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Proactive law in contemporary legal landscape: five main barriers and potential pathways to success

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Abstract: This position paper affirms the transformative potential of proactive law, an anticipatory approach that integrates legal foresight into business strategy to prevent disputes and mitigate risks. Despite its promise, proactive law faces significant challenges within the traditionally reactive legal profession and the business environment. The paper identifies and examines five key barriers: entrenched reactive mindsets, organizational silos, difficulty in quantifying preventive benefits, budget constraints and the complexities of a dynamic global legal landscape. Adopting a reflective and analytical methodology, this reflection draws on interdisciplinary legal theory and organizational behavior frameworks to ground its criteria for evaluating these barriers. It positions itself as a reflection paper aimed at fostering a critical discourse on systemic resistance to proactive legal practices. Contributions include a nuanced understanding of the obstacles hindering the adoption of proactive law and strategic recommendations for overcoming them, advocating for a shift towards a more integrated, client-centered legal framework.

Keywords: *change management, lawyering, proactive law*

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1. Introduction

In the evolving landscape of legal practice, the concept of proactive law marks a transformative shift from the traditional reactive problem-solving model to an anticipatory and preventive approach (Haapio, 2006; Pohjonen, 2006). This paradigm shift is not merely a tactical adjustment; it reflects a profound philosophical evolution in the delivery of legal services (Solarte-Vásquez and Nyman-Metcalf, 2017, p. 213) and a value-driven relational approach to all types of exchange relations (Macneil, 1999). Proactive law aims to minimize conflicts, mitigate risks and streamline transactions by integrating legal foresight into business strategy, fostering collaboration between professionals of different background, lawyers and their clients to anticipate challenges and capitalize on opportunities (Siedel and Haapio, 2016).

Despite its potential to revolutionize the legal profession by promoting a more efficient and client-centered practice, proactive law faces several barriers entrenched within the traditional frameworks and mindsets that dominate both the legal profession and the organizations it serves (Siedel and Haapio, 2016). This article critically examines the five obstacles, exploring why proactive law, despite its clear advantages, struggles to gain traction in a field characterized by conservatism, structural inertia and deep-seated adherence to established practices. By identifying and discussing five barriers to the adoption of proactive law, this analysis aims to contribute to the discourse on legal reform and advocate for a shift towards a more anticipatory and integrated approach to legal practice that aligns with contemporary business needs and societal expectations.

2. Barrier number 1: Deeply rooted reactive mindset in legal and business communities

The legal profession has traditionally been grounded in a reactive mindset, in which legal services are predominantly deployed in response to disputes, conflicts or compliance failures. This entrenched perspective not only shapes the professional identity and ethos of lawyers but also significantly hampers the adoption and effectiveness of proactive legal practices. Proactive law, which focuses on preventing legal issues and optimizing legal environments for clients, fundamentally clashes with the conventional reactive approach ingrained in both the legal and business communities.

Historically, the legal profession has been built around rectifying rather than preventing wrongs. Law schools have long trained lawyers to perceive the law as a mechanism for dispute resolution, emphasizing adversarial skills and the retrospective interpretation of legislative texts (Menkel-Meadow, 2018). Courses often focus on litigation strategies, case-law analyses and courtroom tactics, reinforcing a backward-looking perspective. Consequently, the prevailing professional culture among lawyers tends to celebrate "firefighting" legal crises over preventing them in the first place. Success is frequently measured by the ability to win cases, integrate the best clauses for one's party or negotiate settlements, rather than by preventing disputes through careful planning and foresight. This reactive orientation is further reinforced by a skeptical attitude towards change, where many in the field view legal innovation as a deviation from the sanctity of traditional legal processes and standards (Susskind, 2008).

This mindset affects both the profession and legal departments of companies. Firstly, it discourages investment in technology and innovation, which are crucial for the development of legal tools and new methodologies (Parker, 2021). Secondly, it can erode client relationships (Gardner, 2023). In an increasingly complex and fast-paced business environment, where trust between lawyers and clients aims to be the North Star in terms of perceived value, clients would highly benefit from an approach that anticipates and circumvents potential legal issues. Third, the fear of abandoning traditional legal practices and the perceived risks associated with proactive law contribute to resistance to its adoption. Lawyers may worry about the uncertainty of preventive measures, questioning their efficacy and the potential for unintended consequences. Finally, it should be stressed that conservatism and familiarity bring comfort to practitioners; established methods and processes provide a sense of security that the change disrupts.

The persistence of an argumentative and reactive legal framework is also evident in the curricula of most law schools, which provide limited exposure to courses or content, advocating a proactive approach to legal issues. Subjects such as legal risk management, legal design thinking and mediation are often marginalized or absent (Susskind, 2013). The same happens in relations with other universities (such as in economics and engineering) and the development/creation of interdisciplinary labs. New lawyers continue to enter the profession with entrenched reactive mindsets, where emphasis on litigation and courtroom skills overshadows the importance of strategic planning, collaboration, and client engagement in preventing legal issues (Susskind and Susskind, 2023). The situation is

not better after graduating from the law school. Professional bodies such as bar associations and regulatory entities have a responsibility in the lack of recognition of proactive approaches. Continuing legal education programs often lack content on proactive law, missing opportunities to influence practicing attorneys and interdisciplinary strategies are not seen as integral to professional excellence and client services. How can we promote proactive law, assuming that most lawyers do not know what proactive law is and what are its advantages?

3. Barrier number 2: Integrating proactive law into existing organizational structures and overcoming organizational silos

Integrating proactive law into existing organizational structures presents a significant challenge that extends beyond the legal department and touches upon the very fabric of organizational design and culture (Griffin *et al*., 2020; Volberda *et al*., 2021). Traditional organizational models are not typically designed to accommodate the integrative and anticipatory approaches that are characteristic of proactive law (Tõnurist and Hanson, 2020). This misalignment is exacerbated by the prevalence of organizational silos, which can lead to fragmented efforts, miscommunication and substantial operational inefficiencies that hinder the implementation of proactive legal strategies (Gardner, 2017).

One of the primary hurdles is structural inertia (Gilbert, 2005; Liao *et al*., 2008)—an inherent resistance to change that can stifle innovation and adaptation within organizations (Smollan, 2011; Hubbart, 2023). Legal departments within organizations are generally structured to manage risk reactively, addressing issues as they arise, rather than preventing them. This reactive posture is often reinforced by organizational hierarchies and rigid departmental boundaries that limit cross-functional collaboration (Gardner, 2017). The structural inertia manifests in established processes, reporting lines and performance metrics that prioritize short-term problem-solving over long-term risk mitigation and strategic planning (Gartner, 2017; 2023).

The challenge extends beyond adopting new legal practices to reorienting the organization's structure to support these practices. Silos create barriers that compartmentalize expertise, information and responsibilities, impeding

the flow of information and collaboration (Bento *et al.*, 2020; Castañer and Oliveira, 2020) essential for the effective implementation of proactive law. Each department or unit within an organization often operates as a standalone entity with its own goals, strategies and management systems. This isolation can lead to a lack of communication and cooperation between departments that need to collaborate to identify and mitigate legal risks before they escalate into significant legal problems.

The fragmented efforts resulting from these silos can cause inefficiencies in several ways. When issues arise that span multiple departments, the lack of coordination can lead to duplicated efforts, where different teams unknowingly work on the same issue without sharing insights or solutions. This not only wastes resources, but also delays the resolution of legal issues. Additionally, opportunities for the early detection and prevention of legal risks are missed when departments fail to share critical information. For instance, a marketing campaign developed without input from the legal department may inadvertently violate advertising and data protection regulations, leading to fines and reputational damage that could have been avoided through proactive collaboration. Furthermore, the insights gained from addressing these issues are often not disseminated across the organization, preventing other departments from learning from these experiences and applying these lessons to preempt similar situations in the future.

Organizational silos can also obscure the big picture, making it difficult to assess and manage the overall legal risk. Without a holistic view of legal exposure, senior management may not be able to make informed decisions about where to allocate resources to prevent legal issues. This can lead to a misallocation of effort, where some areas are left vulnerable, while others may receive more attention than necessary. The lack of integrated risk-assessment tools and cross-departmental communication channels hampers the organization's ability to implement comprehensive proactive legal strategies.

To successfully integrate proactive law, organizations should undertake a fundamental reassessment of their traditional structures and cultures. This would involve shifting towards more collaborative, interdisciplinary and cross-functional teams that work across silos to integrate legal considerations into all aspects of organizational decision-making. One of the measures could be establishing teams that include legal professionals, business managers, compliance officers and other stakeholders to facilitate the early identification

of legal risks and the development of proactive solutions. Another could be to cultivate a culture that values and supports proactive legal strategies. This involves training staff at all levels to recognize legal implications in their daily activities and decisions, encouraging open communication and promoting a shared responsibility for legal risk management. The third could be changing how organizations approach internal communication and decision-making. Proactive law, by its nature, necessitates a culture of openness, transparency and shared objectives, where legal risk management is seen not just as the legal department's responsibility, but as a core element of the organization's overall strategy.

In any case, the relevance of leadership commitment cannot be emphasized enough. Leaders must be willing to invest in the necessary resources and systems to support proactive law, including technology platforms that enable information sharing, training programs that build legal awareness and performance metrics that reward proactive behavior. Moreover, they need to champion the cause, providing a clear direction and allocating resources to facilitate the transition. They could even celebrate early successes and share positive outcomes to build momentum and encourage wider adoption across the organization. Only by breaking down silos and fostering a more integrated organizational structure can companies enhance their ability to anticipate legal challenges, reduce risks and create value through proactive legal management.

4. Barrier number 3: Difficulty in quantifying the benefits of proactive law

The shift to proactive law involves a fundamental change from traditional reactive legal processes to a more preventive approach, in which the primary objective is to foresee and prevent potential legal issues before they arise. This orientation is essential in today's dynamic business environment, which demands not only compliance, but also strategic foresight from legal frameworks. However, quantifying the benefits of proactive law is a complex challenge because traditional metrics, such as key performance indicators (KPIs) (Marr, 2012) and return on investment (ROI) (Williamson, 1979), which are well-suited to reactive models, are not readily applicable to preventive strategies.

Traditional KPIs in legal settings typically focus on outcomes, such as the

number of cases handled, the amounts recovered or the expenses involved in legal proceedings. Other factors may be hours spent in research, calls or contracting. These indicators reflect the efficacy of legal departments in managing issues after they occur. In contrast, proactive law aims to reduce the occurrence of legal problems altogether. This preventive nature means that its success is often invisible—no disputes arise or legal crises occur — which traditional metrics fail to capture. Consequently, the application of these metrics to proactive law often undervalues its true impact, particularly the subtle and long-term benefits, such as enhanced compliance, improved business relationships and strategic risk management. How can we make effects and changes that are considered intangible more tangible?

Measuring ROI for proactive legal strategies is equally challenging. ROI calculations in a conventional legal context focus on financial gains from legal actions versus the costs incurred. However, proactive law involves upfront investments in design-thinking processes, training and systems integration, with benefits that accrue over time and are often non-financial, such as improved operational efficiency, enhanced corporate reputation or reduced risk exposure. These benefits are diffuse and long-term, complicating straightforward ROI calculations that seek immediate and quantifiable returns.

Additionally, proactive law influences various non-legal aspects of an organization, such as corporate culture, employee satisfaction and customer trust, which are rarely captured in traditional legal metrics, but are vital for organizational success. For example, embedding legal considerations into business processes can lead to a more informed and compliant workforce, reduce internal conflicts and foster a more ethical organizational environment. Moreover, sustainability departments or sustainability strategies among different departments would greatly benefit from proactive law initiatives. These qualitative benefits, while significant, defy simple quantification and are often overlooked in performance assessments.

Given these challenges, there is a pressing need to develop new metrics that can more accurately reflect the benefits of proactive law. These metrics should consider both the direct and indirect effects of legal foresight and prevention. For example, indicators may include the number of potential legal issues identified through early intervention and the decrease in legal costs over time due to fewer litigations or specific improvements in compliance ratings. Surveys measuring stakeholder satisfaction, employee awareness of legal standards or the organization's reputation in the marketplace could provide

valuable insights into the effectiveness of proactive legal strategies as well.

The task of redefining metrics to evaluate proactive law also involves educating stakeholders about the value of prevention over cure. This education is crucial not only for the adoption of new metrics but also for fostering a broader organizational culture that appreciates and strives for legal proactivity. Communicating success stories and case studies in which proactive law has prevented significant losses or created new opportunities can help to illustrate its tangible benefits. By demonstrating how proactive law contributes to strategic objectives and bottom-line results, legal professionals can make a compelling case for its adoption.

5. Barrier number 4: Budget constraints and the challenge of justifying initial investments

Addressing the financial barriers to the adoption of proactive law may be expected to pose a significant challenge within organizations, particularly regarding the allocation of budgets for substantial initial investments in training, systems and resources. This challenge is exacerbated by the difficulty of demonstrating immediate financial returns on these investments, which is a key expectation in most corporate budgeting processes. Traditional budgeting frameworks and financial evaluation metrics often prioritize initiatives with quick, tangible returns, sidelining approaches, such as proactive law, which promise more diffuse and long-term benefits. How many times have we been forced to not implement initiatives because of quarterly earnings restrictions?

Organizations could struggle to justify the allocation of substantial budgets towards proactive law initiatives because financial benefits, although significant, are not immediately visible. Unlike reactive legal measures, where cost savings can be directly attributed to specific legal interventions, such as settlements, the benefits of proactive law are realized through the absence of legal problems and the smooth operation of business processes. While these outcomes reduce long-term costs and enhance operational efficiency, they do not generate immediate financial returns that can be easily quantified and reported.

Proactive law requires a paradigm shift not only in legal thinking but also in financial planning and resource allocation. Upfront costs may include

the development and integration of advanced legal systems, comprehensive training programs for employees and the establishment of new roles or departments dedicated to legal risk management. These initiatives necessitate a reevaluation of how budgets are allocated and how financial success is measured, challenging entrenched corporate practices that are typically resistant to such fundamental changes. It needs to be considered that the costs of proactive law practices are dynamic and ongoing. As legal environments and business contexts evolve, investments in proactive lawyering must be continuously refined to address emerging risks and regulatory changes.

Speaking about budget, another critical factor is the billing model of the structured law firms. Economically, most structured law firms still work on hourly or contingency fees, which inherently favor post-issue engagements over preventive measures. This economic structure further disincentivizes innovation in proactive legal services as there is no immediate financial incentive to change. Current compensation models reward the time spent on resolving disputes, rather than the value added by preventing them.

In order to overcome this barrier, a sound recommendation is to develop and present (internally and externally) clear, robust business cases that articulate the long-term value and potential cost savings of proactive initiatives. These business cases should highlight not only direct financial benefits, such as reduced litigation costs and penalties, but also indirect advantages, such as enhanced corporate reputation, improved compliance and greater operational resilience (Marrero, 2015). Sustainability metrics could be useful as well, especially for companies that intend to be quite active on the matter. Illustrating these benefits through case studies and real-world examples can be particularly effective in demonstrating the tangible impacts of proactive law, thus making the financial case more compelling.

An additional suggestion is to adopt more flexible budgeting practices that could allow for the allocation of funds to longer-term initiatives. This might include the introduction of special innovation or "proactive" budgets to capture broader strategic benefits. Engaging financial managers and decision-makers in discussions on the strategic importance of legal risk management can help align budgeting practices with organizational goals (Siedel and Haapio, 2016; Arena and Ferris, 2018). By adjusting financial planning frameworks to accommodate and even encourage investments in proactive law, organizations can better align their budgeting practices with the strategic goals of risk prevention and legal excellence.

6. Barrier number 5: Complexity of a dynamic, global legal environment

The fifth, and arguably one of the most formidable obstacles to the widespread adoption of proactive law, lies in the dynamic, global and intricate legal environment that modern organizations must navigate (DiMatteo, 2021). This environment is characterized by constant changes in regulations and legal standards across various jurisdictions, posing a significant challenge for legal professionals and organizations aiming to implement proactive law strategies (Tikkinen-Piri and Markkula, 2018; Herden *et al*., 2021; Montiel *et al*., 2021; Herdegen, 2024). The need to stay ahead of regulatory changes while ensuring compliance across different regions adds layers of complexity to legal planning and operational execution.

In an era of globalization, businesses are not only expected to comply with domestic laws, but also to adhere to international regulations that can vary significantly from one country to another. The complexity of managing legal requirements across multiple jurisdictions can be overwhelming, especially for multinational corporations that operate in highly regulated sectors such as finance (Eun, Resnick and Chuluun, 2021), healthcare (Theodos and Sittig, 2020) and telecommunications. Each of these sectors faces its own set of challenges, driven by both external market forces and the internal dynamics of organizational governance.

First and foremost, proactive law, anticipating legal issues before they arise, requires an extensive understanding of the current and emerging legal landscape. However, the rapid pace at which laws and regulations change can outstrip the ability of organizations to adapt proactively. If this is not enough, regulations on the same topic may be applied in different versions according to the country to which they refer. Think about privacy regulation in Europe and outside or about multiple regulations about data protection and governance in Europe, US and China. Keeping abreast of these changes and implementing systems that ensure compliance can be resource-intensive and complex, especially for multinational companies.

Second, the intricacy of legal environments is further compounded by the need for specialized knowledge and expertise to navigate different legal systems and practices. Legal professionals must not only be experts in law, but also possess a deep understanding of the business contexts in which

they operate. This dual requirement makes the integration of proactive legal strategies a challenging task that involves continuous learning and adaptation. The diversity of legal cultures, languages and regulatory philosophies adds to this complexity, necessitating a multifaceted approach to legal risk management.

Moreover, the constant flux of other regulatory standards also impacts how organizations manage their risk and compliance profiles. Traditional risk management approaches are often ill-equipped to handle the dynamism of the global legal landscape, where new regulatory challenges can emerge with little warning. Proactive law necessitates a more agile approach to risk management, one that incorporates advanced technologies, such as artificial intelligence and big data analytics, to predict and respond to legal risks before they become problematic. Implementing such technologies, however, requires significant investment in both tools and training, creating a barrier for many organizations, particularly small and medium-sized enterprises (SMEs) with limited resources. Additionally, the reliance on technology to manage legal challenges introduces new risks, such as data breaches and cyber-attacks, which themselves need to be anticipated and mitigated as part of a comprehensive proactive legal strategy.

To address this challenge, organizations must develop robust legal and regulatory monitoring systems that can track changes across different jurisdictions and adjust policies and practices swiftly and effectively. This involves not only investing in legal expertise and technology but also fostering a culture of compliance and ethical practices throughout the organization. Training and development programs that focus on equipping professionals with skills to anticipate legal issues and adapt to changing regulations are crucial. Collaboration with external legal experts, participation in industry groups and engagement with regulators can also enhance an organization's ability to proactively navigate the complex legal environment.

7. Conclusion

The integration of proactive law into mainstream legal and business practices represents a transformative approach to the provision of legal services, one that emphasizes collaboration, foresight and a holistic understanding of both legal and business landscapes. This approach transcends the traditional notions of legal compliance or risk management; it is about creating value,

fostering innovation and building stronger, more strategic relationships between legal professionals and their clients. Proactive law shifts the focus from merely resolving legal issues after they arise to preventing them in the first place and leveraging legal insights to drive business success.

By addressing the aforementioned challenges, the legal profession can move towards a more proactive, client-centered approach that aligns with the evolving demands of modern business and society. Proactive law has the potential to enhance organizational resilience, drive innovation and create competitive advantages in an increasingly complex and dynamic global environment. As businesses face new challenges—from technological disruptions to changing regulatory landscapes—the ability to anticipate and navigate legal issues proactively becomes ever more critical.

The journey towards the widespread adoption of proactive law is undoubtedly complicated, given the deeply rooted barriers within the legal profession and organizations. However, the potential benefits of reduced legal risks, enhanced client relationships, improved compliance, and greater value creation make this a worthy endeavor. By reimagining the role of law in business and society and by cultivating a culture that values prevention as much as resolution, we can pave the way for a more proactive and effective legal profession that meets the needs of the 21st century.

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