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How to Create Legal Guidance That Improves Business Performance



Business partners are asking for more legal guidance

Every new regulation, legal, regulatory or political uncertainty, or business change (such as work from home, supply chain disruption and acquisition) creates new demand for legal support. The more legal uncertainty and the more regulatory change, the greater the business need for legal support — 62% of lawyers have experienced increases in the volume of legal guidance requests in the past two years.

But the same factors that make it hard for the business to move quickly make creating guidance difficult for lawyers. Ninety percent of in-house lawyers today believe they face the same or more unfamiliar questions today than they did two years ago. Sixty-five percent of in-house lawyers believe their business models are changing more rapidly, meaning what's important to protect is changing. And 68% of in-house lawyers feel they become more conservative when giving guidance if the topic is unfamiliar. Lawyers also face an uncertain, changing operating environment that tends to make their legal guidance and overall support of the business more conservative.

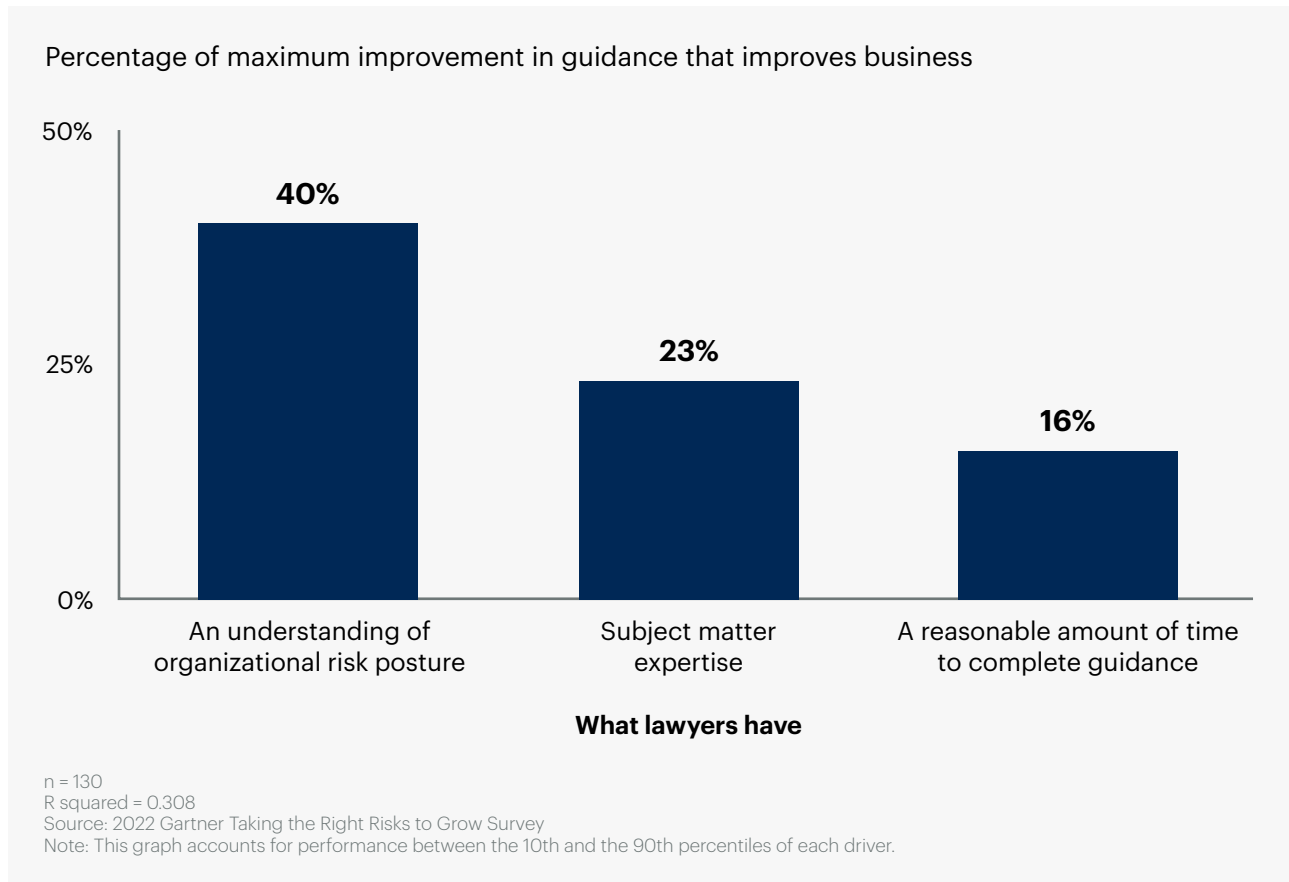
Because guidance is more important today and more of it is being requested, legal leaders are looking for methods that better create legal guidance that improves business performance. Legal functions must help the business succeed by providing guidance that supports necessary risk taking. The 2022 Gartner Taking the Right Risks to Grow Survey results provide insights into the key drivers that improve business performance from legal guidance.

Subject matter expertise and an understanding of organizational risk posture drive business performance

Forty-one percent of lawyers either believe they do not have enough time to dedicate to providing guidance or are neutral on the matter. In fact, nearly 60% of lawyers have an average turnaround time of two to four days for guidance — nearly a fifth only have up to a day. This indicates that many lawyers believe that they are being rushed to provide guidance, which could negatively impact the quality of their guidance and its ability to improve business performance. However, Gartner found that having a reasonable amount of time to complete guidance only facilitates a 16% boost in guidance that improves business performance. Having enough time is important, but it is not nearly as important as many lawyers may think.

Instead, the main drivers of guidance that improves business performance are lawyers understanding the organizational risk posture and having subject matter expertise in the area of the business initiative.

Impact of drivers behind legal guidance that improves business performance



Though subject matter expertise has a large impact, it only potentially improves business performance by 23%. To get the most improvement on business performance, lawyers need to properly understand the organizational risk posture, which has almost two times the potential improvement as subject matter expertise does.

There are several benefits to having lawyers understand the organization's risk posture, including:

- Business opportunities are 38% less likely to be scoped down.
- Business opportunities are 45% less likely to be delayed.
- A positive correlation exists between lawyers consistently adopting the right risk posture and their guidance improving business performance.

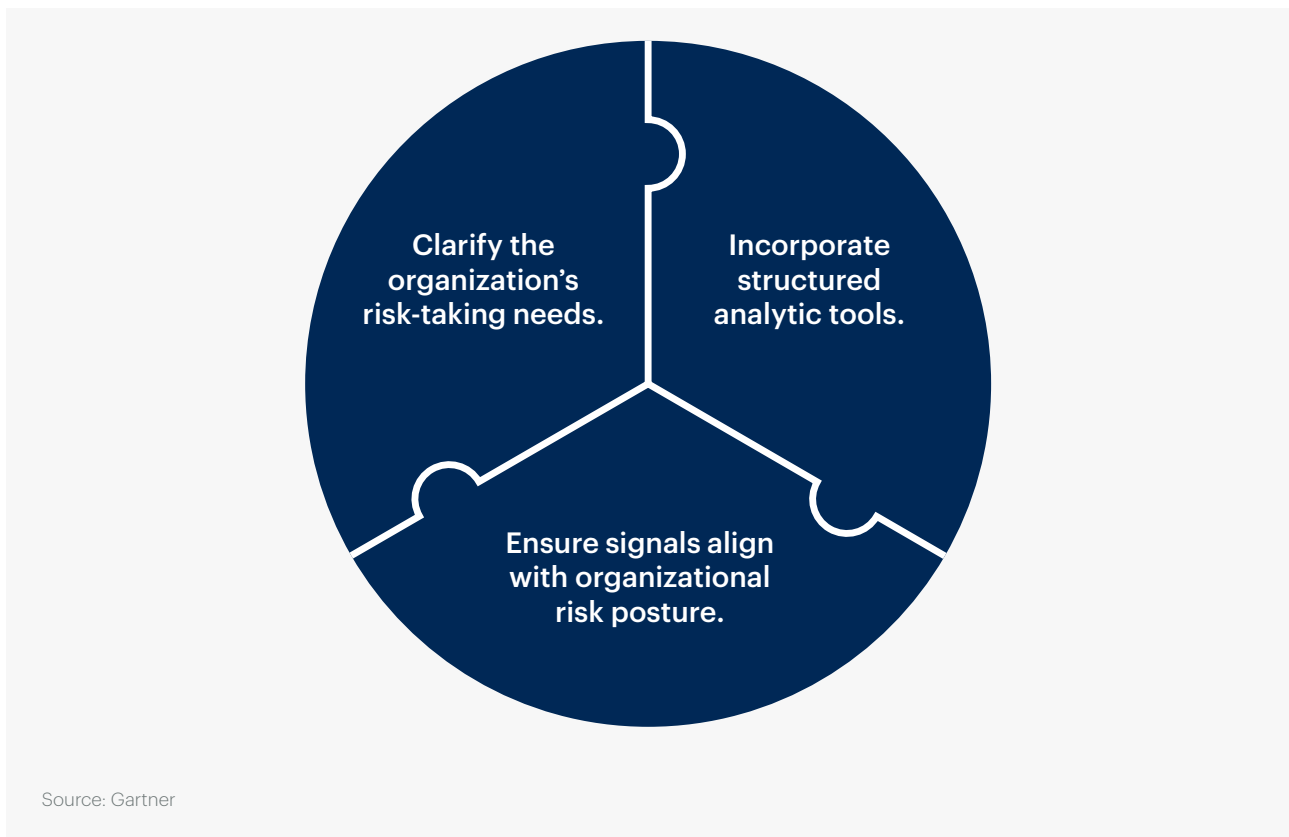
Creating guidance that improves business performance requires supporting necessary risk taking

Even though an understanding of proper organizational risk posture has a much greater impact on business performance, legal leaders overlook it more frequently than subject matter expertise. Instead, legal leaders should actively cultivate “risk-taking know-how” (i.e., a transferable set of practical knowledge and skills that enable lawyers to provide risk-aligned guidance that improves business performance) across the legal department.

To incorporate risk-taking know-how into the legal guidance process, leaders should:

- Clarify the organization’s risk-taking needs
- Incorporate structured analytic tools to balance risk and reward
- Ensure signals align with organizational risk posture

Methods to cultivate risk-taking know-how in the legal function



Source: Gartner

Clarify the organization's risk-taking needs

It is crucial for lawyers to understand where and how the business is willing to take risks. More than a quarter of lawyers do not fully agree that they understand the risk posture their business partners would like them to take. This is mirrored by business partners' top reasons for not being likely to engage with legal — 61% are concerned that legal will issue conservative guidance that will limit their ability to maximize project value. This points to the fact that a significant portion of lawyers only somewhat understand their business partners' risk postures. This may be due to:

- Internal silos (e.g., functions do not consistently share pertinent information between each other or do not have consistent access to said data)
- Unique risk appetites (e.g., marketing has a different risk posture than legal and may be willing to take on more risk than the organization as a whole)
- Rapidly changing business needs (e.g., the organization needs to digitize its client records)
- Business is being done in new and/or unfamiliar terrain (e.g., a healthcare organization wants to provide clients access to wellness advisors who are not medical providers)

Lawyers need to understand the desired organizational risk posture despite changing business conditions that can create new risks that legal may not have explored before. This means applying the organization's strategic position to the legal context by making clear and consistent interpretations of the right risk posture.

Case in point: Scalable gray-area positions (OhioHealth)



Recognizing that legal risk appetite in new or quickly evolving risk areas is often undefined, OhioHealth created an innovative strategy for improving the awareness and consistency of legal guidance. Having noticed an influx in requests for legal guidance in new and gray areas, OhioHealth created a channel for lawyers to escalate gray-area issues, propose and debate the right position to take, and codify that guidance.

Creating accountability for lawyers to drive this process ensures vetting by those closest to the issue who understand how it manifests. This process also creates buy-in for and adoption of the final position. By codifying the final position, along with real-life examples and ongoing updates, OhioHealth ensures lawyers always have access to a clear understanding of the risk posture they should apply to new and evolving issues.

Incorporate structured analytic tools to balance risk and reward

An important element of guidance that improves business performance is quality analysis of the legal risks associated with business requests. The key to structuring good analysis is to ensure lawyers have access to quality playbooks and frameworks that assist with decision making. However, existing resources offer mixed results — only 60% of lawyers at least somewhat agree that their playbooks or decision frameworks help them better understand the particular type of business request they are advising on.

To create better playbooks and frameworks, leaders should consider incorporating bow-tie analysis into them. Bow-tie analysis helps lawyers consider the risk factors in the right order, and it puts impacts in the context of likelihood and organizational ability to mitigate risk. It also incorporates business feedback and perspective into the analytic process to ensure lawyers have all the information needed and are working off the correct assumptions.

Case in point: Bow-tie risk analysis (Sasol)

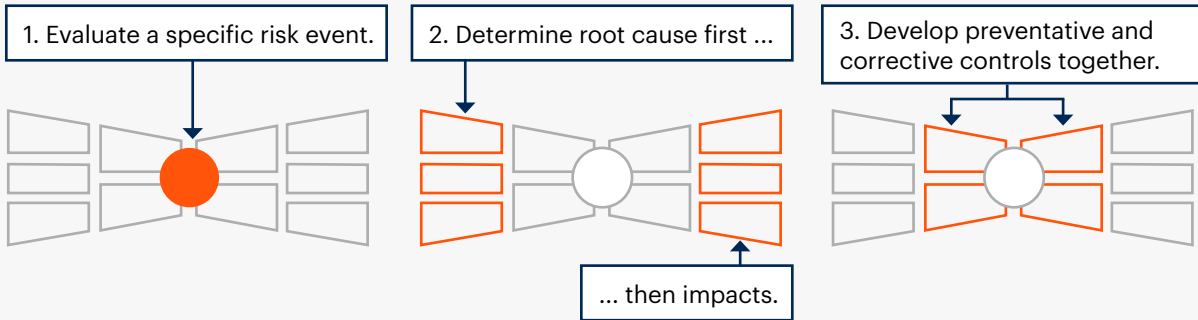


When analyzing a new business opportunity's risk, lawyers can struggle to structure quality analysis without good playbooks or decision frameworks. Sasol's legal department addresses this challenge by using a bow-tie risk assessment process.

To use bow-tie analysis, lawyers first evaluate a specific risk event to enable a more granular understanding of potential risks, impacts and controls. They determine the root causes first and then the impacts. By starting with a root-cause analysis, lawyers can ensure that the controls are targeted to real drivers or risk, ensuring high impact. To appropriately weigh the impacts, lawyers consider them in the context of risk drivers and controls aligned with the business. Finally, with their business partners, lawyers should develop preventative and corrective controls to find the appropriate balance between the two. This way, Sasol's legal department accurately assesses risk and balances it with reward.

How Sasol's bow-tie risk assessment ensures a balanced analysis

Illustrative example



Sasol's Approach

Lawyers assess the risks related to a specific business decision, enabling a more regular understanding of potential risks, impacts and controls.

Example: As the business decides whether to transfer all data to a cloud provider, legal assesses the risk of a data breach containing PII.

- Lawyers consider impacts in the context of risk drivers and controls aligned with business, ensuring they are weighted appropriately.
- Doing a root-cause analysis first ensures that controls are targeted to real drivers of risk, ensuring high impact.

Example: Insufficient security measures are identified as a root cause of a potential data breach, while a regulatory action/penalty is identified as one of the major impacts.

Lawyers and business partners determine the appropriate balance between preventative and corrective controls.

Example: Higher encryption standards are identified as a preventative control, while documenting due diligence is a corrective control.

Source: Adapted from Sasol

Ensure signals align with organizational risk posture

Many lawyers struggle to receive strong signals from leadership that support clear understanding of their organization's risk posture. Among the lawyers Gartner surveyed:

- Twenty-nine percent are either neutral or do not agree that they have visibility into how other lawyers have assessed similar risks.
- More than a quarter are neutral or do not agree that their exposure to legal leadership helps them better understand the risk posture they should adopt when advising on business requests.
- Thirty percent are either neutral or do not agree that the legal tools (e.g., NDA templates, standard terms and conditions, signature policies) made it easier for them to accurately quantify legal risk involved in business requests they advise on.

Legal leaders should ensure that all signals within the function align with messaging about the proper organizational risk posture. To do so, leaders should include risk posture alignment in performance and potential talent assessments, defining it as a critical behavior for success. They should also take steps similar to Citrix's approach.

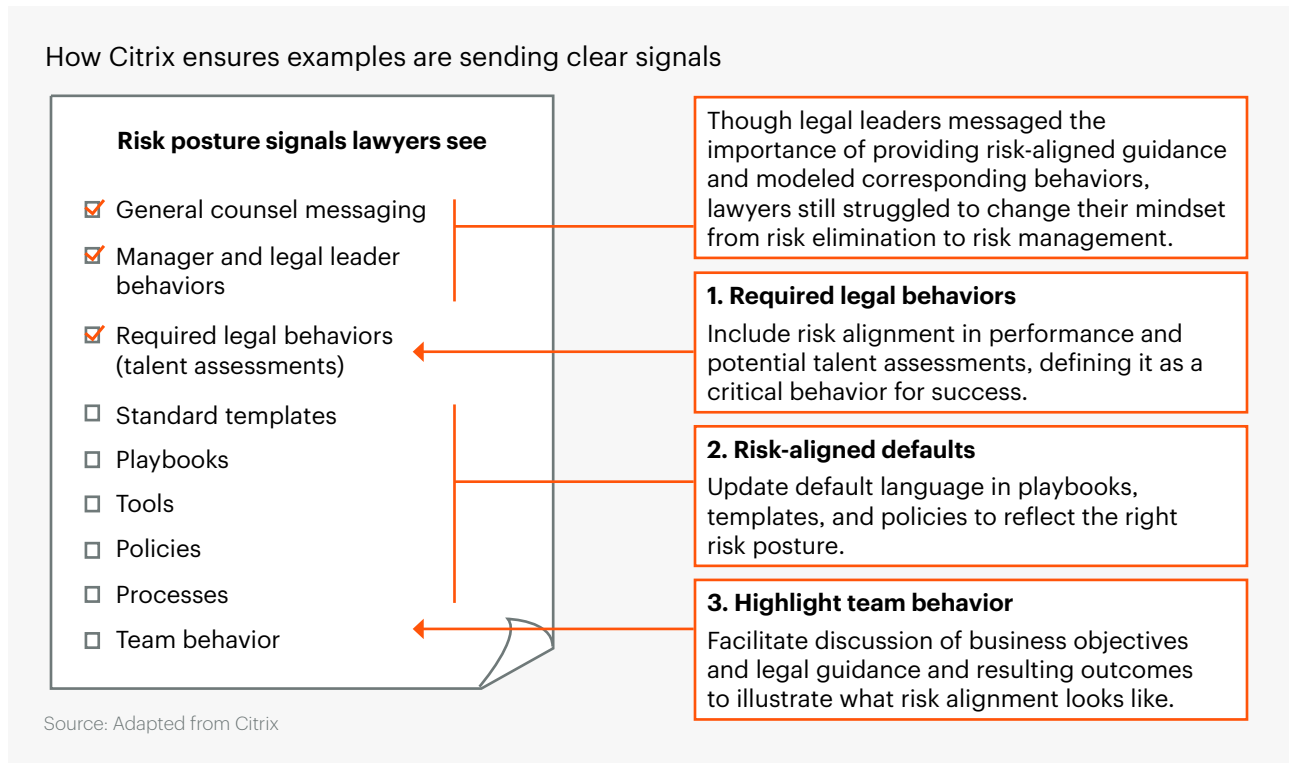
Case in point: Risk-taking signal audit (Citrix)



As Citrix underwent a business model transformation, the legal team needed to reorient its core mission — and resulting practices and behaviors — to enable success in new go-to-market and business support models. Although legal leaders had strong messaging in place about the importance of providing risk-aligned guidance, more work was required to ensure lawyers understood the proper organizational risk posture.

To do so, in 2019, Citrix embedded the idea of enabling the business to take the right risks into lawyers' workflows. The company started with lawyers' objectives, where a new set of legal department behaviors underscored the importance of risk-aligned guidance. Additionally, Citrix conducted lessons-learned sessions to review real-life examples and discuss how legal guidance can be more risk-aligned. Results from this session, together with feedback sourced from other discussion and analysis, informed an update of Citrix's tools, templates and policies to ensure the appropriate risk posture was embedded as the default.

Ensuring signals align with risk posture



Conclusion

Because guidance is more important and more of it is being requested, legal leaders are looking for what drives guidance that improves business performance. The two main drivers of impactful guidance are subject matter expertise and understanding the organizational risk posture. Legal leaders need to cultivate risk-taking know-how to incorporate those drivers into the legal guidance process. To do so, legal leaders should clarify the organization's risk-taking needs, incorporate structured analytic tools to balance risk and reward, and ensure examples and signals align with organizational risk posture.


Evidence

2022 Gartner Taking the Right Risks to Grow Survey. This survey was conducted in November 2022 to understand (from both business partner and lawyer perspectives) how in-house counsel could unintentionally stifle business opportunity and growth, and to understand if legal guidance has been too conservative and the main drivers behind such conservatism. It also tried to assess whether conservatism has increased since the COVID-19 pandemic. The research was conducted online among 200 respondents across North America, EMEA and APAC. All industry segments qualified. Further, the respondents were either in legal or business unit roles.

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