

A New CPR Conflict Prevention Initiative:

**REDUCING DISPUTES
THROUGH
WISE PREVENTION PROCESSES**

AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE

A stitch in time saves nine

BE PREPARED

Fortune favors the prepared mind

FIX THE PROBLEM, NOT THE BLAME

It usually costs less to avoid getting into trouble than to pay for getting out of trouble

The highest and best form of dispute resolution is dispute prevention

DISPUTE RESOLUTION COSTS MONEY. DISPUTE PREVENTION SAVES MONEY.

A new CPR Conflict Prevention Initiative: **Reducing disputes through wise prevention processes**

Background

Shortly after her appointment as President of The International Institute for Conflict Prevention and Resolution, Kathy Bryan, mindful of the “conflict prevention” aspect of CPR's name and mission, asked a group of CPR's scholars and practitioners to take a fresh look at the field of conflict *prevention* (as distinguished from the more familiar field of conflict *resolution*). She asked the exploratory group to make recommendations as to how CPR might better assist its members to take advantage of prevention principles and techniques.

The exploratory group has engaged in a wide-ranging study of the entire field of prevention as practiced in the United States and around the world. Its investigation has considered prevention in many fields of endeavor, from classic principles and practices of disease prevention to the innovative techniques that the construction industry has developed to keep the peace on construction projects.

The group recently made its report to Kathy Bryan. In its report the group presented several conclusions about the conflict prevention field, and made a specific recommendation to CPR of some initial steps that CPR could take to help its members reduce conflict and keep business problems from escalating into disputes.

The exploratory group's key conclusions

Among the exploratory group's conclusions were the following:

- Conflict prevention is a very broad field, but the part of the field which fits in best with CPR's mission is the prevention of business disputes.
- Business disputes interfere with business efficiency, damage valuable business relationships, and cost American businesses high transaction costs, even when they are resolved relatively amicably through mediation or other ADR methods.
- While the practice of *resolving* disputes has experienced dramatic development during the past generation, relatively little attention has been given to improving ways of *reducing or preventing* the scope of disputes and/or preventing them entirely.

- There is a vast potential for saving transactional resolution costs, improving business efficiency, and preserving valuable business relationships, by reducing the number of business disputes that have to be resolved through litigation, arbitration and mediation.
- Many business disputes can be avoided or mitigated by the proactive application of sound prevention principles and techniques.
- American businesses generally pay too little attention to the prevention of disputes. In many other countries there has been a much greater emphasis on the proactive prevention of disputes than in the United States. This experience has provided one practical knowledge base.
- In the business world the most successful examples of dispute prevention are a series of prevention and control techniques developed by the construction industry. This experience has provided a second practical knowledge base.
- American businesses should take advantage of the innovations in dispute prevention and control that have been developed by the construction industry, as well as the proactive approaches to dispute anticipation and prevention that are being used in other countries.
- Business leaders and managers and their inside counsel have a positive incentive to save money through prevention of disputes. Unfortunately their outside lawyers (as well as dispute resolution professionals) typically have no such incentive as yet. Furthermore, these "outside" professionals' traditional perception of their jobs tends to focus on what happens *after* a dispute arises, rather than on what might be done to keep disputes from happening.
- Many general counsel as well as outside lawyers work hard at designing agreements to forestall disputes by such traditional means as substantive precision in drafting. This is a foundation upon which the more recently-developed techniques of conflict prevention and dispute management could be added.

The exploratory group's initial recommendation

The exploratory group considered a number of possible business dispute prevention initiatives that CPR could potentially engage in to encourage and implement better conflict prevention practices. These ranged across such diverse areas as crisis anticipation and management, employer-employee relationships, business-community relationships, business-customer relationships, product liability, and general tort liability.

However, recognizing the breadth of the conflict prevention field, the inherent difficulties of bringing about changes in human behavior, and the need to conserve CPR's resources, the group decided to limit its initial recommendation for CPR's first "prevention" initiative to two areas: business-to-business relationships and corporate governance relationships. Both of these are typically defined by contracts or documents that are the product of negotiated agreements and protocols. These in turn provide a point of departure where meaningful progress could be made relatively economically.

Accordingly, the group recommended that CPR should undertake a new conflict prevention initiative, defined in the following initial set of "Prevention Best Practices":

CPR urges its corporate members, their inside lawyers, and their outside counsel, to adopt the following set of standard "Prevention Best Practices":

- I. During the initial negotiation and drafting of a business-to-business agreement or a corporate governance document, all parties should**
 - a) proactively and realistically think ahead about the future conduct of their business relationship,**
 - b) realistically anticipate the possibility that problems and unexpected events can occur, and that they can generate disputes; and**
 - c) incorporate appropriate processes into their agreements and documents to reduce and avoid disputes.**

- II. Processes recommended for adoption are designed to**
 - a) solve the underlying problem when an unexpected event occurs,**
 - b) prevent the problem from escalating, and**
 - c) achieve the immediate and low-cost resolution of any imminent disputes.**

The exploratory group pointed out that in carrying out these Prevention Best Practices, businesses and their advisers will find the following principles and techniques to be of the greatest help in efforts to reduce disputes:

The most promising techniques for reducing business disputes are a series of principles and techniques developed by the construction industry. When selected and adapted to fit the circumstances of the particular project, these techniques have proved to be very successful in curbing disputes.

Examples of some of the most useful of these dispute prevention principles and techniques include the following:

- Early and realistic recognition of the fact that problems and unexpected events are inevitable during the course of any business relationship.
- At the commencement of the business relationship, thoughtful anticipation and assessment by both parties of potential problems that might arise.
- Realistic allocation of each risk to the party best suited to control or insure against those risks. *See CPR's Prevention Monograph on Realistic Risk Allocation.*
- Improvement of communications between parties, with specific techniques noted in the collateral *CPR Prevention Practice Materials* now being made available.
- Encouraging cooperation and collaboration through such techniques as incentives and partnering. *See CPR's Prevention Monograph on Partnering.*
- Including in the parties' contract carefully-selected processes for controlling problems and unexpected events, such as step negotiations, and the appointment of a standing neutral. *See CPR's Prevention Monograph on Dispute Review Boards and Other Standing Neutral Processes.*

Standing Neutral Processes

The exploratory group made a special point of noting that the single most versatile of the innovative techniques developed by the construction industry is the "standing neutral" concept. This technique is ideally suited to "keep the peace" during the course of any continuing relationship. This concept contemplates that at the inception of the relationship, the parties select one or more independent experts in the subject matter field of the business relationship, in whom they have trust and confidence to serve as a "real time" dispute resolution and control resource throughout the course of the relationship.

The appointment of such a pre-selected neutral, already familiar with the business relationship, avoids the initial problems and delays that are involved in selecting and appointing a neutral after a controversy has arisen. The ready availability of the neutral, the neutrals' acknowledged expertise, the speed with which he or she can render decisions, and particularly the fact that this neutral will hear every dispute which occurs during the life of the relationship, all provide powerful incentives to the parties to deal with each other and the neutral in a timely and frank manner, by discouraging game-playing, dilatory tactics, and the taking of extreme and unsupportable positions.

Experience has further shown that the most important by-product of the use of a standing neutral is that the *mere existence* of the standing neutral results in minimizing the number of disputes that are presented to the neutral, and often totally eliminating them. In effect, the standing neutral serves not only as a standby real-time dispute resolution technique but also as a very successful dispute prevention device.

Even though some initial expense is involved in the process of selecting, appointing, initially orienting, and periodically keeping the neutral informed about the relationship, these costs are relatively minimal. Even in the relatively rare cases where the neutral has to be called on to resolve disputes, overall costs of the standing neutral are dramatically lower than the aggregate potential costs of resolving a dispute in litigation, arbitration, or even mediation.

Collateral practice aids to assist in implementation of these CPR Best Practices:

The prevention exploratory group noted that CPR has developed a number of practice materials that will further explain the available dispute prevention processes, and provide useful practical information on how they can best be deployed to advantage in business agreements and governance protocols:

CPR Construction Dispute Prevention Monographs

CPR has just published three Dispute Prevention Monographs, written by members of CPR's Construction Advisory Committee. These describe three of the most useful dispute prevention techniques developed by the construction industry.

The titles of these Monographs are:

Realistic Risk Allocation: Allocating Each Risk to the Party Best Able to Handle the Risk

Partnering: Aligning Interests, Collaboration, and Achieving Common Goals

Dispute Review Boards and other Standing Neutrals: Achieving "Real Time" Resolution and Prevention of Disputes

Each monograph, in addition to describing exactly how the particular technique has been successfully used to prevent disputes in construction project relationships, also identifies ways in which the technique can usefully be adapted to prevent and control disputes in other industries and business relationships.

CPR Prevention Practice Materials, Notes and Ideas

The prevention exploratory group has compiled a suite of useful practical materials, notes and ideas about the use of prevention processes in business agreements, which were generated by members of the group during the course of the prevention study. These materials are available in a single booklet of *CPR Prevention Practice Materials*. The subjects covered are:

A Practical Introductory Exercise for Business Leaders and Managers and their Inside Counsel

“Thinking Ahead:” A “New Paradigm” in Business Relationships.

Preventing and Resolving Corporate Governance Disputes.

The Case for Including Prevention Processes in Business Agreements.

A Menu of Prevention, Control and “Real Time” Resolution Processes, and Examples of Contract Clauses for Implementing Those Processes.

Background Papers, Research Studies and Exploratory Materials

As a by-product of the prevention exploratory group’s work, CPR has in its Library a number of study and exploratory materials, most of which are still works in progress. These materials could well benefit from the comments and ideas of researchers and scholars in the field, and they should be made available for examination, comment, revision and improvement.. Copies of them may be obtained by interested individuals from the CPR Library. Following is a partial list of some of these materials.

An overview of the present state of the art and practice of anticipation and prevention of disputes around the world.

A Webliography of prevention materials (authored by Helena Haapio of the ProActive ThinkTank)

Language and expressions describing the practice of anticipation and prevention.

A preliminary inventory of various sources and subjects of business disputes.

The economic case for preventing and controlling disputes.

Methods of implementing, training, evaluating, and measuring prevention practices.

Thoughts on recent evolutionary changes in the disputes field, and the resistance that some of these changes have experienced.

The natural constituency for dispute prevention: business leaders, managers, and their inside counsel.

Study project: The problem of “internal integration” of participants who may be confronted with special emergencies such as aviation emergencies and healthcare emergencies. The need for anticipating and dealing with such emergencies and the importance of special advance training

Research inquiry: Why are business leaders so willing to fund dispute resolution efforts but reluctant to fund dispute prevention efforts? Is it because dispute resolution is tangible, something they can feel and touch, while dispute prevention, whose objective is to create “non-events,” is intangible, less real?

Research inquiry: To what extent have there been studies about the behavior of parties to a business relationship when they are confronted with an unexpected event, emergency, or problem?

International Institute for Conflict Prevention & Resolution