

How to use legal research as a proactive legal and compliance risk management tool

Legal research has traditionally been used by corporations and law firms alike to support decision making, back up an opinion or win an argument. However, the use of legal research as a proactive tool in an effective risk management program is new and growing.

Conducting legal research early in the risk management process can provide information essential to accurately identify the potential risks that a company may face across its business lines, geographies and markets. The timely use of legal research may result in better understanding and decision making and improve risk management effectiveness.

A strategic approach to legal research comprises five key elements:

Take a proactive approach to legal research.

Legal research often occurs reactively, undertaken in response to pending litigation or regulatory obligations. However, conducting research early enables companies to better identify issues and make plans to prevent them from becoming costly entanglements. By anticipating when, where and what type of “fires” might break out, in-house counsel can dramatically reduce its role of firefighter and increase its role as a strategic advisor to the business.

For example, expanding a business into new geographic areas – such as to a new state or country – underscores the importance of a proactive approach to legal research. By conducting legal research prior to the expansion, companies can anticipate laws and potential penalties that might require

them to change how they operate their business in that area. A proactive legal research approach to a geographic move might seek to identify the legal risks that can impact the business strategy, focusing in particular on:

1. The existence and identity of relevant laws that might affect the company
2. The nature of the governed conduct (i.e., prohibited, restricted or merely regulated)
3. The scope of any penalties or sanctions (civil, criminal and/or administrative)
4. The existence of any private right of action (as opposed to agency enforcement only)
5. The name of the enforcement agency (including contact information)
6. Observable enforcement trends (past, present and future)

By using legal research to proactively identify laws and potential violations, companies can take action to anticipate and avoid costly issues down the road. This approach can save companies significant time and money for litigation defense while preserving their reputation.

Accurately scope the research.

It is imperative that legal counsel identify the range of risks they face and the dimensions of each issue to accurately scope the anticipated legal research.

The potential range of legal research is endless. Therefore, companies should take time at the start of the project to refine the scope and objectives of the research. As Abe Lincoln once said, “If I had eight hours to chop down a tree, I’d spend six sharpening my ax.” Refining the scope of research at the beginning of the project focuses the research effort, which saves time and money and results in a more useful product. Similarly, by scoping research accurately, legal counsel can determine where their organization is now and develop a better plan for where they would like to be.

The maxim “Begin with the end in mind” is a useful guideline in this regard. In some cases, the research must focus broadly to ascertain the expanse of applicable regulations and potential risks that might challenge the company. In other cases, the research must focus narrowly to capture the obscure or complex topics that impact only one facet of the company’s business.

With both approaches to the research, asking the right questions early helps companies ensure that the end product is useful and valuable and helps identify problems at a stage when they can be managed internally and economically.

Engage legal experts to maximize accuracy.

Engaging experts extends the reach of legal teams by providing a deeper analysis of issues and offers focused knowledge necessary to manage risk over the long term with speed and efficiency.

Experts provide specialized knowledge of complex issues to ensure that the company has understood the full range of its risks. This is especially valuable when a company is confronted with issues related to intricate or developing areas of the law. In these situations, experts supply insight into relevant developments, vocabulary and arguments that might impact the risk area. In the absence of clear court decisions or official pronouncements, experts are typically best able to predict with reasonable certainty where the law appears to be going – and thus help direct an appropriate corporate response.

Expert legal research is also the most efficient way to understand and evaluate complex issues because experts already know the field and have done research in it before. In the course of honing their expertise, they have examined and reflected upon the fine points of the topics in their purview of knowledge. In this way, their expertise and prior work effectively confer economies of scale on the research project because they do not need to invest time in extensive preliminary work. Engaging outside experts ultimately frees the organization to focus its in-house legal resources on areas of their own expertise, while obtaining significant assurances of accuracy and completeness in the research effort.

Share the research results across the enterprise.

Legal research can best impact legal and business strategy if it is shared throughout the organization. In recent years, many corporate law departments have become adept at knowledge management, putting in place structures to share information with all in-house counsel, as well as other decision-makers.

Many corporate entities have legal staff – both in-house and outside counsel – in multiple locations facing similar questions. Too often, the research conducted by an attorney in one office is filed away after the pressing issue is addressed. When a similar issue arises elsewhere in the organization, another attorney will research the same question from scratch. Turnover may also cause newer staff counsel to revisit the same issue.

Sharing legal research across the organization significantly helps expand knowledge, increase efficiency and reduce duplicate efforts and costs. Making research widely available allows the enterprise to operate more strategically and cooperatively. Sharing legal research not only improves business decisions for all, but it significantly reduces the likelihood of missing potential problems in the company’s risk management process.

Revisit the research regularly to keep it up-to-date.

Keeping research current to ensure its continued value is the critical last step in this process. Many fields of law undergo change, which can occur slowly or rapidly, predictably or unpredictably. New cases and precedent-setting judicial decisions can have a profound impact on a company’s business decisions. Keeping the legal research current increases its value in the risk-management process.

As the law evolves, the risks that can arise from particular issues also evolve. This makes the practice of revisiting and reexamining legal risks a necessary process. By institutionalizing this process, counsel can continually refresh an organization's collective knowledge base.

Once legal research becomes ingrained into a company's risk-management program, that company will find it easier to revisit critical issues on an ongoing basis, monitor the legal landscape and employ experts to assess cutting-edge developments.

Conducting proactive legal research provides clear benefits: It informs companies in advance of their business decisions whether compliance with applicable laws and regulations is possible, and if so, whether the costs – financial and otherwise – make the course of action advisable.

A truly effective risk-management program includes a plan for legal research. These five elements help companies effectively apply legal research to proactively determine the legal consequences of actions, so they can make better, more informed decisions about how to proceed in the marketplace.



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