



CLO 21
Advisory Group

Preventive Law: Expanding Your Vision

BY STEPHEN E. NOWLAN

A tiered approach to organizing preventive law strategies can provide a major opportunity for companies to manage their risk profiles to great advantage.

Preventive law, when implemented on a strategic basis, has the potential to dramatically benefit a company. While law departments are most often effective in applying prevention principles to their current work, most have not expanded their preventive law vision to the strategic level, where an organized and focused approach can provide significant additional benefits to the corporation.



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For most people, "preventive law" is synonymous with "effective lawyering." Most chief legal officers hire very good lawyers and expect them to continuously identify legal risks and apply good judgment and skills to address them. CLOs express a commitment to the preventive law mindset and generally try to build a culture in which the prevention of legal problems is a daily goal. However, the concept of preventive law offers rich opportunities that expand well beyond day-to-day excellence in managing legal risks on an ad hoc basis.

In the corporate context, preventive law can be organized into three tiers to provide a framework for organizing and implementing your vision.

Tier 1: Effective Lawyering and Integration With Clients

Most lawyers focus on anticipating legal issues and managing risk in their ongoing work for clients. Effective, expert lawyers are expected to anticipate potential problems that can arise in projects for clients and find creative, ethical, and efficient means to address them. These lawyers make sure that contracts include the right language, and they ensure that due diligence is performed well.

A key goal of a preventive law strategy is

[IN BRIEF]

Preventive law strategies are becoming more important to corporations, as evidenced by insight from leading chief legal officers. By organizing your preventive law approach into tiers, you can detail prevention principles, apply those principles to business processes, and then expand into prevention among specific business units. This broadened view of preventive law can help legal departments identify and address problems that might otherwise be overlooked until lawsuits are filed—and can provide solid examples of the departments' contributions to the success of their companies.

Every person in the department is responsible for identifying a change agent project he or she wants to work on. Projects can focus on anything in the company that could use focus, not just legal issues. The issue could simply be something that inconveniences customers, or it could reflect a matter that might create liability in the future. Change agents identify and organize stakeholders, identify solutions, and then drive ahead to solve the problem. Most projects are related to legal issues. For example, one focuses on managing customer databases to comply with privacy regulations. A large proportion ultimately wind up as “preventive law.” These projects give our staff opportunities to apply initiative, skills, and creativity to contribute to the company as well as develop leadership skills and business knowledge.



—Mark Chandler, Vice President, Legal Services and General Counsel, Cisco Systems, Inc.

To increase the quality of services, we decided to apply ISO 9000 quality standards to all the “products” produced by the department. For instance, as a result of our quality processes, we revised our approach to the retention of outside counsel. We improved the way we select firms,



the information we provide to them, and the way we budget for engagements and then track the resulting expenditures. All of these tasks, which were previously viewed as separate items undertaken by different people, are now organized as a smoothly flowing business process that is of uniformly high quality. This certainly creates much greater efficiency, and the quality of our engagements has gone up.

—François Giscard d'Estaing, General Counsel, Aventis Pasteur Limited

for lawyers to be integrated with clients at the early stages of planning new initiatives and managing business activities. This is when lawyers can be most effective in spotting potentially troublesome issues and influencing business decisions to avoid them. In most companies, lawyers are members of business-unit management teams and participate in these key decisions.

In addition, most law departments monitor developments that foreshadow legal issues the company will have to address. Many law departments review litigation and customer complaints to identify operational problems in the company that need to be fixed. Many companies provide in-person and online legal and compliance education programs for their employees, and this also helps prevent legal problems.

As a general rule, Tier 1 activities are implemented to achieve prevention, but without specific prevention objectives and measures. Lawyers and others are expected to spot problems and address them if and when they arise. Tier 1 activities reflect preventive law principles but stop short of being preventive law strategies. By definition, strategy entails organizing and coordinating resources and action steps in a concerted and focused effort to achieve a desired goal.

Tier 2: Preventive Review of Business Processes

To expand your vision of preventive law beyond effective lawyering on current work, the next step is for lawyers to systematically focus on conducting preventive reviews of vital company business processes. The goal is to prevent legal problems before litigation or financial losses bring these issues to the fore. Such processes may have been in place for years or may be part of a newly acquired business unit. They can be as diverse as a company's operations and can include processes to discontinue products or services, preserve the integrity of sourcing information in the supply chain, manage company databases to comply with privacy regulations, or complete appropriate background checks on employment candidates.

There are compelling reasons to review such essential processes. Laws and regulations may have changed since the last legal review, and the company may be violating the law. Or, a process may have been altered over time, with experienced people leaving and new people coming in, and key steps to minimize legal risk may have been dropped. Finally, a process simply may not be working the way it was intended.

For example, one law department recognized that although its supplier contracts required suppliers to provide certifications that they had insurance covering product liability claims and naming the company as an “also insured,” the process of collecting the certificates and recovering legal costs from the suppliers was not being implemented effectively. The law department helped the business reorganize this process and train the business staff to correctly implement the necessary tracking and notifications.

In some business processes, legal problems arise because of issues that are beyond those the lawyers were originally assigned to address. For example, in the sales process, the original sales contracts may be perfectly suitable, but salespeople may be making unauthorized promises outside the contracts that lead to fraudulent inducement claims. Such allegations were at the heart of the widespread class-action suits in the 1990s against the life insurance industry and resulted in billions of dollars in settlements.

To anticipate such problems, lawyers need to look beyond the original scope of legal work that was completed to consider the broader context in which a process functions. In the life insurance cases, the lawyers subsequently needed to review the processes for communicating with salespeople and customers to ensure that the processes routinely produced the communications and notifications to the sales force and customers to protect against such claims.

Preventive Review Strategy

The Preventive Review Strategy is straightforward: Require each lawyer in the department to set annual goals to review business

processes with clients with the objective of identifying and rectifying potential legal problems discovered in the review. Then, tie performance on prevention projects to the compensation process so lawyers know you are committed to achieving prevention goals.

This strategy leverages your lawyers' knowledge of what is important to the business by allowing them to determine which business processes are the best candidates for such a review. In addition, it gives you a framework to organize how your attorneys will invest their time in prevention activities. When reviewing the proposed projects, you can identify areas where it may be appropriate to combine several projects into a department-wide initiative—for example, to deal with privacy issues common to many business processes. Your portfolio of specific projects also enables you to brief executive officers about what the department is doing to proactively reduce legal risks.

This strategy enables your lawyers to partner with clients with whom they are already working to set mutually agreeable goals. It focuses them on determining what needs to be done without having to provide specific targets. This strategy also helps them expand their understanding of the business, apply creativity and legal skills to something they believe is important, and develop leadership and partnering skills with clients. Clients recognize that the lawyers are committed to the success of the company, and they learn more about legal risk management as well. The company will save money as a result of fewer legal problems and lawsuits.

Tier 3: Business-Unit Preventive Law Plan

You can expand your preventive law vision to a broader level by jointly developing business-unit-wide prevention and legal risk-management plans in collaboration with the business-unit management teams. This approach enables you to focus selectively on one or two business units at a time or include all those business units where the management teams are willing to collaborate.

In Tier 3, the legal-business team identi-

fies which processes in the business unit need to be reviewed and in what order based on a joint determination of where the greatest potential problems may exist. In much the same way that internal audit or compliance departments create a schedule of reviews to be completed over time, the prevention review plan provides an orderly approach with which there is both business-unit and law department agreement.

Criteria for determining reviews can include, for example, how vital a process is to the business unit's operations and objectives, how long it has been since the last legal review, whether a process has been changed due to reorganization or downsizing, how much litigation has been attributed to process activities, and whether changing laws and regulations create new potential risks.

A Tier 3 strategy has the benefit of enabling your business-unit legal team to plan its activities in the context of all its ongoing work for clients. A joint agreement on priorities and resources for both the legal and business teams will ensure effective cooperation and increase trust. Business-unit management will be committed to the plan and support it, which is essential to success.

You can also apply this approach to developing a preventive law plan for the corporation itself by creating one or more teams of lawyers and clients to focus on the processes that are managed at the corporate level rather than business-unit level.

Organizing a Preventive Law Strategy

Tier 2 and Tier 3 activities offer the best foundation for developing an effective prevention strategy. Each tier includes four characteristics that are critical components of the strategy:

- A systematic approach to identifying and selecting prevention goals
- A process for setting specific goals
- The coordination of prevention projects and other initiatives to address specific prevention goals
- The opportunity to track and measure whether the goals are actually being achieved

Our preventive law strategy has two key elements. First, we have outstanding and experienced lawyers who are co-located with their clients and who understand the



strategic objectives and operating plans of their clients. At Honeywell, lawyers participate in business review meet-

ings and are members of their clients' leadership teams. This enables the lawyers to be involved directly in their clients' activities and identify ways to prevent problems.

Second, we are developing an online training program for company employees to strengthen their understanding of the legal issues related to their business activities. Our program is tailored to the needs of various groups of employees, such as general managers, sales and marketing personnel, human resources professionals, and other functions.

We also develop annual strategic legal plans that focus on each of our major business units, and these plans include preventive law goals for the coming year. Our lawyers participate on cross-functional Six Sigma teams to ensure that legal issues are managed effectively in business processes.

—Peter M. Kreindler, Senior Vice President,
General Counsel, Honeywell International Inc.

We place a premium on working side by side with business clients to anticipate legal issues and contribute to business strategy. For example, one of our business lines is expanding its product offerings to a signifi-



cantly larger, more complex customer base. The business head made a special point of asking that the lawyer who

serves as their general counsel participate on a team of six senior managers who will fine-tune the product offering, monitor sales performance, and review strategy. We know we are on the right track when the business head views our lawyer to be essential to his team's success.

—Judith M. Davis, Vice President and
General Counsel, BlueCross BlueShield
of South Carolina

Systematic Approach. Regardless of whether you decide to have individual lawyers identify prevention projects, as in the case of Tier 2, or you decide to tackle prevention through a focus on business units in conjunction with business-unit management, as in the case of Tier 3, you will want to develop and apply sound criteria to select the projects that are undertaken.

In Tier 2, where lawyers individually select business processes to review, you can guide their selection around certain themes, such as transparency or privacy issues. Or, you can focus their selection on practical considerations, such as processes that have generated significant litigation. As a third choice, you can focus them on processes that business units are already streamlining. You can influence the final choice of projects by individual attorneys so the project list reflects strategy.

In Tier 3, the law-business team will also need to apply sound criteria that reflect a strategy. For example, the team might focus on all the processes in one division at a time, on all the customer communications pro-

cesses, or on all the supply-chain processes.

A key action step is to link all the information and knowledge resources you have into the selection process for both Tier 2 and Tier 3. For example, you'll want to distribute the emerging legal issues analysis you are doing so everyone is aware of potential issues. You'll also want to ensure that the lawyers have reviewed the litigation analysis, complaint logs, as well as compliance and audit findings where appropriate.

Setting Specific Goals. Lawyers and business partners can easily develop goals for prevention projects based on their assessment of what outcomes need to be achieved. The goals for individual or business-unit projects can be as straightforward as these examples:

- Ensure that all privacy issues related to the customer order fulfillment process are appropriately identified and managed.
- Identify and address any legal issues and risks arising from the initiative to foster cross-selling in the North American business unit.
- Provide advice and training to the Western Region sales team on what constitutes fraudulent inducement to reduce the likelihood of litigation.
- Review all joint venture contracts in Europe to develop recommendations as to how the regional manager can better address emerging employment liabilities in contract renewals.

The key point is that by requiring your lawyers to identify such goals, you will help them focus on the outcomes needed to make the investment of time worthwhile.

Coordination With Other Prevention Projects. Your strategy will achieve greater results when all the projects and initiatives are coordinated so that each one can be leveraged off the others. For example, if you have transparency projects running in three countries, bring the lawyers together to share information and ideas. If you have client legal and compliance education efforts under way, make sure these

We take preventive law very seriously. Our recent Global Legal Conference focused the attention of all of our lawyers from around the world on ways to better help clients avoid problems at the front end of business processes. At the conference,



I announced the establishment of the PepsiCo Legal Academy to provide lawyers and legal assistants with three

days of training to understand the financial operations of our business units. This is important because all of the financial information for operations in the 200 countries where we operate roll up to the financial statements for PepsiCo Inc. that have to be certified. Lawyers need to understand our financial management and accounting process to anticipate legal issues and provide sound advice to these business units.

—**David R. Andrews, Senior Vice President, Government Affairs, General Counsel and Secretary, PepsiCo Inc.**

In-house lawyers should be doing a better job of drawing on law firms for perspective and proactive thinking about preventive law. The opportunity to draw on experience and perspectives outside the company is very important, especially in the wake of Sarbanes-Oxley and a new era of corporate accountability and transparency. In-house



lawyers should expect law firms to provide best-practice examples based on their awareness of many different

approaches. Most law firms are very willing to share information, make presentations, and discuss strategies for preventing legal risks as part of a partnering effort with major clients.

—**Robert E. Bostrom, Managing Partner, New York Office and Head, Financial Institutions Practice, Winston & Strawn**

Business Processes to Target

When selecting business processes for preventive review law projects, focus on:

- Processes that are critical to the business and have been in place for a year or more or are part of recently acquired business units.
- Processes affected by laws and regulations and/or customer expectations that are changing, such as transparency.
- Processes that have led to excessive litigation at your company or others.
- Processes that have generated complaints from key stakeholders.
- Processes that involve third-party contractors or foreign subsidiaries or suppliers.
- Processes where lawyers have not been traditionally expert in understanding how they work, such as financial operations and foreign exchange.

programs are deployed in the same business units or on the same topics so they will support the prevention projects you have started. Use the anecdotes and problems found by your prevention teams to enhance your education programs.

If you have the resources to develop online client FAQs or documents (such as standard agreements, checklists, or other aids), put them to work developing client tools that support your prevention projects. If there are common themes among your prevention projects, ask your best law firms to make presentations on these themes at team meetings and law department conferences.

Track and Measure Outcomes. Once your lawyers have established goals, tracking their accomplishments is relatively easy. You can request brief quarterly update memos from individual lawyers or from business-unit law teams describing their progress and results. If you want to

track the use of resources, you can set up project matter codes in your timekeeping system or simply ask for estimates of the invested time.

At the end of the year, you can ask for a brief memo that summarizes what was completed, with an evaluation by the lawyer and the client as to what the outcomes were. This year-end memo will also help fuel the annual performance review for the attorney (or the practice group) and provide a basis for recognizing excellent performance.

Most important, you and your management team will be able to use these results memos to discuss how to fine-tune your strategy for the coming year. This will also provide you with a rich database of examples, themes, and accomplishments to communicate with executive officers and senior clients about the contribution of the law department to the success of the company.

An Expanded Vision

Although law departments apply preventive law principles to current legal projects on a daily basis, there is a growing need for law departments to expand their preventive law vision to develop a strategic approach that offers a greater likelihood of identifying and addressing problems that would otherwise be overlooked until lawsuits are filed. A strategic approach enables you to organize and focus your current resources in an efficient manner to proactively select and review business processes that may present major vulnerabilities. Expanding preventive law to the strategic level enables you to take greater control of the uncertainties in the legal environment, helps eliminate costly legal entanglements, and gives you a stronger case to share with corporate management about how the legal function contributes to the future of the company. •

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Successful implementation of prevention programs is critical to running a small legal department with limited resources. Our



strategy is to make sure that the legal department is engaged at every step of any significant business

decision so that we have the opportunity to influence the outcome and ensure that our advice is appropriately integrated.

Another key component of our prevention strategy is that our lawyers closely monitor the prevention strategies that have been put in place in the past to identify anything that needs updating. For example, our attorneys routinely work with our clients to ensure that all of our customer and employee communications and ticket notifications are complete and fully up-to-date.

—**Jennifer L. Vogel, Vice President, General Counsel and Assistant Secretary, Continental Airlines, Inc.**

One of our major initiatives is preventive law seminars for business colleagues. Our goal is to include everyone in each business platform, starting with the marketing and sales people. We've developed interac-



tive CDs that our lawyers use in giving the seminars. The CDs have video vignettes with actors that cover

practical business situations that arise. For example, in the sales and marketing areas, these vignettes include customer interaction, competitor contact, and trade association participation. The seminar reinforces the right ways of handling things as well as improper conduct. It also sharpens issues so that business colleagues understand when to talk with Legal for advice. The CD also utilizes games to foster learning in a fun and engaging way. The net result is that we create a learning experience that will be remembered.

—**Stacey J. Mobley, Senior Vice President and Chief Administrative Officer and General Counsel, E.I. du Pont de Nemours and Company**

FOR YOUR CONSIDERATION

Benefits of a Strategic Approach

There are compelling benefits for a law department to advance beyond Tier 1 to organize a strategic approach to preventive law:

- You'll have an organized and efficient process, driven by sound criteria, to invest time and effort in the prevention projects that are the most likely to reduce the biggest legal risks and generate real cost savings.
- Your legal staff will have clarity about what it needs to accomplish and will be able to confidently focus its energies and enthusiasm to get the job done.
- Your legal staff will become more knowledgeable about the business by understanding business processes more holistically, and thus become better at anticipating legal problems in its day-to-day work.
- Your clients will recognize that you are taking a strategic approach that will create real benefits, and they will be quicker to commit resources and cooperation.
- You'll help your clients stay focused on growing the business and lose less time to involvements with litigation.
- You'll help the company retain more profits and expand its reputation for being well managed.