

Dispute Prevention = Business Collaboration:
How Prevention Can Reduce Conflict and Preserve Relationships
indisputably.org/2020/01/theory-of-change-symposium-part-5-and-coming-attractions/
Theory-of-Change Symposium
January 19, 2020



[Noah Hanft](#) describes the need for dispute prevention initiatives, how they work, and how to overcome resistance to using them. He is the Co-Founder of AcumenADR LLC, a dispute prevention and resolution platform in New York City. He serves as an arbitrator, mediator, consultant, and executive coach. He formerly was general counsel of MasterCard Worldwide and, more recently, president and CEO of the CPR Institute.

The Need for More Dispute Prevention

After five years as CEO of the International Institute for Conflict Prevention and Resolution (CPR), almost ten years as a neutral, and decades as a dispute resolution “user,” I suspect that I share the views of many in the ADR world that great opportunities for ADR lie ahead. We have made significant progress – yet there is plenty of opportunity to go far beyond how parties currently utilize ADR.

Undoubtedly, there will be many changes in the ADR world, and I want to highlight the one that I think may well be the most important. That is a focus not only on the resolution of disputes, but also the **prevention** of disputes. Such a focus will produce more stable and collaborative commercial relationships and enormous cost savings.

For many years, academics and innovative thinkers have opined about opportunities that could be explored to prevent disputes. CPR has been a leader over the years, publishing articles, holding meetings, and forming committees advocating a greater focus on prevention. When I joined CPR and learned about this body of work, my first reaction was to kick myself for not applying it when I was a general counsel.

After a brief period of self-flagellation, I encouraged CPR to take this work to the next level by forming a new committee, the Transactional Dispute Prevention & Solutions Committee. The committee has a twofold mission. First, it will introduce ADR to more transactional lawyers and educate them about the importance of contractual dispute resolution provisions. That mission is particularly important because these are the folks who draft the provisions.

The second objective, and I believe the most important part of the committee’s mission, is to drive the adoption of dispute identification and prevention. The committee is laser-focused on how to operationalize dispute prevention by developing terms of reference that can be incorporated in agreements.

Dispute Prevention and Early Dispute Resolution

Dispute prevention should not be confused with early dispute resolution (EDR). EDR programs, which are related to but distinct from dispute prevention, are designed to enable companies to evaluate disputes soon after they become evident. A thoughtful EDR program includes a strong early case assessment (ECA) protocol to review relevant facts and law in the disputes. ECAs help companies to assess the likelihood of liability and the range of potential damages. This review can be undertaken by in-house counsel and/or outside counsel. ECA protocols can take many forms, and their depth and complexity generally should be proportional to the anticipated exposure in a particular case.

ECAs give lawyers and executives a relatively quick and early look at the strengths and weaknesses of a case. Without an early realistic assessment of a dispute, an overly confident evaluation of a case – say, an 80-20 chance of success – can sink to a 50-50 “jump call” after the warts have been revealed.

Support from senior management is critically important to the effectiveness of EDR programs. The unfortunate truth, however, is that very few businesses have implemented EDR and far fewer utilize dispute prevention programs.

But before a company needs to turn to using mediation – and even before EDR and an honest ECA protocol come into play – a dispute prevention program can bring extraordinary value to companies. That is because, if it works, you don't need to get to early assessment or resolution – the seeds of the conflict have been addressed.

Just as forward-looking companies ultimately accepted mediation, I believe that over time, an increasing number of businesses will “see the light” and take advantage of the benefits of dispute prevention programs.

Why am I so convinced? I have never met anyone who listened to the rationale for these programs and rejected the concept. It makes such obvious business sense to invest in a commercial arrangement by creating a mechanism for identifying and addressing problems **before** they become full-blown disputes. These programs can be used in joint ventures, technology agreements, or any other sustained relationship.

The goal is to build into the contract a process to address issues as soon as possible and thereby ward off disputes down the road. The concept is very straightforward. Using a joint venture as an example, where failure rates have been estimated to be around 60%, why would parties **not** build prevention into the process?

How Dispute Prevention Initiatives Work

Parties can incorporate prevention in their projects in many different ways. In any case, these efforts should mesh with the types of businesses and cultures involved.

Perhaps the most obvious approach is to introduce a “standing neutral” (or “relationship facilitator”) into the relationship. Parties should use a standing neutral in any relationship that involves a significant investment or one of strategic importance. The neutral’s role is to ensure that the parties surface issues promptly, have a forum for addressing them, and resolve disputes efficiently.

Neutrals can play many roles; the more versatile, the better. Ideally, neutrals understand the industry involved, possess business acumen, and have experience in risk management. Equally important, neutrals need soft skills, including the ability to listen to the parties; they also need the leadership skills to help parties collaborate.

Parties agree on a standing neutral at the outset of a project and the neutral is engaged in decision-making discussions throughout the project. If parties want to avoid the costs of a standing neutral, they can retain a “stand-by neutral” who would stay “on the sidelines” until needed.

Dispute prevention agreements should include several important elements. First, the parties should acknowledge the importance of maintaining a strong ongoing relationship and that open channels of communication are critical to success. Ongoing communication needs to focus on how the collaboration is working and what circumstances must be addressed to avoid serious problems.

Second, parties need to designate empowered, appropriate representatives to monitor performance, oversee the business relationship, and identify any potential or current issue that could result in a disagreement – or worse.

After the early identification of a problem, if the parties are unable to resolve it following escalation to appropriately chosen senior executives and to the neutral, the parties can go through a more traditional mediation process utilizing the neutral. Often, the mere presence of the neutral dramatically increases the likelihood that the parties will avoid disagreements.

If the parties do not resolve the dispute between themselves or with the neutral’s intervention, they can proceed to adjudication. In some situations, they may need an expedited process such as baseball arbitration.

Overcoming Resistance to Dispute Prevention

You might ask: if the benefits of such programs are so obvious, why aren’t many businesses adopting them? I have heard concerns about cost, delay, variance from the standard or status quo, or simply that these methods won’t work. Here are responses to these objections.

Too Costly and Likely to Result in Delays

Parties that have used dispute prevention programs have found just the opposite – they save time and money. With a relatively small up-front investment for the cost of retaining

a neutral, companies can realize massive savings. One major company reported that it dramatically reduced the number of its disputes after introducing its dispute prevention program. The company cited greater communication coupled with the presence of a neutral as reasons why it worked. Early elevation of issues led to resolution without the need for law firm involvement, which resulted in a large reduction in legal fees. And the regular discussion of issues actually sped up processes rather than causing delay.

Some people worry that a dilatory party could cause delay in getting a needed resolution. That concern can be addressed by a provision that allows a party to skip steps and proceed directly to arbitration if desired. To discourage parties from inappropriately short-circuiting the process, the agreement can provide for sanctions if the bypassing party loses the arbitration.

Parties Don't Want to Discuss Prevention at the End of Negotiation

Some people note that these provisions are very different from the substance of the transaction, and that many businesspeople don't want to negotiate them after they finally agree on all the other terms. There are several ways to address this concern. One is to discuss dispute prevention early in the negotiation and not wait until the end.

Second, the way we utilize the word "dispute" may contribute to the problem, because it can be a "turn off." To address that concern and more accurately describe these provisions, we should instead use phrases such as "business collaboration" or "business continuity." This can help parties switch from adversarial negotiation to discussion of opportunities, synergies, and success – and do so from the outset. This suggestion probably can apply to all dispute resolution provisions, but it is particularly apt when addressing prevention.

Disputes Are Inevitable and Can't Be Prevented

Of course, no prevention agreement can avoid all disputes. However, by making collaboration and prevention a contractual focus, the parties set the tone for a constructive relationship focused on surfacing and handling problems as early as possible. The availability of a neutral provides a framework for facilitated discussions that reduces the likelihood that problems will be ignored until they become too toxic to handle amicably.

Dispute Prevention Reduces Opportunities for Mediators

Some may assume that a prevention program reduces opportunities for mediators. I strongly disagree. In fact, I think it opens up entirely new and exciting opportunities for neutrals because, to quote Amit Kalantri, "A good doctor cures the disease, but a great doctor cures the cause."

When an argument appeals to common sense, it's generally worth considering. This one does.