressly notify the other in writing of a problem. The other side then must respond in writing within the contractual timeframe with an explicit response. Thus, neither side may ignore an issue because the contract requires direct written communication to raise an issue or risk waiving it. Businesses can adapt this protocol to include a contractual requirement that each party notify the others within a specified timeframe of an issue and propose two to three reasonable solutions for resolving it. The other parties then must accept one of the options or respond within a specified timeframe in writing with an equal number of fair alternatives. Such notice and cure clauses force the parties to communicate about an issue and to start working on its solution. Ideally, the parties start to concentrate on fixing the problem, rather than digging in their heels or assigning blame.[8]

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[8]If the parties reach impasse at this early stage, a third-party neutral can help them resolve the issue immediately and informally rather than through a formal ADR process. This is one effective use of a standing neutral, discussed later in the article. The parties will

5. *Dispute Cost and Bonus Allocation Clauses*

The parties can also consider the use of dispute cost allocation clauses, which contractually allocate the costs of resolving the dispute to the party causing the dispute. They have to be wary, however, as parties can abuse such clauses to focus on blame rather than prevention. They can also misinterpret such clauses to focus on who identified the problem—which is the first step to fixing it—instead of who caused the dispute. A better approach might be to contractually agree that each party will allocate the costs of a dispute to the department within each of their own businesses that caused the dispute and/or a bonus to the department that successfully resolved the problem. If businesses charge the dispute costs to the budget of the department which caused it instead of the legal department than managers may better appreciate, and seek to avoid, the true costs of disputes. Similarly, if businesses award bonuses to in-house and outside counsel for resolving disputes, with greater amounts made available the earlier and more jointly beneficial the resolution, then counsel may better appreciate the need to remedy problems more quickly and cost-effectively.[9]

C. Using Emerging Technology

For those willing to try more forward-looking and creative approaches or those with the in-house technical expertise, the parties can employ emerging technologies, such as predictive analytics, blockchain, smart contracts, and augmented reality, to help them anticipate and prevent problems. Predictive analytics, an area of statistics, extracts information from data and uses it to predict trends and behavior patterns. Predictive analytics include data modeling, machine learning, artificial intelligence, deep learning algorithms, data mining, and predictive web analytics. At its core, predictive analytics relies on capturing relationships between explanatory variables

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also present more realistic, cost effective options to fix the problem if the arbitrator has the authority to accept one of the choices, as she would in baseball arbitration.

[9] Of course, companies need not wait for a contract to implement this carrot and stick practice; they can easily and unilaterally allocate these costs and benefits internally at any time.

and predicted variables from past events and then using them to predict the unknown outcome.

Predictive analytics represents a technology that learns from experience (data) to predict the future behavior of individuals in order to drive better decisions. Used in many industries, such as insurance and pharmaceuticals, predictive analytics is probably best known for its applications in the credit score area. Financial institutions use customers' credit history, loan application, customer data, and other financials to predict their likelihood of paying future credit payments on time.

Yet, the technology offers a much wider range of possibilities. In business, predictive models could exploit patterns found in historical and transactional data to identify risks and opportunities presented in any proposed contract or venture, which the parties could then address in the contract or relationship itself before the risks materialize. For example, a deal involving private information could benefit from a predictive risk assessment of privacy and data leaks in the past. Or, the parties could examine the legal landscape of current and pending legislation and design a deep learning algorithm to predict the likely magnitude of an attorney fee award in the event of a class action against the businesses in the project.

The parties could also use blockchain technology and then combine it with predictive analytics to make smart contracts that interact with the blockchain even smarter. Simply put, blockchain technology uses a growing list of data records, called "blocks," which it then "chains" together using cryptography. It then uses cryptography functions to essentially create an "open ledger" of transactions not easily susceptible to hacking.

A key use case for blockchain technology, a smart contract is really more of a computer program than a traditional contract. It enforces the parties' agreement automatically based upon the contract terms inputted into the code.[10] Smart contracts help reduce conflict because the language

[10] Smart contracts are not the same as smart legal contracts, which are traditional, legally enforceable natural language contracts, in which some terms are expressed and/or implemented in code. Smart contracts, on the other hand, are electronic representations of the contracts themselves, which helps multiple parties conduct and enforce their contractual transactions with transparency.

used to write them—code—is more defined than human language, which can easily contain ambiguities that may lead to conflicts. Smart contracts can also help avoid defaults in performance since the computer will behave as programmed.

Over time, the blockchain in the smart contract will gather significant amounts of data, which predictive analytics can then leverage to identify potential problems or behavioral patterns. Predictive analytics would make smart contracts even smarter because the parties can use those identified potential problems and patterns (anomalies) to continuously train the clustering models against the historical data and then run those models to predict risks in future contracts or transactions. More importantly, the parties can use the information to actively prevent the spotted problems from occurring or to jointly plan in advance how to resolve them if they arise.

Similarly, augmented reality (XR) can help inform strategic decision-making. XR transforms volumes of data and analytics into images, which are superimposed upon the real world. It essentially allows the user to "see" the information. For example, a popular game Pokmon GO uses XR through the player's smartphone to show the player an animated character in the player's real-world surroundings.[11]

XR has great uses beyond games. Reality is three-dimensional but data, which informs the world's decisions and actions, is two-dimensional, existing on pages or screens. XR converts two-dimensional digital data into images overlaying the three-dimensional physical world allowing people to see the information collected from billions of connected smart devices worldwide. XR basically allows a more effective and faster information delivery system in which the parties do not have to mentally bridge the gap between the two-dimensional information and the three-dimensional vision of the transaction because they can process both simultaneously.

XR's power comes from the way people process information. While people access information through all five senses, approximately 80-90% of

[11]XR is different from, but related to, virtual reality. In virtual reality, the technology transforms the data and superimposes it on a computer-generated world, not the real world, as in the movie "Ready Player One," which depicted people in 2045 escaping everyday problems by entering a virtual universe.

it comes from vision. Therefore, the parties can literally fix and prevent problems faster because they can identify and avoid them faster. For example, business partners could use XR to have their onsite managers transmit images of what they are seeing to their headquarters or offsite experts for real time guidance, thereby immediately resolving an issue and preventing a possible later dispute. Or, one contract party could use XR to "show" the other what they see now or envision in the future. In short, emerging technologies offer parties new ways to look at their deal, its potential risks, and benefits.

V. Real Time Prevention Tools—Emerging Dispute Prevention

Real time tools prevent emerging problems and their associated costs from escalating. They defuse rather than worsen a conflict. The parties can use them in-house or engage outside experts to assist. In-house tools help businesses maintain control over their issues when they use contractually built in party-to-party prevention tools to deescalate a budding conflict. Whether they directly negotiate or use in-house ombuds, the parties can keep a lower profile on any conflict than they otherwise would going to court to resolve the issue. Outside experts add a level of neutrality to the problem-solving and have a strong deterrence effect.

A. Using Pre-Authorized Decisionmakers

Parties can help resolve issues quickly in-house if they establish within their respective business managers or decisionmakers who already have authority to execute contract or venture changes within a specified range set internally by each deal partner. While these decisionmakers cannot resolve all problems, as many may be unforeseeable, they can use the early assessment tools discussed above to ascertain the most likely areas of future dispute. They can then work with their supervisors, management team, counsel, and executives to preestablish acceptable modifications, resolutions, or outcomes the decisionmaker can implement without further approval. Basically, the company will develop an acceptable menu of problem-solving options and then empower the designated decisionmaker—perhaps the relationship man-

ager—with the authority to select from and implement from the menu as issues merit.

B. Using Step Negotiation

Negotiation is essentially any discussion aimed at mutual agreement—the parties talk through their issues. Step negotiations—often written right into the deal structure—represent a multi-tiered negotiation approach. Step negotiations have several built-in advantages. Sometimes, the day-to-day participants become entrenched in the problem or vested in their own positions. Step negotiation provides for review of the problem by the next level of management. For example, if the direct line workers cannot resolve an issue amongst themselves, then they each forward the issue to the designated relationship managers, who have a bit more distance from the problem and an established rapport working together to support the deal and the relationship.

If they cannot solve the issue, then they have to refer the problem to their immediate supervisors, who will have to either resolve the issue or pass it along to a higher up. Ultimately, an unresolved issue would land on the desk of the CEOs involved. But no managers want their bosses to think them incapable of creatively resolving problems, and no vice presidents want to trouble their CEOs because they could not fix problems within their departments. As a result, step negotiations by their very structure incentivize each step to resolve the budding conflict before it escalates to higher management.[12]

C. Using an Ombud

An ombud investigates complaints and tries to resolve them, typically through negotiation and/or recommendations. The federal government uses ombuds regularly and has for years. Corporations have started to see the value of using an internal ombud to informally and confidentially investigate issues in the workplace. Superior ombuds focus on identifying systemic issues that may have contributed to the issue, so as to improve the organiza-

[12] Step negotiation is a key feature of collective bargaining, where it has been used effectively for years.

tion's overall business. The ombud usually works independently, reporting directly to the CEO or board of directors, but plays no other role within the organization and does not form part of the executive management team.

Deal parties could easily adapt the ombud function to their business venture, using a point person from within each deal partner to receive and investigate complaints informally and confidentially before escalation or litigation. The ombuds could report directly to the CEOs (or relationship managers) who could then talk directly with each other about how best to handle the tension.

D. Using a Standing Neutral

A very effective prevention tool is the pre-selection of a third-party neutral who will help the parties throughout the duration of their relationship. At the start of the relationship, the parties mutually select a neutral with expertise in the particular areas likely to raise issues as the parties work together. The parties must equally share confidence in the neutral as the neutral works best as a prevention specialist if the parties trust the neutral, value her opinion, and respect her expertise. The parties explain the project, as well as their needs, relationship, goals, and deal points, to the neutral. They update the neutral as they progress, covering key milestones, minor issues they resolved internally, and any developing issues. The neutral can and should meet regularly with the parties informally to stay abreast of the deal's progress and understand the parties' working dynamic. The parties and neutral should calendar the regular meetings at intervals that work for the deal and the speed of the project—weekly, monthly, quarterly—and not wait for a conflict to develop. The neutral's continuous involvement with the parties and their venture builds more confidence and trust in the neutral's judgment when a conflict does arise.

When an issue does arise, the parties contact the neutral and get expert advice on relatively short notice because the neutral already has familiarity with the project, the basic parameters of the deal, and the parties' relationship. The neutral then issues a prompt, but nonbinding, decision on how best to resolve the dispute. Ideally, the parties agree that the neutral's decision will be admissible in the event of later arbitration or litigation because

admissibility will increase both the parties' reasonableness in their positions and their likelihood of accepting the decision without further action. In fact, the neutral's sheer presence will deter escalation of the dispute because the parties will more likely adopt reasonable stances in negotiations so as not to appear unreasonable later before the standing neutral. Indeed, after a while, many disputes will never reach the neutral because the neutral's immediate availability will deescalate the conflict.

The standing neutral offers flexibility and adaptability because the parties can fashion the standing neutral process to suit their needs and preferences for any particular deal.[13] For example, they can use a standing industry specialist, a standing contract specialist, a standing ombud, a standing mediator, a standing arbitrator, and/or a standing review board or committee. The standing neutral approach also discourages gamesmanship because the neutral will hear all the parties' disputes over the entire history of their relationship and deal. Consequently, the parties will be less inclined to become intractable or unreasonable when they know a third party will immediately evaluate the problem and proposed resolutions. Importantly, the approach also adds speed to the resolution process because the parties have already selected a mutually agreed upon neutral, to whom they have already explained the deal, in whom they already have confidence, and with whom they already have an ongoing business relationship. The parties hence avoid the long delays of filing a dispute, selecting a neutral, and briefing the neutral on the dispute.

VI. Lessons Learned—Post-Dispute

Most parties to a dispute wish to put the dispute behind them as quickly as possible. Understandably, they want to "get back to business." But they can learn prevention lessons even after the dispute resolves because disputes weave through a cycle. Thus, if parties learn data from Problem 1, they can use that data to help prevent Problem 1 from reoccurring and may even prevent future Problem 2.

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[13] For parties concerned with appearing "weak" or losing control over the process, they can also engage on parallel paths simultaneously, pursuing de-escalation and litigation at the same time, if they desire.

A. Conflict Autopsies—Endpoint Retrospective

Lessons truly learned are one of the most powerful prevention tools. Debriefing with the decisionmakers on how the problem can best be avoided in the future can save vast time and resources down the road. General counsel and other executives with a line of sight across a lot of departments should take the lead on the post-conflict review. Their focus should be actually getting to the root causes of the problem, rather than positioning or blame shifting. Often, outside neutrals can help those involved more effectively see the bigger picture because they are removed from the dispute. While companies can and should also debrief with their in-house team, an outsider's view will lend greater perspective and weight because they never had a "dog in the fight."

The parties will also want to conduct an "autopsy" within the affected departments, and not just the legal department. Getting to the root causes of the conflict goes beyond the legal theories involved; prevention has to focus on the departments that actually handle the day-to-day operations of the venture. They have a stake in the result; but more importantly, they are best equipped and positioned to implement the lessons learned from the post-conflict autopsy.

Manufacturing companies have employed this technique for years. They often use the fishbone diagram or Ishikawa diagram to depict the causes and effects of a problem. The diagram helps managers track down the reasons for imperfections, variations, defects, or failures. The diagram looks just like a fish's skeleton with the problem at its head and the causes for the problem feeding into the spine. They also use the five Whys method created by Toyota to get to the root cause of a problem. The technique keeps asking "Why?" until the businesses have determined the cause of the problem, which typically requires at least five iterations.

B. Training

Companies routinely require mandatory training on a whole host of topics—sexual harassment, workplace safety, and more. Use the lessons learned from the retrospective to educate the deal team on avoiding a repeat of the problem, conflict resolution, conflict avoidance, and prevention techniques.

Hire or train an ADR practitioner in-house or for the deal. Use a mediator or other neutral to share their expertise with your staff, especially in-house counsel, so they can employ them directly on the job. Better yet, incorporate this training as part of an annual strategy retreat or meeting to which the parties or company invite outside counsel, business executives, neutrals, experts, and their full external network of advisors to share in helping them develop and implement business and prevention strategies for the coming year.

C. Legal Audits—Ground Zero

After the training, companies should regularly conduct legal audits company-wide or department-wide on a rotating basis to help prevent problems within their businesses and to ensure that the team has implemented the lessons learned. Indeed, most companies perform some type of internal legal audit or compliance check. Now, extend that policy to the relationship. Regularly review or audit the partnership, deal, or project even when the parties have no current problem or have resolved them all. By periodically reviewing the venture at ground zero of the dispute cycle, all parties help forestall future issues from ripening into disputes. The audit, comprised of members from all parties, can search for signs of the reoccurrence of past problems or the emergence of new issues. Either way, regular checkups and check-ins foster prevention. The relationship managers, discussed above, are perfectly suited to perform a relationship audit as part of their joint duties as they already know the deal, the parties, and the issues.

VII. Conclusion

Many industries have learned the value of, and turned their expertise toward, prevention. Doctors cure diseases, and dentists repair teeth, but both focus on maintenance and prevention as the best medicine. Firefighters fight fire, and the police fight crime, but both focus on education and prevention as the best weapons. Federal and State Occupational Safety and Health Administrations address workplace injuries, and psychiatrists and psychologies treat mental illnesses, but they all see prevention as the ultimate goal. Like these industries, all companies and professionals can save costs, increase

productivity, and maintain stronger business relationships through dispute prevention. Businesses can avert many problems entirely with some forethought, and they can certainly minimize their costs when they do arise. Prevention—conflict cost containment—makes economic sense.