

THE BUSINESS GUIDE TO LEGAL LITERACY

Table of Contents

Preface

Part One: How to Create a Winning Legal Attitude

1 The Need for a Paradigm Shift

Early intervention and understanding the relationship between law and business can help anticipate and avoid costly legal mistakes. Unfortunately many managers discount the legal aspects of their business and brush them off as a cost of doing business. But, if we want better results we need commitment and solutions, not casual trade offs. We need to reframe business risk management to include legal risk management.

2 How Behavioral Economics Influences Decision Making

Recognizing a mistake is not the same as understanding how it was made and being able to avoid it in the future. Before old paradigms can be changed it is necessary to understand why we do what we do to stay stuck in our old ways of thinking.

3 How Latent Legal Liabilities Escalate the Cost of Doing Business

More regulation, more personal liability, more criminalization of civil wrongs and spectacular jury verdicts inflated by punitive damages create headlines that depress stock prices and significantly raise the cost of doing business. Even small legal mistakes have a big negative impact. Together they provide incentive to protect assets and change the way we think about legal risk.

4 How Legal Leverage Creates Value and Competitive Advantage

Besides avoiding lawsuits, improving your company's legal risk management builds stronger business relationships and enhances reputations that create opportunities for competitive advantage that would otherwise not exist. The convergence of compliance and performance management thereby transforms the nexus between law and business into a business sweet spot. It creates legal leverage.

Part Two: How to Achieve Legal Leverage: Developing Tools to Minimize Risk and Maximize Opportunity

5 How to Integrate Legal Literacy into the Value Chain: Who Needs to Know What

Integrating legal literacy into the value chain transfers responsibility for legal risk management to the primary decision maker and puts the employees, not the company lawyers, in the driver's seat of legal risk management. How sweet is that?

6 How Miscommunications Create Liabilities: Avoiding Smoking Guns

Smoking guns come in all shapes, sizes, and languages. But regardless of whether they are confessions or merely well intentioned, yet double-edged, words stored in hard files and hard drives, they are all evidentiary landmines waiting to explode when you least expect it. Smoking guns fuel litigation. The twelve legal leverage rules show you how to take control of your business documents and keep them from turning into a minefield.

7 How to Keep the Wheels On: Managing and Mediating Expectations

Business is about relationships: creating them, maintaining them, and if necessary, fixing them. Lawsuits are triggered by the breach of duty, supporting evidence, *and* the incentive or motive to take action and sue. Eliminate or reduce any one of these aggravating factors and the likelihood of successful litigation goes down.

8 How to Transform Legal Obstacles into Strategic Opportunities: The Role of Good Decision Making

Bad decision making processes combined with the mathematical principle of regression tempt the hand of fate. It's not a question of *whether* latent legal liability will materialize, it's only a question of *when*. Good decision making and critical thinking skills are a smart investment.

Part Three: How to Maintain Legal Leverage: Developing a Supportive Corporate Culture

9 How to Stay On Course: The Role of Continuous Learning and Knowledge Management

Knowledge management is how the business enterprise makes information available to the organization and how it develops employee judgment that consistently converts the information into results the organization wants. Without the ability to convert information into action, learning is nothing more than the acquisition of information and data.

10 How to Stay In Synch: The Role of Lawyers

Having access to a trusted legal professional either in-house or through a law firm can help embed legal literacy in your value chain. Advice from a licensed professional has the benefit of attorney-client privilege, a special form of confidentiality that allows communications to remain within the confines of the relationship, and can help keep the law and your business objectives in synch – but lawyers can be so annoying. Utilize the legal leverage ten-step program to build a better relationship and unleash the tremendous power of the attorney-client relationship.

11 How to Stay On Message: The Role of Communications

Exactly what kind of compliance message does your organization send? How often is it sent? Compare that answer to how often the sales and cost-saving message is sent. Which message is louder?

12 How to Stay Centered: The Role of Ethical Leadership

The leadership challenge in architecting moral authority within the business enterprise is in creating enough freedom to allow employees to apply sound risk management tools. Leadership that is spelled with a capital “L” as well as a lowercase “l” must be mindful of their role in creating incentives and how those incentives shape expectations, drive behavior, and impact their company’s legal risk profile.

Epilogue: Winning from the Beginning

Appendix A: Legal Literacy Toolkit Chart

Appendix B: The ABCs of Legal Literacy

1. International Law
2. Contracts
3. Product Liability
4. Employment
5. Unfair Competition
6. Intellectual Property

Appendix C: The Lessons of Sarbanes-Oxley

Appendix D: Excerpts from Federal Organizational Sentencing Guidelines, 2004

Appendix E: Excerpts from the Sarbanes-Oxley Act of 2002: Table of Contents

Appendix F: United States Attorneys’ Manual: The Thompson Memo

Bibliography

Acknowledgments

The Author

Index

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Preface

*For the want of a nail the shoe was lost.
For the want of the shoe the horse was lost.
For the want of the horse the rider was lost.
For the want of the rider the battle was lost.
For the want of the battle the kingdom was lost.
All for the want of a horseshoe nail.
—George Herbert (1593–1633)*

When I first began practicing law in 1981 I was struck by the way smart, seasoned business professionals could significantly underestimate the legal consequences of their business decisions. A minor course correction early in the process could make the difference between hitting a bull's eye or missing the mark altogether. It could prevent corporate meltdowns and protect profits. Yet I quickly learned that legal issues and lawyers were something managers preferred to avoid. At best, we were viewed as a necessary evil. Like patients who visit the dentist only when the pain becomes unbearable, business professionals consulted lawyers reluctantly. They waited.

At the same time, I learned why many managers and executives held a dim view of lawyers. I met lazy lawyers who found it easier to say no and kill a deal than to work through the issues and find solutions that were both practical and legally sound. I also met lawyers who never met a legal issue they didn't like. They rendered very good legal advice, but in their zeal to leave no stone unturned they'd lose sight of the big picture—the client's overall business needs. Both camps made every issue sound like the sky was falling. After a while their Chicken Little pleas were ignored. Worst of all, their lopsided *weltanschauung* alienated clients.

There was clearly a tension between law and business, a tension that the textbooks, the classroom, and the bar exam had not prepared me for. Yet, as a young lawyer with a master's degree in business administration who had grown up in an entrepreneurial family where dinner-table conversation inevitably turned to business and family outings often included customers, I viewed law and business as a natural fit, not as natural enemies.

Nonetheless, there was a standoff between the two. More time was spent fixing problems than avoiding them. If only these business professionals could envision the law as a tool for achieving business objectives rather than an obstacle to be avoided, I thought to myself. Similarly, if only these lawyers could master the art of a balanced response. Together they could create a tremendous,

unparalleled partnership. They could manage legal issues in their infancy while problems were small and inexpensive to fix, instead of at the more rebellious adolescent stage. They could also open doors to new opportunities by securing their legal rights early, before those rights were compromised. Such partnering would save a lot of horseshoe nails, horses, riders, and corporate kingdoms. Staying in the saddle would also make it easier to conquer new realms. *If only they knew.*

It was these early perceptions of law and business that were the genesis of *The Business Guide to Legal Literacy*. From my perspective, law and business are the yin and yang of commerce. They are complementary sides of the same coin. Harnessing and synchronizing them is the key to business sustainability. Yet too many managers viewed the synergy between law and business as counterintuitive. Until that tension was harmonized, the full potential of this tremendous partnership would remain untapped and unfulfilled.

My desire to bridge the gap between law and business heavily influenced my legal practice: how I counseled clients in transactions and how I managed litigation. My goal was always to translate legalese into language that made business sense—to use the law as a business tool. To help facilitate this goal I developed legal training programs for corporations that directly related the law to people’s everyday work responsibilities and decisions. These training successes evolved into “Legal Leverage,” a course I taught in the graduate programs at the Duke University Fuqua School of Business, and they contributed significantly to the evolution of *The Business Guide to Legal Literacy*.

While I was busy building bridges one case and one class at a time, the gap between law and business unfortunately continued to widen. Over the years more civil liabilities were criminalized, retroactive liabilities were imposed in the form of environmental compliance laws, and more regulations and stiffer penalties were necessitated by assorted scandals, beginning with the insider trading and the savings and loan debacles of the 1980s.

The legal environment of business was growing increasingly hostile. Ironically, the gap was growing at the same time that missteps were becoming more expensive than ever before. A bridge urgently needed to be built between the two disciplines. To encourage the U.S. business community to be more proactive about its legal compliance efforts, the U.S. government stepped in and adopted the Federal Organizational Sentencing Guidelines in 1991. The law offered sentencing leniency *if* organizations had an *effective* compliance program in place.

The new guidelines were a roundabout way of aligning business practices with the law, but they were not much of a marketing coup. In some corporate corridors lawyers asking for more compliance resources were faced with a tough

sell. After all, how do you convince an organization to devote resources to effective compliance if all anyone gets out of it is reduced sentencing? I mean, who *plans* on getting sentenced? Sentencing is a disincentive. Reducing the disincentive doesn't make it more attractive.

That would be similar to my telling my husband I'll save money by spending more when my favorite dress shop is having sale. "That's right, honey, the more I spend, the more you save." You can imagine his reply. All he'd have to do is open the door to an overstuffed clothes closet to make his point.

Selling managers on less jail time and smaller fines met the same kind of enthusiasm. More compliance was a want, not a need. Effective compliance was a good thing, management acknowledged. "We have a program, we'll look at it again, but there's no need to get carried away," they reasoned, particularly if they experienced no serious compliance problems.

The "no harm, no foul" approach meant that effective compliance did not rank high when competing against revenue-generating projects for limited resources. From management's perspective, increased compliance would be a smart investment only if they thought the company could land in serious hot water—that is, if noncompliance were *probable*. Otherwise, added compliance was seen as little more than an insurance policy, another lifeboat on what was perceived to be an overcrowded deck of overhead costs.

As a result, many corporate compliance programs are perfunctory. The sentencing guidelines' backhanded benefit generated very little deep-seated commitment or passion for compliance. It just wasn't much of a marketing platform. The consequences of sentencing were too far removed from the event that could cause *or prevent* the legal mishap. That's why more than a decade after the guidelines became law some general counsels are still unnerved by their company's ad hoc approach to compliance and worry about their compliance program's effectiveness. They wonder whether it would really pass muster if a meltdown led to sentencing.

The fresh wave of business scandals, including Enron, WorldCom, and Parmalat, that hit the U.S. and international business scene near the turn of the century created a new level of concern and awareness about compliance in the business community. Suddenly the unthinkable became possible. Executives who were once heralded as corporate heroes, who had graced the covers of business magazines, were now being led away in handcuffs and disgraced in "perp walks" on the evening news. The scandals created a buzz about compliance. When the enactment of a new financial transparency law in the United States, the Sarbanes-Oxley Act, paired the disciplines of law and business in a shotgun wedding, the hastily arranged marriage pushed the role of compliance and corporate governance further toward the top of corporate agendas. It was a major stepping-stone in bridging the gap, and it created new impetus for reexamining business legal risk.

Another plank fell into place in 2003, when the fast food and snack food industries, concerned about obesity lawsuits, began to tout the virtues of healthy eating and began reformulating recipes. When a spokesperson for a major food company defended the practice, saying, “It was the right thing to do” and adding that if it “discourages a plaintiff’s attorney because he or she would have an even tougher time trying to portray us as a company that doesn’t care, that’s OK with us,” I realized that the stage was set for *The Business Guide to Legal Literacy*. Fear of the legal anaconda in the corporate chandelier was causing more businesses to become proactive. They now needed a comprehensive road map to maintain the momentum.

Even though a number of books have been written about business law, *The Business Guide to Legal Literacy* breaks new ground by offering a different way of thinking about this intimidating subject. It is the first book of its kind to connect the dots between law, decision-making psychology, quality management, organizational change, and leadership. It is also the first to explain how these disciplines influence legal risk exposure.

The purpose of this book is to cut through the fear factor of “The Law” by offering practical solutions to help you avoid lawsuits and embarrassing perp walks. It also shows you how to transform latent business legal risks that threaten growth and profitability into opportunities for developing more constructive business relationships that deliver sustainable shareholder value, more competitive edge, and greater excellence.

In twenty-five years of legal practice experience and through extensive research I have watched smart executives and managers unwittingly make the same types of mistakes over and over again. In the process I have seen patterns of cause and effect emerge, the kind of patterns that lead to the missing horseshoe nails that jeopardize transactions—and companies. *The Business Guide to Legal Literacy* identifies these patterns and shows you how to steer clear of the speed bumps and potholes. It puts you, not your lawyers, in the driver’s seat of legal risk management.

More specifically, this book gives you tools and solutions that have been honed and polished over time. In the chapters that follow you will learn how to anticipate legal problems and use the law to your advantage. For ease of reference the book is organized into four key sections:

Part One sets the stage by showing how decision traps keep us stuck on a decision-making hamster wheel, how being stuck is costlier than ever before, and how legal literacy lets you pick and choose your legal risk, thereby avoiding unnecessary liability that detracts from your business objectives.

Part Two focuses on what individual employees can do: how you can improve your legal literacy and how you can use that knowledge to identify problems early. It shows you how to avoid the creation of smoking guns that fuel litigation, and how to manage expectations that strengthen business relationships through sound decision-making processes that balance business and legal risk with integrity and fairness.

Part Three takes the matter to the organizational level and identifies the infrastructure necessary to support legal literacy and legal leverage. Effective knowledge management is the key to establishing an institutionalized reservoir of legal literacy, and effective communications are necessary to broadcast the role of legal literacy throughout the business enterprise. Business-minded legal counsel can provide coaching and act as a vital sounding board, while ethical leadership breathes life, legitimacy, and trust into the entire process.

Finally, the Appendixes offer several resources, including a legal primer that will serve as a quick reference guide to assist you in connecting the dots between core legal concepts and their business applications. It is not intended to be legal advice, but rather to provide a baseline of information that helps you ask the right questions sooner, rather than later.

The Business Guide to Legal Literacy will help you develop a better understanding of the law and a more structured approach to legal risk management. It won't turn you into a lawyer or be a substitute for one, but if it helps you avoid losing even one horseshoe nail and keeps you on the right trail—instead of en route to trial—I will consider the book to be a success.

*January 2006
Chapel Hill, North Carolina*

Hanna Hasl-Kelchner

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CHAPTER 6 excerpt

How Miscommunications Create Liabilities Avoiding Smoking Guns

Traffic cones on the highway slowly funnel cars into one lane. Up ahead, at the Delaware border, the first sign of trouble is a police car parked on the shoulder. Then the driver sees it: a sign with big black letters reading CLOSED right next to the “Welcome to the State of Delaware” sign. A man in uniform, clipboard in hand, walks slowly toward the car.

“What’s going on here, officer?” the driver asks, rolling down the window.

“I’m sorry sir, but the State of Delaware is temporarily closed,” the officer replies, pointing to the sign.

“Closed?”

“Yes sir. I’m afraid so,” he says, emphasizing the sign again.

The driver stares incredulously at the sign, at the officer, and then back at the sign. “For how long?” He asks after a pregnant pause.

“We’re not sure. A few hours. Maybe more. Could you come back?”

“Come back? What do you mean ‘come back’? I’ve got family in there!” he says, trying not to let his voice betray frustration.

“I’m sorry sir, but the State is closed,” the officer repeats in a measured bureaucratic tone polished by years of patient practice. The verbal volleys continue until the “officer,” also known as Alan Funt, creator of the original TV reality show (which catches unsuspecting individuals in compromising situations), finally says, “Smile, you’re on *Candid Camera!*”

This *Candid Camera* segment illustrates the power of the written word. When combined with the appearance of authority—in this case a man in uniform with a clipboard, a squad car, and a set of traffic cones—the word *closed* created expectations that brought cars to a standstill.

The Role of Writing and Apparent Authority

Businesses cloak their employees with the appearance of authority in many ways. They give them business cards to identify their business affiliation. They let them use business letterhead to write correspondence. They program

their fax machines to print the company name on the top line of every fax page sent. They assign e-mail addresses incorporating the company's name. Some even provide their employees with company cars or trucks to drive and expense accounts for business travel and entertainment. To outsiders, employees' trappings of authority confer credibility on their words and deeds. Indeed, this apparent authority literally transforms them *into* their employers.

In legal terms, employees are agents of their employer. They speak and act on behalf of their organization. As a result, everything they say and do in their job capacity reflects on their employer and can create legal liability for their organization. From a strategic perspective, the cause-and-effect relationship between employee actions and corporate consequences means that all employees are individual gatekeepers of their organization's legal liability. They can create liability, or they can mitigate it.

The business documents employees write have added legal significance. Unlike human memories that can fade, documents are tangible evidence that live in computer memories and conventional paper files. Once they are created they have a life of their own, one whose end is by no means certain. They can come back to haunt the company unless they are managed well during their life cycle. Unfortunately, most employees don't appreciate the pivotal role they play in a document's life cycle or the role documents play in protecting their company's legal health. This lack of awareness can turn business documents into wild cards.

We create more documents than we often realize. Sure, we write memos and reports, but we also write comments on the memos and reports we receive, and we underline, circle, highlight, and jot notes in the margins. We keep diaries, fill out forms, and respond to a slew of electronic messages. We might even scribble numbers or designs on a paper napkin or paper place mat while at lunch, a scrap of construction material while at a work site, on a sticky note, or any other portable writing surface that is later placed into the file. Over time, that adds up to a lot of words and a lot of evidence. Some of it is helpful; some of it is not.

The informality and the familiarity of routine writing create a comfort zone that causes us to lower our guard and be less careful about how we express ourselves. Stress, fatigue, and reflex reactions only exacerbate the problem, causing us to write things we may later regret. In the process, seemingly innocent documents get stored in hard files and hard drives only to resurface at a later date in a lawsuit, causing more heartburn than a bad burrito. As Intel's then-CEO Andy Grove put it, "It is entirely possible that when your actions and your heart are both in the right place, one document written in annoyance can outweigh mountains of evidence about your actions, principles and practices." . . .

WHAT PEOPLE ARE SAYING ABOUT THE BUSINESS GUIDE TO LEGAL LITERACY

Anyone who is serious about business ethics needs to understand the law. Hasl-Kelchner provides a clear roadmap for business people to understand how to do the right thing.

Steve Odland, Chairman and CEO, Office Depot and
Chairman, Business Roundtable Corporate Governance Task Force

At last, a book that demystifies the relationship between business and the law . . . I found it easy to read and full of real life examples. The Business Guide to Legal Literacy should be required reading for every business manager.

Gary Krall, Chief Operations Officer, BioSignia, Inc.

This work will be extremely valuable to CEOs and all other executives who are required to deal with the complexities and vagaries of today's legal environment. Hanna Hasl-Kelchner has developed a straightforward and easily understandable approach to legal problems in the business context. She answers a number of critical questions. Why do some companies continue to insist on litigating weak cases and how can this mindset be overcome? What do business leaders really need to do to establish a regime of high ethical business standards? This work is successful because, in a number of unique and creative ways, it bridges the communication gap that sometimes exists between lawyers and their corporate clients.

Larry D. Thompson, Senior Vice President Government Affairs, General
Counsel & Secretary, PepsiCo, Inc.
Former Deputy General Counsel, U.S. Department of Justice

As a small business owner without corporate counsel I've used Hanna's rubrics to avoid pitfalls and maximize opportunities. Her use of cases, related conversationally instead of legalistically, drives the legal points deep into long-term memory.

Tamela M. Rich, Managing Member, Thor Industrial Services, LLC

Industry and management are in turmoil and “Legal Literacy” is an important aspect which will help secure the future success of perceptive managers if for no other reason than to avoid diversion of time, energy and resources to needless legal challenges.

John W. Eschenlohr, retired Director and Executive Vice President,
Degussa Corporation