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# Conduct a legal premortem to identify and mitigate risk before a crisis

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By Jonathan Aronie

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More than 2,000 years ago, a Jewish sage living in Jerusalem compiled a book of wisdom today known as *Ecclesiasticus*.<sup>[1]</sup> The book was translated from Hebrew to Greek by the author's son around 130 BC, and much later, the book was translated into English. Among the aphorisms that find their origin in this ancient text is one we've all heard before: haste makes waste. In the late 1700s, Napoleon Bonaparte is said to have remarked to his valet as he prepared for battle, "dress me slowly; I'm in a hurry." We don't know whether Napoleon had read *Ecclesiasticus* (Napoleon generally is regarded as having been rather skeptical of religion, so it's quite possible he had not), but he certainly understood the underlying truthfulness of the adage: the more in a hurry you are, the more you need to slow down.

Since the introduction of the terms "SARS-CoV-2," "coronavirus," and "COVID-19" into our collective lexicon in early 2020, businesses across the globe have certainly been in a hurry. Sales leaders rushed to find innovative ways to preserve or rebuild revenue in the face of a shuttered economy. Contracts managers dusted off terms and conditions they had all but forgotten about prior to the pandemic. Human resources teams struggled to deal with unplanned furloughs and layoffs. And in-house counsel worked nonstop to make sense of an endless stream of new statutes, executive orders, regulations, directives, and guidelines from federal, state, and local officials. Many of these stressors continue to this day and will likely continue into the foreseeable future.

With all that going on, who can afford to slow down? A better question may be, "Who *cannot* afford to slow down?"

### Learning from the past

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 Afghanistan and Iraq wars of the early 2000s, the Wall Street bailout of 2008, and the H1N1 public health emergency of 2009 all presaged such a trail. The COVID-19 pandemic is no different:

- Attorney General Barr directed all federal prosecutors "to prioritize the investigation and prosecution of Coronavirus-related fraud schemes."<sup>[2]</sup>
  - 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 quickly took up the call by standing up their own COVID-19 prosecutorial
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task forces.

- The federal Department of Health & Human Services (HHS) Office of Inspector General (OIG) community quickly suited up for a fight as well. The HHS OIG was one of the first to roll out a dedicated online portal focusing on COVID-19 fraud.
- The Pandemic Response Accountability Committee, made up of 21 inspectors general from across the federal government, was given a new leader and readied itself for action.<sup>[3]</sup>
- Congress stood up a five-member oversight committee to oversee Coronavirus Aid, Relief, and Economic Security (CARES) Act spending, and increased funding to the Government Accountability Office to the same end.<sup>[4]</sup>
- And, of course, the relatively new inspector general is focusing specifically on the pandemic recovery effort as the special inspector general for pandemic recovery, housed within the Department of the Treasury, and has been given a \$25 million budget and subpoena authority to root out fraud, waste, and abuse.<sup>[5]</sup>

Additionally, whistleblower law firms began circling overhead even before Congress passed the CARES Act,<sup>[6]</sup> just waiting for their chance to swoop in. Indeed, in March 2020, the National Whistleblower Center announced the creation of a formal Coronavirus Accountability Campaign.<sup>[7]</sup> Among the campaign's key elements are "whistleblower protections and incentives" in coronavirus spending bills and providing "whistleblowers with the information and tools they need [to report fraud], including access to qualified legal counsel."

Sadly, trying times can 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 the nets cast by the enforcement community and whistleblowers entangle well-intentioned actors as well as bad ones.

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