Denver Law Review

Volume 64 | Issue 3 Article 2

February 2021

The Proceedings of the First Annual Conference on Preventive Law

Denver University Law Review

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Recommended Citation
Denver University Law Review, The Proceedings of the First Annual Conference on Preventive Law, 64 Denv. U. L. Rev. 415 (1988).

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The Proceedings of the First Annual Conference on Preventive Law

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The following is a transcript of remarks made at the First Annual Conference on Preventive Law held at the University of Denver College of Law on May 8, 1986. The transcript has been edited by the *Denver University Law Review* stylistically and organizationally in order to present these remarks in a more readable form. The conference was the opening event of the National Center for Preventive Law which was established at the University of Denver on January 1, 1986. The participants in the Seminar were:

Professor Murray Blumenthal	University of Denver
William Bolger	Executive Director of the National Resource Center for the Consumers of Legal Services
Harold Brown, Esq.	Los Angeles, California
Professor Morris Cohen	Yale University
Dean Edward Dauer	University of Denver
Dean Sheldon Krantz	University of San Diego
Alex Elson, Esq.	Chicago, Illinois
Professor Robert Hardaway	University of Denver
Constance L. Hauver, Esq.	Denver, Colorado
Professor Neil Littlefield	University of Denver
James Luce, Esq.	Mountain View, California
Major John Meixell, Judge Advocate	Unites States Army
Professor Michael Millemann	University of Maryland
Forrest Mosten, Esq.	Los Angeles, California
Dr. Robert Redmount	Chester, Connecticut
Edward P. Richards, Esq.	Houston, Texas
Clarine Nardi Riddle	Connecticut Deputy Attorney General
Dr. William Robertson	University of Washington School of Medicine
Robert Shafton, Esq.	Los Angeles, California
Edward P. Smith, Esq.	Executive Director of the Rhode Island Bar Association
Professor Frank Strong	University of North Carolina
Professor Alan Widiss	University of Iowa

INTRODUCTION

Edward Dauer: Welcome to everyone and thanks very much for coming. This meeting is the opening event of the National Center for Preventive Law which was established at the University of Denver, School of Law on January 1, 1986. Although it has been in existence for several months, this meeting is the most important event to occur to date — the first gathering of the Preventative Law family from throughout the United States.

The National Center for Preventive Law has three goals. One is to engage in curricular development — to see how the attitudes, notions, theories and techniques of preventive law can be worked into law school curriculum. We will be using ourselves as a test site for that, making our materials freely available to other law schools. A second purpose of the Center is to act as a catalyst as well as a site for research — to provide funds for scholars, both from the academy and from practice, to engage in research in Preventive Law, as broadly defined as possible, and to be a place to nucleate and facilitate that research, where and when we can. Our third purpose is to be a resource center to the profession.

More to the point, beyond those three purposes, is the fact that this Center will provide a capability which several of us have felt for several

years was needed, and that is an institutional home for Preventive Law. A place where the field can have some identity. A central focus, if you will, to which scholars from throughout the country can look whenever it is useful to them to do so.

The idea of an institutional home leads quite naturally to what I regard as perhaps the central, but at least the initial, problem in the field. To put that problem in its boldest terms, it is: Is there a field of Preventive Law, and if so, what is it? It is clear that we have under the banner many people doing many different things in many different places. Indeed, we will see some of that diversity here today.

Within the question of whether there is some such field is the opposite question: Is Preventive Law something less than everything? That is, there were lawyers in the early days when Louis Brown and others were first writing and talking about Preventive Law who would respond: "I don't know what you are talking about. Preventive Law is what I do whenever I'm not in court. What you have done is to describe all of out-of-court lawyering, and of what use is that?" I think that is still a challenge. We must define what we are about, and see if we do have any defensible thematic unity. Or to put it another way: Is it possible that this is a coherent field, and one that has some values? Are there unifying theories or organizational structures which underlie its several guises? Are there ideas which unite the procedures of tax planning, for example, with those of estate planning or with real estate planning, or which connect questions of delivery of legal services with products liability loss prevention techniques? The ambitions, therefore, of this seminar, are the following:

The first by way of our acting in the role of institutional home, is to facilitate introductions among those of you who may not have been aware of each others' work, yet who work in fields that touch, overlap, or coincide. The second thing is to achieve, though I think not explicitly, some sense of a definition of what we mean by this phrase *Preventive Law*. What is it about? What unifying things underlie it? And thirdly, to propose or dream about a set of aspirations from which we can derive an agenda for the future development of the field. That is, what are the important things to be done? What can this institutional home, this Center for Preventive Law, most usefully do to serve those people who are working in many different costumes?

I. THE SOURCES OF LEGAL CONFLICT

Edward Richards: My area of research and practice is medical law. In keeping with our topic, *Sources of Legal Conflict*, I want to discuss differing value systems and intellectual paradigms as a source of legal conflict. Part of the high level of legal conflict in the United States arises from our cultural heterogeneity. While businessmen often look wistfully at the low level of legal conflict in Japan, few would be willing to live with the shared value system that makes this possible. In my work, I see the mischief that arises from the different value systems in medicine and law.

This poses a difficult dilemma for physicians in the United States. Physicians in the United States have great autonomy. Standards for training and accreditation are set by voluntary organizations. In general, these are procedural standards. Knowing that a physician is a "board certified" specialist tells you how he was trained, but not how he practices. The licensing of physicians is done by the states. In most states, this is a pro forma process. No state actually evaluates individual competence. This laissez faire professional standards setting results in the toleration of a great diversity of medical practice styles and levels of competence.

Some of these tolerated practice styles are at odds with legal expectations. This leads to legal conflicts, but conflicts whose cure demands that either legal or medical values be changed. Many physicians believe that it is law that should change. This presupposes that legal values are merely professional conventions, as is the case for medical values. I believe that this view underlies the fundamental paradigmatic conflict between medicine and law: law may be a profession, but its values are extrinsically set by society, rather than intrinsically set by the profession.

Now I should tell you that I have a populist view of the law. I believe that the law, especially tort law, reflects societal values rather than shapes them. There is considerable debate over the extent that these values are shaped in an egalitarian manner. Irrespective of whether law reflects the values of all society or a privileged subset, law is not shaped by lawyers in the manner that medicine is shaped by physicians.

This is particularly true of tort law. Tort law is predominately common law. Common law is "found" by judges as they enforce the mores of society through legal proceedings. A central theme in tort law is the problem of reconciling personal autonomy with societal expectations, the precise basis of law's conflict with medicine. Tort law reflects the high value society places on personal autonomy — individual freedom of action. It is this belief that has allowed medical diversity to flourish. At the same time, we have a societal belief in the notion of accountability — that an individual should be responsible for his actions. In a Holfeldian sense, we opt for more rights, with their attendant responsibilities or duties. Physicians, however, make the opposite assumption. They believe that increased autonomy should be coupled with decreased responsibility.

The litigation over informed consent to medical treatment typifies this mindset. The courts never debated the need for an informed consent to medical treatment. The legal debate has always been over the standard for accessing the adequacy of the information. This is most clear in the cases dealing with informed consent for arguably incompetent, psychiatric patients. In contrast, the medical profession seriously questioned whether there should be a requirement of informed consent. Physicians treat patients paternalistically. This is a paternalism rooted in both superior knowledge and pre-scientific notions of the importance of a secular faith in physicians on the part of their patients. This is not

an unusual model for professional relationships. While not based on science, law maintains its own body of secret lore. Moreover, lawyers are often guilty of the same brand of paternalism as physicians. Even preventive lawyers can wax omniscient when counseling clients.

The central dogma of this paternalism is that physicians believe that they should make decisions for their patients. This decision-making is seen as an onerous burden that has been lifted from the patient's shoulders. In an informed consent lawsuit, an ungrateful patient alleges that the physician should be castigated for not forcing the patient to make these difficult decisions. The physician is outraged that his doing this favor for the patient is seen by the courts as usurping the patient's autonomy and thus shifting the responsibility for the consequences of the decision from the patient to the physician.

The litigation of these suits is bitter because they are about intentional actions. Failure of informed consent is litigated as a negligence issue, yet it is only negligence in a technical sense. Most informed consent cases involved physicians who told the patient precisely what they intended. As a plaintiff's attorney, I plead that this disclosure was negligent, but the real issue before the jury is fraudulent inducement. I am not challenging the physician's technical skills. I am challenging his values. Putting aside the elements of the tort, I must convince the jury that the physician's values were wrong, that he had no right to withhold information from the patient.

From the physician's perspective, no amount of tinkering with the formalities of obtaining the informed consent will substitute for modifying their underlying values. It is possible to develop legal strategies to make it more difficult to prove a failure of informed consent. If, however, these strategies are only shams, the underlying value conflicts will foster litigation in other areas. One of these areas is the tension between medicine as an art and medicine as a science.

Current medical practice is based on a scientific model, tempered with subjective value judgments. This explicit acknowledgment of a component of art serves to shelter medical practice from close scrutiny by other branches of science. For example, when research money is at issue, medicine wraps itself in the cloak of science, promising technological fixes for the maladies of life. Conversely, when questioned about the scientific basis of fashionable therapies, the banner of art is floated and the crude judgments of science are forsworn.

This duality is typified by the rhetoric that statistics do not apply in the individual case. This rhetoric allows physicians to opt out of scientific analysis for individual treatment decisions. While this is an important safeguard against totally mechanical decision making, it destroys the integrity of clinical decision making.

The acceptance of this escape from rational decision-making complicates the introduction of new technology into clinical practice. In intensive care medicine, the problem of the ad hoc introduction of new technology has become so acute that it is difficult to rigorously establish

that a stay in the intensive care unit (ICU) significantly improves either morbidity or mortality. There is no doubt that many patients benefit from ICU care and that much of the technology in the ICU is valuable. The problem is that some patients are worse off in the ICU and some of the equipment is not effective. The mix of patients and equipment is so complex that it is difficult to sort out the winners and the losers. Tragically, it is probably impossible to do controlled experiments that would involve withholding accepted (but unproven) technology from ICU patients. Once technology permeates the marketplace, it is very difficult to dislodge.

This problem is not limited to machinery. It arises whenever personal anecdote is allowed to substitute for scientific validation. We are currently witnessing the first objective evaluations of coronary artery bypass surgery (CAB). Since there is no regulation of surgical procedures, a surgeon can market a new surgery without having to demonstrate its efficacy. In the 1970's, this was done with CAB. By the 1980's, more than 100,000 CAB's were being performed each year, without a proven basis for many of the operations. As the results of various controlled studies have become available, it has become clear that many people underwent the procedure needlessly.

Drugs for AIDS (Acquired Immune Deficiency Syndrome) may be the most poignant example of the perils of untested technology. The Food and Drug Administration (FDA) usually requires that drugs be proven safe and efficacious before they may be marketed. Since safety is poorly defined for sufferers of AIDS, the FDA is being pressured to be "compassionate" and allow AIDS drugs to be marketed without full testing. The problem is that once the marketplace is filled with incompletely tested drugs, it will be impossible to perform the controlled studies necessary to determine which drugs are effective. If a substantially more effective drug is introduced after several less effective drugs, AIDS patients will die needlessly because physicians will not be able to recognize the value of the new drug in the noise of the untested existing drugs.

These problems appear to be technological in origin, but they actually reflect conflicts of values. The law, as a reflection of societal values, expects medicine to make its decisions in a consistent, objective manner. Medicine eschews this constraint, preferring to shift between a scientific and prescientific frame of reference. The problem is that society is asked to pay the costs of technology, both financial and human. These costs have been inflated through medicine's opportunistic abandonment of objective decision making. Societies' attempts to recoup these squandered resources will fuel both litigation and the legislative regulation of medical practice.

W. O. Robertson, M.D.

With a background in medicine and thus a stranger in your midst, I believe I have been invited here because I have been involved in a pro-

gram trying to persuade doctors to look at prevention as a solution for much of the current malpractice problem. As a "black sheep" of a lawyer's family, with a father, a brother, and uncle already lawyers and a son about to graduate from law school, I grew up with and maintain a sensitivity to the philosophy of the legal profession. I have been further "educated" in our television era by Perry Mason, Paper Chase and the like — all emphasizing the adversarial element of the law as it addresses dispute resolution of the individual case. In contrast to medicine, the concept or the image of "prevention" seems conspicuous by its absence. Implementing a nonadversarial approach toward dispute avoidance ought to benefit both our society and every individual within it.

Be that as it may, I found my background and my familiarity with the legal profession particularly valuable when, during my stint as president of the state medical association, we were confronted by the "first malpractice crises." As a faculty member of the University of Washington, I am sure I was looked at to bring a sense of "objectivity" to the discussion which followed. We had many meetings with the bar association, the insurance industry and the legislature. These interactions had not been traditional; at first, all parties seemed more than a little bit suspicious of the others. My troops — the physicians — were all too anxious to have solutions and to have them right away! I favored approaching the problem by extrapolating from experiences with the traditional "medical model of disease" — recognition, definition, determination of cause, treatment and prevention. That model had been especially productive for infectious diseases, for nutritional deficiencies, for accidents and trauma. To apply the model, one has to undertake a number of steps. First, one has to gather some data about the problem at hand, what has gone on in the past and what is going on at the present. Then, one has to subject the resultant data to analysis and interpretation; this permits one to consider a "diagnosis" — a tentative and testable hypothesis as to "possible cause." Only after that point can one suggest "rational treatment" or take the final step toward recommending avenues of "prevention." Moreover, such a progression of steps enables us to "evaluate" the effectiveness of our deliberations — such a critical step in implementing the aforementioned model. It seems only logical to pursue such an approach in addressing the "medical malpractice dilemma."

In truth, that turned out far easier said than done. In the mid-1970's, there was remarkably little data — and where it existed it was carefully protected, hidden or declared "confidential" depending on what you sought and from whom you sought it. I suspected then and continue to think that most of the data that had been collected was almost exclusively applicable to the financial aspects of the problem rather than its epidemiology. At the same time, when it came time to analyze the paucity of data that was available, almost none of the parties involved had an operational awareness of the concept of statistical inference. Most of the parties seemed only too willing to accept trends to let

them jump to obvious conclusions. Far too many of our physicians, relying on a single testimonial case, were ready to point the finger at the culprits: some aiming at plaintiffs' attorneys, others at the "law," and still others at greedy patients, the insurance industry and uncritical juries. Far too few — at least in my mind — considered the possibility that far too much "malpractice" was actually occurring, and that perhaps the increasingly complex "system" of health care was, in fact, somewhat responsible. Of course, referring back to the "model," the suggested treatment depends on the postulated cause and there was little agreement on that point. But there seems to be a lot of agreement that the treatment ought to be a 100% cure and that it ought to be able to be applied overnight! Furthermore, since we were talking about cure, there was little need to worry about trying to evaluate the treatment to be used. Would it work or did it work? The Government Accounting Office's (GAO) recent five part series dealing with the malpractice scene reports that in their six state sample, tort reform seemed to be of little benefit and that not a single study had been initiated to see if it had worked. As each of you know, many "solutions" were enacted on the legislative scene and enacted quickly. In the first crisis, forty-six states took action; to date, approximately forty states have acted in the second crisis. But the problem has not gone away and, in the eyes of many, it may even be worse.

With physicians' maintaining this mindset, it is of little wonder that other groups — attorneys, insurance representatives, the press and many legislators — acted in similar fashion. Reason should have told us all that a "quick fix" to a problem that had been evolving for more than half a century was most unlikely. Nonetheless, our Medical Association went to the legislatures in 1975-76 and appealed for help; ten specific bits of legislation followed — in those days we had yet to coin the catchy phrase of "tort reform" with all its positive derivative images. As we know today, the basic problem persists. In 1976, we joined with the State Bar Association in cosponsoring data gathering by an independent consultant actuary; both groups were dismayed to find out that the dollar amounts paid out in the state of Washington as a result of verdicts or settlements in medical malpractice cases had been escalating at a rate of twenty-two percent per year since 1962. Twenty-two percent per year! And it continued to do so for at least the next six years in Washington. This information, however, did not dampen our enthusiasm in going to the legislature in 1984-85 as the second crisis loomed so large. And again, at this last session of our legislature a remarkable paucity of data was available; much of what was used by all parties was poorly defined and usually unverified — and frequently exaggerated with much puffery and posturing. Once again, the resulting confusion permitted all of us to ignore the real potential of an effective prevention program as one and all were deluded into believing that quick legislative fixes would make the problem go away.

In actuality, a second strategy had been employed in our state and

in a number of others beginning in the mid-1970's, the formation of a physicians' insurance company. The concept was disarmingly simple: creating such an entity would permit medicine to bypass those "profit motivated rascals" in the insurance industry who carefully hide their real profits, pander to their stock holders and maintain obscene and overbloated administrative expenses. While such insurance entities are now operative in more than thirty-five states, their existence has not reversed the malpractice problem. Their presence, however, has stabilized the availability of insurance and made member physicians aware that insurance reserves are not simply dollars available from some bottomless pit in Hartford, Connecticut to be squandered away for nonmeritorious cases, but rather, the result of premiums and investment income. Unfortunately, they did not call for appropriate premium increases between 1976 and 1983. Instead, along with the commercial carriers, they relied on high interest rates to satisfy payments for the ever-increasing rates of losses going up at twenty-two percent per year. The result was that when interest rates fell, the day of reckoning was here and sizable increases in premiums provided the clarion call of the "second crisis."

At this point, I would shift to describe the third strategy we adopted — and one that I am convinced is more likely to be productive. It called for working to try to minimize those episodes that lead to allegations of malpractice. A California study had warned us in the mid-1970's that there were perhaps as many as twenty-three times the number of malpractice cases out there as were surfacing for action. Two studies from Massachusetts confirmed the possibility. Consequently, we initiated a study of closed claims in our state — seeking to itemize their bases and then develop approaches to prevention. We sought to find out what events lead to suits and were avoidable.

Groups of cases with common themes were developed; representative cases were summarized, recommendations for avoidance were made and amended, and both were widely distributed to the profession. Specialty societies were enveloped into the process with particular success being evident among the anesthesiologists. We went one step further and distributed audit programs which we called Risk Management Review Units for use by the individual hospital medical staff initially and subsequently by individuals or groups within office settings. This combination of approaches — case reviews, topic discussions and recommendations plus potential audit outlines — were supplemented by some historical information and published in a book, *Medical Malpractice: A Preventive Approach* (1985). Examples of items subject to concern included the thoroughness of tetanus immunization programs in our state's Emergency Rooms, and on the record documentation of "informed consent" of any patient going near the operating room, scheduled for cancer chemotherapy or risky diagnostic procedures. The goal was to heighten awareness about what had gone wrong in the past so that one and all could avoid it in the future.

Consider the issue of physician availability. Until after the turn of

the century, availability of the doctor tended to be a bit of a hit or miss issue. With the arrival of the telephone, expectations began to rise; with the advent of the beeper, expectations escalated significantly. Today, physicians tend to function as members of a group, one of whom is expected to be reachable by patients of the group. Of course, the question is how available is available? Ten minutes? Five minutes? Present in the hospital? I serve as the medical director for our Pacific Northwest's Poison Center — and with the aid of our nationwide beeper system am available for consultation while I am here in Denver. A remarkable change from as short as twenty years ago. Nowhere is a change in expectations more noticeable than in the public's expectations about hospitals today as compared to fifty years ago. As late as 1916, less than half the patients who entered a hospital left it alive! The situation is unbelievably different today — and physicians must take those changing expectations into account as they deal with patients and their problems in the 1980's. For many of the malpractice problems, the difficulty began as a problem in patient-physician, and sometimes in a physician-physician, communication. For many others, the complexity of the care system and the innumerable opportunities for something to go wrong seemed almost out of control — but nonetheless had to be addressed. Small changes can make an enormous difference when it comes to preventive measures. For example, fluoridation of water supplies has brought about a plummeting of dental cavities and cut down on the production of dentists. Using "child resistant containers" on prescription items and household products has helped bring about an eighty percent reduction in morbidity and mortality from accidental ingestion.

In summary, change in the malpractice situation is only one of a number of changes taking place in our profession. All such change, ideally, should stem from some data-based decision making process. Recall that the specialist of the past was a specialist because he or she was a storehouse of information; not so today. Instead, he or she is a specialist because of an ability to manipulate and interpret information that is, in fact, stored somewhere else. Real progress is based on that data base — and so, I feel, most progress in solving the medical malpractice problem stems from an adequate data base of experience so that errors of the past can be avoided in the future; it is referred to in today's parlance as risk management. I will bypass commenting on how our society will resolve — or at least become comfortable in living with — the balance between the rights of the individual and the rights of the society — or some group contained within — except to note that the answer had better have a wide base of input or it is not likely to be "correct." Quite clearly, change is underway in how our society will deal with issues such as transplants, termination of life support measures, or "Baby Doe and Baby No Dough" decisions, and the process is likely to bring about new disputes — some of which will impact the medical malpractice scene. While the "prevention" program based on avoiding repetition of mistakes of the past can and has assuaged the medical malpractice problem, our two professions would seem to have an opportunity — and, I be-

lieve, an obligation — to attempt to develop a comparable "prevention" program to avoid some of the conflicts looming large on the horizon. Absent such action, the worst may still be before us!

Murray Blumenthal: In preparing for today's conference, I asked my son-in-law, an attorney with ten years experience, "What do you think are the sources of legal conflict?" With a laugh he answered, "the seven deadly sins." I looked them up, and as I am sure that you recall, they were: sloth, anger, gluttony, envy, lust, covetousness and pride. My first reaction was, well you cannot change human nature.

Then I began to wonder. Early in the year, the Dean had organized a faculty seminar on law and economics with an eye towards encouraging economic thinking and analysis. Are the seven deadly sins amiable to economic analysis? Indeed, they are. At first glance, with the exception of anger and sloth, the deadly sins reflect relative scarcity or an unequal distribution of wealth and resources. Gluttony, envy, lust, covetousness and pride would be largely irrelevant if abundance prevailed. On the other hand, sloth seems to be a by-product perhaps of superabundance. After thinking about anger, even that sin yielded to economic interpretation. If, as the psychologists claim, anger is a reaction of frustration or threat, then with general abundance, frustration would be minimized and the threat would be generally unnecessary.

Hume, in 1739, more recently paraphrased by Ophuls,[1] described the role of scarcity far more elegantly when he

> pointed out that if all goods were free like air and water, any man could get as much as he wanted without harming others. Men would thus willingly share the earth's goods in common 'as man and wife.' However, without a common abundance of goods, 'selfishness and confined generosity of man along with the scanty provision nature has made for his wants,' inevitably produce conflict; thus a system of justice that will restrain and regulate the human passions is a universal necessity. The institution of government (and thus law), whether it takes the form of primitive tabu or parliamentary democracy, therefore has its origin in the necessity to distribute scarce resources in an orderly fashion.[2]

If we assume that scarcity of resources gives rise to competition, and inevitably to conflict, and if law provides the framework for resolving these conflicts, then it appears that several avenues of theoretical development for preventive law are available. These include searching out specific conditions associated with the sources of scarcity, examining the legal system's role in creating, maintaining or educing scarcity, and investigating its role in the resolution of conflicts arising out of scarcity. If legal rights and the accessibility and malleability of the legal system are viewed as scarce resources, then a theory of preventive law could usefully encompass the politics and the economics of the law. The fore-

1. W. OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY (1973).
2. *Id.* at 8.

going analysis suggests that preventive law (or lawyering) can be viewed from either a macro and policy perspective or from a micro and practice perspective.

Assuming that subsequent legal conflict,[3] the avoidance of which is a goal of preventive law, is preceded by contributing actions or decisions by lawyers or their clients, then it seems useful to examine such behavior or decisions. Marshall[4] proposes that human behavior can be placed on a scale of intentionality. Building on Marshall, the following outline of a micro analytic model proposes a scale ranging from "Act of God," and "Pure Accident" at one end, to "Conscious Intent" at the other end. A near midpoint on the proposed intentionality scale is "Action Where Consequences Are Not Foreseen."

A MICRO-ANALYSIS OF LEGAL-CONFLICT-RELATED BEHAVIOR

A. Act of God
B. Pure Accident
C. Reflex Action
D. Irresistible Impulse
E. Action Where Consequences Are Not Foreseen
    1. Error, Mistake, Omission
    2. Incompetence
    3. Change in the law
    4. Change in economic circumstances, i.e., bankruptcy
    5. Change in physical circumstances
    6. Change in enforcement policy
    7. Change in political policy
    8. Change in relationships
    9. Unforeseeable consequences
    10. Underestimation of risk
    11. Misunderstanding the law
    12. Inadequate dissemination of the law
    13. Retroactive application of the law
    14. Ambiguous law
    15. Conflicting interpretations of the law
    16. Mistaken prediction of legal and policy changes
F. Force Majeure
G. Coerced Action
H. Action Under Duress
I. Action Under Stress
J. Action Where Consequence Is Foreseeable
K. Conscious Intent
    1. Attempted resolution of conflicting interests
    2. Attempted resolution of conflicting values
    3. Attempted clarification of the law
    4. Attempted test of the law

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3. "Legal conflict" can be defined as an attempt to resolve a difference concerning substance, procedure or values, between or among two or more interests, with one or more of the interests claiming legal support for their position and represented by an attorney or making use of a legal tribunal.

4. *See* J. MARSHALL, INTENTION IN LAW & SOCIETY (1968).

5. Attempted change in the law
6. Attempted resolution of perceived injustice
7. Pursuit of perceived rights
8. Perceived benefits greater than expected costs
9. Defense of perceived rights
10. Expected low probability of apprehension
11. Expected low probability of conviction

The items under "Conscious Intent" are a partial listing of motives for deliberately engendering legal conflict. The list under "Action Where Consequences Were Not Foreseen" contains conditions and circumstances contributing to the development of legal conflict, largely, if not totally, without the conscious intent of the parties.

A suggested first step, aside from evaluating the usefulness of the intentionality scale, is to add to, modify or subtract from the items listed under sections E. and K. on the scale. A second step involves proposed specific examples of the listed items. A third step consists of identifying what a lawyer can do, if anything, to prevent the legal conflict, by changing his or her own behavior, the client's, or others.

The micro-model is an attempt to contribute to the systemization and specificity of the preventive law concept. If the model survives critical scrutiny, it may find uses in teaching preventive law or in diagnostic applications.

James Luce: I just have one question that bothers me all the time in court. Is your scale relating to, for example, a conscious intent. Are you talking about a conscious intent to do the act or are you talking about a conscious intent for the result of that act?

Murray Blumenthal: I have been around the law school long enough to say either or both. I see no reason at this point to rule out either in terms of motives or consequences.

Edward Dauer: I would suggest two scales then because I think that law has to draw a distinction and it is a fundamental distinction: there are 180 degrees between the conscious intent to do something as opposed to the conscious intent of achieving a result that flows naturally from that intent.

Connie Hauver: I am a lawyer in private practice in Denver, specializing in estate planning, business planning and tax law. Murray is a hard act to follow. Because presentations have not been rehearsed, many of my thoughts parallel those of Murray's. I do not, however, have them on a nice little scale. The other night as I was driving home, I heard on the radio a report on doctors in Los Angeles who have made a list of patients to avoid who are most likely to sue doctors for malpractice. Malpractice cases are maybe what some people think of as preventive law. There are also trial lawyers in Los Angeles who have made a list of those doctors to avoid — those who have the most malpractice claims. Other people might think that is preventive law. When I first talked to Ed Richards, he indicated that the title of his presentation was going to be,

"Why Don't the Swine Like Our Pearls?" I took him seriously. He indicated that he thought many lawyers were not very interested in preventive law. My experience has been quite to the contrary. The type of law I practice may be largely responsible for that orientation. Any lawyer involved in the planning process is involved in preventive law.

I would like to talk more about what is preventive law, rather than sources of conflict. It seems to me there are two key words relating to preventive law. Those two words are anticipation and education. While we, as attorneys, have no greater ability to predict the future than any other profession, or any other people, we are trained to try to foresee the consequences of what one wants to do and to try and portray to clients what alternatives are available and what might result from those choices. We counsel clients on various alternatives, on human reactions to choices that they might make, and on sources of conflict. An example in estate administration practice is to forestall conflict that might center on the disposition of tangible personal property. Psychiatrists and psychologists in the group may have an explanation for that conflict. I have seen several situations in which family hostilities focus on this particular part of the asset division even though the tangible personal property may have a relatively small value. If a lawyer anticipates such an area of conflict, steps may be taken to diffuse it.

Another issue that can cause family disputes is the disposition of a closely held business, particularly where one or two children are involved in that business and other children are not involved. This is perhaps an example of the scarcity problem to which Murray referred. There are not enough assets to go around. How do you satisfy all members of that family when you have that kind of situation? Another set of circumstances which creates conflict is a division of assets between a second spouse and children of a prior marriage. If the potential conflict is addressed by the client who knows the beneficiaries best, a workable solution may be achieved.

The other important concept in describing the parameters of preventive law is education — education of clients. Education of our clients has not been in the forefront of our activities. Professional ethics have discouraged solicitation of business and perhaps have oriented us to solving the particular problem put before us. But there are many forces at work which promote an educational orientation. They may not be forces we like, but results could be quite beneficial.

The competition for clients is increasing, generating an increased desire of attorneys to bind that relationship and to do so by offering services that have not been offered in the past. These include providing corporate clients with seminars on compliance procedures, introducing clients to labor relations problems that might arise, and keeping clients abreast of changes in the law. These things are very preventive in nature and should be quite beneficial to clients. Another factor in the shift toward a more preventive type practice has been the change in ethical rules which no longer proscribe outreach to clients. The greater degree

of specialization among attorneys enables us to pursue problems in greater depth rather than dealing with them in a general way. And I think increased government regulations may also have encouraged new ways to practice preventive law.

In conclusion, my experience has been that most lawyers are using preventive techniques on a day to day basis. Preventive law is not a body of law; it is an attitude, an approach to the practice. Certainly one of the best tools of preventive law is a high quality of legal work. And we all can continue to work toward that goal.

Robert Redmount: I am Bob Redmount. I am a psychologist, and also have a law degree. I think what both Ed and Bill have done is to show there is a need for a change in certain structures and emphasis in the delivery of professional services. There is a need for changes in methodology to improve the consciousness of preventive law and of preventive issues. Murray is doing something different. He has thirty-eight categories and subcategories for the analysis of a preventive law matter. That is a little bit overwhelming. Using larger abstractions, I end up with four analytical categories. Murray deals with conscious intent as sort of the point of departure and I am lucky if I ever get to conscious intent which will be apparent in a moment. I think that Connie offers an even simpler system for reflection. She only had two categories: anticipation and education.

My four categories derive from some skepticism. I begin by asking this question, "Why does the concept of prevention not have more currency?" This is a question to be asked not only of physicians and of lawyers, but also of the average person. Why not think more preventively?

First, there is the problem of *awareness*: awareness of conditions having legal relevance and legal consequence. Take as an example a physician who has been occupied with problems of diagnosis of illness and treatment. His awareness has not lent itself to the idea that prevention was terribly important for himself, for the profession, or for this patient. A simpler example would be if I want to buy a boat. As a layman, I am not sure I think very much about liability and lawsuits, or for that matter, about buying boats and preventive law suits. There is just no consciousness of these kinds of matters. So, one of the problems is how does one generate awareness about preventive law either within the individual or through a professional approach directed to the individual.

Another issue is *risk taking*. There are, however, different attitudes about risk taking. At one end of the spectrum there are people we might call obsessive. In other words, if they own something, they are going to cover themselves in every possible way to make sure they are protected. Or, they are going to look at every possibility to see what gain they could get and what it is that they have or can work with. There are, however, other people who say, and I think we are all this way: "I don't give a damn. It's not terribly important. I'll take the risk or I won't even consider the risk, because this is what I want to do." Of course, some peo-

ple just carry this to an extreme. Most of us may vary with circumstances in our attitudes about risk taking. But, concern about risk taking, or the lack thereof, is an important issue.

A third issue is *motivation*. Most of us who are reasonably successful, busy, and talented or educated have a lot of motivations in our system going on all the time, doing a lot of different things, thinking about a lot of different things with different priorities. One of the lowest priorities might be the issue of prevention. We might be occupied with having success in a business or just generally having an awfully good time. We may not think very much about the issue of prevention, not because we are unaware, but because we will agree that there are other things which take a priority in our interests and concerns.

A fourth matter is what might best be termed *resources*. In general, it is more likely that people with more resources will be more prevention-conscious and, if they have large resources, they may be more disposed and better able to think and act preventively. Those people with few resources for one thing just may not have discretionary means to spend on prevention.

Edward Dauer: A question that I was hoping you would address is whether prenuptial agreements are preparations for marriage, or are preparations for divorce?

Connie Hauver: That is a big question. I was discussing this with John at the luncheon. He said, "If I'd have gotten into that, I never would have gotten married." Other people indicated this is happening on a nationwide basis. I think we are seeing more and more of it for obvious reasons. I certainly do not have the answers. It is a very tough representation because you are forcing people to think about divorce when they are about to get into a marriage. The idea on a theoretical level of allowing two intelligent adults to regulate their own economic affairs is a nice idea, but so often you are dealing with people that come from very different positions of power and resources. I certainly have not worked this all out in my own mind, but I hope that lawyers as a group will try to keep some degree of fairness and perspective in getting more and more involved in these types of agreements because I think this area is open for great abuse.

Robert Redmount: There is a sharp distinction between first marriages and second marriages. Very often, people coming into the first marriage are young, they have relatively few assets and hopefully no serious problems. Frequently in second marriages, both spouses have children and accumulated assets where they really have serious decisions to make.

Connie Hauver: There are so many different circumstances which arise when you have a lot of inherited wealth, and it really is a parent who is trying to put the pressure on the child to preserve those assets. Obvi-

ously, the second marriage situation has created a great increase in this type of representation.

Edward Dauer: Bob's four categories fit very nicely in these instances. I have a question that I want to put to Connie, and that is in the area of anticipation, with which I agree. The question is, where does the knowledge about the consequences of alternatives come from? Is it necessarily a function of the experience of the attorney who has been through some of those alternatives in like cases? Is there a way of thinking about the problem in some systematic way, accepting the notion that anticipating the consequences of various alternative structures is imperative? How do you go about generating these possible futures? Where do you draw them from?

Connie Hauver: That is a real good question, Ed. I have to say there are some very nice things about getting older and one of them is experience. From my experience, I would attribute a lot of that ability to the experience of the attorney. This is unfortunate because if that is the main source of review of alternatives with the client, then there are going to be a large number of clients who are not going to have the benefit of that kind of input. It also is very much a function of the client. I mean very often the client will raise those kinds of issues with the lawyer and that is terrific. But with some people you really have to draw them out. However, to have some kind of technique or some kind of guidelines to create the awareness on the part of attorneys would certainly be useful.

Bob Shafton: My name is Bob Shafton and I have a question for Murray or Bob. From a psychological standpoint, why do people fail to think preventively? My general thesis is: raw fear sometimes causes people to do things. I would like you to comment on two examples. First, a director of a corporation who can no longer obtain director's and officer's liability coverage might well act differently, particularly in today's era, than he or she might have originally. Second, a financial institution executive who is under the gun by one of the federal regulators might react differently when he or she is told, "You better have a compliance program or we are going to put you out of business." Both those things obviously raise preventive law issues. And I am not sure they fall exactly within either of your scales but perhaps you might want to comment.

Murray Blumenthal: Bob, I defer to your practicality about that, initially.

Bob Redmount: Thanks for the hot seat. I am not sure whether the question has to do with whether this fits within the concept of prevention or whether it reflects the fact that strategic choices may involve something more than just the practices that lawyers normally deal with. There are motivations for prevention other than the ones, for instance, that Murray mentioned or the ones that I mentioned. Bob Shafton mentions fear and that is an important specific motivation that may engender prevention. Another specific motivation is desire. The problem may still be

how to translate either or both into "preventive consciousness" and preventive action.

Bob Shafton: You have talked about awareness, risk taking, priorities, and resources. What I think raw fear does if you are a director without director's and officer's liability coverage is to say: cost be damned. I am going to cause the company on which I serve as a director to do things preventively because it may be my pocket now, not the insurance company's and not the corporation's. A similar reaction may develop if that executive sees that the button is now not going to be pushed by the stockholders, directors or the chief executive officer, but by the very regulator who has, with the flick of a pen, the opportunity to put a financial institution out of business. So, I think fear of being put out of business by a regulator, by a hit at your own pocketbook, may or may not fall within Bob Redmount's categories, or may be within the seven deadly sins. It is a different kind of emotion.

Bob Redmount: I think you have successfully identified some strong motivating influences and there are probably others as well. One generic one, perhaps, for the area of prevention, is anxiety. Anxiety has an interesting impact on people, and fear may be one kind of anxiety. Anxiety causes over-reaction, so that a person may do some things that are not very prudent if he or she is too anxious. On the other hand, anxiety may cause construction and under-reaction so that imprudence may take the form of not doing enough rather than doing too much.

II. Client Education and the Demand for Preventive Law

William Bolger: I am Bill Bolger. I am the Executive Director of the National Resource Center for the Consumers of Legal Services, a small research and education organization in Washington, D.C. I spend most of my time trying to help people start and run legal services plans. These plans serve mostly the middle class. My message is an upbeat one. Although there is some sense among the pioneers in preventive law, as Bob Redmount said, that prevention does not have much currency, I would like to suggest that, at least among the middle class, prevention does sell or can sell, but that it does have to be sold.

I wonder how many of you remember the Fram Oil Filter commercial from a few years ago. The punch line was, "You can pay me now or pay me later." They were talking about changing an oil filter for four dollars or paying the mechanic for a complete engine overhaul for about $400. Obviously, it must have been successful, because Fram ran that commercial for a long time. They were selling oil filters by selling preventive maintenance, though they did not use the term. Preventive law is not yet a buzz-word with middle class consumers or their lawyers, but I think it will be. Preventive maintenance, though, is a broadly accepted concept. It is not just an accepted concept among people in transportation, industries or the military; it is accepted by automobile owners.

Surveys of automobile owners have shown that most owners do follow the maintenance schedules that their manufacturers suggest. In fact, most people change the oil considerably more often than the manufacturers say they need to.

Preventive maintenance is not the only "preventive" concept that is widely accepted. So is preventive medicine. It may mean different things to different people, but everybody thinks it is a good idea. The concept did not happen overnight; it took years. An even better example is preventive dentistry. The American Dental Association pushed the concept of dental checkups for decades. It was done by the association, not by the individual dentist. Preventive dentistry was promoted in a low key way over a long time. I grew up with twice a year dental checkups and I expect there are other people here who did as well.

But preventive law is not where preventive dentistry, preventive medicine or preventive maintenance are. That we all know, or we would not have a conference of this nature. I think mostly it is the fault of the Bar, because they prevented lawyers from marketing. Lawyers, for so-called ethical reasons, were not able to tell people how they could be helpful. Gradually, over time, people learned to go elsewhere or go without when it came to legal services, except in certain narrow, traditional areas where everybody knew that you had to have a lawyer.

We need only look at the legal needs study done by the American Bar Foundation back in the mid-1970's — it is still the best study of its type around — to be reminded that two-thirds of American adults have not used a lawyer more than once. Those infrequent uses fell into four distinct categories that accounted for close to eighty-five percent of the total. People simply did not go to lawyers if there was any other choice. When asked why, they stated that their primary problems were: 1) Not knowing which lawyer was interested in their problem and competent to handle it; and (2) not knowing what it would cost. Their estimates, particularly for preventive services like wills, averaged well over the actual costs. You still find that today. People over-estimate the cost of getting a will done. But now I think we are well on the way to solving those problems. We have been for several years and I think it is only a matter of time before, as I said, preventive law becomes a buzz word.

The two keys are legal services plans and competition, and they are not entirely separate. Legal services plans are reducing the transaction cost of getting lawyers and clients together. The problem has been that because the middle class individual was not a repeat customer and did not have a continuing need for legal services, he got out of the habit of finding one. From a lawyer's point of view, not only was he ethically prohibited from going out and reaching out to that client, but it was not cost effective because the person simply did not have enough legal problems. Well, the legal services plan, by making an advance arrangement between a whole group of clients and a few lawyers, reduces the costs of obtaining needed legal advice. That is one of the big advan-

tages of the plans and one of the reasons why plans lend themselves so well to preventive law.

Another way is alleviating the fear of the cost of legal services, either by pre-payment of the lawyer, as in a traditional pre-paid plan, or through a published fee schedule which may or may not include discounts. Just having a fee schedule out there alleviates some of the fear of the cost and some of the fear of going to lawyers.

Competition is the other key, and advertising really enhances it. If you can publish your fees, if you can publish the fact that you are available to do a certain kind of work, you will bring people to the door with that kind of work. If you can advertise the fact that you practice preventive law, then you have a better opportunity to practice preventive law. I suggest that if the bar association had spent forty years pushing legal checkups we would probably have a far different situation than we have now. But that did not happen. I think it will happen with the kind of advertising, and the competition for clients, that we have now. There is downward pressure on fees. There is a need to specialize. Just get the word out what you can do for people. If you cannot tell them what you can do, they are not going to come to you.

I think there are scattered pieces of evidence that preventive law sells. I will highlight a half dozen. First, there is the popularity of the telephone access plans. These legal services plans emphasize telephone advice. "Pick up the phone and call your lawyer any time, 24-hours a day. It is an 800 number, call it, get whatever kind of advice you need. If we cannot answer it, and we can answer it in seventy percent of the time, we will refer you to a lawyer on our specialty panel, and the fee will be well below the going rate." These plans cost $70 to $180 a year, even though the service can be provided on a true group basis for less than $10 annually. The difference is marketing expense, adverse reaction and profit.

Some of these plans are doing very well. One of the investment houses recently published a review of the financial services group. It included some very well-known companies, like Dow Jones and American Express. They called it a "high flying group." The number one and three positions on the list were held by two companies selling, through credit cards or multi-level marketing organizations, legal services plans at hefty prices. They are selling a new service that requires considerable education of the consumer, but one that consumers will embrace when they understand it.

A second piece of evidence that preventive law sells is that lawyer use doubles when people have a legal services plan, but litigation increases hardly at all. This is true even in true group plans where the members have not chosen to pay for a plan. If using a lawyer is made easy and inexpensive, people will bring questions to lawyers that they otherwise would not have, and are more apt to contact one earlier in the course of a problem.

A third piece of evidence is the growing popularity of legal services

plans with particular special interest groups, whether it is a trade association, a particular field of law, or a legal services plan directed at a particular membership group such as doctors or insurance agents. Another is focus groups done by the insurance industry and by consumer marketers. They confirm people's fear of lawyers, and ignorance of what they can do. They uniformly reveal a desire for expert assistance.

People would like to have a legal expert on call. That is born out not only by the focus groups, but by the success of experiments like Tele Law. The usual failure of Tele Law programs is publicity. The taped information program is popular with those who know of it, but there is not enough money to mail enough brochures, so they are relegated to bar associations headquarters, library bulletin boards, and places like that.

A.A.R.P. recently did a telephone advice hotline experiment in Pittsburgh using staff lawyers. They have not published their final report yet, but the utilization of the plan was very high. They found out that, depending how you measure it, somewhere between 1.5% and 3% of all the people who receive a little postcard announcing the service responded in the first few months with a call for legal information. Finally, some unpublished consumer research explored the appeal of an ombudsman service and found that people liked the idea of having panels of experts available, particularly in the areas of financial and family counseling. I believe we are going to see programs combining legal and financial services, and ones combining counseling and legal services in the near future. I am surprised there are not some now.

What does all this tell practitioners out there? That there is plenty of opportunity to get involved in preventive law. I see three excellent ways for the typical general practitioner who is interested in individuals as clients to do preventive law. One is through free legal services plans. Not the ones where you try to get people to pay for a service they have never used before. That's too difficult; it requires too much education. No, a free plan where you simply make an advance arrangement to provide free consultations and certain follow-up services in return for endorsement by the sponsoring group. There is a lot of potential there, and there are already thousands of plans like this.

A second way to do preventive law is to promote legal checkups, whether of the thorough type advocated by Louis Brown or the simpler type some others have advocated. Finally, I really think lawyers need to consider combining their services with those of non-lawyers, whether they are real estate agents, investment services, or social workers. I am really at a loss to explain why that process is not further along.

James Luce: I have been asked to speak on the topic of client education and demand for preventive legal services. Dean Dauer has stated that our task here today is to reach a working definition of "preventive law." The following thoughts are those of a commercial litigator. I must warn you that I enjoy litigation. The process of distilling an ounce of truth from a ton of facts and then mixing that ounce with a few years of civil

procedure to produce a just result is exciting. But, I am not a trojan horse in your midst. The litigation process is too expensive and time consuming to be cost-effective in most disputes. Thus, litigators have been called upon in recent years to use private arbitration, judicial arbitration, alternative dispute resolution and endless settlement conference and other procedural "cut-outs" to avoid trial. In the San Francisco bay area it is not uncommon for a Superior Court commercial case to take four years just to get to trial. In municipal court, commercial cases almost never get to trial and the parties end up settling out of sheer frustration.

A. *What is Preventive Law?*

It is a different system, outside of the judicial system and outside of the arbitration system, or is it inside the system? In either case, is preventive law likely to change the existing systems that are not working or is it just a band-aid being applied to a mortal wound? Is it a transactional guide whereby businesses and lawyers use check lists to avoid problems or is it a behavioral modification technique whereby lawyers teach business personnel how to anticipate and prevent problems? Is it designed to merely increase compliance with law or is it something designed to creatively use the law? Is it a system to be used offensively or defensively? That is, do we teach our clients preventive law so that they may be more responsible, law-abiding and organized entities, or do we teach them preventive law so that they may be better able to compete? Is preventive law a tool to be used in the ivory tower or is it a weapon to be used in the trenches? That is, are we developing preventive law to aid society in general or our clients in particular?

I am hopeful that this conference and the research and development which follows from it will generate answers to these questions.

B. *Why is Demand Low?*

The demand for preventive law services is low for two basic reasons. First, there is a perception in the business community that it will not work. There is a lack of predictability in the law and how the law will be applied in any particular case. Preventive law is perceived as not being cost effective, and is viewed as an unwanted interference with business operations. (Who wants another efficiency expert?).

Second, there is a lack of an appropriate "delivery system." A preventive law system requires the expertise of a C.P.A., a transactional attorney, a litigator, an environmental law specialist, a labor law specialist and an estate planner. A small business usually cannot afford the normal preventive law audit. The medium-size business either cannot afford or cannot find a law firm with these capabilities to represent it. A large corporation usually has an in-house counsel staff that is understandably reluctant to seek the assistance of a preventive law audit. Even when willing to suggest an audit to management, in-house counsel is

frequently not sufficiently independent of management to effect the changes suggested by the audit.

C. *How To Increase Consumption*

Obviously, the major task is to convince business people that preventive law is both affordable and effective. There are three basic means by which this can be accomplished. First, the lawyer must take the risk with the client and point out that the decision to not use preventive law services in today's world is fiscal insanity. The cost of one complex commercial trial exceeds the cost of the average legal audit. Thus, if the legal audit prevents one suit, it will have paid for itself. The mere fact of the existence of pending litigation raises the threat that competitive information will be lost during the discovery process and that the company's management personnel may be held hostage by that same discovery process. Since every commercial case today has the potential of becoming a tort case with tort damages, it has become more imperative than ever to avoid even the filing of a law suit. Furthermore, prejudgment attachment remedies can cause severe dislocation. In short, the days when the judicial process of hide and delay could be used as a substitute for planning are over. We have reached a point in our legislative and judicial history where the mere filing of a lawsuit can be as devastating as the losing of a lawsuit was in the not-too distant past.

The second method for us to use in increasing consumption is publicity, in its various forms, in the business world and otherwise to make the general public aware of the existence of preventive law. It is always easier to have people change their behavior to that which they perceive as conforming rather than to that which they perceive as unfamiliar. The major difficulty with publicizing preventive law is that from a typical press perspective, preventive law is a non-event. One simply does not see headlines reading: "Law Firm Avoids the Filing of a Five Million Dollar Suit."

The third task is to make the law sufficiently predictable in outcome and limited in scope so that it is possible to make plans concerning it. The lack of judicial predictability has become a crisis in California, a crisis which is spreading to other states. One need only compare the holding in *Li v. Yellow Cab Co.*,[5] with *Sun and Sand Inc. v. United California Bank*,[6] to see the seriousness of the problem. In *Li*, the California Supreme Court negated California Civil Code § 1714 and changed California from a contributory negligence state to a comparative negligence state, without the help of the legislature. The supreme court justified this blatant intrusion into the legislative domain on the grounds that the court had the inherent right to interpret the common law and that California Civil Code § 1714 was "merely a codification of the Common Law." *Li* clearly recognized that the court had no right to negate legisla-

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5. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
6. 21 Cal. 3d 671, 582 P.2d 920, 148 Cal. Rptr. 329 (1978).

tive enactments in the guise of interpretation. Less than three years later in *Sun and Sand*, the court imposed comparative negligence principles on Article 4406 of the California Commercial Code. This decision is insupportable in light of the fact that the Commercial Code is expressly not a codification of the common law, as is made clear in Commercial Code Article 1103. More recent examples include the application of tort damages to contract cases and the abolition of the five hundred year old common law rule that a landowner is not liable for natural conditions on the owner's land.

The lack of legislative restraint need no more proof than the fact that one can rarely find the law in the bound volume of any annotated code, state or federal. Most of the law must be found, if at all, in the pocket parts.

This lack of predictability has created a growing disrespect for and distrust of the law. This lack of predictability is also the major problem facing this conference. Education of the public on the subject of preventive law will prove impossible if the public does not perceive the law as a dependable guide to behavior.

My concerns are shared by many people in the business community. I have been authorized to quote from a presentation made by Mr. A. C. Markkula, Jr. of Apple Computer, Inc. at the recent conference on *Alternative Dispute Resolution* at the University of Santa Clara:

> In general, most of my concerns have to do with a fear that providing a short-term solution that is divorced from the existing system, may reduce the motivation to correct the fundamental problems, and thereby prolong the implementation of sorely needed improvements. I believe that we have the best legal foundation in the world; we've just let it get out of control in certain areas. In addition, I think we may not have adopted modern techniques as rapidly as some other areas of society.

Harold Brown: My name is Harold Brown. I am in private practice in Los Angeles. I thought I would spend a couple of seconds on the problem of why corporate delivery of preventive law is so difficult.

From my experience, preventive law is basically long range planning. At best it is sold to upper management, but it is implemented by middle management. Middle management tends to be, too often, a short term, short-sighted position. Middle managers often do not look beyond a short term employment with this company, although they may expect longer term employment with the next. They concentrate on preventing the short term problems which can effect performance and, thus, their employability at other jobs. They are less interested in the long range solutions that preventive law provides.

I have four suggestions for the resolution of this conflict. One, the short term or the middle manager cannot be asked to pay the fee for the long term plan. Whether the fee is an hourly arrangement or a retainer fee, the short term middle manager will resist it, cut it and eliminate it. Second, the middle manager must be required to consult with a preven-

tive lawyer. It cannot be left to his or her discretion, because too often the long range planning will interfere with the short range goals, and the long range legal health will be sacrificed for short term profitability. Third, except in emergencies, there cannot be a direct channel between the preventive lawyer or the provider of the legal services and upper management. Or if there is, it must be silent. What happens when there is such a direct channel is that the middle manager sees the preventive lawyer as more of a snoop or a spy for upper management than as an assistant to the middle manager in his or her management. The result is that problems do not get shared. The middle manager views the preventive lawyer as simply one who creates problems with upper management and not as a problem solver and, consequently, refuses to give the lawyer the necessary information to discover a problem and reach a suitable solution. Finally, the preventive lawyer must understand the short term goals of the middle manager and help deliver services which not only effectuate long term solutions, but also short term solutions required by the middle manager.

Forest Mosten: My name is Forest S. Mosten and I am in private practice in a very small firm near the Los Angeles Airport. The focus of our firm is to provide quality legal services to middle income persons. Our firm is a direct access service provider on a fee for service basis. Our clients are individuals who are not part of a group or prepaid legal services plan.

Our main substantive areas of the law are family law, general civil litigation and small business and real estate transactions. In addition to stressing the important nature of the client consultation in all matters, we attempt to improve service in two ways: utilizing a preventive approach, in both symptomatic and asymptomatic situations, and utilizing alternative dispute resolution in both the planning of transactions and resolution of disputes.

Before I develop these themes, I was asked earlier to share some of my own professional odyssey to give some background to my commitment to preventive law for middle income people. You might notice that I said people, not clients. Clienthood is not a genetic nor a permanent characteristic, and people touch the law in their daily personal and business transactions much more often than they consult with lawyers.

My involvement with legal services for middle income people started when I was a founding partner in the firm Meyers, Jacoby and Mosten, also known as the Legal Clinic of Jacoby and Meyers. We had two main goals: first, making lawyers more accessible and affordable to middle income people, and second, to improve the quality of representation that middle income people received. After four years, just as we were about to expand outside of Los Angeles, I felt that we were on the verge of accomplishing the first goal of improving affordability and accessibility. However, I felt that the heavy focus of achieving this goal conflicted with improving the quality of representation. I resigned and spent two productive years as a law professor at Mercer University con-

centrating in the areas of client counseling, negotiation and professional responsibility.

In 1978, I received an appointment from the Carter Administration to head-up the area of consumer protection for the Los Angeles Regional Office of the Federal Trade Commission.

A. *Preventive Law Application in a Small Law Office*

I heard it rumored that I was invited to this conference because I am the world's most notorious example of a walking failure in making preventive law work. I have advertised in the Yellow Pages: "Prevention Saves Money" and offered services such as personal periodic checkup and small business legal audit. I have spoken about preventive law to many lawyer and business groups and to the general public in media appearances. Despite these efforts, I can honestly report that I have never had a client retain my firm on a first visit to perform asymptomatic legal services. My failures do not end here. On at least two occasions I have had hot leads to provide preventive legal services for groups of middle income consumers only to have the leads fizzle.

Let me relate one of those aborted attempts. I had a client in a real estate transaction who was Administrator of a credit union of a Fortune 500 Company. I had been representing him for several weeks before he brought up the subject of preventive law after seeing some literature in our waiting room. He said that he thought that a periodic legal checkup would be a wonderful benefit for credit union members. I mentioned my collaboration and friendship with Louis Brown and told him that we would submit a proposal for the plan. Louis was even prepared to pay for the checkup booklets and mailing costs. I was willing to have my firm perform the checkup at no charge. Armed with our well thought out proposal and our generous inducements, my client approached his Board of Directors and found the proposal nearly unanimously rejected. Grounds: the board could not see the *benefit* to its members of having them spend the time filling out the questionnaire when perhaps no problem existed; if it did exist, it might be bearable, or if unbearable, it might be still too expensive or wrenching to solve. Also, it was felt that the checkup was intrusive and threatening and it might cause some needless discomfort among the membership.

It must be said we have had much better results using preventive approaches with our existing clients — but still in symptomatic situations. Suggesting a will or transfer from joint tenancy to tenancy in common in a divorce matter has accounted for generally favorable client response and not insignificant income for the firm. Our efforts to suggest wills when the client comes in on a consumer or contractual complaint are not so successful. Likewise, a suggestion to review a will or tenancy arrangements are not generally fruitful two years after the divorce is final and the crisis is less immediate. The immediate relevance to a pending matter seems to be the causal variable that ignites preventive action.

So, what lessons can anyone draw from this limited experience? First, we cannot underestimate the amount of general education that is necessary to prepare the public to prevent legal problems. The resistance appears less due to antagonism and more to ignorance. Obviously, present and future providers must be trained to offer and to competently deliver preventive legal services. Such training, of course, requires conceptual orientation as well as technical implementation of the craft. However, as just mentioned, even if providers are adequately trained, the very clients who have come in to the law office for nonpreventive purposes and have come to trust the provider have great resistance to spending time and money on legal prevention when it is not seen as immediately and directly meeting their curative needs. Therefore, the problem may be larger than any one or group of well-meaning and trained preventive lawyers can solve. The emphasis of the National Center of Preventive Law to offer conceptual research and development in this field will be invaluable. Generic advertising on specific applications of preventive law funded by government and business may be a start to build the receptivity of the public to prevention. Concrete demonstrations of how prevention actually saves money to individuals may start to wear down consumer resistance — particularly when providers recognize that it is a satisfying and profitable devotion of professional time.

B. *Preventive Planning in the Resolution of Disputes*

An area ripe for immediate applications by both transaction lawyers and litigators is the planning for the process of solving future disputes. Lawyers are obsessed with the substantive rights — we start by reading appellate decisions and we continue in practice by specializing in a substantive area. Clearly, the method of resolution of disputes affects rights and people's lives. Rarely does a settlement of a lawsuit or negotiation of a transactional document lack problems of future enforcement. The parties often concentrate on the fact that $10,000 is owed in one year and the amount of the penalty for nonpayment. Much less emphasis seems to be placed on how the collection (including penalties) can be enforced. For example, arbitration clauses are much more common now but are often not refined as to how to implement arbitration, how to select the decision maker, which issues are subject to arbitration, what rules apply for discovery, or how awards can be enforced. As a means of collection, do not forget the opportunity to get security for the obligation. It is true that one can never plug up all the holes of future disputes. However, if arbitration clauses are often neglected in careful drafting, imagine the problems that lawyers might have with drafting clauses for mediation, mini-trials, summary jury trials, or even procedures for good faith bargaining and notices before litigation. Litigators are often too focused on solving the immediate storm and planners may lack sensitivity to the intricacies of dispute resolution. This is an area in

which attention as well as training may lead to improved service to the public.

Thus, the planning of dispute procedures may be an area which is ripe for study and consideration by the Center and both transaction and litigation lawyers across substantive lines.

Robert Shafton: My name is Bob Shafton and I have been a partner in a Los Angeles office of a large national law firm, Stroock, Stroock and Lavan. In addition, I'm an optimist. I believe in self-realizing prophecies despite the fact I, like Woody, have met and was adopted by and became a fan of Louis M. Brown thirty years ago. Only once in my career have I earned a fee for what I would call a classic example of preventive law.

We have already overused our time so I will be very brief, and say first the reason I am an optimist is I really believe that preventive law is a series of specific subjects. Woody alluded to this: it is a process, not a happening that goes both to what we are doing today and to the general concept about which we are talking and with which we are wrestling so hard. There are several examples about how to educate clients and the bar. First, I would try in every way I could to expand the circulation of the *Preventive Law Reporter*. I think the work of the publication does a damn good job of sensitizing clients. I have given away probably forty subscriptions to clients that I have checked years later who continued to subscribe, teasing me about the fact that they are not calling me any more because they just read that publication. To which I respond, "that's terrific, that's wonderful! I think you should refer to it, excerpt from it, xerox from it, even though that's probably illegal, do it anyway, and I think that Mr. Brown and others would love it if you did." See that accountants, attorneys, clients and everybody get it and everything else like it.

Preventive medicine is not harmful to the health of physicians. Attorneys should not worry about the negative financial impact of preventive law. We should go for it. It is not unethical, we will get to that later, and it is good for our practice. It certainly is good for our clients. Estate planning and tax planning as Connie pointed out certainly are key bellwethers of the use of preventive law. Think about how much money will be earned by hotels, restaurants, publishers, tax lawyers, accountants and others whether or not the present tax law goes all the way through Congress. Think about what is going to happen in the next six months.

This conference is certainly a milestone. Ed and Louis and others here should feel very, very good. And I think that speaks extremely well for the future. How do we get this to the top of the agenda of the business roundtable? How will we get the press? I will end with the thought that the buttons to push are the CEO's and internal counsel, because outside counsel will not always see preventive law as being in their self-interest. It has got to come from the top down as most things do. Notice that it is the Dean of the law school that is doing it here today. I

think it is okay not to define what preventive law is. Define means finish off. We do not have to finish it off. We can start and I hope this is a beginning, and I think it is a damn good one.

Edward Smith: My name is Ed Smith and I am Executive Director of the Rhode Island Bar Association. An Executive Director of a bar association has many responsibilities, but absolutely no authority. Any bit of information I have to say about preventive law is included in my article. I cannot cover the material in the article in three minutes. My thirty years of meetings planning tell me we have to keep time schedules. You are all ready for the coffee break, not to listen to me. I think this is a tremendous conference in that it has brought out many things that we can do as associations. Administrators have to have guidance from those people who know what needs to be done. Administrators know how to do it, but the members must come up with the objective. Administrators can put out nice bar journals that can say, "This is the 350th anniversary of the State of Rhode Island." However, somebody who has the expertise has to write and research the history of those 350 years for the publication. Unless we, as administrators, can excite our lawyers to do things that we cannot do as administrators, then we are not going to get the job done as associations. So when you go out and talk to people within your association, to those who have the bright ideas on what to do, try to get them to take the initiative in starting an association program or policy.

Too often we, as administrators, hear the question, "Why don't 'they' do this?" As an administrator, I do not want to get into arguments by saying, "Why don't you do it?" That does not make me popular, but sometimes it does get an article or a program going. My message then is this: Association executives are expert at getting things done, but are normally resented and in trouble if they assume the policy setting role. I hope this conference will bring forth concepts in preventive law that can be made part of bar associations programs throughout the nation.

IV. Preventive Law in Government Practice

Mike Milleman: My name is Mike Milleman and I teach law at the University of Maryland School of Law. I am going to talk today about the public practice of preventive law, by, in effect, sharing with you the autopsy of a public law audit. It was an audit that was quite removed from the commercial world; an audit that I helped conduct when I worked in the Maryland Attorney General's Office. I was hired as Chief General Counsel with a specific charge to develop a preventive law program. We learned a lot in the course of developing that program.

In reflecting on this public law audit, I believe there is a justification for the practice of preventive law in government — indeed a preventive law mandate — that is quite different than its practice in the private sector. On the other hand, I think there are a lot of similarities, including

the existence of significant common benefits and tensions that have been mentioned by a number of people today, and about which I will also speak.

When I first came into the Maryland Attorney General's Office in 1979, I took a tour of the various general counsels' offices to try to identify the most perplexing legal problems that state government faced — our "legal pathology" if you will. Those of us on the tour asked a seemingly simple question to our lawyers: "Where are we in trouble?" We received a responsive question: "Do you really want to know?" We glibly answered "yes." I think that was the right answer or I would not be here. But the issues raised by that dialogue are a lot more complicated than the brevity of that dialogue indicates.

One problem we learned a lot about, both from advocates outside the Office and our own assistant attorneys general, was a tragic human, and profound legal, problem. Over a long period of years in Maryland, a number of people had been wrongly confined in mental institutions; they were mentally retarded, not mentally ill. If assistant attorneys general look hard, they also will find this misplaced population in virtually every state.

These lost souls were committed to mental institutions long before the due process revolution; before one facing commitment had a right to a hearing. One was committed as early as 1928! Many had been committed two and three decades ago. Some were sixteen and seventeen year old children who had been committed more recently. All were inappropriately placed, without treatment. They were not receiving rehabilitative services appropriate to their condition. In short, there were compelling arguments that their initial and continuing commitments were illegal and unconstitutional.

In response to this described problem, and with the consent and support of the administrators of the mental health system, we performed the equivalent of a legal audit. We looked at records, examined files, and conducted interviews. We found over 300 mentally retarded persons within this misplaced population, warehoused in the back wards of the State's mental institutions. Many of the records contained entries that told the troubled history of the asylum and read like excerpts from Charles Dickens' novels.

The symbol of this misplaced population was the "quiet man." That is how institutional staff referred to him. He was, indeed, a quiet man. He was committed to a state mental institution in 1957 when he was a sixteen year old retarded boy. Then there were no alternative special education placements, as there are today.

When he was committed, he had some basic social skills: the capacity to talk, the capacity for self-care, and other competencies that survive moderate retardation. However, over the years, he had deteriorated. He had been treated with the "therapy of the time," including electroshock therapy and insulin therapy, and he had regressed because of the lack of appropriate care.

When I met him and attempted to talk to him as part of the audit, he did not respond. He had not talked for several years. He sat quietly, hands clasped behind knees, rocking back and forth. His life was a tragic reality, and he was a powerful symbol of our potential civil liability. He was, as one of my colleagues on the Attorney General's staff said, "a self-contained potential civil rights explosion."

Our justifications for beginning to deal with this extraordinary problem, thus, were two-fold. One set of justifications was pragmatic, mirroring those offered today to justify the practice of preventive law in the private sector. The potential for the award damages in civil rights cases was very substantial. The public exposure for the client administrators and the State would have been devastating. (As I later learned as a government lawyer, it is a rule that public exposure of sensitive governmental problems must occur during the legislative session when the oversight committee is considering the budget of the problem-ridden agency.) Disclosure would have seriously restricted policy options that, otherwise, would have been available to the executive branch of government. A reviewing court or oversight committee inevitably would have been tempted to make decisions to resolve this pervasive problem that, in normal circumstances, would be best left to the executive branch. Finally, it is not difficult to imagine the time, expense, and executive energy it would have taken to litigate the several decades old civil rights problems of this misplaced 300 person population.

So there are lots of good pragmatic reasons to deal with the arguably illegal and unconstitutional confinement of 300 mentally retarded persons in mental institutions; the same reasons that justify corporate audits, for example, to measure, and help assure compliance with environmental laws. But there is another, at least equally important reason, to practice preventive law if you are an assistant attorney general. We have heard interesting and accurate suggestions today about the terms of the original social compact, the moral source of government. We have been told that the compact was born in the necessity of government to seek peace by allocating essential resources, protecting vulnerable citizens from those who over-reach, and generally insuring the public good.

These governmental responsibilities are embodied in *law*. In this sense, the *raison d'etre* of government is law implementation, and the essential work of governmental lawyers is civil and criminal law enforcement. The practice of preventive law in the public sector is an indispensable means of civil law enforcement. Thus, this practice has a basis more compelling than pragmatism. It discharges the fundamental responsibility of government.

However, you can imagine some of the tensions that a preventive law audit produces for governmental clients. The first tension, which surfaced when we met with our clients about this special audit, concerned who we were. Let me read to you an excerpt from the Model

Rules of Professional Conduct that describes a basic ambiguity in the governmental attorney-client relationship:

> Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purposes of this Rule.

How does one translate this relationship to the administrator of a troubled state agency? Perhaps as follows:

> Administrator Jones, I am your lawyer or at least you are part of my client responsibility. But you are just one part of it. I also represent the governor, and he is part of it, but he is not the whole of it either. I represent the legislature, and they are part of my client responsibility. To make it simple Administrator Jones, when the three parts of this fragmented governmental personality coalesce into a single entity, that *entity* is my client.

It helps to be Catholic to understand this almost divine relationship.

So the first tension in the practice of public preventive law may be confusion. The governing rule of the adversary system, invoked in the context of litigation, is breathtakingly simple; indeed, grossly oversimplified I believe. It is "my client right or wrong." As counsel, I cannot violate ethical mandates or the law, but I can, and must, vigorously defend my client in almost all other respects.

When one compares this apparently simple rule with the complexity of a preventive law audit focused on problems that may lead to substantial legal liability, the potential role confusion is very significant both for client and lawyer. I expect that I am going to hear appropriate criticism about the failure of law professors to introduce law students to this complexity.

Aggravating that potential role confusion, assistant attorneys general often physically are placed in the agencies they represent, are sometimes paid by those agencies, and feel the most understandable human instinct to befriend their clients. When asked by a sometimes frustrated client whether you are an advocate or auditor, an advisor or defender, a supporter or critic, it is sometimes difficult to answer "all of the above." This potential role confusion can present the biggest risk to the practice of preventive law, the erosion of client confidence to the point that a client no longer wishes to take advantage of the invaluable preventive law resource that he has available to him.

These problems can be summarized in the context of our particular audit in a response that we might have received from the administrators of the mental health system. I emphasize that this response is hypothetical rather than actual; in fact, the administrators in my example were supportive and anxious to resolve the problem we jointly had identified.

> Administrator Jones: Are you saying that we have to find more appropriate placements for 300 institutionalized persons? If

> so, do you know what percentage of our budget will be encumbered by this exercise? We would prefer, very frankly, to spend our money on young people who have mental health problems. The people you have identified are older, and many will die in five, ten, or fifteen years in the hospital. Why must we provide costly appropriate treatment for them? And, if we do, don't we run the risk of emphasizing, rather than minimizing, this extraordinary problem that you have unearthed? After all, we cannot sneak 300 people out of mental institutions under cover of dark. The advocacy community has some of the characteristics of sharks; when it smells liability, it masses.

Assistant attorneys general must be powerful advocates for the rule of law to respond convincingly to these legitimate concerns.

There are other antidotes to this understandable client angst. One is careful role clarification. An assistant attorney general has to be very honest initially with her client about the limits of the public practice of preventive law. It is rooted in the law — in my cases constitutional and statutory law — not policy. It is based on advice, not coercion. While it is the lawyer's obligation to honestly assess potential legal liability, it is the administrator's prerogative to respond to that advice with a range of lawful policy options that maintain flexibility and efficiency.

Another antidote is confidentiality. Sometimes it will be in the interest of government to "get out in front" of a problem by publicly noting its proactive response to it. Other times it will not. In these latter instances, assistant attorneys general must bathe every step of the preventive law process in the attorney-client privilege, the work product privilege (where applicable), and, yes, executive or governmental privilege. The predicate for client cooperation is confidentiality.

This need for confidentiality often poses serious problems for assistant attorneys general. The work of government often is, and should be, available for public inspection and review. However, because preventive law is such an essential component of public law practice and, through its civil law enforcement, it supports the creation and expansion of existing privilege law. For example, recognition of the much maligned executive or governmental privilege is warranted when assistant attorneys general are able to demonstrate that it is necessary to protect communications that are essential to voluntary law compliance.

Aggressive advocacy can also prevent the erosion of client confidence that sometimes accompanies the practice of preventive law. When the practice of preventive law created a good faith defense to litigation, an assistant attorney general must aggressively and convincingly assert that defense. In short, there comes a time to "show the flag." This may involve a bit of posturing, as well as a lot of good lawyering, but it makes the practice of preventive law cost effective and a lot more fun for the client, especially when you are successful.

Indeed, in the middle of the preventive law exercise that I have been discussing, advocates for the mentally retarded filed a class action lawsuit against the administrators of the mental health system, arguing

that the 300 mentally retarded patients were illegally and unconstitutionally confined. We filed an answer to this lawsuit, not a motion to dismiss. We attached to our answer documents that indicated the dimensions of the preventive law exercise: the state's identification of the problem, its proposed solution, and the significant progress that it had made in the implementation of its own remedial plan.

The judge, *acting on his own motion*, dismissed the complaint in a forceful opinion in which he praised the governmental response to the problem. That was the most effective message to our clients that the practice of preventive law can be pragmatic, as well as the right thing to do.

In closing, let me return to the quiet man. As you recall, he had been wrongly institutionalized for over two decades. He was placed in an appropriate community-based program, as were many of the 300 mentally retarded residents of the mental institutions. (These placements, by the way, generally have been extraordinarily successful.)

In a short period of time the quiet man began to talk, and was exhibiting positive behaviors that he had not shown for years. When I heard this encouraging news, I approached the Attorney General and said, "I have happy news for you. The quiet man is talking." The Attorney General said, "That's just wonderful. I hope he never stops talking again. But for your sake, mine, and the sake of preventive law, I hope he never learns the words civil rights litigation."

It helps to be a little bit lucky in the practice of public preventive law.

In sum, I suggest that, for assistant attorneys general, the practice of preventive law is not simply a pragmatic option. It is a mandate that inheres in the rule of law itself, and it is an indispensable means of discharging the public duty to enforce the law.

Major John Meixell: I am Major John Meixell, with the Office of The Judge Advocate General of the United States Army. I serve as the Deputy Chief of the Army Legal Assistance Office. While Clarine has addressed the state entity as the client, I am going to be addressing the individual employee as the client and how we aim the Preventive Law Program toward that individual.

By way of introduction, let me state that the Army has historically had a very strong interest in Preventive Law and feels a very close tie to the organization that is sponsoring this seminar. In November of 1964 the First Emil Brown Preventive Law Award was made to the United States Army's Preventive Law Program. While I can not take any credit for this, the plaque is still very proudly displayed at our offices in the Pentagon.

In the 1985 Department Of Defense Authorization Act, we received formal recognition of the Armed Services Legal Assistance Program. This provides a number of legal services to all members of the armed forces and to family members of those military individuals. The Army

has implemented a number of regulations that expand upon this. The first is the Army Regulation 27-3 and I will have copies available. This regulation outlines in more detail who is eligible for legal assistance and the types of legal assistance that may be provided. The types of service include domestic relations, wills and estates, adoptions and name changes, non-support and indebtedness, taxes, landlord-tenant relations, consumer affairs, civil suits, Soldiers and Sailors Civil Relief Act and other services as the commander may deem appropriate. I mentioned the Legal Assistants Officers; we have about 248 Legal Assistance Officers world-wide. These are attorneys who provide the retail legal assistance to the soldiers and their family members and can cover the whole gamut that I described earlier. We have a separate regulation, Army Regulation 600-14, entitled *The Army Preventive Law Program*. This regulation formally recognizes a Preventive Law Program for the Army. This program is a command responsibility and thus the commander is required to implement a local Preventive Law Program responsive to local problems. While the lawyers are the main players in this program, by making the commander responsible, we have insured a significant degree of command interest, influence, and support which goes a long way in effectively implementing the program.

This past year, as a part of our tax program, the Chief of Staff of the Army sent a letter of direction to all subordinate commanders directing them to implement a strong and effective tax assistance program. This emphasis has raised the level of consciousness of all commanders and resulted in more effective support of the program. This support is manifested in more personnel and resources. Army Regulation 27-3 also speaks of the Preventive Law Program. It directs that the Army's Legal Assistance Officers will "prepare and participate in the active preventive law functions of publicity, education, and training to insure that service members and their families are informed at a minimum about the following legal information: (a) counseling services available through the Army's Legal Assistance Program; (b) the importance of seeking legal advice before taking action that may lead to adverse civil involvements . . . ; (c) the rights and privileges granted by law to assist the service member; [and] (d) the rights and privileges of service members and their families as consumers." To further the Legal Assistance program, the legal assistance officers are encouraged to cover additional subject matter, and to provide preventive law services which will make aggressive and continuous efforts to ensure that active duty members of the armed forces and their families are adequately prepared in the event of deployment.

In addition we have formed an Armed Forces Individual Income Tax Council which contains representatives of the various armed services to examine all income tax proposals that may impact upon military members, and make suggestions on changes in these proposals. They are also asked to educate the members of the armed forces as to their tax responsibilities and to assist them through the Tax Preparation Pro-

gram. The four Chiefs of the various armed services Legal Assistance Divisions get together on a monthly or bimonthly basis in order to exchange ideas, common problems and suggested solutions. Recently, as a result of one of these meetings, we established contact with the Legal Services Corporation and began working with them and sharing legal and educational services. We are exploring the possibility of providing more comprehensive service to those clients that both organizations might serve. And finally, we work very closely with the American Bar Association's Legal Assistance to Military Personnel (LAMP) Committee, that is composed of members of the ABA and representatives of the armed forces to examine means to provide better civil legal services to the members of the armed forces.

The military can be a somewhat closed community. As a result, the legal assistance officers often have a better grasp of our clients and a rare opportunity to identify their needs and to address those needs. Our officers provide a comprehensive legal assistance to the clients and in the process they identify those areas of reoccurring problems which need to be addressed through the Preventive Law Program. Much is accomplished at the local installation level. For example, in South Carolina our attorneys identified problems with some retail merchants who typically aim at the lower ranking enlisted personnel. As a result of the consumer complaints the legal assistance officers raised, one of the companies was recently investigated by the South Carolina Department of Consumer Affairs and found to be charging an illegal rate of interest. The South Carolina Board ordered the company to cease the practice and to refund excess interest payments to the consumers. This is one of the more aggressive uses of the Preventive Law Program.

Also we have a chain of command control over our clients that allows us to force them to see a lawyer. As an aside, one can lead a horse or a soldier to a lawyer but you cannot make him follow the advice. That was recently pointed out in a tragic air crash at Gander where 248 soldiers were killed. A review of their personal affairs after the crash indicated that many of them did not have wills or otherwise provide for the disposition of their property. This despite a very intensive effort on the part of the chain of command to see that all were offered the opportunity to have a will prepared and to take other opportunities to arrange their personal affairs. In interviewing survivors of that battalion they readily acknowledged that they had been put through classes on these subjects, but as one soldier said, "My family knows where I wanted it to go so why bother with a will?" This is one problem that I am not sure we are ever going to resolve.

I have outlined some of the areas that are authorized under the Legal Assistance Regulation and now want to address three areas of particular importance in our Preventive Law Program. The most obvious one is in the area of consumer awareness. We try to educate the client concerning what to look for before signing a commercial contract, and also aim at information on merchandise schemes that prey on our

soldiers as in the South Carolina example. A recent problem that has surfaced within the United States is that a large number of our soldiers are entering into long term lease arrangements on automobiles as opposed to buying them. This may be fine for the average consumer, but not for the soldier that enters into a four year lease and after one year receives orders to go to Germany, and finds that he is unable to ship the automobile. He is then stuck with that long term lease and effectively denied use of the car. We highlighted that problem and are taking steps to educate the consumer concerning the problems with these contracts and to work with him in resolving the existing problem contracts.

The tax assistance program consists of establishing Unit Tax Assistors at each unit and volunteer tax preparers through the Army Community services Organization. These individuals are trained on the preparation of income tax returns. In the tax program, finally, we have Legal Assistants Officers at each installation. The tax program is designed to educate the client about their tax obligations and, to warn of the danger of individuals who prepare tax returns and then offer the soldier a highly discounted immediate payment. We have a structure in which the lower level unit tax advisors and volunteer tax preparers will prepare the bulk of the tax returns for the individual and then pyramiding up to the Legal Assistants Officer to resolve any questions that are beyond the capabilities of these volunteers. Finally in the areas of personal affairs we stress very strongly the preparation of wills, powers of attorney and, as indicated earlier, pre-mobilization planning.

I think a large portion of the methods we use throughout the Legal Assistance and Preventive Law Programs are educational in nature. First of course is educating the attorneys as to the need for preventive law training. We do that by keeping them fully informed of current developments. This can be done through electronic messages which go out on a fairly regular basis to provide updates and current information. We have a monthly publication called *The Army Lawyer* which is published by The Judge Advocate General's School in Charlottesville, Virginia. This publication includes a section dealing with current topics of interest in the legal assistance area. The Air Force has what they call *Short Burst*, published on a monthly basis and distributed to their Legal Assistance Officers. This publication concentrates on one particular area of legal assistance interest and provides a concentrated amount of information. A recent *Short Burst* dealt with consumer affairs, and consisted of a six page letter dealing with various aspects of this topic and then backed it up with a large amount of resource material.

We have a semi-annual one week training course at The Judge Advocate General's School for Legal Assistance Officers. The most recent one included Representative Pat Schroeder discussing recent legislative developments affecting the military, and a half day pitch by the Federal Trade Commission as to some of the resources they had available to assist us in the consumer affairs area. And finally we engage in inspection visits of the various field offices. Yesterday I was at Fitzsimmons

Army Hospital in Denver and at Fort Carson in Colorado Springs, talking to them about their programs, and to the attorneys about their hands on training and finding out the areas in which we could share knowledge.

At the local level this involves classes to the soldiers, newspaper articles in the post newspaper, radio and TV spots on the on-post stations. Overseas we have our own television network and instead of commercial announcements they have public service announcements. Many of these are in the preventive law area. There is an annual legal checkup form. It is a multi-page document that is probably useless as far as an actual checkup, but it is an excellent tool in the estate planning area. I usually give it to clients after they have completed a will, saying "fill this out and keep it with your will; it will help your personal representative in handling your estate." We are currently studying a simplified annual legal checkup that will be mandatory throughout the Army. This will highlight those areas where the soldier needs to consult with an attorney, i.e. changed circumstances requiring an updated will. Also, those units that are engaged in a pre-mobilization mission will have a semi-annual legal check-up to determine the status of wills, powers of attorney, tax returns and consumer affairs. We are testing an alternative dispute resolution program at Fort Hood, Texas, which could serve as a small claims court for local disputes. If that is successful, it can be expanded to include rental contracts with a clause requiring arbitration of any disputes under the contract and the consumer affairs arena.

Edward Dauer: One quick comment and then a quick question. Your point about the South Carolina case, where you identified one particular emergency, suggests a shift from private health to public health, to use that analogy, which is located in sources of individual legal problems in some environmental factor rather than in the individual affairs of the client. Individual lawyers seeing individual clients don't have the sense of overview which they can accumulate into the identification of those etiologies.

Medicine is often practiced in large groups. Law is also practiced, sometimes in large firms so that there is something interesting to be said about the potential for doing an analysis of public "legal health" through a group practice plan. The question I have is "Have you done the client cost effectiveness evaluations for delivery of these services?" Because that seems to have been an issue on the minds of a lot of people as we have gone through the day.

John Meixell: We do not anticipate doing a cost effectiveness study. It would be very difficult since so much of our practice has been centralized. Perhaps the answer to cost effectiveness is not one of the important factors in our practice. We have the increasing demand of the legal services to be provided to the soldiers, while not having a corresponding increase in resources available. As we have identified, an effective preventive law program will allow us to more effectively utilize the re-

sources to provide an increased service to the soldier with a non increasing basis.

In response to your original comment too, as a result of the Gander accident we have seen, I think, a very effective use of this public aspect. One of the early ideas was that we could settle all claims against the insurance company on behalf of the surviving family members. We soon realized this was perhaps an area much more complex than our individual attorneys could deal with. We then went out and contacted about ten of the better known law firms nationally, in the area of aviation accident law, and obtained commitments from them for very favorable potential new contracts. Most of them are now operating at the 12.5% to 15% range. We made that available to the legal assistance attorneys that have been assigned to assist each of the families.

Louis Brown: I just want to make one short comment, the military services is the largest group legal service program in this country by an enormous number, and my observation is that has been overlooked in the studies that have been made of group legal service programs.

Clarine Nardi Riddle: In 1984, the Connecticut Attorney General, Joseph I. Lieberman, commissioned a task force on alternative dispute resolution (ADR) to review the policies and procedures of our Attorney General's Office and its impact on the judicial system in light of ADR. The Attorney General's Office is one of the largest law firms in the state and is responsible for some 8,000 of the 50,000 civil suits in the state's courts. Therefore, the procedures in our office regarding dispute resolution could have a very significant impact in the state legal arena. Attorney General Lieberman became interested, as Dean Dauer mentioned before, in litigation avoidance after a trip to Japan where he witnessed a justice system that operates with far fewer lawyers than the United States and where the filing of a lawsuit is viewed as an act of very last resort in that all attempts to resolve the dispute have failed.

I was asked to head the Attorney General's ADR Task Force and worked with four other senior attorneys from our office. The Task Force was charged with reviewing three goals; 1) avoiding legal disputes altogether, 2) providing alternatives to litigation as a means of resolving legal disputes, and 3) reducing costs of litigation when resorting to court is unavoidable.

To meet our charge, the Task Force agreed upon two approaches: educating ourselves on alternate forms of dispute resolution and reviewing the current caseloads of our various legal departments to determine where ADR techniques would be beneficial. Our education included meeting with Dean Edward Dauer, then of the Yale Law School, and many others in the field, including judges and people in the corporate and business communities. We also reviewed initiatives already present in Connecticut in the public and private sector. In the Attorney General's Office itself, we have an extensive number of examples of cases which we had settled through pre-trial negotiations.

The Task Force was also quite sensitive to the role of a public law office and the public policy and constitutional issues it was responsible to represent. I would refer you to an article in which Judge Harry Edwards raises some of the particular concerns of a public lawyer.[7] Most of the materials concerning ADR involve peculiarly private sector considerations and rely heavily on assumptions about bottom line business judgments and financial considerations as the basis for using ADR. This article, published after we issued our Task Force report, helps define for the public lawyer the policy considerations prior to utilization of nonjudicial dispute resolution. At the conclusion of our review, we developed a list of "recommendations for action" to achieve the three goals established by the Attorney General.

A. *Avoiding Legal Disputes*

In the category of avoiding legal disputes altogether, the Task Force recommended a more deliberate process of counseling our client agencies. We firmly believe that this is the best way to avoid litigation. Public clients need to be apprised quickly of changes in the law. Changes in federal and state statutes and recent court decisions, which affect an agency, can be numerous and overwhelming. In addition, some new requirements for state agency practice and procedure are so complicated that client agencies do not understand the full impact. This lack of knowledge raises the possibility that litigation may be initiated against the client for failure to follow newly established constitutional, statutory, or regulatory requirements.

Time dedicated to preventive legal counseling is difficult to marshal. The office is involved with approximately 10,000 lawsuits or contested hearings annually, and defense of those matters is a very timely process. As a result, the counseling process sometimes takes a backseat to other "hot" priorities.

The Task Force specifically recommended that the office undertake a series of seminars on areas of the law which greatly impact all state agencies, such as our freedom of information laws, our personnel and labor laws, and our administrative procedures act. Some of the seminars would also focus solely on ADR techniques and application. In addition, the Task Force recommended that the Attorney General establish a regular newsletter to supplement the seminars, in order to inform the agencies of any changes in the area covered by the seminars or any other helpful subject matter areas. The intent of the newsletter would be to contain an overview in plain, non-legalistic language, of new laws and cases impacting state agency practice, but then also refer the reader to an Assistant Attorney General representing that agency for further information.

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7. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L REV. 668 (1986).

1. Legal Audit

Our second recommendation for avoiding litigation through education of client agencies is the implementation of legal audits. The audit would consist of regular meetings with personnel of each client agency to determine whether the agency is complying with the statutory, regulatory, common law and constitutional mandates of the particular agency. It would not be the same as the legal audit used in business, but would review agency procedures and regulations for non-compliance with state and federal requirements.

2. Administrative Law Judges

In our discussion with the heads of our various legal departments, there were often comments regarding the quality of decision making at the state agency hearings. Some of the decisions which our office must defend in court do not have adequate records by these decision makers. In light of this problem, the Task Force recommended that a separate Administrative Law Judge Unit be established by the legislature or executive. The new unit would consist of a pool of Administrative Law Judges who could be called upon to conduct hearings for state agencies as needed. This unit would better coordinate the needs of the state. These judges could then be trained and have more expertise in ADR, administrative procedures, due process and relevant law. Short of having the Administrative Law Judge pool established, we would develop extensive training programs for state agencies and their hearing officer personnel. On April 16, 1986, we conducted such a seminar entitled "Plain Talk About Contested Cases" and 150 state government officials and employees from the highest level — agency heads, commission members and hearing officers — attended this seminar. It was a full day program and received a most favorable evaluation from the participants.

3. Advising Against Litigation

Also, under this goal, we reaffirmed the office's position that we should avoid lawsuits by assertively counseling some client agencies. There are cases in which the client agency head would like our defense but from a legal standpoint the cases are very weak. Therefore, the Assistant Attorneys General representing the client agency must always exercise independent judgment in evaluating cases and must not automatically agree with the client's decision to bring or defend a meritless case.

B. *Alternatives to Litigation*

Our second goal was to find alternatives to litigation. To achieve this end, the Task Force suggested that Attorneys General be trained in ADR techniques. By training the attorneys to think in terms of ADR, more cases may be resolved earlier, resulting in maximizing the attorney time spent on public law issues, where judicial resolution or court an-

nexed resolution is mandated and needed. We have now added a permanent negotiation component to our training program for first year new hires in the office.

1. Screening Cases

The litigation management committee (LMC) of the office, which is composed of two other senior attorneys and myself, review all significant cases in the office and all appellate and settlement decisions. The LMC serves as the litigation strategy review committee and takes ADR techniques into consideration when reviewing the office's caseload. The LMC is prepared to recommend arbitration, mediation, summary juries, mini-trials and mini-hearings. The committee can also retain an ADR specialist if warranted and can categorize cases as being presumptively appropriate for ADR.

2. Advocating Use of ADR Techniques by Contract Attorneys

Sometimes a large public state law office has to hire outside counsel. In those situations, we execute a contract with the contract attorney. We have now included in all of our private attorney contracts a provision that states: "Contract attorneys will use ADR techniques or encourage the use of ADR techniques." We supervise all of these contracts so we can invoke this provision of the contract when we believe the contract attorney should be using such techniques. This is also useful to reduce the cost of litigation under those contracts.

3. Statutory Mandates of ADR

Another way that we can use alternatives to litigation is by expanding statutory provisions to include ADR. We are in the process of reviewing all state statutes to ascertain where a statutory mandate of ADR techniques would be helpful. A statutory arbitration procedure is in place for construction claims. Another particularly attractive area is child support where states are now being encouraged to set up administrative or quasi-judicial procedures to perform these functions. Experience has shown that these procedures are successful in eliminating all but a small percentage of cases from the court docket and have increased collection of child support. The Task Force also recommended that the state legislature look at current experimental projects involving state mediation offices and multi-door courthouses to see whether these concepts could be adopted in Connecticut.

C. *Reducing Court Costs*

With respect to the third goal of reducing delay in the courts and court costs, the Attorney General issued a directive which established a set of guidelines for Assistant Attorneys General to follow in order to reduce these delays in courts which add to costs. He urged quick evaluation of cases, judicious filing of motions and concise discovery requests.

The Task Force also recommended that the department heads assess the performance of all Attorneys General along ADR lines in any incentive and performance evaluation system. Additionally, the Task Force recommended active cooperation with the judiciary, the Connecticut bar and the business community in its ADR efforts.

Since the issuing of our report, the Attorney General has publicly advocated ADR techniques as the best solution to many legal conflicts. Many action steps other than the ones mentioned before have been taken. ADR publications, including the *Preventive Law Reporter*, have been added to our library acquisitions. We have supported a bill in the legislature to create a group of independent hearing officers to provide a trained group of people responsible for the conduct of hearings. And during the week of May 4, 1986, the General Assembly adopted a legislative proposal to place child support matters in a quasi-judicial process, referred to as family support magistrates. This will take approximately 4000 of our cases from the Superior Court docket. Our office is also preparing summaries of state statutes and Attorney General advisory opinions for inclusion in our regular newsletter that goes to state agencies.

It is too early to gauge the impact of the steps that we are able to take toward preventing litigation. Nonetheless, I firmly believe that the formal initiative and ongoing awareness and action plans we have established represent a good model for further study and implementation. In times as litigious as ours, each taxpayer has every right to expect that its public law enforcement agencies will do everything in their power to address the goals of ADR that I have mentioned today *and* to provide equal justice for all. Thank you.

V. Preventive Law in Legal Education

Sheldon Krantz: As the program indicates, I am the Dean of the University of San Diego School of Law. Along with all of you here, I have long admired Louis Brown and Edward Dauer for the work they have been doing in the field of preventive law.

A few days ago, a group of law school deans met with members of the Committee of Bar Examiners in California. I was a member of this group. At this meeting, the deans raised a number of concerns about the administration of the California Bar Examination — mostly those relating to the pressures to add more and more required subject areas and the extremely high pass-line.

As you know, the percentage of those passing the California Bar Examination is consistently the lowest in the country. Thus, the Committee of Bar Examiners takes its responsibility as gate-keeper to the legal profession very seriously. Typically far fewer than fifty percent of those that take the California bar exam pass it. Committee members apparently feel that extremely high standards are warranted because there are already over 100,000 lawyers in California and 12,000 to 14,000 aspiring lawyers who take the bar exam every year. Of equal

significance, according to members of the Committee, a large number of those taking the bar exam each year go into solo practice. Committee members, believe, therefore, that new admittees must clearly demonstrate the ability to practice law since so many will not be nurtured along by law firms, governmental agencies or corporations.

Given these concerns, the members of the Committee shared with the deans the view that the examination process is not yet even rigorous enough. One Committee member, for example, raised the following question: "How can applicants for admission be approved for law practice without having been tested on taxation or family law," topics that are not now required on the California bar exam.

The primary format of the California Bar Exam, like that of most other states, combines the multi-state and an essay examination emphasizing state law issues. California also has a performance exam which supposedly tests lawyering skills such as those relating to reviewing factual information, synthesizing issues, and drafting documents. But even the performance portion of the examination currently appears to largely test doctrinal knowledge. It is to this exam format that the Committee member was seeking more required subject areas. He did not get any support from the deans. It seemed to them ludicrous to test on even more doctrine. According to one of the deans, "being able to remember a few more legal principles in a few more subject areas says little about one's ability to practice law competently."

I report this event because in many ways the response of the deans, including me, could rightly be turned against us. For the deans were rejecting an approach to testing for competency to practice law which they have already embraced as the core of legal education: pervasive reliance on doctrinal courses for preparing students for the profession.

Reviewing curriculum at nearly all law schools will confirm this. Law schools mostly teach law and legal reasoning. They devote little time to what is involved in the practice of law, what it means to be a professional person and how attorneys relate to their clients. Law students prepare for practice primarily by studying appellate cases in their courses. Granted, there have been some changes in the past twenty-five years, many of which were prodded by support for clinical programs by the Ford Foundation during the early 1960's. But even with the expansion of legal clinics; new skills training in areas such as interviewing, counseling and negotiation; some new emphasis on basic writing and legal research; and experimentation with computer-aided and simulation education, the core curriculum at most law schools remains wedded to the study of doctrine and analytical forms of reasoning.

I am not opposed to our stressing these matters. After all, gaining knowledge about the law in different subject areas is important information for lawyers to have. So is learning how "to think like a lawyer." In my view, though, the undue emphasis in law schools on these areas inadequately prepares students for their chosen profession. The narrowness of legal education may in part also explain many of the problems within

the profession today and what I perceive to be widespread unhappiness among both students and attorneys. Why I reach these conclusions is the topic for my brief presentation today.

As part of my research for a book on the future of the legal profession, I have had interviewers talk to prelaw and law students and attorneys. The purpose of the interviews has been to learn why students want to go to law school, what they think of their experiences once they get there, and what attorneys think of the profession once they enter it. An early impression culled from the interviews is that prelaw students often enter law school with considerable enthusiasm for the notion of helping people solve their problems, that the enthusiasm tends to wane during law school, that students often become disaffected with their legal education by their second year, and that altruistic goals quickly are replaced by more self serving ones. Two few interviews have been done so far to permit quantifiable conclusions, but the findings thus far should not surprise most of us involved in legal education. What happens during law school that accounts for loss of enthusiasm, disaffection, and replacement of altruistic goals with more selfish ones?

I would argue, first of all, that the extensive emphasis in law school on law and legal reasoning is partly responsible. Law students begin school with their own special personal aspirations, convictions and values. During the exchanges that occur in first year socratic dialogues, the personal feelings and values of the students are often deemphasized or belittled and the complex relationships between lawyers and their clients virtually ignored. Little time is devoted at the outset to providing students with an overview of what lawyers do, what types of skills they need, and what impact lawyering has on one's own values. In short, doctrine courses unintentionally depersonalize the nature of lawyers' work by focusing immediately upon law instead of on the nature of the lawyering process.

First year students receive little context. It is not surprising, therefore, that the intellectual game playing with professors wears thin after awhile, that students get cynical about the law (like their professors seem to be), and that they quickly begin to lose sight of their reasons for going to law school in the first place.

In fairness to legal educators, however, declining student interest in and enthusiasm about law school has a broader genesis. The accelerating cost of education, for example, requires more students to work longer hours at earlier stages of their education. Thus, law school is no longer a full time effort for many. The fears of not getting a job and of not passing the bar also preoccupy students and erode student attention.

But there are other matters within our control that also negatively impact legal education. One is the way most of us teach. Not too long ago, one of our faculty members arranged for an expert in learning theory to sit in on a number of classes at our law school. After observing a number of classes and talking to students, he prepared a brief report

and presented it to our faculty. The social scientist began his report by saying that the law professors he observed were brilliant, articulate and clever. He said he was truly impressed with what were equivalent to fine theatrical performances. After making those comments, though, he added that he was not sure students were learning very much. According to him, there may be real limits on learning when there is heavy reliance on large classes, Socratic teaching or lecture in 50 minute segments, and so few opportunities for students to receive feedback and positive reinforcement. In other words, the primary ways in which law schools teach their students is counter to current thinking in the field of learning theory. That should concern all of us.

A third matter that troubles me is the severe isolation between practitioners and academics. Law professors often know little about the practice of law or have not kept up to date on it. They seldom weave matters relating to practice into their courses and do very little research on practice issues either. Although law schools would be harmed by an overemphasis of any particular area, the need for more focus on the practice of law, particularly in areas of prevention, seems to me to be inconvertible. There is a common assumption among law professors that learning about practice is not of intellectual merit equivalent to learning about law. The absurdity of that notion is readily apparent. After all, what does or does not go on between an attorney and his or her client in an office setting is worthy of intellectual development. Creatively assessing a client's problem or need and identifying alternative ways of responding to it is a challenging undertaking. It requires far more than knowledge of law and legal reasoning. Spending more time on counselling, advisory, drafting and negotiating functions, therefore, appropriately deserve enhanced attention in law school. So do the complex human interaction problems that inevitably occur when working with clients. The problem thus is not subject matter but lack of knowledge by professors and the absence of useful course and library materials. Also, we have all been weaned on the Langdellian casebook method and we tend to denigrate alternatives to it.

When legal educators do develop courses on the lawyering process, they more often than not focus on litigation. Certainly, students should learn how to file lawsuits and fight vigorously for their client's rights in court. But the perception that develops in law school that being a lawyer primarily means being a litigator (and that the courtroom is where lawyers and their clients succeed or fail) badly distorts what most lawyers do or should do, as we all know.

In mentioning this, I am struck by an analogy to another field that I know something about — the field of law enforcement. For years, I spent time observing police in the field and in police training academies. The image typically developed in the training academy is that a police officer fights crime. Little attention is given during training to the role police officers play in order maintenance, in crime prevention, or in simply helping people in crisis. When police officers leave training acade-

mies, they find that they actually spent little time catching criminals. They also learn that they are not prepared to handle most of the tasks that await them.

In a number of interviews I have had recently with attorneys, I heard responses similar to those I use to hear from police officers: "I was not prepared to address most of what I do." I also found, by the way, that many lawyers do not seem to be getting much gratification from practice. This may come from the inherent limitations in lawyers' roles, the shifting of law from profession to business, the distortion in law schools of what law practice is all about, or the current lack of direction within the profession itself. These comments disturb me. It is appropriate, therefore, to explore what law schools might do to help address some of them.

Law schools rarely have clearly stated educational goals. To the extent that they do, it may be timely to re-exam them. If goals do not exist, it may be worthwhile for law faculties to formulate them. Existing curriculum and methods of instruction should then be analyzed in light of those goals. I would like to suggest a few goals to which law schools might begin to give more emphasis:

1) teaching students the roles that lawyers play in society and the nature of lawyering; (this should be done in some instances within an historical context, through comparisons with the roles of lawyers in other societies, and through comparisons with the roles of other professions)
2) retaining their current commitment to rigorous analysis of doctrine and legal reasoning;
3) critically examining professional responsibilities and attorney and client relations;
4) analyzing the range of skills that lawyers need to perform various roles; and
5) assessing the inherent limitations of using the legal process to prevent or resolve many problems and other options that might be preferable.

Let me now give you a few illustrations about how law schools can begin or already have begun to achieve some of these goals:

1) Professors should integrate more lawyering process and professional responsibility materials into their basic courses, even during the first year. These can include simulation exercises which place students in lawyering roles confronting typical problems. Schools such as New York University do this now and use team teaching approaches in situations where one professor can benefit from the lawyering expertise of another.
2) Separate courses or components of courses should be developed to focus more specifically on the nature of lawyering roles. In addition, far more time should be spent on the dilemmas of lawyering (such as the conflict between personal values and a client's problem), the nature of the attorney-client relationship, and the types of problems that commonly lead to malpractice suits, disciplinary charges and client dissatisfaction.

3) Greater emphasis should be given in courses to creative lawyering exercises.
4) Greater attention should be given to supplementing large classes with more frequent feedback opportunities, and smaller group discussions.

Implementing these approaches will require the development of new materials. It will also mean additional time pressures for faculty who already feel overburdened. But it will be difficult to make significant improvements in legal education as long as curriculum remains the same as it is now structured. Wider use of computer-aided instruction will make necessary changes easier since it will assist in basic doctrinal learning and feedback. Other aids may also be needed such as the utilization of teaching assistants (for small group discussions and for the grading of simulation exercises or quizzes).

Law schools must also reassess how the last year of law school is utilized. Instead of having the last year simply replicate the first two, it seems more sensible to use this period to permit students to: 1) master one area of the law or 2) practice law in a controlled environment—the equivalent of a teaching hospital. The value of the first option is that it would permit students to learn about at least one area of the law at more than a superficial level. Learning one area at a far higher level of sophistication may be invaluable even if the student does not end up practicing in that field. At least the student might just learn how complex the area of law can be.

The notion of the teaching hospital model for a law school is certainly not new. It is also fraught with complications: cost, competition with the profession, and malpractice coverage are only a few. But the worth of emulating a range of practice experiences in a controlled setting merits experimentation and should go well beyond what exists in most clinics.

Finally, it seems to me that law schools should involve students in more research efforts relating to the practice of law and should stimulate faculty to work in this area as well. For finding ways to improve the profession will require the active involvement of professional schools.

Even assuming the merit of some or even all of the ideas expressed above, there will be real constraints in pursuing them. As noted above, all of us who now teach will find making significant changes in what we do difficult. This is particularly true for those who teach basic courses and who have not practiced for a number of years. Such faculty will particulary find it difficult to integrate skills training and client related issues into their courses. Team teaching may be part of the solution to this problem but this in turn creates resource allocation problems.

There are other constraints as well. Most schools continue to have isolation between clinical and non-clinical responsibilities. As skills training programs expand, clinical faculty will likely be asked to do more, and more and more. Their backgrounds, though, will not be suitable for much of the non-litigation emphasis need in lawyering process

courses. If we are going to begin to restructure the nature of legal education somewhat, existing library materials will be inadequate. Law libraries still largely contain court related materials, and this is insufficient if we are going to broaden the base of legal education.

These constraints do illustrate the difficulties in change, but they should not dampen our enthusiasm for the challenge that lies ahead. It is a fascinating time to be involved in legal education. I do not anticipate major reforms in the near future. I am not even sure of the correctness of many of the suggestions I have just made or that others are now trying. It is timely, however, for law faculties to reassess what they are doing, what they are accomplishing, and what they can and should be doing far better than they now are. Thank you.

Alex Elson: As I listened to Sheldon Krantz list the deficiencies in legal education, I was struck again, as I have been many times in the past, by the strong resistance to change that characterizes many law school faculties. To be sure, we have come a long way in the past twenty-five years. Many legal educators now recognize that clinical training, skills training in general and what may be referred to client-focussed legal education have a legitimate place in law schools. But there is still a hard core of law teachers who are skeptical of these developments. Their conception of the role of the law school is that of teaching legal reasoning, and understanding in depth legal doctrines and their development. They would leave to the practicing bar the task of teaching lawyers the skills necessary to take care of client needs.

How can we get preventive law into the mainstream of legal education? The key is to make it plain that there is nothing antithetical to combining the objective of learning legal doctrine and legal reasoning along with the cases or materials which underscore how client problems can be solved and disputes avoided by creative application of law.

A course in preventive law, entitled legal planning or whatever you will, is an important step in the right direction, but will not alone achieve the objective of turning out lawyers who will look upon keeping clients out of trouble as their primary role and who are creative problem solvers. Such a course, particularly if it is an elective course, will fail to impress students with the fact that the preventive law approach is relevant and important to all basic bodies of applicable law. What is needed is a more pervasive approach.

Just a glance at the agenda for the Preventive Law Conference makes the point. As appears from the program, preventive law models and case studies have been developed for antitrust, warranties and products liability, securities, environmental law, employment relations, labor law and ethical responsibilities. Similar preventive law models and case studies are available in the basic core courses, such as contracts, torts, trusts and wills and estate planning. I want to digress for a minute to discuss an interesting development in connection with the teaching of legal ethics. The course in legal ethics, now frequently titled Professional Responsibility, has been a stepchild in most law schools. The

irony is that it has taken a sharp rise in malpractice suits and in malpractice insurance premiums to wake the legal profession to the need for learning how to act ethically as professionals to avoid disputes with clients.

Soaring malpractice insurance premiums have led 300 of the leading law firms in the country to organize a Bermuda based insurance company known as Attorneys Liability Insurance Company. According to a recent *Wall Street Journal* article, April 28, 1986, for the past six months a former partner of Covington and Burling, on behalf of this company, has been visiting the law firm members and has been conducting a Preventive Law course on what to do to avoid being sued. Some of the items included are:

> 1) subjecting opinion letters and briefs to extensive peer review; 2) avoiding matters outside the firm's expertise; 3) evaluating clients more carefully; 4) developing better communication with clients; and 5) avoiding over-extending attorney client relationships by serving as officers and directors or by making investments with clients which open the firm to more conflicts of interest.

We would all agree this is an important educational venture. It would be much better if the focus was on helping the client rather than minimizing risks to lawyers. It would also be much better for the profession if law graduates entered the law practice as professionally responsible lawyers, educated as to how they should relate to clients in an ethical way.

But to come back to the primary issue: how do we bring preventive law models and case studies into the basic course? This is a challenging enterprise. It is probably futile to think that we can persuade the present generation of teachers busily engaged in teaching the standard courses in contracts, torts, corporation law, the Commercial Code, securities law, labor law and the like from departing from their favorite casebooks in the field. Nor is it, in my opinion, necessary or feasible to rewrite the casebooks. It should be possible to prepare special units in pamphlet form to be used as supplementary materials in each of the areas. By now, as Louis Brown can testify better than I, there is a mass of models and case studies that can be drawn upon for this purpose. Preparing the supplements should present no major difficulty. The hard task is how do we get the teachers to use these materials? That is an important challenge to our host, the National Center for Preventive Law. One of the great things about the Center is that it is part of a law school and a recognized part of the law school world. The presence today of so many distinguished law professors attests to this fact. In the past, changes in law school curriculum such as teaching litigation skills, providing clinical training through legal aid clinics, client centered counseling and alternative dispute resolutions, have come about despite the passive resistance of law school faculties, largely through the pressure of the practicing bar and judges and some more forward looking law teachers. Now we can look to this Center to provide *leadership* to the

law schools of the country to make room within the curriculum for preventive law.

Robert Hardaway: Well, first I think I must say that in following some of the excellent and enlightening presentations I feel a little bit like Zsa Zsa Gabor's seventh husband. I think I know what to do, I am just not sure how to make it interesting. What I would like to do though is pass out a few pieces concerning legal education. One is a comparative study of legal and medical education and some of the lessons I think we can learn from medical education in terms of integrating procedures and methods of skills training. And then from that, perhaps we can go even further and learn some lessons about how we can integrate methods of teaching preventive law in the law school curriculum, keeping in mind that the primary restrictions are cost and resources. We have already gone through this with regard to clinical education. We saw a huge rise in the teaching of clinical education in the 1960s, and then as interest was lost somewhat, and as the budgets became tighter, we found that what passes for clinical education in the law schools today is nothing more than a disguised farm-out system where we send students out to various law firms or institutes where they are not under the direct supervision of a faculty member. So keeping in mind these restrictions, the Center this summer will be suggesting a comprehensive plan for integrating the teaching of preventive law in the curriculum. In this regard I must again thank Louis Brown for the work he has done over the years in providing the theoretical underpinnings for a comprehensive plan of teaching preventive law. But this summer we hope to get to the nuts and bolts, the logistics of how we would incorporate the teaching of preventive law into the curriculum.

I would like to briefly outline five possible areas in which preventive law can be taught, given the present academic curriculum. First the Preventive Law course. Dean Dauer told me that just this morning he has had several students come up to him who have heard about our institute and are already inquiring about a course in preventive law. So I think we are going to have some built-in interest if we are able to provide such a course here at the law school for the next year. A preventive law course, I think, would start out as a two credit hour course, possibly in a seminar format, which would provide the theoretical underpinnings for preventive law, go into and analyze the whole notion of the legal autopsy, the legal check-up; it would cut across all the other disciplines and look at preventive law in the context of contract law, tort law and corporate law.

The second context in which preventive law could be interwoven into the curriculum would be in the clinic. We already have a clinic here, of course, but it is litigation-based. Under the most liberal student practice laws in the country, our students are allowed to go into court and practice as though they were attorneys under the nominal supervision of a licensed attorney who is a member of the bar and a member of the faculty at the law school.

We can learn some lessons from that clinic because we have attempted here at Denver University to integrate that clinic into the curriculum. We have tried to get away from the classic model of a clinical program which is isolated from the main curriculum. I have distributed a short piece giving the history of how we have tried to integrate the clinical program into the main curriculum. I think we also can do that in the area of preventive law by setting up, in coordination with our present clinic, a preventive law clinic—not litigation-based, but based on personal contact with the client. So you have the same element of the present clinic which is the personal responsibility to a live human being, the client, but at the same time it would not be litigation based. With regard to this, I envision a clinic in which students would give legal check-ups and write wills or contracts for live clients under the supervision of a lawyer or faculty member.

Possibly as an adjunct to an internal clinic would be the external clinic, which has the advantage of being relatively inexpensive. That is why most law schools like externships because they simply farm-out students to government agencies or law firms and then they ask the law firm to report back as to the person's progress. In order to make it look good on their bulletin, sometimes they will appoint a lawyer at the law firm as an adjunct professor. It has the advantage, of course, of being cheap in that we can provide it to a large number of students and it does not require immediate use of law school resources. We could farm out students to law firms or government agencies with the idea that the student would do legal audits, look in to the law office management, perhaps apply some of the things he might have learned in the preventive law course. Then he would report back to a faculty advisor at the law school.

Fourth, I envision a preventive law course which is offered in conjunction with the course in legal counseling. We have a legal counseling competition (Murray Blumenthal runs that) and it seems to me that preventive law should be part and parcel of a legal counseling program. You get into the whole problem of the scope of lawyer responsibility. If a client comes in and says "I have a speeding ticket," but in the course of talking with the lawyer, it becomes apparent to the lawyer that the client needs a will, what is the responsibility of the lawyer to advise a client of his need to get legal advice or to take some kind of action with regard to the will? I am sure we can think of better examples than that, but it raises the whole question of the scope of lawyer responsibility. Of course that is a gray area right now, and that is an area which I think would be looked at more closely in the context of a preventive law course.

Finally, and this would be the broadest in scope, we would like to see a program whereby preventive law methods would be interwoven into the general classes of contracts, torts and civil procedure. What could the present teachers who are used to the Socratic method do to focus on preventive law problems? Louis Brown has been a pioneer in

this area and has tried various techniques and we hope to make use of his experiences this Summer, in coming up with a comprehensive plan. This comprehensive plan would then be given to faculty members to use as they see fit in the teaching of their own courses. One technique, for example, that Louis Brown has pioneered is to take a case that is in the casebook and then pick a point in time, before the transaction had occurred, and then have a discussion of what could have been done to prevent what occurred in this lawsuit. Another technique is the use of a lawyer-client dialogue in which you simulate a lawyer-client discussion that might have gone on before the transaction occurred and analyze that discussion, and the questions that are asked between the lawyer and the client.

These are five areas we are going to be looking at this summer in trying to come up with a plan or a program for integrating the teaching of Preventive Law in the law school curriculum.

Neil Littlefield: I am Neil Littlefield of the University of Denver College of Law and I teach Commercial Law. Two comments have been made and I would like to pick up on them and put them in a specific context. Sheldon has been talking about the difficulties of translating what we have been talking about into legal education terms. One comment is that teachers run around thinking that law schools are products of the past. I went to Law School quite some time ago, and I learned the Socratic method and I learned legal doctrine — incredible amounts of it. Secondly, we talked about the fact that as professional law teachers, we are unaware of what lawyers actually do. Let me relate a story of my experience to illustrate why we have to resist these characteristics of legal educators if we want to teach preventive law techniques in the law school.

Fifteen years ago, I came to the University of Denver and was assigned to teach Article 9 of the Uniform Commercial Code, which I had been teaching for some years. I told myself I ought to give the students a drafting problem. That is what lawyers do. But I did not have them only draft the documents. I assigned them a client, a bank, which engaged in twenty or more transactions of a certain kind weekly. The bank did not want to hire a lawyer to supervise each and every transaction. As part of their assignment, they had to hand in a set of instructions to the bank as to how to proceed. That is where I began to learn about problems of teaching preventive law.

Let me give you one simple example. In an Article 9 transaction one has to file a financing statement, a public record of the transaction, so as to perfect the interest against that horrendous character called the trustee in bankruptcy. The debtor must be named. A lot of cases have posed the problem of the so-called "tradename" problem. Litigation teaches that if ABC Construction Company is the debtor, and that is the name used in the financing statement, it might work. If ABC Company, Inc. is a corporation it will work. If it is a d/b/a, a doing business as, that is, a tradename, it will not work.

We are all used to examining litigation and asking, "What did they do wrong?" What we should do is use the legal name or real name of the debtor. In translating litigation learning to counseling advice, more is needed. A memo goes from the bank lawyer to the bank vice president or commercial loan department and specifies "use the real name of the debtor on the financing statement." Imagine the subsequent interview between the debtor, ABC Construction Co., and the bank vice president. The bank vice president says: "My lawyer says I need your real name. What's your real name?" What happens? Parties use ABC Construction Co. What happens is that you have the same litigation on the tradename that you did before. The preventive law advice was inadequate.

I have had dialogues in my class with my students in which I tell the students that I am the vice president, and ask for advice. They tell me to "use the real name, use the legal name." But this is not enough. It is necessary to "laymenize" the counseling advice.

A lot of people say: "That's common sense and you don't teach that in a law school course. Get into the intricacies of the hypothetical lien creditor power of the bankruptcy trustee. Don't bother with details." But if you do not translate the legal tradename problem into effective advice by stating: "Mr Vice-President, you need a method to determine the individual, partnership, or corporate name of the debtor. Watch out for tradenames and do not use them on the financing statement," you will still have problems. The only way to remove the threat of litigation is to change the ways in which bank personnel operate. What tells me that effective counseling advice is not being given is that the trade name cases do not diminish over time. Clients continue to think that ABC Construction Co. is a legal name because they have a bank account in that name; it's a name registered with the city clerk under the Doing Business Under a Fictitious Name Act.

One final example. The counseling advice that lawyers are used to giving is inadequate. Standard legal texts, for example, have almost no counseling advice other than the standard, "Follow Peskind's rule." That is, file wherever a litigator might argue you should have filed. Section 9-307(2) provides that a consumer goods security interest is good unless you want perfection as against a consumer buyer from a consumer buyer. Peskind's rule would require you to file in all consumer goods transactions. I ask my students to consider advising their clients to evaluate the risk. If your client sells 1,000 television sets and you file in every case, you add $3.00 to every transaction, at a minimum. Out of those transactions arguably one percent of such transactions will result in a need for the 9-307(2) protection. In short, your client spends $3,000 to save $50. That is not good counseling advice.

Lawyers, law professors and law schools have a lot to learn. I found that out some sixteen years after assigning these drafting problems. I learned by trial and error. We need to share with our colleagues, identify the commonalities, and become more effective in preventive law

techniques. The goal is, through check lists, compliance procedures, legal audits, or, in my field, through drafting exercises and better legal skills in instructing lay clients, to avoid litigation. Thank you.

Frank R. Strong: I am Frank R. Strong, in active retirement after forty-five years of teaching law and contributing to reform in legal education.

To include instruction in preventive law as a part of formal legal training makes so much sense in itself that there is no merit in a contrary view. The problem concerns how to work such instruction into the overall law curriculum. At one time there was some support for adding a fourth year, or extending summer sessions into third semesters, but financial and other considerations led to early demise of any such solution. Computer assisted instruction during the traditional three dual semester years and post-admission supplementation have loomed as possibilities, but inherent limitations in these make it clear that they are not adequate to solve the problem of an added time dimension. In order to introduce an adequate array of instruction in private law within the established three year span clearly something has to give way. I have these three suggestions to make.

First, get rid of overlap. There is no question that overlap is to be found in many law courses. I was on the Curriculum Committee of one law school when an effort was launched to ferret out the extent of this form of double timing. Members of the faculty were asked to submit quite detailed outlines of the coverage of their courses. Only one-third cooperated; the others failed to respond to the request. The latter were protecting their assumed "right" to teach what they wanted to teach. One excuse offered for overlap is that it's a good pedagogy to afford second coverage for "important" material. This is rubbish; there is not time for this luxury in a crowded curriculum. Indulgence of overlap is significant and must go.

Second, eliminate from the courses the exhaustion of every detail of a subject matter. Teach the structure of a subject, leaving the detail to be filled in by the student. In other words, self-instruction. This is feasible if legal education is understood as an institute to instruct students in learning how to learn. Current reform in medical education offers a model. I have battled with colleagues near and far over the number of semester or quarter hours necessary for adequate teaching of Constitutional Law. This can be done in four hours of one semester if instruction is directed to basic structure rather than case by case coverage. But what has happened? The trend is rather to expand the course to five or even six semester hours in order to cover "all the decisions." A similar trend can be seen with respect to other subjects. For instance, some schools provide a second year of additional hours of Torts. This overkill is known as Advanced Torts. Fighting this nonsense unsuccessfully at North Carolina, I suggested renaming the first-year course of six semester hours as Retarded Torts. What a name, Advanced Torts! All this foolishness in the face of studies demonstrating that the human mind

cannot retain mass detail but only fundamental concepts and principles. This leads me to my third suggestion, a radical proposal that should have been put into curricular effect a hundred years ago.

Third, rid the legal curriculum which is organized by subject-matter. No more courses in Contracts, Torts, Property, Corporations, Conflicts, Constitutional Law, *ad infinitum*. Rather, follow Mortimer Adler and Robert Hutchins in the search for the great ideas. If Mortimer Adler could come up with 102 great ideas in the total field of knowledge, surely those of us in legal education should be able to identify the basic principles that underlie the legal system as we know it. Vicariousness is one idea; ultra vires another. To complete the catalogue, someone would have to go through law school a second time. You go to law school the first time, you do not learn very much. By going to law school a second time you might be able to comprehend the underlying principles of law, and that is what ought to be the heart of legal education!

Noting that the last topic on today's agenda concerns research in preventive law, I have, with this third suggestion, probably been guilty of "Frankfurterage". Felix Frankfurter never taught at Harvard Law School the course in Constitutional Law. T. R. Powell, one of the greats, the likes of which we will never see again, taught the course in Constitutional Law. However, Frankfurter was wont in his teaching of other public law courses to poach on Powell's domain. This led T. R. to exclaim on at least one occasion that "I've been guilty of lots of academic offenses, but I've never engaged in Frankfurterage." Asked to explain, he defined the offense as "spreading your own manure on another man's land".

VI. A Research and Development Agenda for Preventive Law

Morris Cohen: Dean Dauer has suggested that I touch on the history of criticism of the legal profession as a background to our discussions on the concept and practice of preventive law.

Every serious history of the legal profession in this country reveals widespread criticism of lawyers for stimulating unnecessary litigation. While the medical profession has long been subject to criticism for greed, avarice and incompetence, it is largely in recent decades that physicians have been attacked for promoting unnecessary services. Lawyers, on the other hand, in virtually all ages and places, have been accused of promoting, enlarging and prolonging disputes for their own gain. The most pervasive and recurring theme in criticism of the legal profession in America has been directed against the promotion of unnecessary litigation to the detriment of clients' interests. Those of us who have engaged in legal practice know that some clients need little encouragement in provoking controversy and bringing lawsuits, but from our earliest history the polemical literature against the bar is replete with such accusations.

It is interesting to note that many critics specifically have proposed the use of informal dispute resolution procedures and arbitration as a substitute for "going to the law." This was particularly true in those colonies where utopian ideals of a new society were the basis of settlement, and during periods of increased religious revival. By the second quarter of the 19th century, there was significant evidence of the use of alternative modes of dispute resolution. Arbitration was used in commercial disputes in the larger American cities by the 1840's as a way of avoiding the expense and delay inherent in court litigation. But such enlightened practices did not reduce the accusations of barratry and related offenses against the legal profession generally.

We are all familiar with the colorful invective of these attacks on lawyers — one of my favorites is that of Timothy Dwight against the evil of law practice, delivered to the Yale College graduating class in July 1776, just two weeks after the signing of the Declaration of Independence.

> That meanness, that infernal knavery, which multiplies needless litigations, which retards the operation of justice, which from court to court, upon the most trifling pretenses, postpones trials to glean the last emptyings of a client's pocket, for unjust fees of everlasting attendance, which artfully twists the meaning of law to the side they espouse, which seizes unwarrantable advantages from the ignorance, interests, and prejudices of a jury—you should shun.

If only Dwight could have been here at our discussions today. His disbelief might have been overcome by delight at what he heard.

I was surprised to discover, in reviewing the literature against the legal profession throughout our history, the repeated emphasis on arbitration, mediation and lay dispute settlement. An 1805 tract carried the following engaging and lengthy title: *Sampson against the Philistines: or the reformation of lawsuits and justice made cheap speedy, and brought home to everyman's door: agreeable to the principles of the ancient trial by jury before the same was innovated by judges and lawyers.* After a stinging attack on the lawyers of that time, the author proposed a detailed program for reform of the legal system based on compulsory arbitration.

Coming down to our current interest in alternative dispute resolution, an agenda for research in this field was stated by Derek Bok's widely publicized Annual Report as President of Harvard University in 1982. Speaking of new simplified methods of dispute resolution, Bok noted: "experiments may abound, but there is often no rigorous, comprehensive process for evaluating such ventures to decide which work well and under what circumstances." Bok further compared the situations in medicine and law:

> Though doctors are learning to assess the costs and benefits of medical procedures and new technologies, lawyers are not making a comparable effort to evaluate provisions for appeal, for legal representation, for adversary hearings, or for other legal safeguards to see whether they are worth in justice what

> they cost in money and delay. Exploration of the forces that encourage or inhibit litigation, so that we can better predict the rise and fall of legal activity, and perhaps reduce avoidable actions.

As to law school curricula, Bok noted that there were: "many courses in the intricacies of trial practice, appellate advocacy, litigation strategy, but few devoted to the methods of mediation and negotiation."

My own limited involvement in this field was stimulated by suggestions from Edward Dauer and Louis Brown that there was virtually no research material available in our libraries for the study of how lawyers really practiced their profession. As a law librarian, I knew that the task of compiling archives of the working papers of lawyers, for both teaching and research, had been sadly neglected.

Examining Louis Brown's 1950 *Manual on Preventive Law*, I went through its table of contents, and quickly realized that aside from the illustrative cases that he quotes in the book, there was very little in our law libraries on the areas of study and research that might be undertaken in this field. There were virtually no library or archival holdings on 20th century law practice, beyond the few published collections of lawyer's papers, usually of 18th century political figures like Adams, Hamilton, Jefferson and Madison. There was more 18th Century collections of lawyers' working papers than those for the 20th Century. Whatever teaching and research has been done has utilized sparse resources painstakingly collected and prepared by teachers. That has been much less effective and much less productive than working with the actual materials that reflect law practice as it is conducted today.

About twenty-five years ago, I was asked on short notice to supervise the moot court program at the University of Buffalo Law School. I didn't have time to prepare the proper materials for the program. As librarian, I discovered that we had a fragmented set of New York Court of Appeals records and briefs, which were about to be discarded. I distributed those appeal records to pairs of students as the basis of the moot court competition. The use of the actual, complete record, including pre-trial documentation, trial transcripts and post-trial motions, was far superior to the usual hypothetical case usually presented with a sparse, artificial record. The students, working with the actual records, were fully engaged by the material, had a lot more fun, learned more, and the quality of their briefs and arguments revealed the advantages of better preparation and motivation.

You are probably aware of some of the problems involved in collecting this sort of material today. There is the reluctance of librarians due to space problems, costs of cataloguing and indexing, and problems of limitations on access. There are problems of confidentiality and privilege, fear of client's disfavor, and the reluctance of lawyers to expose their work product to scrutiny. There has been one ethical opinion of the D. C. bar censuring a lawyer for turning over papers to a library without the consent of his client.

These problems are not insurmountable, however, and I believe that much can be done. Many law librarians have indicated a willingness to collect such material as part of a national effort. The program could begin with a study of the main problems and possible solutions. The areas of study would include:

1. A description of the types of materials which are most needed for research and teaching, and in what ways they would be used.
2. The legal and practical obstacles to collecting and providing access to lawyer's working papers and files, and the development of approaches to overcome these obstacles. The obstacles obviously include professional rules and traditions, legal restrictions, problems of library management, the difficulty of obtaining consent of clients and lawyers, etc.
3. The various storage media available for housing the material, including their costs and evaluation, the determination of the most desirable immediate and long-term approaches, and the selection of sites for initial collections, if traditional library collecting and storage seems feasible.
4. The design of the best initial system for collection, storage, and use of this material, and for the dissemination of information to potential users. This would include not only storage media, but also indexing and inventory standards, rules for access and use, methods of communication, approaches to future expansion and growth, and possible conversion to new storage forms as more advance technology is developed.
5. Estimates of the costs involved in creating the system, possible funding sources, and methods of distributing or sharing the costs involved.

It would be a large undertaking, but much interest has been expressed already, and support has been offered by a number of professional groups in law, legal history, librarianship and archival management. We hope that valuable results will follow if sufficient energy can be stimulated. Perhaps the results of our discussions here will focus more attention on an agenda for research in preventive law, and on the materials needed to pursue that agenda.

Alan Widiss: Twenty-five years ago I was very stimulated in a law school course which — if memory serves me correctly — was titled "Jurisprudence." The class, taught by Louis Brown, included an extensive unit on preventive law. I was impressed by the ideas considered in that class, as I have been by this meeting. Accordingly, I am extremely pleased to be a participant in this conference.

In order to provide you some perspective from which to view my comments and proposals, I would like to offer a few items of background information. I am a law professor at the University of Iowa, and I have been a member of the faculty there for over twenty years. I am also the chair-elect of the Alternative Dispute Resolution Committee of the American Bar Association, Torts and Insurance Section. This commit-

tee involves a "fusion" of my interests in the fields of insurance and arbitration.

Before turning to the topic I have been asked to address, I would like to make several observations which have been stimulated by the preceding presentations. First, I teach Contracts, a basic first year course. And for at least the past decade, one of the questions I have repeatedly asked students has been: "How can clients in similar commercial contexts prevent or avoid this type of problem?" Introducing this element into the classroom discussions does not require new teaching materials, and it does not take a reconceptualization of the contracts course. It merely means that a law teacher has to identify the cases which are appropriate for such a discussion and then include this type of inquiry among the questions that are posed to the students.

Second, I also teach Insurance Law. One of the preventive law teaching techniques that I use in this course is to "construct bridges" to problems and topics that students have encountered in other law school classes. Let me offer two brief illustrations. First, family law courses deal with trial separations. Even this presents insurance problems. For example, if a husband and wife have had a single motor vehicle insurance policy, unless the parties are properly counseled one of them may not have automobile insurance when they are no longer living in the same residence. Second, students may have analyzed or considered partnership agreements in a number of law school courses. There are life insurance and property insurance matters that should be considered in regard to partnerships. For example, in the event one of the partners dies, very serious problems can be avoided by the practice of preventive law through counseling the parties in regard to the acquisition of life insurance coverage for each of the partners. Life insurance benefits can be arranged so that the value of the decedent's share in the partnership can be passed to the decedent's heirs without having to liquidate the business. The point of these examples is to provide illustrations of the observation that it is possible to introduce and teach preventive law in our traditional law school courses.

Third, when I think back to my years as a law student a quarter-century ago, as well as my first years in teaching, and then look at what's going on in law schools today, I am struck by a tremendous number of differences. There was no client counseling competition then. There were no preventive law discussions in substantive law courses. Moreover, as several of the preceding presentations have indicated, law professors are now rethinking some of the basic questions about the pedagogy of legal education in ways that are likely to produce additional significant changes.

The topic that I've been asked to address today is, "What should be the Agenda for Preventive Law Research?" It seems to me that as we examine the possible agenda for research, we should bear in mind two primary objectives. First, I believe that we need a more complete and comprehensive understanding of the costs and benefits of practicing

preventive law. Second, I think we should consider possible research agenda with a view towards developing both (1) an expertise about what is necessary to practice preventive law and (2) the materials that will be needed to teach students how to practice preventive law.

Many aspects of the practice of preventive law depend on the "diagnostic" skills of the lawyer — that is, frequently the practice of preventive law requires the ability to "diagnose" the problems that may develop for a client. The attorney must be able to discern the conditions that may lead to significant problems. I believe that so long as we primarily — and perhaps exclusively — continue to teach law through the examination of legal disputes retrospectively by analyzing appellate court opinions, we are doing very little to teach students to develop the skills that lawyers need to practice preventive law.

Several of the preceding presentations have included references to the practice of medicine. I wish to make one more analogy to the medical profession in relation to suggesting an aspect of the possible agenda for research in regard to teaching preventive law. In hospitals throughout the United States, surgical procedures are subject to a post-operative review. The questions that are asked include: "Was the operation necessary?" and "Was the diagnosis correct?" Doctors, and especially surgeons, have to repeatedly confront these questions when their diagnosis and treatment are considered by a review committee. Lawyers, on the other hand, are rarely compelled to address the analogous questions that, for example, exist when a controversy results in litigation. There is little, if any, peer review of a lawyer's analysis of a problem and the appropriateness of the legal procedures employed by the attorney. Similarly, we seldom, if ever, analyze or review the work of practitioners to consider whether a lawyer who counseled a client could have foreseen possible problems and provided advice which would have led to measures that would have avoided a dispute.

I believe that the basic format and approach used for most law school classes contributes very little to developing a student's diagnostic skills. The judicial decisions and problems that comprise the teaching materials for the vast majority of law courses come "labeled": they are set forth in the context of a specific course, and within the course format there's a table of contents. Frequently, the question which a case or a problem is intended to raise or address is specifically identified by a heading or a note which precedes or follows the material in the book. Consequently, in general we allocate little effort to teaching "diagnosis."

When I started to think about the teaching of "diagnostic skills," one difference between the medical and legal professions was particularly notable. Although we have many legal specialties developing — and indeed they are now being licensed or certified in some states — there is one type of specialists that I have never heard discussed with respect to the practice of law and the legal profession. There is no specialty among lawyers that is comparable to the pathologist in the medical

profession. Among the tasks performed by pathologists is the determination whether a treating physician's diagnosis was correct on the basis of an examination of tissue removed by an operation. Although the analogy to the practice of law in regard to litigation may not be perfect, there is a notable similarity in regard to what could be done by a "legal pathologist."

I believe that one of the principal reasons why we award relatively little attention to teaching and learning the techniques of diagnosis is that we do not have the type of materials that Morris Cohen was talking about in the preceding presentation. Therefore, my first recommendation in regard to the research agenda is to develop a body of materials from which we can teach diagnosis in regard both to the analysis of possible approaches to "treatment" of existing problems, and how to recognize "symptoms" so as to avoid such problems before they arise. I believe that the compilation of such materials will constitute an important resource which will enable us both to teach about, and to implement the practice of, preventive law. The development of materials which are essential for teaching diagnostic skills may facilitate another type of learning experience that I believe is also very important in regard to preparing students to practice preventive law.

Typically, when we talk about the case method, we mean the appellate court opinion. As I read a court decision, often I am curious about aspects of the dispute that are not reflected in the opinion. When this occurs, I ask our librarians to borrow the briefs and trial court record. Unfortunately, these materials frequently do not provide the answer — that is, information that seems to me to be significant does not appear in the "official record" of the case.

Sometimes I have written to attorneys and asked them for materials from their files, and often we have found ways to overcome the confidentiality problems. Frequently, the files have been most informative. In the courses of making such requests, I have also discovered that this material generally "disappears" very quickly. Once a case is fully and completely resolved, law firms do not have a great deal of interest in preserving material in their files. Typically it is destroyed by the attorney or returned to the client who usually has little reasons to preserve the file. Sometime files are placed in "long term" storage with an instruction to destroy it after a specified date. Thus, unless libraries collect such materials, they will not exist in the twenty-first century. We will forever lose the opportunity to gain the more complete understanding of disputes that is provided by an examination of the materials included in lawyers' files. However, this is not the primary point I want to make in regard to teaching the principles and practice of preventive law.

The legal autopsy has been referred to several times at this conference. I have sent students out to perform "autopsies" by assigning them the following task: "Talk to the attorneys for both parties about a dispute that was not settled and consequently ended up in litigation, and then prepare a paper which explains why the negotiations failed." This

project is particularly appropriate for students because attorneys in practice rarely — if ever — have an opportunity to impartially examine both sides of a litigation. Once in practice, a lawyer almost always views disputes as an advocate for one or more parties involved in the case. Lawyers rarely are afforded an opportunity to examine both sides of a dispute.

It is extremely important to the practice of preventive law for lawyers to have had the experience of examining disputes from both sides. While it may be impossible to secure cooperation from enough attorneys to provide every law student with such opportunities first-hand, this experience could be attained by having students study the complete files of attorneys for both sides of selected disputes together with videotaped interviews with the lawyers and the parties to the dispute. Therefore, I propose as one facet of the research agenda the identification, collection, and organization of materials that will make it possible for students to analyze problems from the viewpoints of all parties to the dispute, rather than viewing cases only through the "distillation" presented in an appellate court opinion or even by the record of the case together with the appellate briefs. I believe that this type of educational experience can contribute significantly to educating law students about the avoidance and settlement of controversies, which — at least in my view — should be one of the important aspects of practicing preventive law.

A third aspect of the research agenda that I would like to propose involves developing materials that will facilitate a thorough cost/benefit analysis of preventive law practices. As several of the panelists in the course of today's discussion have pointed out, preventive law ultimately will flourish or wither because it is or it is not cost effective. I believe it can be shown to be very cost effective. Perhaps it is my work in the insurance area which leads me to believe that this conclusion will be justified by research.

We typically think of insurance as a transaction in which a premium is paid so that in the event a loss occurs, there is resource to call upon to provide indemnification. That characterization is true for many types of insurance which are sold in this country. It is, however, not descriptive of every type of insurance. For example, in the area of boiler insurance, historically ninety percent of the premium dollar was allocated to developing better designs for boilers and to the inspection of boilers. In other words, the insurance dollar was primarily used to avoid losses, rather than to indemnify insureds after a loss. The same approach applied to dental insurance.

Dental insurance programs are most cost effective when the system is designed so that each individual is encouraged to have preventive dental care — that is, when a significant portion of the insurance dollars are allocated to prevention. This usually means that the insurance plan must provide for a program of semi-annual dental care that includes a checkup and a cleaning for everyone who is covered. When we were looking at the proposals for a dental insurance program at the Univer-

sity of Iowa and one of my colleagues from the business school heard this, he said "It's not insurance." He added: "You don't have an insurance plan when you are cycling dollars for prevention and you know that if you take in $100, $85 is going to have to go back out to pay for regular dental checkups and semi-annual teeth cleaning." Yet for dental insurance, without such a flow of dollars to encourage preventive dental care, small problems go undetected and develop into conditions that result in major expenses. Thus, experience has shown that everyone's interests are served by "funnelling" dollars to encourage or even require preventive dental care by each insured. Experience with other insurance coverages has also demonstrated the cost effectiveness of such preventive actions.

There are many types of human activities where experience has shown that preventive actions are cost effective. Some of the practicing attorneys at this conference have suggested that preventive actions are cost effective, and that preventive law practices *are* cost effective. However, for the most part, we are still at the level of "assertion" rather than proof. I believe the research agenda for preventive law should include an analysis of legal problems with a view of demonstrating the economic value of preventive "legal care." And I hope that one of the missions of this Center will be to provide support for conceiving and executing research which will show that preventive law practices can be cost effective for clients.

Edward Dauer: Not long ago, two professors of something-or-other at a major research university were overheard arguing about an idea which one of them had and which the other was roundly criticizing. The proponent of the idea pointed out that actual field experience had clearly confirmed the soundness of his views, to which the critic replied, with some exasperation, "Well it may work in practice, but it'll never work in theory!"

Preventive law — to be precise we should call it preventive *lawyering* — is something like that just now. It works in practice, but it has not yet been sufficiently described in theory. That is an important point, and not a point of interest just to us wooly-haired academics. It has rather a large practical bearing on the usefulness and accessibility of the information now becoming available to practitioners of the field. The point can be illustrated — as we law professors are prone to do — with a hypothetical case. A company in the machine-tool industry, let us suppose, has developed a program for the prevention of products liability losses. Among the program's elements are a design review process, accident awareness considerations wrought into customer relations and marketing, a novel system of hazard warnings, and an accident-analysis feedback loop. The process seems to be successful; descriptions of it are written and made available to other companies. "Sharing the experience," to misuse the popular California phrase, in this way is important. Without it the same wheels would be reinvented over and over again by other companies in the industry, a "dis-economy" that benefits no one.

But now consider the manufacturer of a different kind of product — critical-care medical devices, for example — products like anesthesia regulators, heart-lung machines, dialysis units. How might that company actually utilize the description of the machine-tool maker's system, to reduce its own portfolio of products liability expense? Replicating its elements exactly into this different context probably will not work very well. Accidental injuries are, after all, products not only of the characteristics of the offending machine, but also of the environment in which it is used. Injuries from machine tools happen to the people who operate the product; injuries from medical devices happen (if you will pardon the pun) to those whom the products operate upon. (Thus, for example, the *legal* effectiveness of a particular hazard warning system may vary considerably from the one context to the other.) The potentials for controlling those misuses of the product which otherwise might turn design "defects" into lawsuits are also very different. Do these differences matter? Are there other differences which might? Hint: They do, and there are. If a preventive law strategy is therefore to be *adapted*, as it must be, from one setting to another, it is necessary, when thinking about what to take as is and what to change, to have an understanding of *why* and *how* the original design worked in the original context: to have, in other words, a *theory* of at least that aspect of preventive law.

Good and useful theories are assembled from collections of individual observations: here are twenty or thirty products liability prevention systems actually field-tested by a variety of companies. The ones in this pile worked. The others, over in this pile, did not. What are the common denominators of success, the *general principles* out of which new particular applications can be crafted? Collecting and sharing the experiences is a critical beginning. Turning the collection into useful theories is the equally practical and equally necessary next step.

Products liability prevention is not an isolated example. The point is just as valid for legal audits, regulatory compliance exercises, dispute incentive reviews and each of the many other techniques which comprise this growing field. The practice of preventive law needs a set of theories of preventive law.

Analogies are occasionally helpful. Some of us in thinking about preventive law have found analogies to preventive medicine to be useful, not because we lawyers need to emulate our physician friends, but because our operating predicates are similar to theirs and therefore comparisons to a more familiar and more well-developed field might illuminate opportunities we could otherwise miss. (Preventive law *is* less well-developed than preventive medicine is.) Hence we speak of such notions as legal autopsies (litigation audits), periodic checkups (corporate legal audits) and the early diagnosis of nonsymptomatic "disease." The preventive law/preventive medicine analogy should therefore also be useful in our thinking about a research agenda for preventive law.

The practice and theory of preventive medicine are built on the

principles of three disciplines: epidemiology, prophylaxis and public health.

Epidemiology is the study of the origins and causes of disease. It logically precedes prophylaxis — the processes of preventing disease — for a fundamental reason which is, in law, sometimes overlooked. Without knowing where disputes actually come from, we cannot design a system which will effectively prevent them. Consider, for example, a corporation which seeks to reduce the expense and disruption of EEO complaints brought by or on behalf of its employees. It is a relatively straightforward matter to design, and (what is often a little harder) to implement an EEO compliance system which will not only guard against inadvertent acts of discrimination, but which will also create the records necessary to support a successful defense when litigation does arise.

No trick to that. But that is only half of what good preventive lawyering is about. Once a problem is voiced as a claim of legal right, much of the trouble it generates is irreducible, even if its prosecution is entirely meritless. Thus, the other half is preventing the dispute from arising in the first place. To accomplish that we need, first, an epidemiological theory: where do EEO disputes come from? Interestingly enough, they do not always begin with acts of even arguable discrimination. The data we have suggests that they often come from the same place — physicians would say they have the same "vectors" — as certain strains of OSHA troubles do, and as other employment standards complaints do. Namely, from people who feel themselves aggrieved by something someone else in the corporation has done to them or about them, and who perceive no effective means of redress other than to package what is not in fact a discrimination complaint into the legally cognizable clothing of EEO.

One remedy for malaria is quinine. Often a better strategy is to drain the swamps where mosquitos breed. This is a lesson which the banking industry learned in an expensive way during the late 1960's and early 1970's, when the bringing of Truth-in-Lending suits seemed to be as popular a consumer pastime as stickball. Some banks responded with a combination of litigation postures and redrafting — sometimes many times over — their Regulation Z disclosure forms. That was a perfectly logical legal response but it did not do as much practical good as the lawyers would have liked. Other banks analyzed their litigation portfolios as if they were the symptoms, or consequences, of causal factors a layer down, as well as being problems in themselves, and in the process learned about a linkage between the recruitment of TIL claims and the ways in which delinquent retail accounts were handled at the level of the branch. The solution was not then to take a dive on every workout, but rather to recognize that there were business judgments to be made about whether the quinine would cost more or less than draining the swamp would. The outcomes were in many cases much better for having been informed by analysis of the causes.

We are now discovering something very similar about medical mal-

practice. It has been convincingly established that the origin of a fair portion of all malpractice claims is not the injury (or disappointing medical outcome) itself, but rather the remoteness (or absence) of a professional relationship which satisfies the patient's emotional needs and personal expectations. That finding is proving to be a very useful piece of a general theory.

The results of these separate "epidemiological" insights comprise, when taken together, useful theories about the origins of legal troubles. Some of them may be hard to believe at first glance; but then, until Van Leeuwenhoek invented the microscope no one believed that disease came from microbes rather than from an angry God. The building of causal theories out of empirical observations has proven to be, in law as in medicine, a useful alternative to celestial supplication.

Epidemiology, as preventive medicine employs it, is partly analytical and partly statistical; until we understand all of the elements of a causal chain, correlations have to do. Everyone reading this article, I suspect, has some familiarity with the "statistical risk factors" in the etiology of coronary artery disease, and with the relationship between statistical studies and the promulgation of preventive advice.

Physicians have large bodies of data from which *theories* about causal correlations can be gleaned, because, unlike lawyers, they do their work in institutions which deliberately collect such information from individual practitioners in normal course. Few if any individual physicians have sufficiently deep and broad experience to build valid general theories from their client base alone. The sharing of nonconfidential data with others in the profession has therefore been a strong theme in the culture of medical practice for as long as prevention has been. We lawyers need to develop some such institutions, and perhaps a dose of that aspect of the professional culture as part of our own R & D agenda. No shared observations to study means no useful theories to grow on.

There is a significant body of methodological literature in preventive medicine. It covers not only the biological and chemical sciences, but the behavioral and the social sciences as well. Medicine takes the need for broadly-gauged causal studies very seriously, and believes that the origins of disease — like the origins of legal claims — often reside in patterns of human behavior as well as in the Latinesque crannies of the profession's "harder" science. All physicians are to some degree social scientists as well as scientific practitioners.

Law has not yet developed its own epidemiological methodology. But lawyers can similarly be social scientists, easily well enough to contribute to the building of our own theories about the causes of litigation and legal conflict. In fact, we already do it, all the time, without necessarily thinking about it systematically. Every well-planned transaction is based upon predictions not just of what courts will do, but of what people will do, and of how their future perceptions may be translated into legal forms of action. That crystal ball gazing is nothing if it is not the derivation of particularized predictions, drawn from a more general the-

ory about human behavior. The R & D agenda of preventive law, however, must be broader in its ambition than what any one of us can achieve alone.

Where then, do we go from here? First, we need to gather lots of data, about experiments that worked and experiments that failed. Second, we need to develop sound methods for analyzing it all. And third, we must take seriously the commitment to search for mosquitoes as well as for quinine, for useful theories of the organizational determinants of legal dispute.

Prophylaxis, preventive medicine's second major element, is the process by which trouble is prevented, by which the transmission of disease is interrupted or rendered ineffective. It is, as I have been arguing, inefficient unless it is based upon an adequate understanding of the "vectors" of the troubles to be avoided, because only with that knowledge can sound practical judgments be made about the cost-effectiveness of alternative prophylactic strategies. As one medical text points out, it is vastly cheaper for the patient to sleep on the second floor, where mosquitos seldom fly, than for the physician to keep the patient's blood in a state of constant alkalosis, even though the latter is by far the professionally sexier thing to do.

In discussing the prevention of personal injuries — a matter of some interest to both professions — one physician has suggested the following menu of generalized options. Some of them have intriguing legal analogues:

Prevent the cause from coming about. ("Human factors" engineering in product design.)
Prevent the cause from acting. (Post-sale monitoring of field use.)
Constrain the causal act in time and place. (Notice requirements.)
Impose barriers to the injury. (Include mandatory ADR clauses in sales contracts.)
Raise injury thresholds. (Warranty limitations and indemnity agreements.)
Optimize emergency care. (Any ideas?)
Maximize rehabilitation. (Well, every analogy has its limits.)

The point is not that this list is particularly good, or bad or even relevant. It is, rather, to suggest that for any given disease there will likely be a range of different preventives to choose from. Some will work better than others. Some, given at the wrong time in the wrong dosage, may prevent the disease but kill the patient. How are we to choose? In a word, counseling.

I must mention a related point. When I came across this in my reading of a preventive medicine text, I was struck by the power of its simplicity. It has to do with how professionals categorize things. From the point of view of *treatment*, squamous cell carcinoma is best classified as a cancer. From the point of view of *prevention*, it is best classified as a disease caused by smoking. If the preventive analysis hews to the classifications of the curative, it may not get very far.

My friend and collaborator, Louis Brown, once told me about a client who wanted a special class of common stock for his closely-held corporation, one that would afford its holder full participation in some aspects of the enterprise but not in others. I would guess that would have been easy enough for Louis to create, if he had classified the problem as one of corporations or securities law. What the client was asking for, however, was not the problem. It was the solution to a problem that lay deeper. The client had an adult son who was the cause of certain difficulties, which the client thought would be ameliorated by bringing him into the business (but not allowing him to exercise any control over the business' fundamental affairs). Once that was identified as the problem — and the securities device as only one possible solution — a world of other possibilities opened up, most of which had nothing to do with corporations law or common stock.

The successful outcome in that case came not from some rule of substantive law, but from the technique of client counseling. Counseling is something good lawyers learn experimentally and do instinctively. Poor lawyers do not do it at all, and the rest of us do it at best unsystematically. Yet preventive lawyers demands a focus not on the legal forms of facts that have already happened, but on the aspirations and factual constraints of the client. Instinctive methods of counseling may not be enough as our preventive pharmacopeia develops. There is nothing "soft" about effective counseling. It is an area of professional skill as open to development through applied research as any other. Who needs a doctor with forty different pills but no client-centered theory with which to choose among them?

The third and final run at the preventive medicine analogy concerns "public health." That is a very broad area, which means essentially the procedures by which the benefits of epidemiological and prophylactic studies can be brought to the client population in *acceptable* ways . . . to a population which as often as not does not think it needs it.

One of the problems of preventive anything is that it addresses matters that are not obvious, risks of diseases with no current pains, incipient legal problems (or foregone opportunities) that have not yet given rise to a perceived loss or to the assertion of a claim by someone else. How do we get nonsymptomatic clients to take advantage of preventive legal services? Medicine does it by brute force. From 1946 until 1953, for example, patients admitted to hospitals for anything at all were subjected to TB screening through chest X-rays. Few doctors then or now will treat a problem solely as *you* have defined it without doing at least some screening for other nonsymptomatic things. And many HMOs have created strong financial incentives for periodic preventive care.

For another thing, litigation — for the plaintiff anyway — creates a fund from which the lawyers' fees can be paid. (Litigation defense has something of the same psychological "advantage," in that the client can compare the concrete fee with the concrete judgment he might otherwise suffer.) But preventive lawyering creates no such obvious fund, and

to prove that it is a wiser investment than waiting for the disease to erupt is often to prove a negative, something even lawyers have trouble doing.

Part of the problem is that we do in fact reinvent wheels, and the diseconomies of doing so affect the costs of our ministrations. Even in legal audits, the preventive law device most well advanced, we have only begun to create replicable procedures, audit techniques that do not have to be built from scratch for each company and each topical area. While a machine-tool company cannot just apply as is the audit instruments of an anesthesia company, neither must the machine tool folks design their own procedures as if none had ever existed elsewhere. Again, the key point is the idea of the useful theory; a collection of general principles, of how and why preventive strategies work, which can be adapted to new contexts, efficiently enough for the economic value of the service to be maximized and to become obvious. This is an avenue of important R & D: fashioning our discoveries into less expensive and sweeter medicines. If we can let this law-to-medicine analogy take one final, probably self-destructive leap, it would be to suggest that our clients still take what we do pretty much as an unnecessary injection in the gluteus. For their sake we need to change that.

None of this comparing and analogizing should be taken as a naive lionization of another learned profession, nor as a suggestion that preventive law must take its form from its medical namesake. Preventive law will develop its own intrinsic techniques and methodologies in time. At the moment, however, it is a body of useful practice much in need of supporting theory. For ideas about how the necessary research and development work might be conceived, it seems fair to search for likely analogues.

Whether the analogy is apt is ultimately not important. What it demonstrates, however, is. Preventive law is an effective mode of lawyering. Its development beyond its present state will require, in addition to continued experimentation, efforts at theoretical understanding; R & D ventures which will enhance our professional abilities to plumb the real sources of avoidable legal conflict; to fashion optimal strategies for its containment, and to do so in a way that our clients can accept.