PREVENTIVE LAW AND CREATIVE PROBLEM SOLVING:
MULTI-DIMENSIONAL LAWYERING

By Thomas D. Barton and James M. Cooper

Lawyers are typically regarded, and regard themselves, along only one dimension: the **Fighter** who advocates zealously toward vindicating the violated rights of a client. The aim of California Western School of Law, its Louis M. Brown Program in Preventive Law, and its McGill Center for Creative Problem Solving, is to explore and promote two other dimensions of lawyering: the **Problem Solver** and the **Designer**.

The Fighter uses and responds to power: the power of the State, the power of legal rules, and the power of a just cause strongly advocated. The Fighter's power flows from on high, down through a structured vertical system that, in its upper reaches, transcends every individual. The legal system is majestic: it permits itself to be summoned and used by those who understand its operation, speaking properly the language of authority, rights, and rules. Access to the power of the legal system, however, is carefully guarded within its hierarchical structure. As each higher rung of the judicial ladder is reached the power is greater *but so is its formality and its remoteness from those whose problems it is meant to resolve.*

The rule-oriented legal centralism of traditional legal thinking is expressed in its typical patterns of problem solving. The facts are transformed into "legal facts" in order to apply legal rules to them. Matti Rudanko

Lawyers as Fighters operate on a *vertical* plane and in a *rewind* mode: up, down, and backward. They do not often look sideways, at ground level to the people who experience legal problems or to the social, financial and organizational environments in which those people live. Fighters also do not often look ahead, to imagine the consequences of solving problems through adversarial procedures or toward interventions that could prevent a recurrence of the problem. Instead, fighters tend to look up, finding lofty principles of law or rules defined by higher authorities. They also look down, digging deep to uncover facts and basic elements. Finally, they frequently look back, because "legal problems" are often defined as historical events, the breach of some rule or right.

The Fighter mentality is reinforced by the structure of litigation procedures, which squeeze human problems into legal molds. Litigation is devoted to finding the single right answer about who did what when, and to whom, and whether that behavior was legally actionable. The Fighter puts together a case by "rewinding the tape," i.e., reconstructing the events that give rise to liability. Formal pleadings and the expert, precedent-following quality of legal argument are scrupulously devoted toward reaching a precise, reliable result based on these events. Rewinding the historical tape of events and behaviors accurately is thus crucial, both to supplying victory for the Fighter and to supplying legitimacy to a court judgment that ultimately must affix blame to one party.

Some problems, especially those that derive from the oppressive actions of people who want to dominate others, are indeed best resolved through Fighter skills and Fighter procedures. For certain problems that symbolize the crucial values of public life, public pronouncement by the courts of binding rules and their clear enforcement by the state are most valuable. In a liberal democracy we will always

need the Fighter, and lawyers must continue to be trained to exercise traditional litigation and oral advocacy skills.

Other problems, however, can be prevented altogether by lawyers who operate in a *fast forward* rather than rewind mode, designing environments and facilitating relationships that are less conflictual or problem-producing. Other problems may unavoidably erupt into visible conflict. Rather than resorting to litigation, they may be better resolved using legal procedures that are more *horizontal* than vertical, and in a culture of *supportive accountability* rather than blame. Lawyers who can operate preventively and creatively are Designers and Problem Solvers. They achieve these capabilities by stressing honest communication with their clients, depth of understanding of differing interests and the soft spots or tension points along which problems arise, and a willingness to be proactive in restructuring the parties' relationships and environments.

> **Our present system has been assembled, not designed. It is in too many respects reactive rather than creative. We must recognize this as a situation which we can no longer tolerate in a society grounded in the rule of law.** Thomas H. Gonser & Forrest S. Mosten

Inside these pages we first locate the origins and dominance of the Fighter, a necessary yet ultimately limiting role. We then begin a journey toward conceiving and constructing additional roles: the multi-dimensional lawyer. We walk around this lawyer, describing the contours as we go. We hope to convince the reader that the trip is worthy. Before we begin, we want to thank those who have equipped us with appropriate roadmaps and compasses. Thanks especially to Louis M. Brown, the Father of Preventive Law, for discerning the need; to Hermione Brown, Harold Brown, and John and

Libby Drinko whose generosity have made the search possible; and to Steve Smith, Murray Galinson, Ed Dauer, and dozens others who have inspired and challenged the path.

I. UNDERSTANDING THE NEED FOR THE MULTI-DIMENSIONAL LAWYER: The Evolution of Legal Procedures and Lawyering

Most lawyer think of themselves as Fighters. How did that evolve? More importantly, how may lawyers come to think of themselves as Designers and Problem Solvers as well as Fighters?

The Fighter mentality developed over centuries. It unfolded naturally from several influences: First, from the primary *function* that law was seen historically to serve in society; second, from the *structures* of the legal system put in place to carry out that function; third, from the *skills* that lawyers developed to represent their clients effectively within those structures; and finally from the *mentality* that lawyers developed from exercising those skills on a daily basis.

Only in the past couple of decades have the faint outlines of the Problem Solver and Designer been visible. To make those roles as significant to law as the Fighter, we need to reverse the process by which the Fighter became dominant. A new, expanded mentality about the role of the lawyer is needed, along with the skills that will enable lawyers to act as Designers and Problem Solvers. As new skills emerge in new spaces, legal structures will also change: new procedures for dealing with human problems will be adopted. Finally, as legal structures change, the law will be seen by lawyers and the general public as serving new functions.

The Functions of Law

Law has always had to balance two opposing tasks: first, *to protect individuals* from other people who may be violent or manipulative; and second, *to facilitate human interaction and purpose*. This tension in the primary purpose of the legal system has a long history. Philosopher John Locke dreamed of securing order through facilitating trade and other forms of social interaction. Thomas Hobbes, however, stressed the need for protection. For Hobbes, order could not emerge spontaneously, through peaceable interactions within the community. Absent strong state powers, society would degenerate into a chaotic war of all against all, producing lives that were nasty, brutish, and short.

Hobbesian dread prevailed in the design of legal procedures. Legal process made certain that citizens would be protected from one another, exercising whatever power was necessary to secure order. Hobbes's Leviathan, the state as biblical sea monster, was born. Power, not cooperation, shaped legal procedures. Blame, not environmental reconstruction, captured legal rhetoric.

The Structures of Law

Yet Hobbes despised his own creation, and so did the judges of our Common Law and the designers of our Constitution. They tried at least to ensure that the power of laws and legal procedures would not be arbitrary or crushing of human potential. They demanded a legal system that produced strong substantive rules and clear answers to disputes. These rules not only informed the public about

the constraints on citizens' behavior, but simultaneously limited the power of the judiciary. The legal system constructed careful, regular procedures that aimed toward accuracy. In turn, these legal procedures gained legitimacy through the idea that on the same facts, judges would rule alike. At the trial level, the rules of evidence worked toward this goal of consistency. Appellate courts offered a second look at a trial decision, making sure that it did not deviate too far from what other courts had done.

The legal system needed to display and use power, but the power needed to be administered reliably. Strong rules with clear answers was one way to get both power and reliability. Another way was through procedures that promoted consistency. Yet another way was through the adversary system. Having lawyers make opposing arguments worked to clarify and elaborate the rules, even while it made legal decisions more transparent and objective.

The Skills of Lawyers

The message sent to lawyers was unmistakable: success depends on basing arguments on abstract, universally-applied rules. Success requires strong advocacy of an uncompromising vision of one version of the facts. Neither the substance of the argument, nor its presentation, nor the decisional process turn on cooperation or the give and take of human relationships. Traditional legal rules and procedures favor clarity and precision, achieved through strong adversarial advocacy.

Preventive law has emphasized the need to find out individual needs and wishes of clients and to be creative to be able to fulfill them. These tasks demand skills.
Soile Pohjonen

The Legal Mentality

Legal rules and traditional procedures also work through dominance. This is not to say that the power of the law is cruel or unjustified, or even that it is unnecessary. Securing the rule of law represents one of the most significant achievements in human history. There are indeed forces of danger that threaten our liberty or property, forces that may listen to no other language than power and force. But this truth must also be faced: the law's authority was, and to some extent still is, based in the domination of state-backed rules. The party favored under the rules could invoke the vast powers of the legal system to vindicate the rightness of that position. Seeking uncompromising victory not only enriched the prevailing party; it also contributed to the rule of law and the evolution of our legal system. The Fighter was seemingly not only successful, but a patriot.

Conceiving and Constructing New Dimensions

Practicing preventive law requires a lawyer to reorient his mindset from crisis management to crisis prevention. Although it is a simple concept, it is often difficult to implement. A lawyer's education is geared toward crisis management, rather than crisis prevention.
Michael Goldblatt, Robert Hardaway & Robert Scranton

As the traditional legal system has evolved, however, what has happened to that alternative function in tension with human protection–*the function of facilitating human interaction and purpose?* Clearly that function has never completely gone away. Having clear rules, reliably enforced, will smooth the path for social interchange. Contract, Property, even Tort law function to facilitate as well as to protect. Yet the structures of legal procedures, the skills of lawyers, and the mentalities associated with the law too often neglect this other function of facilitating human purposes.

Yet pressures to expand from traditional structures and functions are growing. First, the judiciary is underfunded and struggles with an unmanageable docket even while access to justice is difficult for the middle class. We should keep in mind, however, that one important source of this expense and clogging is the court's own reactive and backward-looking procedures. As we explored above, litigation procedures require extensive investigation of historical fact, which are preconditions to measuring the litigants' behaviors against legal rules, which in turn are preconditions to affixing blame and liability on one party.

The second pressure that is growing on litigation is that its vertical procedures limit the participation of problem holders in the assessment, presentation, or resolution of their own problems. Cultural values in the West, and especially in America, have gradually favored more direct, inclusive communication of problems. The third pressure is closely related: solutions based on affixing blame are seen as less productive and less psychologically damaging than solutions in which mentalities, relationships, or physical environments are adjusted so as to prevent recurrence of the problem. A culture of supportive accountability is emerging that transcends the culture of blame. Finally, new

conceptions of truth are unfolding that require openness to the differences in people's positions, rather than homogenizing people's perspectives and ignoring social context.

Preventive law has an important role in both broadening legal theory and spreading good legal practices. Soile Nysten-Haarala

New, more accommodative legal procedures are now being devised . Traditional legal processes must continue to be strengthened by these emerging structures: mediation, conciliation, arbitration, court-ordered settlement, and other hybrid procedures short of litigation. Further, altogether new problem solving procedures that are more participatory, more *horizontal*, need to be developed and implemented.

As these new procedures proliferate in the legal system, new lawyer skills are required to serve their clients effectively: better communication; more comprehensive understanding of the social, relational, financial, or emotional contexts of problems and the connections among people that influence those contexts; better insight into the environmental or personal changes that will prevent a problem from recurring; and the ability to get needed changes implemented.

The move to multi-dimensional lawyering thus requires simultaneous reform of legal procedures and the development of new lawyer skills. Lawyers need to act differently. To act differently, they must think differently.

This is the place to begin: with a new mentality for lawyers and the public about the possibilities

in law for securing human interaction and fulfillment in solving problems. To make that new mentality real, lawyers must develop new skills of listening, of identifying interests, of framing and investigating problems, and of finding solution systems that offer mutual gain. As lawyers use these new skills, new legal structures will evolve around them. When that happens, the law will have re-invigorated its historical function of helping to secure human goals.

Encouraging signs of these needed reforms can already be seen in both law schools and courtrooms. If their meanings can be clarified, their unfolding will be hastened. Eventually, lawyers may feel as comfortable and skilled with the Designer and Problem Solver roles as they traditionally feel with the Fighter role.

II. BEGINNING THE TRANSITION: Moving from Vertical to Horizontal Lawyering

Vertical lawyering–advocating rights and vindicating legal rules–is essential to the rule of law. Yet its adversarial, reactive, power-based style promotes the creation of bipolar narratives that will sway the judge, a neutral stranger. Parties do not work together to solve their own problems. Instead, they turn to others–experts, hired guns, mouthpieces, to fight for a judgment that will typically choose a winner and a loser.

Winner-take-all litigation is based on competing versions of legal rights and legal rules–concepts and duties that hover above the interests, relationships, and emotions of the parties. To be effective, the Fighter must focus higher than those interests, on the rules floating above client interests. That, indeed, is how Fighters are taught. Fighters in training spar with appellate cases, working with the logic and

broad public policies underlying denatured rules and principles. They do not sit on their corner stools and listen to client problems.

> **[O]ver the years, we get to know our clients, we try to advise them with objectivity after diligent probing of their true wishes, even though the immediate question posed may not disclose it. This may involve dissuading them from practices we deem unethical, or encouraging them to adopt techniques which will adapt to, or take advantage of, changes in the law, in their profession and in the world at large.** Hermione Brown

Analytical skill, not fighting, is the underlying goal of legal education. Yet in its almost constant use of appellate cases as a device to train that analytical skill, the Fighter mentality is a frequent consequence. Legal education in the Twentieth Century sought to recreate in the social, normative world that same expansion of human understanding and control that the scientific method had achieved in the physical world. Appellate decisions are scrutinized carefully and objectively. Each case is taken apart, element by element, stripped of social context in a quest to uncover the kernel of legal rule or principle that could make the decision of the case consistent with others in a given area of law. The search itself was valuable–paring away all that which was legally irrelevant and then examining the pure rule under the microscope.

> **Traditional scientific way of thinking reflects a person who is seeking safety and certainty. The methods of problem solving are limited and ready-made which means that as one is solely following the rules there is in principal not much personal responsibility. If one wants to imagine that one is completely in control, one has to imagine that reality is simple enough to be totally recognised.** Soile Pohjonen

We should ... reexamine that aspect of our professional culture which views disputes as inherently requiring a "winner/loser" outcome, as opposed to other conciliatory options which seek to adjust differences between parties in a less hostile context. Thomas H. Gonser & Forrest S. Mosten

Human disputes were understood by reducing them, and disinfecting them from emotions that threatened to cloud the principles. "Hard cases," it was said, "makes bad law." "Good law" by default is understood from a vantage point that transcends whatever human circumstance may make a case "hard."

One might expect the question "Does it work?" be the most important in developing methods for human co-operation. That has, however, not been the starting point in science. Soile Pohjonen

Furthermore, cases are always punctuated by a "v" as in *Palsgraf v. Long Island Railroad*. It is always about someone versus someone else. Given the way lawyers learn law, it is not surprising that the lawyer's role as Fighter is ingrained.

But lawyers are more than Fighters. We can operate horizontally as well as vertically, as social architects providing the legal infrastructure for civil society's relations, inside and outside of court. Being "horizontal" in the formal legal system means attempting to make problem resolution more participatory for those who actually have the problem, concerned less with formal rules and expert vocabulary and concerned more with consent and negotiation among disputants who speak directly to

one another and to legal officials using their own words and concepts.

Lawyers must be trained to provide our clients with creative mechanisms for conflict resolution – not just courtroom briefs and arguments. Most problems are solved outside of court. Some ninety-five percent of civil cases are settled before getting a court judgment. An overwhelming number of criminal cases are plea-bargained. We must understand that by providing our clients with only our Fighter dimension, we might be shortchanging them. In addition to fighting, we can solve problems and we can design solutions preventively. One way to begin that process is to imagine more horizontal approaches to resolving legal problems.

It's no secret that our entire methodology for the administration of Justice has been under increasing strain. Staggering volumes of litigation have led to congestion in courthouses at all levels. Even the most deserving civil remedies sometimes must wait for years to achieve resolution in the courts, with the stresses and costs of litigation often rendering even a complete "win" a shallow victory at best. Thomas H. Gonser & Forrest S. Mosten

Law should not be diminished into studies of court cases. Even if cases are important for lawyers in courtrooms, legal thinking should not rest only on rules, which are drawn from the rare cases, which end up into courts. General rules should not be drawn up on the basis of these marginal cases. The ordinary application of law, which does not produce court cases, should not be excluded from legal studies. Soili Nysten-Haarla

A number of horizontal mechanisms have been developed. Three of these–Peacemaking Sessions, Problem Solving Courts, and Youth Courts–are described below. These new structures must be studied, and, where appropriate, their processes duplicated for use in other contexts.

Peacemaking Sessions

The Navajo have, since time immemorial, used peacemaking as a means of resolving disputes. The Navajo peacemaking program operates under the auspices of the Navajo Nation Supreme Court. Although most crimes are adjudicated in a Western style, some crimes are dealt with outside the Western accusatorial/blame mode.

In peacemaking, a thoughtful and attentive examination of each aspect of a given problem is provided to reach conclusions about how best to resolve the problem. The traditional concept of

Navajo justice is based upon discussion, consensus, relative need, and healing.[1] The mechanism is horizontal to its core, with constituents participating in a circle and each having a right to speak their respective truths. There is no hierarchy, for no person is above another person. Navajo peacemaking pronounces no judgment or blame. Instead, it provides a framework of supportive accountability and connection. It can transform the participants involved and not just the defendant in a criminal case.

In the more vertical model of Western justice, authority is elevated to a clear decision maker: the judge or panel of judges, an umpire, an arbitrator. A horizontal justice system, by contrast, is often portrayed as a circle. There is no judge to whom to appeal, nor is there a defendant below who is the subject of judgment. Each person on the line of a circle looks to the same center as the focus. The circle is symbolic, an unbroken celebration of unity, harmony and interconnectedness.[2]

Aboriginal cultures have dispute resolution mechanisms that are not forms of Alternative Dispute Resolution (ADR), but are "Original Dispute Resolution" (ODR). Long before the Europeans imposed their laws, there were alternative systems of problem solving and means by which a community's participants could plan for future generations. Peacemaking decentralizes power, encourages participation, and attempts to fashion solution systems that all the stakeholders can embrace. Those of us steeped in the vertical Western justice system of resolving disputes can learn much about procedures from these more organic forms of conflict management.

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[1] *See* Robert Yazzie, *"Hozho Nahasdlii"-We Are Now In Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, (1996).

[2] *See* Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).

Problem Solving Courts in the United States

Problem solving courts offer another example of how more horizontal justice principles can be integrated into existing vertical judicial institutions. Drug treatment courts, for example, provide for close monitoring of and immediate response to behavior, and employ a multi-disciplinary approach to solving the problem of addiction through ongoing judicial intervention. By collaborating with community-based organizations, governmental agencies, and faith groups, the defendants enjoy an atmosphere of supportive accountability and an opportunity for self-determination. Instead of separating constituencies, problem solving courts recognize the interconnectivity of social problems, criminal law and family dysfunction and bring together stakeholders to create solutions.

Given the increasing workload of the judiciary in the United States, it is not surprising that some judges' associations are increasingly supportive of more innovative means to deal with the pathologies of the defendants appearing before them. In August 2000, the U.S. Conference of Chief Justices and the Conference of State Court Administrators adopted a resolution agreeing in part to:

> [e]ncourage, where appropriate, the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims and the community.[3]

By so declaring, all 50 State Chief Justice and 50 State Court Administrators committed

[3] CCJ Resolution 22, COSCA Resolution 4. Adopted as Proposed by the Task Force on Therapeutic Justice of the Conference of Chief Justices in Rapid City, South Dakota at the 52nd Annual Meeting on August 3, 2000.

themselves and the administration of justice behind the problem-solving, therapeutic forums of dispute resolution. As a result, there exists an unprecedented opportunity to transition toward effective, transparent and accountable rehabilitation based court systems.

By integrating treatment services with judicial case proceedings, drug treatment courts are often viewed as models for problem-solving courts. With the fast pace of drug addiction and the war on drugs being waged internationally, more and more drug offenders are coming before the judicial system. Drug court focuses on non-violent drug offenders who want to participate in their rehabilitation. The drug treatment court builds a bridge between the criminalization and legalization of drug-using. By working with and connecting to other parts of civil society invested in finding solutions to drug addiction on our streets and in our homes, judges are working to solve the problems that force the endless cycling of defendants through the criminal justice system.

A unified family and juvenile court must provide a broad array of effective services for the families and children over whom the court presides. Such services are usually best delivered in the local community with the cooperation of the public and private agencies. Examples are mediation services, visitation centers, CASA volunteers, a close working relationship with the local bar, child interview centers, substance abuse treatment including a juvenile drug court, domestic violence intervention, divorce education and comprehensive services for juveniles. The very existence of a unified court will encourage such services, as families with very similar problems and needs will appear on the different calendars being heard by the judges. The very same services are often needed regardless of the kind of case before the court. Michael Town

Youth (peer) Courts

Youth Court is yet another example of a problem-solving court that integrates horizontal justice principles in a preventive way. Youth Court provides nonviolent juvenile offenders an opportunity to avoid incarceration by committing to a rehabilitation program. In exchange for a guilty plea, the defendants avoid a permanent criminal record. They must agree to have their sentences routed away from the more vertical Juvenile Court system and instead be determined by a jury of their peers–other teens. The experience is highly transformative–life-altering.

Youth Court sentencing is designed to demonstrate to the participants the interconnectivity in crime. The jury passes a sentence that includes two future jury participations (by the defendant) and a letter of apology to their victims. Other options for additional punishment and recourse are fashioned by the youth offender's peers. The defendants have two months to complete their respective sentences and are supervised by community members--parents, probation officers, law students and other volunteers. These stakeholders act as compliance monitors concerning the sentence. With such broad-based participation, Youth Court champions the value of volunteerism. Research shows that defendants are less likely to re-offend.

The use of horizontal justice principles can assist to fill the gaps where more vertical justice systems have failed to solve problems or where justice officials have abdicated their role. Society is constantly in flux, and "in flux typically faster than the law, so that the probability is always that any portion of law needs reexamination to determine how far it fits the society it purports to serve."[4] Horizontal mechanisms bring together the various constituencies as stakeholders in solving a problem rather than to place blame. Often horizontal judicial mechanisms provide a forum for participants to be heard and empower them with a *voice*. These various horizontal processes are therapeutic in nature, and lead to an end of the problem, rather than result in cyclical pathological patterns. In the criminal law context, these programs are often referred to as "Restorative Justice," for they aim not simply to restore the community to its state prior to the crime, but also to restore the defendant to the community and within himself or herself.

Horizontal systems are more therapeutic, but often are also more successful in reducing crime. In seeking channels of resolution at the horizontal level, lawyers begin to recognize problems for their relational implications at many levels--the individual, institutional, corporate, regional and inter-Statal. The solutions become transformative and preventive. They look forward as well as backward.

Further, by diverting the process out of the regular criminal procedure and into an alternative regime, imaginative exercises in problem identification exercises are possible. By avoiding blame, accountability for the problem (and not merely for the effects of the problem) is recognized and behavior modification is supported. By involving various constituencies and the community, a multitude

[4] Karl Llewellyn, *Some Realism about Realism - Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931), at 1237.

of parties can assist in the design of the solutions. Problem-focused processes attempt to solve a problem, rather than place blame that then becomes part of a cyclical pathology.

II. CONTINUING THE TRANSITION: Selecting the Fast Forward Mode

Trial lawyers ... should always be alert to the potential of settlement. Because settlement will avoid further litigation that is always costly, risky, and stressful, the techniques of engaging in settlement discussions and convincing the client of their value are important preventive law tools that every trial lawyer must possess. Bruce Winick

Being an effective lawyer according to traditional legal education and traditional legal processes favors developing good Fighter skills. Clients pick up on this as well. They come to understand their lawyers as Fighters. Not only is this the almost ubiquitous image of lawyers in popular entertainment media, but it is the predominant image among lawyers themselves.

Clients understanding lawyers exclusively as Fighters gets in the way of lawyers being able to develop themselves as Designers and Problem Solvers. Lawyers tend to be consulted only after a problem has arisen, only when the clients come to think–too late--that they need a lawyer.

If a client is planning a transaction, perhaps the lawyer will be consulted in advance. Even in that setting, however, the Fighter can knock out the Designer. The lawyer acting as a planner may try to ensure, through drafting appropriate documents, that the lawyer's client will prevail in any legal contest that may arise regarding the transaction. Planning for winning disputes, however, is not acting preventively.[5]

[5] James Frierson, *Essay: Pre-Action Advice May Not Be Preventive Law Advice,* Unpublished Manuscript

[P]reventive law advocates are satisfied when more clients ask for—and more attorneys give—pre-action legal advice. However, the "preventive" legal advice given by attorneys who continue to see the law in terms of plaintiffs, defendants, and lawsuits may be wrong because the advice recommends actions that aid in winning future lawsuits, rather than preventing the lawsuits. James G. Frierson

The legal system traditionally has had almost no institutions that systematically encourage creating an environment that prevents problems from arising. Happily, that is starting to change. Slowly, new institutions and procedures are being adopted that are more horizontal in nature, like those described earlier. Furthermore, new thinking operates in the fast forward mode, seeking to redesign institutions or rebuild people's lives.

Operating in the Fast Forward mode means that the lawyer anticipates the problem. In dealing with individual clients, the lawyer moves from being the ***reactive object of events***, to becoming the ***planful shaper of environments.*** Here are some guidelines for addressing problems preventively:

1. Attempt to structure workplace, financial, family, or personal environments for clients that prevent problems from arising.

2. Where problems do arise, promote independent reflection by the problem holder on the meaning and implications of the problem.

3. Promote cooperation and communication among contending parties, and with other lawyers.

Problems are structural barriers or dysfunctional links in the relationships between people and their environments. The Lawyer as Designer responds to these problems by suggesting interventions that change human relationships or the objective environment in which those people live.

> **The solution could be to file a lawsuit, or it could be to apply for a government grant or build a fence.** Harold Brown

The design that is fashioned by the preventive lawyer is certainly to be measured by its effectiveness: is the incidence of problems lessened? Their severity? Further, the design should be measured by the level of respect that it reflects, both toward the links that people want to keep and the decisions that they want to retain.

> **What is different and vibrant about preventive law today is that the techniques and skills of preventive law are being combined with a philosophical approach to lawyering that reaches beyond simply preventing lawsuits and preventing legal problems and encompasses actually benefitting or improving human well-being. This adds a valuable, explicitly normative dimension to preventive law. When combined with this philosophy, preventive law moves from being value-neutral to being value-laden. In turn, preventive law provides lawyers who want to practice law as a helping or healing profession with a set of specific, concrete, tested, and well-thought-out skills or tools for their new trade. It also provides a model for a lawyer-client relationship that is closer, warmer, more collaborative, probably longer lasting, and more like a partnership. This kind of lawyer-client relationship is appropriate for lawyers who want to function as healers and problem solvers rather than gladiators or neutral, technical experts.** Susan Daicoff

Law as Design and as Problem Solving, is not pure process. It is not value-neutral technology, nor would that be desirable. Rather, it seeks pragmatically to advance the values of inclusiveness, decentralized decision-making, and respect for both human differences and the bonds of non-coercive relationships.

The most important aspect of an effective compliance program is its foundation.
Gary Boyle

To become the multi-sided lawyer one should aim at being a Counselor rather than simply a legal expert, and to work well with other professionals.

We should foster the notion that the highest and best use of legal services is in providing guidance to clients before rather than after the fact. Thomas H. Gonser & Forrest S. Mosten

[A]ny truly innovative effort at developing a national strategy for our legal system will require the collaborative effort of lawyers and a variety of professionals from other disciplines; it should provide for significant participation by a broad range of consumers of legal services as well. Thomas H. Gonser & Forrest S. Mosten

Professionals have to learn to understand the wholeness of the business project to make their professionalism serve the common purpose, to learn to talk to each other in an understandable way, to realize the value of each others´ competence and use it. Matti Rudanko

Finally, the multi-dimensional lawyer should understand the particular contexts in which their clients may find themselves, contexts in which common sense and instinct may fail.

A transactional lawyer must always deal with people's expectations, and a good transactional lawyer must not just deal with his client's expectations, but help to create reasonable expectations, and be sensitive to (and where possible guide) the expectations of all other parties. Harold Brown

Your value as lawyer is only part technician, it is more consiglieri. Forrest S. Mosten

III. COMPLETING THE TRANSITION: Moving from a Culture of Blame to a Culture of Supportive Accountability

Becoming a Designer and Problem Solver means, finally, that the lawyer focuses ***less on assessing behavior and vindicating rules***, and ***more on promoting healthy relationships and human fulfillment.*** Formal court decisions are simultaneously impersonal, yet strongly binary and authoritative. This is because traditional legal judgments are in the service of the legal rules and the legal rules, in turn, serve the social order. Legal judgments are not intended to repair relationships or reconstruct the lives of those who appear before the court.

Throughout the legal system–in rules, legal argument, judgment, and remedy-- we see the same dominance of the *protective* function of the law. Blaming the loser as a rule-violator, and then making losers pay, are important support structures for our vertical system of ensuring social order. If the law were to take more seriously its *facilitative* function, however, the focus on blaming and zero-sum remedies could be softened.

In legal logic conflicts are solved in courts where the "right" decision is given and its reasons stated by explaining the cause and effect chains. Usually, the one party is declared to have been right and the other wrong. Even if contracting is co-operation between people contract law has not been based on creating the most workable ways to co-operate. Instead, legal rules have been developed from legal principles based on generalizations. What kind of law would be based on the question "how"? Soile Pohjonen

The logic of blaming and vindicating rules actually controls more than even these structures of the law. Rule-based blaming also reduces the *sorts of conversations* that lawyers need to have with their clients. Where finding someone to blame and compensating for rule violations are the primary goals of the judicial process, lawyers are given little incentive to develop the kind of creativity skills and depth of communication that the Lawyer as Designer and Lawyer as Problem Solver require.

In other words, when lawyers interact with clients, lawyers know the rules on which the dispute will ultimately be based. Lawyers also know the narrow range of remedies that the courts will impose–almost always money damages. Lawyers have little reason to inquire broadly into the context that caused the clients problem or to imagine a reconstruction of that environment to prevent recurrence.

A client's emotional response to a problem was at least as important as any legal analysis. Harold Brown

Traditional legal procedures require little communication by clients about the nature of the problem. The law will define the problem according to its own rules, framing the problem according to legal categories. Yet lawyers have great potential for prompting reflective attitudes in their clients. In their conversations with clients, lawyers should seek to give clients a choice, or planning role, in solving their problems.[6]

Our "after the fact" emphasis on lawyering and legal services is also fostered in part by the client population itself, whose perception has typically become that lawyers are people to be consulted only as a last resort–after something goes "wrong." Regrettably we lawyers may have inadvertently contributed to this perception by failing fully to recognize the need for greater emphasis on prevention and by clinging tenaciously to the traditional formal processes of dispute resolution. Thomas H. Gonser & Forrest S. Mosten

Further, they should facilitate the client's understanding of the legal aspects of the problem, through giving accessible information.

[6] David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 292-293 (1993).

Accessibility applies not only to the lawyer, but also to the law. Translating complex legal concepts into workable guidelines delivers tangible benefits. First, people better know when to call for professional help. Second, they're armed with basic tools to fend for themselves when they're on their own. And third, translating legalese into plain English – speaking "miles per hour" rather than "furlongs per fortnight" – enhances the counselor's credibility. David Rowley

Due largely to ignorance of the law, and confusion as to the extent of its applicability, legal immigrants have found themselves in deportation proceedings. Herein lies the role of Preventive Law. If our clients had been informed about the effect of the laws before, they could have avoided these problems. Lilia Velasquez

Finally, lawyers should strive to give clients not only a choice, which is required by legal ethics, but also responsibility.[7] By initiating broader conversations with their clients, law could begin to reclaim the role of moral guide for our culture.

Business is personal. It's built on relationships. And relationships are built on trust. Earning trust is step one towards credibility, a condition of effective preventive counsel. Legal issues aren't isolated or labeled. They're part of the warp and woof of the broader fabric of life – dreams, visions, goals and aspirations. Without the wider context, counsel is needlessly limited. Credibility is the key to the big picture. David Rowley

[7] See Forrest S. Mosten, UNBUNDLING LEGAL SERVICES (2000)

Life and human beings are too complicated and many-sided to be governed with analytical reason. Objective and universal law is not always able to make decisions which are suitable in a particular, individual case. Decisions based on fairness are legal attempts to deal with individual circumstances. Soile Pohjonen

Once again, multi-dimensional lawyers can address this potential through both the skills of its practitioners and the design of legal procedures.

Looking back at the period when I practiced preventive law ... makes me realize how formative that practice was for me. It taught me much about lawyering and about preventive lawyering, much about the role of lawyer as planner and facilitator, as creative problem solver and creative problem avatars. It taught me to regard law as a helping profession, and showed me the joys of helping people with my professional skills. It taught me much about dealing with clients experiencing great stress, anxiety, fear, and other strong emotions, about how to convey empathy in the lawyer/client relationship, and about how to empower the client. It was my introduction to lawyering, and as such, has colored everything that has come thereafter. Bruce Winick

Families and children who come before the court to be treated with great civility, dignity and patience. Efforts must be made to develop a rich source of information about their problems so that a variety of disciplines and areas of expertise such as social work, family dynamics, child development, psychology, and medicine are brought to bear on the family's problems. The family intervention should include prompt, front end loaded, well-documented and case specific services, rather than a bureaucratic, one size fits all (or one size fits none) case plan. Consistent with due process every effort should be made to minimize the impact of adversary court hearings so the family may continue on its way without emotional and financial devastation. Michael Town

We must recognize

> the potential of lawyer as well as clients to talk in a different way. ... The integrity of legal professionals is not jeopardized by simple efforts at empathic, personal conversations. Nor is the social order threatened by a lawyer's plain talk with a client about the need for that client to reconcile a torn relationship, or the need to be more respecting or charitable toward another person. Presuming to judge behavior in the absence of feeling or relational context inevitably weakens the expressive function of law–that force by which we come to understand our past and make statements about what we wish to become.[8]

[8] Thomas D. Barton, *Therapeutic Jurisprudence, Preventive Law, and Creative Problem Solving: An Essay on Harnessing Emotion and Human Connection*, 5 PSYCH., PUB. POL'Y & L. 921 (1999).

Expertise is not based solely on analytical rationality but on intuition, creativity and empathy. People appear as themselves, as certain kind of people, revealing their background, not as impersonal representatives of a system. This kind of authenticity is important in order to build a real relationship and inspire confidence. Listening actively to needs and wishes of the parties or the other is an essential ability in mediation, contracting and counseling. Soile Pohjonen

In the days when I first thought of going to law school, the designation "Preventive Law" was unknown; but the concept of it existed in a time-honored aspect of legal practice–the solicitor as "Counselor at Law". Indeed lawyers were frequently referred to respectfully in that manner. The words meant someone, other than a hired gun engaged by the hour. They referred to a solicitor–frequently gray haired–engaged under a long-term retainer arrangement who acted as family friend, consultant, and negotiator on all sorts of matters relating to the law. The Counselor prepared the client's will and maintained it in confidence. He acted frequently as trustee of the trusts for the client's children, and as their legal guardian. He advised on banking and financial matters, extricated the client from debt, served as his real property administrator and agent, negotiated in the event of intra-family disputes. He took positions on behalf of the client, and directly engaged in supervising litigation, where required. But the emphasis was on understanding the client's needs and desires and those of his family, on using the skills and knowledge of the law to achieve those desires and satisfy those needs to the maximum extent possible.
Hermione Brown

Finally, working as Problem Solver and Designer reveals the value of relationships in our solutions. Too often lawyering has been about the application of rules, separate from the human relations that connect the parties. To build durable and better solutions, the legal professional should work at sustaining and building relationships that will outlive any one particular legal situation.

As such, we can recognize that parallel decision-making and obligation systems exist outside the ambit of formal law. From contracts to criminal law, problem-solving mechanisms should be designed to facilitate a dialogue for the many constituencies that are invested in solving a problem. Problem-solving should provide a venue for other loyalties, bonds and social patterns based on family, clan, ethnic grouping and other affiliations to have a voice. Moreover, the social welfare and other service or faith organizations can play a role in the solution system that results. Traditional vertical systems of justice too often ignore the other *juriscapes* that parallel the economic and political bonds of Western liberal democracy.

In Institutions

Lawyers must work within many different types of institutions, both public and private. The Problem Solver and Designer communicate effectively within each, sometimes in very different ways. Even in the most traditional lawyer settings, more thoughtfulness about the methods and channels of

communication will open new opportunities for change and stronger client service.

Oral advocacy is important within the current international legal system, where non-domestic tribunals require oral argument. In the era of globalization, public international legal agreements have been ratified that create mechanisms to resolve disputes. Indeed, international dispute resolution mechanisms have impacted domestic legislation and policy worldwide. A plethora of private arbitration chambers and public institutions deal with international commercial disputes and human rights concerns, including the Hague Permanent Court of Arbitration, NAFTA dispute panels, and dispute settlement panels under the World Trade Organization's Dispute Settlement Understanding.

We must enhance our advocacy and persuasion skills, not just for the courtroom but for the many kinds of institutional mechanisms before which we shall appear in the future. Often courtrooms are not the right dispute resolution channel to solve a client's problem. Administrative agencies, international, regional and municipal organizations, and community-based groups are empowered to assist in developing solution systems to help address social justice issues. Even the most modest project requires a broad-base consensus by all the actors in legal culture. For that reason, the skillsets of lobbying, legislation drafting, and international agency development are essential. Many of the reforms that need to be addressed, however, require more than just good legislation. Lawyers must learn to work with justice and law enforcement officials, legislators, technocrats, non-governmental organizations, the media, the judicial authorities, and law schools to make reform work. Only then can we truly provide the necessary results for our clients and assist in the legal reform process that makes disparate parties invested stakeholders in solutions.

In the media

But oral advocacy is not the only kind of advocacy that lawyers perform. In a globalized world with 24 hour media coverage and satellite communications, we must participate in the shaping of public opinion. The media are fast becoming essential outlets to ensure access to justice and the rule of law.

With the rise of the global economy and digital telecommunications, the media collectively becomes a forum before which we must court public opinion. It is also part of the legislative negotiating process. It is the fourth power within the balance of powers–among the legislative, executive, and judicial. It is no surprise that restoration of democracy projects have focused on the reconstruction of civil society with the belief that a variety of actors–the media, non-governmental organizations, organized labor, and other advocacy groups–can provide valuable solidarity and watchdog services. A free media is part of a functioning democratic process and part of pluralistic governance.

According to former United Nations Secretary-General Boutros Ghali, "[f]or the past two centuries, it was law that provided the source of authority for democracy. Today, law seems to be replaced by opinion as the source of authority, and the media serve as the arbiter of public opinion." It is time for judges, lawyers, Ministry of Justice officials and other leaders in the judicial reform movement to develop skills to engage with the media and to learn how to advocate in this milieu. The media must be engaged in the change process that attends judicial and legal reform. Part of access to justice is the ability to tell one's story in the public arena–and often that is in the media.

Lawyers must learn about the media and how to use it to achieve significant legal reform and

work with lawmakers to produce workable systems of adjudication and conflict resolution.

In culture

The other space in which lawyers operate is culture. Whether it is culture derived from kinship, family, community, nation, or faith, the lawyer must act as a cultural translator in his or her attempt to promote the rule of law and provide solutions to increase the welfare of clients, no matter their location.

Lawyers must also recognize a whole set of competing jurisdictions, many of which are not traditionally based on law, but on culture. These juriscapes recognize that we attach to more jurisdictions than to the city, state, or country in which we reside. We also are bound by traditions related to family, kin, religion, ethnicity, and language. Each of these juriscapes have their own codes of conduct and forms of enforcement mechanisms outside the ambit of state control. Lawyers should understand this cultural context in addressing client problems. The richness of context simultaneously constrains some solutions, while it enables others.

Indeed, "We have reached the era of relativity." Comparative law and cultural sensitivity must be stressed. History has shown that instead of conquering, collaborating appears to be more likely to bring long-term results. The problems which face our work–the population explosion, environmental devastation, the rise in ethnic conflict, inequitable economic stratification–appear to be unsolvable, immense, and out of our collective control. Attorneys must understand, as scientists and philosophers do, that our respective disciplines can solve little on their own.

The time is ripe for approaches to law and lawyering, like preventive law, that de-emphasize pitting individual parties against one another and instead seek to find creative, collaborative, forward-looking solutions to human and legal disputes. The time is also ripe for approaches that concern themselves with maintaining and fostering the client's ongoing relationships with his or her family, friends, workplace, community, and society. Preventive law clearly allows the lawyer to focus on and explicitly work towards both these goals, consistent with our apparent growing awareness of the need to acknowledge our "connectedness." Susan Daicoff

Globalization affects us all–whether we are lawyers in the United State or in Latin America or factory owners and workers/trade unionists. Part of globalization is the need to understand other cultures, particularly the rules of other cultures and the manners by which other people negotiate. If we are to have a truly integrated economy, legal cultures need to develop common methodologies for problem solving. In a globalized world, lawyers are the cultural translators for our society.

Lawyers thus must be better prepared to work with both clients and opposing parties from around the world. We must be better able to build consensus on a transnational basis. We must understand cultural differences and similarities. We live in a globalized world with chaotic immigration patterns that blur international boundaries. The major cities of the world are now housing multicultural communities. There are one million Indian emigrants in the United States. The Japanese community of Sao Paolo Brazil now numbers more than two million people. Toronto has the largest Italian population outside of Rome, Milan, Naples, and Palermo. These fascinating demographic patterns are increasingly reflective of our global village. Our job as lawyers is to facilitate healthy relationships for our clients from other countries and to be responsible bearers of the rule of law.

When we do not see the world as a predictable machine waiting to be explained but as an interactive flux to be lived in we cannot believe we are in control but we do believe that nothing is fixed and there are always various alternatives to be found. Soile Pohjonen