

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.*
—BENJAMIN FRANKLIN (1706–1790)

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.

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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 comparatively 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

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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, World-Com, 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

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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 and the techniques 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.

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