

# **Preventive Law Symposium**

**Launching National Center for Preventive Law Activities  
at the California Western School of Law, San Diego**

*Sponsored by the Louis M. Brown Program in Preventive Law  
CWSL Boardroom, 2nd Floor, 225 Cedar Street  
Friday, November 10 and Saturday November 11, 2000*

On this Webpage we have preserved first the agenda on this Preventive Law Symposium, followed by a very lightly edited transcript of the proceedings. Many of the participants to the Symposium also have submitted an Essay, which can be accessed by clicking of the “Essays” button on the left-hand side navigation bar of the NCPL Website.

## **SYMPOSIUM PROGRAM – FRIDAY, NOVEMBER 10, 2000**

- 8:15 am        Coffee and Continental Breakfast  
                  (Boardroom)
- 9:00 am        Welcoming Remarks  
                  (Steve Smith [[SSmith@CWSL.edu](mailto:SSmith@CWSL.edu)] and Tom Barton)  
                  [[Tbarton@CWSL.edu](mailto:Tbarton@CWSL.edu)])

### **I. REWINDING THE TAPE: A Primer on Issues in Preventive Law**

- A. 9:10 am– 9:40 am *The Search for a Theory of Preventing Problems*  
                  (Discussion Group: Tom Barton, Ed Dauer [[edauer@mail.law.du.edu](mailto:edauer@mail.law.du.edu)])
- B. 9:40 am-- 10:05 am *The History and Future of Preventive Law*  
                  (Discussion Group: Woody Mosten [[mosten@mediate.com](mailto:mosten@mediate.com)], Bob  
                  Shafton [[RSHAFTON@stroock.com](mailto:RSHAFTON@stroock.com)])
- C. 10:05 am-- 10:30 am *The Lawyer as Private and Public Counselor*  
                  (Discussion Group: Hermione Brown  
                  [[preventivelaw@haroldbrown.com](mailto:preventivelaw@haroldbrown.com)], Murray Galinson  
                  [[mgalinson@price-entities.com](mailto:mgalinson@price-entities.com)])

### **10:30 am-- 10:45 am Coffee Break**

- D. 10:45 am– 11:10 am *The Values and Assumptions of Practicing Preventively*  
                  (Discussion Group: Dave Rowley [[daverowley@home.com](mailto:daverowley@home.com)], Alidad  
                  Vakili [[avakili@san.rr.com](mailto:avakili@san.rr.com)])

E. 11:10 am-- 11:35 am *The Role of Communication and Cooperation*

(Discussion Group: Debra Gerardi [**debragerardi@hotmail.com**], Soile Pohjonen [**Soile.pohjonen@helsinki.fi**])

F. 11:35 am-- Noon *Law Reform: Building Prevention Through Substantive Laws*

(Discussion Group: David Wexler [**dwexler@compuserve.com**], Josephine Gittler [**josephine-gittler@uiowa.edu**])

### **12:00 to 1:30 pm Lunch**

Luncheon Presentation: *Video Production and Preventive Law*

(Jamie Cooper [**JCooper@CWSL.edu**], introducing *Jurist Voices* video, and also showing clips from *Mike Goldblatt*

[**Michaelgoldblatt@aol.com**] and *Milton Bordwin*

[**mbordwin@rubinrudman.com**] interviews)

## **II. PLAYING THE TAPE: Current Practices and Emerging Ideas**

A. 1:30 pm--2:00 pm *Entertainment Law*

(Discussion Group: Harold Brown [**preventivelaw@haroldbrown.com**])

B. 2:00 pm--2:30 pm *Preventive Law in Commercial Transactions*

(Discussion Group: Helena Haapio [**helena.haapio@lexpert.com**], Jeff Schneider [**JSchneider@SWSSLAW.com**])

C. 2:30 pm--3:00 pm *Diverse Business Practices*

(Discussion Group: Daniel Hapke [**dhapke@elawforum.com**], Soili

Nysten-Haarala [[nysten@iiasa.ac.at](mailto:nysten@iiasa.ac.at)], Rafael Rafaelli III [[chochito@juno.com](mailto:chochito@juno.com)])

**3:00–3:15 pm      Coffee Break**

D. 3:15 pm--3:40 pm *Immigration and Human Rights*

(Discussion Group: William Aceves [[WAceves@CWSL.edu](mailto:WAceves@CWSL.edu)], Lilia Velasquez [[livel@k-online.com](mailto:livel@k-online.com)])

E. 3:40 pm--4:05 pm *Physical and Mental Health*

(Discussion: Steve Ciceron [[steven.ciceron@bms.com](mailto:steven.ciceron@bms.com)], Dan Groszkruger [[Dgroszkruger@chapinlaw.com](mailto:Dgroszkruger@chapinlaw.com)], Steve Smith [[SSmith@CWSL.edu](mailto:SSmith@CWSL.edu)], Bruce Winick [[bwinick@law.miami.edu](mailto:bwinick@law.miami.edu)])

F. 4:05 pm-- 4:30 pm *Family Law and the Courts*

(Discussion Group: Janet Bowermaster [[JBowermaster@CWSL.edu](mailto:JBowermaster@CWSL.edu)], Mike Town [[towno@lava.net](mailto:towno@lava.net)])

G. 4:30 pm– 4:55 pm *Training Preventive Skills*

(Discussion Group: Leary Davis [[davis@webster.campbell.edu](mailto:davis@webster.campbell.edu)], Janet Weinstein [[JWeinstein@CWSL.edu](mailto:JWeinstein@CWSL.edu)], Mark Weinstein [[MWeinstein@CWSL.edu](mailto:MWeinstein@CWSL.edu)])

**4:55 pm      Day Program Ends**

5:30 pm      Reception and Film Screening of *Jurist Voices*  
Museum of Photography Art, Balboa Park, San Diego

7:45 pm      Evening Program Ends

## **SYMPOSIUM PROGRAM – SATURDAY, NOVEMBER 11**

8:30 am          Coffee and Continental Breakfast (in Boardroom)

### **II. PLAYING THE TAPE: Current Practices and Emerging Ideas (con't)**

A. 9:00 am-- 9:30 am    *Corporate Compliance Programs*

(Discussion Group: Gary Boyle [**Gary.boyle@williams.com**], Richard Gruner [**rgruner@LAW.WHITTIER.EDU**], Paivi Nygren [**Paivi.Nygren@Sampo.com**])

B. 9:30 am-- 10:00 am    *Preventive Law and International Trade*

(Discussion Group: Jamie Cooper [**JCooper@CWSL.edu**], Joel Junker [**jrjunker@aol.com**], Matti Rudanko [**rudanko@hkkk.fi**])

C. 10:00 am-- 10:30 am    *Preventive Law in the Community*

(Discussion Group: Art Campbell [**ACampbell@CWSL.edu**], David Hobler [**DHobler@aol.com**], Sue Manheimer [**SManheimer@ci.sanmateo.ca.us**])

**10:30-10:45 am          Coffee Break**

D. 10:45 am-- 11:15 am    *Employment Law Issues*

(Discussion Group: Jim Frierson [**frierson@ACCESS.ETSU.EDU**], Jerrilyn Malana [**JMalana@littler.com**], Scott Rechtschaffen [**Srechtschaffen@littler.com**])

E. 11:15 am– 11:45 am    *Probing the Relational Contexts of Problems*

(Discussion Group: Floralynn Einesman [**FEinesman@CWSL.edu**], Janeen Kerper [**Jkerper@CWSL.edu**], Linda Morton [**LMorton@CWSL.edu**])

## TRANSCRIPT OF PROCEEDINGS

### Preventive Law Symposium

First Session: Welcoming Remarks

(Dean Steven R. Smith [[SSmith@CWSL.edu](mailto:SSmith@CWSL.edu)] and Professor Thomas D. Barton)  
[[Tbarton@CWSL.edu](mailto:Tbarton@CWSL.edu)])

Thomas Barton:

Hi folks. Welcome to our preventive law symposium. I am first going to introduce Dean Steve Smith, who will have some remarks for us of welcome.

Dean Smith:

Thank you, thanks very much, welcome. I will say a word more than that, if I may, that will surprise you coming from a dean. I want to say thank you as well as welcome. It is an honor for us to host this symposium on preventive law. This room is not infrequently filled with distinguished groups such as our board of trustees, but this is an especially distinguished group from around the country, and we thank you very much for joining us. I would also like to thank the Browns, both Hermione and Harold Brown. They have made, through the Louis M. Brown program in Preventive law, this and so many other exciting things possible. We our most grateful for their support, and for their attending. I am looking very much forward to the next couple of days. Preventive law has already added a great deal to this law school over the years, a great deal to the profession, and we think that it can do a lot more. This is a chance to talk about fleshing out some of the concepts of preventive law, and making it a standard part of what lawyers do on a day to day basis. So, thanks for all of the intellectual power and interest you bring to this, and I am looking forward to a great couple of days.

Thomas Barton:

Thank you. I am Tom Barton, and I am on the faculty here. I am the director of the Brown Program on Preventive law. I first want to acknowledge and thank Hermione and Harold Brown for sponsoring this event, and for making the Brown program in Preventive Law possible. I want to acknowledge Steve Smith's leadership as Dean of a school which has embarked on a mission of creative problem solving. I will come back to that in just a second. I also want to thank Murray Galinson who for the last several years has been the chair of our Board of Trustees, whose vision and strength of leadership together with Steve Smith has really made a lot of things happen that gives us great pride. A new vision of lawyering that we are really trying hard to implement, and I am gratified to see so many people from not only America, but Europe here to listen to what we have to say. I also want to acknowledge James M. Cooper, who is our executive director of the McGill Center for Creative Problem Solving. And it is aptly named, because Jamie is one of the most creative people I have encountered, and one of the most energetic. He exhausts me, and if I could take a little of his creativity and have it rub off on me, I would be much appreciative. We have not learned how to package that yet, but he is working on it. Finally, I want to acknowledge Ed Dauer, who for many years most of you know was the leader intellectually--following Lou Brown's death--in the area of preventive law. Ed hosted the National Center of Preventive law at the University of Denver for many years, and was instrumental in linking up the preventive law ideas with California Western School of Law. He saw the synergy between creative problem solving-which is the mission of California Western- and the ideas of preventive law, and I think without his initiatives we would not be here; certainly not at California Western. Ed has continued to be so gracious with his time and ideas. He is one of the most selfless people I have encountered in academia. So, thank you all very much for that.

We're going to ask basically three questions about building a theory of preventive law. First, *what* we should seek by way of a theory of preventive law? Secondly, *why* we should engage in that activity, and thirdly *how* we should go about doing that enterprise? The *what* question, what we should be doing, is what Ed will be talking about. I'll talk a little bit about *why* it is important to develop a theory of preventive law. Then we'll turn to you, if we have some time before questions and answers, to help us think through the *how* of developing a theory of preventive law. So, I will turn it to Ed.

Ed Dauer:

Thank you. Rather than introduce myself, I would like to incorporate by reference all of the exaggerations Tom started. However, they are not true, but I love them. So just assume all that is me. It is really great to be here.

Since I saw most of you last I have been living the life of an unemployed full time student at Boston, which is not irrelevant to what I am going to talk about in just the next couple minutes. I have been studying public health. I have been teaching in the area of preventive law and health care, and so what I thought I would do is just take a year and go off and find out what health care actually is about. There are lots of comparisons between public health and preventive law that make that somewhat less screwy than you might think. One is, for example, that both fields are very concerned with the well being of individuals, and people are motivated to do it in many of the same ways. In addition, public health and preventive law both have private and public dimensions. The private is obvious. The public dimensions, for the health people, are things like community health. The public dimension for us is community justice. The reason I mention it here is because I have precisely one year of trying get my arms around something that is absolutely enormous. Including such things as biostatistics, which I can barely pronounce and much less do.

But, in order to be able to do it in one year, I had to get a good sense about what the whole thing is about. So I spent a little time trying to figure what the thing was made of, what is public health made out of. It turns out that it is ridiculously self evident, and I want to suggest that it might be useful to us as one way, not *the* way, but it is one way of thinking about what it is that preventive law as a working process itself may need. So, as I look around the curriculum, and what people in public health were doing, it occurred to me that it could be divided in three parts. Forgive me for writing things down. I have been away from the blackboard for so long, it is so nice to be back to one. It occurred to me that there are three things that we need in public health, and by analogy preventive law. One of those is a knowledge base. The second one is what I will call a skills base. The third one is, I am making these terms up so they do not necessarily mean anything, but what we need is a delivery system, and that is how do we actually get the benefit of what we are doing so people will care about it.

Let me give you some examples of what preventive law has already done in each of these kinds of fields. In the delivery system, Lou Brown gave us way back lots of things, including things like the legal audit program, periodic legal check up, and the blue car project, and a number of others. Woody Mosten has been working in this area with a variety of things including his client library. Richard Gruner has done it with compliance programs. So many other people have also contributed to this part of the enterprise.

The skills base is one in which we have also had a number of wonderful contributions. Indeed one of the potentially most interesting connections we have made recently is the intersection of preventive law and therapeutic jurisprudence, which Bruce Winick and David Wexler, which is now bringing our attention to the our discussion of skills.

The third part of it is the knowledge base, and it is that, that I would like to spend a minute talking about, because it is this where maybe a law professor would have any comparable advantage rather than the other two. Let me tell you a little known story to get into what I want

to say about the knowledge base. In 1983 when Lou Brown and I were thinking about where to create the preventive law center, this may not be widely known, we had almost settled on putting it in a business school rather than a law school. The reason for that was two fold. One was we thought business schools would be fertile and hospitable grounds, because business people understand the advantage of an investment today that will pay off tomorrow. There was another reason for wanting to do that, that we weren't really clear about at the time, and that was that business school, and business schools and management and organization theory have knowledge organized at what I will call just the right kind of level that was useful for us. Let me explain what I mean by that, and then I will come back around and talk about maybe a connection to business schools in the future as well.

If were to take a knowledge base and arbitrarily divide it into three levels of its own, we can say that there is some kind of knowledge which is really cosmic, and that is at the level of insights. These are grand abstractions that are really very important. For example, one of them which Lou--whose name I will invoke several times today, as I know others will--taught us is that it is important to predict human behavior. It is more important than preventive law, or to predict what people will do, than it is to predict what courts will do. So insights at a fairly high level. We also have a lot of information, and this is the kind of thing that practicing lawyers know really well, and that is what do we do with this kind of case? How do we solve this problem for the client? Help this client achieve their goals, and reduce the risk that those goals might be upset by some kind of untoward legal trouble?

The problem with these two, they are both very important but they are not complete. The difficulty is what do we do with this? That is we can start with these abstractions but how do we actually use them in particular cases. They are nice as motivators, and they kind of orient us in just the right way, but as a practical matter they are not on the ground yet. On the other hand down here, while this is really important, it is not really recallable unless we can do something

else with it. For example, what Hermione Brown does and has done for many years in practicing preventive law in the estate planning area. What is it that she is doing that can be used by an environmental lawyer? That is there is an enormous amount of information she has about helping clients in the area in which she works. Our challenge, I think, is to figure out a mid level range of general principles that make the work that is being done, the information that is being gained in each of these areas in which lawyers practice, make that transferable, replicable, and useful.

For example, we know that in doing partnerships we want to have buy and sell agreements funded by insurance. That's a piece of very important information. Can we generalize that a little bit, and make it important in another field? One of the things we could say about that is, "sure, the availability of insurance funding for buy sell agreements is one way of avoiding changes in the bargaining leverage the two parties to a transaction have." That is a nice middle range kind of proposition. It is one that it is immediately more applicable than the larger insights. It is one that is more general, useful, and transferable, than the information from which it is drawn. I am not trying to say this is the gold standard, but it is certainly a piece of it. It is the piece of it in which we have most of the work ahead of us. Where preventive law is very much a work in process.

How do we go about getting this is the next question? And again I want to divide this. Somebody once said people who think, think; and people who can't, make lists. I want to divide this also into two parts, because I think that there are two sources from which we can get the kind of information which can fill up the middle range, what Tom called last night the mid air level propositions. There not up here, and there not down here. They are kind of mid air. One of those referred to as internal, by which I just mean the legal profession, and the other one external, by which I mean everything else.

The external one is simple, that is I think that we have a lot to learn from other areas like theories of management and organization. In the health area we have a lot to learn from theories of risk management. We have a good deal to learn from applied industrial psychology, as well as other forms of psychology. And we have a great deal to learn from the principles of creative problem solving. This is why the intersection is so valuable. We know that preventive law doesn't involve just doing law, it involves dealing with people in all the various ways in which they behave. So we need, I think, to create connections; again with occupational theorists, management theorists, and people who are working in this middle range of ideas. We have stolen these things in the past you know. After all, primary prevention in preventive law is just something we lifted right out of public health. The very idea of legal checkups is something we stole from public health. Let's go out and steal some more. Fair is fair.

The other thing, internal, is finding out this kind of information and being able to transfer it into these general propositions. Who has that? Lawyers have that, they do it all the time. This, I think, is what creates the dilemma that lawyers say to us about preventive law. "I am already doing it." The answer is many of them already are. But what we need to do is to take the it that they are doing, which is at this [lower] level of information, and try to make some general kinds of recallable theories. So when this lawyer leaves that information does not go with them. So that what someone is doing in estate planning is useful to what someone is doing in business planning, which in turn is useful to what someone is doing in tax planning. We need to be able to categorize these types of ideas. How do we go about doing this? We can talk about this more if this side of this general scheme makes sense. We can talk about this a little bit more in the course of the day. I think one of the things that this led me to was some ideas for concrete kinds of projects. And that is, why don't we just get some lawyers together and have them do it while we watch. That is, do some seminars in which we listen more than talk. Or get some lawyers together who are working in an area like entertainment law, because we have Harold Brown who is working in that so well for so many years here, and try to watch what they do.

Ask them if they would think about creating maybe the equivalent of practice protocols. You can't do that without thinking at somewhat higher level about what you are doing. Or ask them to work with us in teams. In various kinds of seminars. To help us create ideas, replicable notions about what principles of law they are operating on.

This idea leads me to some practicable kind of suggestions, and one is to create linkages with these other fields, and the other is to create maybe a different way of dealing with the practicing bar than we have until now, and that is engaging in dialogue rather than engaging in lecture.

Audience Comment:

In your structure there between insights and principles, the two there are very interrelated. Sometimes it is very hard to break down the two of them into principles, you've got concepts and theories, and dividing them up is difficult.

Ed Dauer:

All of that. This is a continuum. I think any list has an arbitrary definition. We could divide this into five instead of three, but having done three, I felt that that was as much as I was capable of, but I completely agree. Not only that, but they feed each other. Lou Brown got his insights partly from watching this, and then he we took some of those and applied them, as everyone in this room has, to real cases, from which we then derived some of these sorts of principles. Nevertheless this is a way of thinking, to me at least, one way of approaching the question of what we should have by way of a theory of preventive law? The next question is why do we need this?

Thomas Barton:

I really like Ed's analysis in terms of a kind of framework for what a theory would look like, because everybody has a different level at which they operate best, and at which they are most interested. I think between the accumulation of knowledge, at what ever level of comprehension, and the development of skills, and the delivery of the information, you know there is really something that plays to each person's strong suit and interests. It is a comprehensive agenda for a theory.

We talked last night about how so much of the information about preventive law is at either end of this continuum. At one end is the very high abstraction, the *worthiness* of preventive law. And how can it not be worthy? It saves clients money, it saves people emotional distress, its better service for your clients. There is just no reason not to do it.

At the other end of the continuum is the information, which is very particular about a given practice and what works in this practice. The fact that so much is at either end, leaving the middle relatively blank, I think that this led to two general conclusions about preventive law. Both of which, I think, have led to the relative inattention to either skills or delivery.

The first is that preventive law is self evidently worthy. We don't need to convince other people about that, or we do not need to educate students about that, and perhaps what's more important we don't need to educate our clients about that, because we know that it works and why not do it? Nonetheless, we need to create a better market, we need to create a demand for these preventive law services, and the best way do that is to educate the potential clients about its worthiness. So, to the extent that we are way up here, up at the level of the moral worthiness of preventive law, it is just too pure in our minds. If we could move down a little bit, to the middle level of general principles, we could describe it better to a nonlegal audience, i.e. the client base. If clients demand it that will create in itself a demand to be better trained, both in existing lawyers and law students.

Now down here the particularization of the information, I think, has led to another general conclusion. Which once again leads to inattention at both levels. That is, that preventive law just happens. It's experiential. You work with your clients in a given context of the law, and preventive law just happens. "I'm a lawyer, I have been doing this all my life." We hear that again and again, and that is down here. It just happens naturally. You just experience it. Then once again there is nothing in the middle, at the level of principles or skills, which says we should train it. There is nothing at the particularist end of the continuum that suggests we should develop particular skills, and be able to package it in a certain way.

So, what we have done, I think, has led to a certain inefficiency about preventive law. We haven't systematically thought about how to train it in terms of skills. We also have not convinced our clients about the market for it. We have also made it rather difficult for us to talk amongst ourselves about preventive law, because it's a little too enclaved in particular doctrines and practices. We want, as Ed said last night, an environmental law preventive person to be able to talk freely and communicate at the same level, with the same vocabulary, as a trusts and estates preventive lawyer. You need principles at this mid level that are basically generalizable, that are not just the big insights, in order to have that dialogue take place.

Finally, I want to add that the profession is changing very rapidly, and I am indebted to Woody Mosten for prompting me to attend an excellent conference that he put on about unbundled legal services just last month. I was astonished at the rapidity with which the law practice is now moving away from a full service client lawyering model, to discreet tasks. In that, there is perhaps a difficulty, and perhaps a greater opportunity. We need to be able to package preventive law in modules, as it were, that are understandable for ourselves, and understandable for clients, who we can expect to be taking greater responsibility in the future for their own legal matters. So, with that I will stop, and we will pose the how question? How are we going to do this? How can you fit yourself into this scheme, or if you do not like this

scheme feel free to say so. And maybe think about that as the rest of the discussion groups unfold.

Audience Comment:

Let me relate two of the points you made, and try to tie them together in a sense. You talked about creating a demand on the part of the consumers of legal services, and you also talked about training people to delivery those services. Of course usually, from an economic perspective, we think that demand will have an impact on causing a greater supply. But maybe it also works the other way around, and what I am suggesting is that the training piece is an important piece, and that we need to think more about how to train our young law students, and maybe members of the practicing bar in creative problem solving and preventive law approaches. That in itself will spark a demand, because of course once lawyers become preventive lawyers they are going to be themselves motivated to create a demand in the profession. So, I think both of those points can be tied together in that way.

Audience Comment:

I have practiced most of my 26 years in-house in companies. My experience has been that clients are in a continuum from extremely risk adverse down to a very cavalier attitude toward legal risk, and I think its very difficult to apply a principle that will cover the entire continuum. It's going to be a series of principles, I think, that relate to the clients experience. If the client has been burned in a transaction, for example, the next transaction they will approach with a whole different outlook. And the client who has been perhaps lucky, or who has just never fallen into that type of a transactional problem, when you give them all the advice about what to do and what not to do, a good bit of it will go right over their head because they just do not identify. It is not going to happen to me is to often the attitude.

Ed Dauer:

Tom, can I just put a foot note on that? If I had a bigger pad as I flew out here I might have done this as well, and that is to say skills can operate in the same kind of different sorts of abstractions. When we teach interviewing and counseling, we teach grand notions about interviewing and counseling about relationship between lawyer and client way up here at the top. I have done a little bit of teaching of interviewing. But if what we are going to do is take your experience, and be able to teach your experience to someone else, and to combine it with the experience of other people; so that we can make it available more generally, to do what Bruce Winick was suggesting, that is to create a supply of people who are skilled, I think that the most efficient package in which to put it is at this level, and that is the kind of general level. Your particular experiences give rise to these, but your particular experiences, as you pointed out, may not be replicable. You may have a different client with a different colored tie coming in on a Thursday that isn't replicable? So what we need to do is take what happened in that case, and translate it into something that is more immediately useful than the insight level. So that when you stop doing it we've got a history of stuff that we can now transfer. That is really all that we meant by saying that if we think about it as these different levels of abstractions it would be impractical.

Audience Comment:

Well, it is really a comment. It struck me that what Ed just talked about as an intermediate skill could also be regarded under the principle column. So, that you might have as a principle, clients who have been burned maybe more receptive to this, or maybe less receptive to a certain course of action. Or for those who have not had any prior history, they may need to be more educated about certain risks, and those may need to be conveyed in a different way. It seems to me that could be regarded as a principle as well.

Ed Dauer:

Oh sure. The same kind of division can apply to all of these things. I was just talking about this one because it is the one I am familiar with. I think both of your comments are exactly correct.

B. 9:40 am-- 10:05 am *The History and Future of Preventive Law*

(Discussion Group: Woody Mosten [**mosten@mediate.com**], Bob Shafton [**RSHAFTON@stroock.com**])

Tom Barton:

Thank you very much. We will move now to the next discussion group, which is “The History and Future of Preventive Law, with Woody Mosten and Bob Shafton.

Bob Shafton:

Good morning everybody, it is a pleasure to be with you. It is my pleasure to introduce Woody Mosten, which only proves that I am Bob Shafton. Woody and I agreed that I would start briefly, and then we would kind of go back and forth, and we want a lot of interplay which we have already had a lot of this morning.

We are going to talking about everything from compliance checklists to annual legal checkups. From the corporate field, to government to employment, to entertainment, and I apologize for those who I have left out of the equation. What most of us don't know is that last night Tom

Barton received two telephone calls almost simultaneously. One from Al Gore, and one from George W. Bush. Seeking his help using one of these models, that they did not even know that Ed and Tom were going to develop, to see how there can be a prevention and avoidance of the kind of Florida ballot debacle that has taken place this year for future elections. Tom very wisely said that we will be glad to talk about that this morning, and I understand that he has appointed three people to head that up. Jesse Ventura, and I won't name the other two. That only goes to show that that may be abstract and ridiculous, but when Lou Brown called me in 1955, having already been my mentor-thanks to the Beverly Hills Bar Associations mentor mentee program-as I was starting in the U.S. attorney's office, he said, "I have some ideas about the annual legal checkup." "Why wouldn't people go to their lawyer at least once a year like they should go-they don't always go-to their physician every year?" And, "is it appropriate for lawyers to send out notices once a year, saying its time for you to come back and see me about your will or, in those days when this was much more sensitive, is that soliciting legal business?" He said, "What I would like you to do is, I hear there is an opening on the Los Angeles Bar Association public relations committee." Something about which I knew very little, and I served there and became chair of that committee.

We began to look into some of the areas which today are fairly basic. Louis was very upset about a Michigan Bar survey which ranked lawyers lower than used car salesmen for honesty, integrity, and truthfulness. We used this a lot within our conversations. He said, "we have got to get over that." That's one of the things that I have in mind. I am not sure where that fits on this chart. The other pragmatic issue, I want the Bar Association and schools, not law schools but kids type schools, to begin to take a look at is what do we do to prevent things from happening? You on the public relations committee can look at the one aspect, but you should be looking at the others at the same time because it may be one of the answers that Tom and Ed have referred to this morning. If every Bar Association distributed a pamphlet on some ideas which lawyers then could revise, rework, adopt, or not adopt. Annual legal checkup was

one, but just one, and those pamphlets were in fact distributed. I am not sure if bar associations are doing that today, frankly some things are good ideas and get dropped, and maybe that proves they weren't good ideas, or maybe it really proves that people just don't have the follow through that they should have. So that was one kind of very homey beginning at that time.

One of the things that I found as a corporate lawyer, doing a lot of merger and acquisition work, was that lawyers end up with a wonderful closing binder, which is usually done even after the little Plexiglas cube comes out. The closing binder includes everything imaginable. Two examples. First example, there are a bunch of leases that the corporation has, and Dan and others will attest to this, there are a bunch of leases, and some of those leases have options to renew those leases at the end of five and ten years. And that's in the binder, and its handed to the CEO, or to the general counsel if the corporation is large enough to have one, or to somebody who does internal audits, and also the outside law firm is going to follow up to and be sure that those things are done.

Early in my career, and Louis and I talked about this a lot, we concluded that the outside lawyer is absolutely the worst person in the world to do that. Even if he or she remains in the picture. I decided-and we debated-that I would attempt something and use the outside independent auditor, because they are great with follow up and with lists of their own, and frankly with liability issues. What happens if I don't? What do I have to footnote if they don't? So, that is one kind of example.

Second example is forms of the corporation. Each of the parties had their own forms. Take a bank or a savings and loans, someone who does mortgages, deeds, and trusts. Each one had their own forms, and at the time of the merger either one of the forms are adopted, or a totally new one is used. Does it surprise anyone to know that within three weeks the employees that ran the branches in these financial institutions- and this is only one example, I am sure it happens

all the time-the employees reverted back to their old forms with which they were familiar? In the case of a deed of trust it is recorded in the county's recorders office of the jurisdictions of which the savings and loan, bank, or mortgage company does business. So that they were using old forms, which on the back of the forms says, "and this has been recorded," and it had not. That form is no longer in existence. They have been replaced by something else. So what do you do about that? It does not happen at the CEO level, that is for sure, and I maintain that it doesn't even happen at the outside counsel or inside counsel position. It's got to happen at an accountant auditor type position. This isn't a pitch for accountants, but again it makes the point that I think Ed and Tom were making, is the very very important aspect with dealing with the external world, whether it be accountants, appraisers, or other publics that we deal with.

Woody Mosten:

Well, just a few words. I think the whole day will be an appetizer of ideas, because we have so much to cover. As I look around I just can't help think how happy Lou would be at the development of his ideas that started really with one person who started to look at the obvious, and take much of what Ed has so eloquently put on the board as a development of a theory. And I think I really want to thank the law school for having Lou's name associated with this program, because a lot of things he did we can extrapolate from and be able to build our theory and our future.

For example, where's Dave Rowley? Dave stand up and show the Lou Brown tie. The preventive law tie. Very handsome on that white shirt. Lou kept thinking that, number one he did not have to talk or preach to everybody, but those of us that were fortunate to have been within his family, he wanted to nurture us and make sure we had tangible remembrances of all his theory, ideas, and insights. So one of the things he that he felt that preventive law would teach lawyers was really to be tireless, persistent, and helping. That people came first, and

people not just in a law office but people well outside. So he had this tie and other kinds of little ways to remember.

Am I right that it has a quill pen and a gavel?

Dave Rowley:

Yes

Woody Mosten:

To show his belief in choices it also comes in brown and blue. Of course he designed it, paid for it, and distributed it. Which is not unlike his first book, Preventive Law. I don't know if any of you have seen this? Even before he met Bob Shafton, 1950. And he did not wait for a law review or a publishing house to come out with it, because he did it himself. Part of, and there is a lot of big ideas within this book and the book that he and Ed wrote, finding by lawyers, a lot of big ideas and that one actually had a cover.

Ed Dauer:

Actually had customers.

Woody Mosten:

You know, that did not seem to bother him either, because when there were good ideas, if you could get one person to think about it really was enough. He put a lot of his big ideas and experiences into another book, called Lawyering through Life. In that book, which he self

published and which was reviewed absolutely favorably throughout the world in various publication, there is a bibliography. This was in 1986, and the bibliography, not the book, is 40 pages long. For any of you who are committed to preventive law, but maybe want to brush up a little, he has a wealth of his own insights in there. Lou was not, and I think this is kind of an insight that Ed has given us, limited to the legal profession. Although he loved the legal profession, he loved lawyers, and he was very active in the bar association. So he could talk that talk, and was very familiar, and got enough awards in his lifetime and beyond. But the fact is he would write about preventive law for airline magazines. True. He was the PSA columnist, when PSA was around. Anyone who got on an airplane could be able to read about helpful hints that were going to help peoples lives be a little better. That is something that differentiated him from many of his colleges, and or colleges of the time. When you talk about going through form to substance, the substance that he was looking for were better lives for people.

Audience Comment:

Talking about the future about preventive law, and one of the things that comes to light for me is in forms of that is winning the public over, and you had mentioned earlier the annual checkup. In order to get the annual checkup, the importance for that going, the public would need to be willing to accept that. It seems to me that something on the nature after a particular case sort of a closing or exit interview with a client you could say, “what are our next steps, where do we go from here, and how satisfied are you?” That might be a good place to start.

Woody Mosten:

Well, there may be lots of ideas for that. Lou also had lots of tools to try and implement his ideas, and the checkup was one tool. For example in my law office every client who comes in gets that checkup. But, we had opportunities. I remember the head of Xerox benefit program

happened to be a client of mine, and I shared that with Lou and asked the client if Lou could come and sit with him one time because we had an idea. The idea was Lou would pay for the legal checkups if you sent out to all the employees of this little company, a subsidiary of Xerox, to see if they were willing to fill out this legal checkup and come to see a lawyer. Not only did we not get an opportunity to get a tremendous sample, but the company was unwilling to do it. They were afraid that it would stir up discontent within the company itself. You are right. For years I offered free consultations to clients to come in and fill out a legal checkup, and I had plenty of time to play golf because people didn't come. That did not mean that the ideas weren't worth it and need refinement, but I think Tom's point of being able to assess the need, and market to that need on a meaningful level needs a lot of work, and perhaps all of us can think of that.

Bob Shafton:

Can I toss in just two very brief interdisciplinary things? The American Bar Association ADR Alternative Dispute Resolution section has a magazine called *Dispute Resolution*. In summer of 2000, it has a whole issue devoted to the future of problem solving and legal education. Bob Mnookin and Frank Sander write a piece, "Teaching and Problem Solving." Paul Brest writes, "Problem Solving and Legal Education faces uphill climb." That to me kind of speaks to what you are talking about. Publishers and editors and the public are looking for material, direction, and no one should be shy about beginning to put to paper thoughts and ideas, and at least discussing it with people, peer editors and others.

One of the things that has always bothered me is Preventive law is not a bread and butter issue to most lawyers, and it is a cost issue to clients. It shouldn't be, but it is. I exclude from that things like the compliance checklists. If you do this for FCC your client may stay out of jail. Some things are completely pragmatic. Coming in to have your will looked at or your estate

plan doesn't always fall under that category unless Hermione is your lawyer, and then you would probably get beaten up if you don't. Cost is not an issue, and there are exceptions. One of the things I would like to see, is what the medical profession has begun to do, is talk about alternative medicine. Not quirky things, and not just preventive medicine. I do not know how we work preventive and alternative law. I don't want to be cute about this, but there are alternatives to the norm. Whether it be litigation versus arbitration versus mediation versus planning. I don't know if it is taught in client counseling competitions, or moot court. To me the methodology is important, but the concept of what we referred to earlier is what Woody and I agree has to be thought through carefully.

Woody Mosten:

Do we have a few minutes?

Thomas Barton:

Formally not, but I would like to hear a little about your library.

Woody Mosten:

This is really fascinating. Lou had a maxim, he had lots of maxims and maybe we will talk about them throughout the next couple of days. One of them was that client waiting time should be client learning time. When he would walk into a law office, and he would see old National Geographic and Field and Stream and other magazines that we lawyers like, and then would throw out to the clients. It was to him a metaphor for non client centered lawyering. So, over the years we discussed why we could not make a law office a learning center? A place where if you are going to have informed clients, who are responsible and empowered to make their

own decisions, why can't they have a place in the law office? Lawyers do. Where do the clients fill out their stuff? Where do they learn in lay oriented materials?

So in 1990, with Lou's help, I established a client library. Now the client library does not have to have its own room, it can actually be in a waiting room. It has a video monitor, and a computer monitor. Video so that people can look at some of the really good tapes, some more need to be made, in their substantive areas. Or learn about negotiation or mediation or some of the rights that they might have. Books for them to get either by prescription from the lawyer or just to browse, and also, and I consider it the most important part, a telephone and a desk. A place where they can do their own work. They can do their own thinking, and they have their own resources to play a meaningful role as a collaborative partner. Whether it be full service or discreet task service.

There are client libraries now all over the world. In Sidney Australia they are in the public library. In Brisbane, Australia they have an absolutely beautiful office with high tech and comfortable chairs and things like that. It is my dream, when we talk about the future, that every court house and public institution will have some place for people to learn, and that Lawyers as part of their CLE or their Bar card will have to have some kind of client kind of tools, and train their staff to be client educators as part of what we want to do. because that is really at ground zero where the learning takes place. Thanks for listening to us.

Thomas Barton:

Thanks for that very imaginative insight into delivery systems and how that can work. William just published a book called, UNBUNDLED LEGAL SERVICES, which elaborates on some of these ideas and is very fine. I think we have one or two minutes at least for questions and answers.

Audience Comment:

As a footnote many of you know that not all your clients go to court. But when they do go to court, around the country there is a concierge concept. Where clients, who do unfortunately spend a lot of time waiting in our court, can come in and there is highly trained staff to educate them. Lawyers know it, and if it is inconsistent with their learning then there could be a big problem, but if it is consistent then it reinforces all that.

Woody Mosten:

Well I have a dream. There are senior citizens dying to be able to have something to do. You look at our courts and they are not very friendly. What if there was a chance to link those two populations so that, whether it's from churches, community centers, they were able to make cookies, pour coffee, and help have a neighborhood atmosphere in court houses. So that when people are waiting to decide very important parts of their lives they either could have docents who help explain for them, and or have educational materials that are paid for by the people that allow them to make better decisions. I think you're right, this has happened in some jurisdictions, but it could happen a lot more. It's sort of a symbiosis between the private and the public sector, in that preventive law has generally been a private sector phenomenon, and the public sector learns from it. But there is a lot happening in the public sector that we in the private sector can learn from, and they seem to be in totally different worlds, and maybe something that we can do here can merge those worlds.

Audience Comment:

A quick footnote on that very point. I am going to draw on an example from several years ago to make a present point. I wonder if part of the enemy isn't us. That is the impediment to achieving the dream isn't the profession itself. I'll give you the example I had in mind. In 1978

when the new bankruptcy act was being considered in congress, it may have been 1977, I forget what year it was. There was a proposal in the original bill for the creation of an office of consumer counsel, that wasn't the word they used, that would have attached to the bankruptcy courts so that people who were going there for wage earning plans, or whatever it was they were doing, could have gotten some advice from counsel or somebody to talk to in the court system itself. Which is a very formal application of the piece of the dream you are describing. That proposal was stripped out of the bill by the organized bar. The ostensible reason was that these things are too complex for people to do on their own, they're going to get bad advice, and they need to have the benefit of the bar association. Whether that really was the reason or whether it was a concern of losing some business, I really do not know. I expect that the impulse to do that in 1978 has not abated in the last 23 years, and that we might find that educated the profession may be a way of greasing the skids towards educating the public.

Woody Mosten:

I might also state Bill that in the area of unbundling and ADR the bar of recent year has played an incredibly important part. In fact most of the studies, and the impulse for unbundling has come from the ABA, and I think that in our desire to work with the organized bar maybe we can also work with taking what has been positive and the momentum that has been going. I think that your right preventive law is happening, and is being endorsed by the ABA. You remember the Gonser memo that has been floating around. The fact is that these seeds have been germinating for a long time, and taken those leaders that are there and working with them.

Audience Comment:

A VA hospital in Lexington Kentucky, a couple of years ago, was hit with a 2.5 million dollar malpractice verdict. They subsequently decided that when some committee of the hospital

decided that they really had failed, they were going to call the patient in, assuming the patient was still alive, or the family in and apologize and make an offer in settlement. Not just gratuitously for the benefit of the patient, but also for the benefit the hospital and its liability, and also for insurance if it is not self insured. So, I think there is nothing to complicated to take a stab at. I mean if that worked there, it might work other places.

Thomas Barton:

Thank you. On that positive note why don't we turn to Hermione Brown and Murray Galinson for their discussion of "The Lawyer as Counselor."

Hermione Brown:

I think that the topic is slightly overstated in the program, because I know nothing about public law, and I wrote to Murray and said why don't you take the public law section. He said he did not know anything about it either, so we are stuck with private law. What I really wanted to say is that I think one of the delivery mechanism that we use in our firm, and which could be used more widely is the mechanism of a counselor. A counselor is an old English concept of the guy behind the nice walnut or mahogany desk who looks after the family. After all the barons did not know much about law. They did it for annual fee. He was sort of the business manager, the supervisor of their estates, he handled all their major documents, and drew their wills. It went out of existence 25 or 30 years ago in this country as law got very specialized, but there is a place for them.

We found in our firm, which by design is very small and looks to relatively sophisticated clients, that we can charge on an annual retainer or a percentage of their business profits. Make a very nice living, and because they don't have to pay for extraneous services, they call. It is very comfortable to call your doctor and know Medicare paid for it. It is similarly comforting to

know that you have paid or budgeted for your lawyers bill, and you can call your lawyer and say I've got this problem. How do you think I should deal with my kids, I want to get another house do I have any problems from a tax point of you, or I talk to my architect and what do I do about this, he gave me a long piece of printed paper called AIA form, do I just sign it? There are a million areas that are irrelevant to his business maybe, or maybe they are part of it. How much insurance do you think I should get? Where should I place my insurance? What does it mean that it is best rated AAA? Is that important? You have all sorts of practical considerations that he would never call a lawyer if he were not on a retainer arrangement. I think that from a lawyers point of view it is also a wonderful arrangement, because you get to know the client. Instead of coming in with a discreet problem, should I sign this contract? You know what the clients goals in life are, what his marital and family arraignments are, what his dreams are, and what sorts of risks he is willing to take. It's true, as someone else said, there is a vast difference between the guy who has been burned and the guy who comes fresh out and is a 28 or 22 year old who the world is his oyster. That's why I find it very very much more fun to practice law because the fee arraignment is behind you. You do not have to worry about hours, you don't have to worry about rates. You set it once, and at the end of the year you look at it, and say well this year we did not do to much for him last year maybe will give him a discount, or he had a great year and we did all these things so lets up it 10%. Its fixed like an insurance premium is fixed, and it works very well. I would like to reestablish the concept of a counselor for life type of thing.

Murray Galinson:

Let me say that had I heard about this 20 years ago, this fee arrangement, I probably would not have left the practice of law. It sounds like a great idea. Whereas if you could do away with faculty meetings, I wouldn't have left teaching. I will have to say that I am little anal compulsive. We were told this morning that we had to introduce ourselves, so I will do a little introduction.

I think I am going to be approaching this morning from one of three hats that I have wear. I was a practicing attorney doing mostly trial work. I then became a law professor right at this very school, not at this particular building. I then became a client. About 16 years ago I went into business and became a banker. So, I am approaching it more as a client now then anything else. I have also got to say that it is really thrilling for me to share a podium with Hermione, because when I went into teaching Lou Brown was really one of my heroes. I feel really strongly about the areas of law he was preaching, and he was sort of a lone voice out there, and I became a lone voice down here and somehow it worked. I picked up on things he was saying. I taught courses from the range of evidence to interviewing, negotiating, and counseling. I taught it with a psychiatrist. We called it interviewing, negotiating, and counseling because in order to get the rest of the faculty to buy into it, I had to have the interviewing and negotiating, but it was clearly counseling. The role of the attorney as a counselor.

I can't overemphasize, in my role as a client, the importance of preventive law, both to the legal profession and to society. I think that the legal system, like politics, is and will fail unless preventive law has a greater role in it than it does now. It is growing. It is wonderful to hear the things that Bob and Woody are saying are going on out there that were not going on when I was practicing 20 years ago.

I think it is very clear to lawyers that when a party comes in and says I want a divorce, that they should talk to the client, and counsel that client, and refer that client to a professional and see if really they want that divorce. Yet for some reason when a client comes in to you and says I have a business of mine, and I want to break up the partnership that I have had for thirty years with this no good son of gun that I have been a partner with, counseling is not even thought about by many lawyers. That is what they are really talking about. Do they really want a divorce of that business, or is it something well beyond that that they should be involved in. I think when you talk about trial law, and I guess I did have this feeling when I was a trial lawyer,

that the only parties that win in a trial, are not the winners of the lawsuit or the loser of the lawsuit, but the lawyers. The amount of money that is spent by the client, but also the amount of time, energy, and emotion can be devastating. When I was the president of a bank down here, it was a public company, we got into a lawsuit. I am embarrassed to say I can't remember the name of the brokerage firm, but it is long gone. It is one of those that got gobbled up. They were suing us over a third party who had defrauded both of us, and I said to my lawyers, I am going to call the president of this brokerage firm and try and meet with him and settle the case. He said, "you can't do that." I said, "Why not?" He said, "because you have lawyers representing you." I said, "hey if he does not want to meet with me because he's got lawyers great, but as far as I am concerned you and the other side are so into this case as advocates that it will never settle." I called the president who was in New York. I said I was willing to fly out to meet with him. He said, "well I am going to be in Los Angeles next week, why don't we meet?" We met and within about an hours worth of meeting, a week later the case was settled, and it took a week longer because it took the lawyers that long to work out the details.

There is no reason why the ultimate goal has to be the court room. I might say that I appreciate very much, as a client, a lawyer who is doing much more than advising me about the law. Many times the lawyer will get involved in the matter and start saying that you can't do this because of XYZ, and x is a legal issue, and YZ are business issues. At that point I am more than happy to say to my lawyer look that is a business issue. I appreciate your advice but I am not going to follow it. The nice thing about being a client is that we need only listen, we don't have to follow the advice. But clearly, as a client, I appreciate the lawyer saying that this is an issue that is going to come up, and not necessarily a legal issue, and have you thought about it.

I think that when I was active at the bank we put on a seminar at the bank called family succession issues. The reason we did it is because we had a number of small businesses where

one generation was running and another generation was involved, and how are they going to deal with the succession issue? We had on the panel lawyers, and actually a lawyer who worked for an accounting firm back east who spent all of his time dealing with family succession issues. That is not necessarily just a legal issue, but a lawyer can play a big role in avoiding some huge problems that may exist. By the way on Tom's notion where you need to market the client, and I agree with that on preventive law. But, I think that it is even more important to market the lawyer. Get the lawyer to understand what preventive law is all about. I have a suggestion for Woody on getting the client in for an annual checkup. Now I don't know if this ever worked, and I never did it when I was in practice, but I was just at the doctor's office for my annual checkup, and before I left they said make an appointment and fill out a post card, and the post card said your appointment is blah blah blah with doctor so and so for your checkup. That might be a way of getting them in.

I think that there is a fine line between the legal advice and making business decision, but the lawyers that are involved in the counseling aspect, that are involved with their clients, I think are greatly appreciated by the client, and I think that they will find they enjoy the practice of the law a lot more. And that might be a way to sell it to the practicing attorneys.

Audience Comment:

You know it struck me earlier when people were talking about the parallels between our profession and the medical profession, and how we would like to get people in for checkups and have docs. I also heard a bad word, and that was waiting, or waiting room, and that is one of the things that I think we have to be very careful that we do not borrow from the medical profession. If we do this and the result is a line of people in your waiting room, maybe they will be using all of the materials you have got there, but then you have lost them because you haven't been client centered, and I think that if we really are going to be client centered then we

have to think like the clients. That goes back to, I think what Ed was saying at the very beginning, that if we borrow from management theory, and that if we borrow from theories that are common and understood to the clients, then we can be client centered as we do these things. I think that is a focus that some of us can miss. Especially if they operate in academia where the clients aren't here every day and they are not telling us what they think, or how they feel and what their problems are.

Murray Galinson:

You know I agree with you 100%. Recently within the last year my wife has some, fortunately, minor surgery, and I was at the outpatient with her. She went in at like 8:30, and at 10:30 nothing had happened. She was in the operating room on the table. I said to the nurse, "what's going on, has there been some kind of surgery?" She said no, doctor so and so overbooks in case there will be a kind of cancellation. My wife decided never to go back to doctor so and so. I said is that the height of what you could not want in a doctor, or a lawyer.

Audience Comment:

Both of you have alluded to something, the counselor idea, and also the litigation lawyer as single purposed, very focused on being a litigator. Perhaps that's what that person has been hired to do. I refer to it in mediation as the wimp factor. When I sit in a room and it's a good time to get clients to go off by themselves, and the lawyer will let loose a little bit. I say to the client and the lawyer, "look I am not sure if your lawyer has discussed some of the weakness of your case with you." And it may kind of throw them around a little bit, but it is clear that he or she has not discussed it with his client. I say it's the wimp factor. You did not hire this person to wimp out on you and tell you all the weaknesses. Although I am not suggesting to you that litigation lawyers don't, but sometimes they don't. I give Kraft Foods the credit, they may not

have started it but they were amongst the beginners of having two sets of counsel. Settlement counsel, which you have read about, and litigation counsel. Working simultaneously on two separate tracks. Sometimes the director of lawyers says “I want this track to go forward, and this one to stay on hold.” And sometimes they both go forward together. I think we can perhaps learn from that some way. I am not sure of its application to all that we have been talking about, but in the corporate field, those of you who have lived your lives in it know that people are looking for different and expansive ideas. Sometimes they come up with it themselves, and sometimes they need help from us.

Murray Galinson:

I think that one of the great advantages between the recovering attorney and the private entity in the business world is that you can tell your attorney things that you ordinarily can't. We were involved in a huge litigation, all the banks in San Diego, because a mortgage company had failed and claimed that the banks had helped to involve themselves with check payments. Which is a little funny because the bank is the one that ends up losing money when the check fails. I hired a graduate of this law school and a previous chairman of the board of trustees. I said that I need you to settle this case. He said you have counsel, and I said and good counsel but it is never going to settle with those lawyers.

Hermione Brown:

Well, the English weren't stupid when they invented Barristers and Solicitors. There really is a different function. One is to come out as your gladiator or your surrogate warrior, and the other is to advise, consult, settle, and understand in more depth where you are going. And they really are two different functions. Lawyers in this country have been torn between the two. You get

big firms where they are fifty or sixty percent litigators, and the balance are transactional lawyers, and who's in charge of the client.

Audience Comment:

The first company I worked for was a large engineering and architecture company. We had a big client named Stroh's brewery, and Stroh's acquired Shaffer. We were hired to go around to each brewery that Shaffer had and fix the processing plant so that it could make the Stroh brew. The first plant wound up with a wad of claims. Stroh's hired a big Detroit law firm to represent them, and sometimes the guns were pointed at us and sometimes at the real culprits, which is always the contractor. In any event, when we went to brewery number two Stroh's used the litigation lawyer to draft our contract. They weren't going to go off of the A item form. They were going to use their own form. Well this guy totally ignored statement of work, price, and schedule, which are the three key ingredients in any contract. He goes to the back of his form, and he wants to negotiate a confession of judgment, a dispute clause, and limitations on remedies. Its just what you were saying Bob. It's the focus of a litigator, when you take him, in this case it was a man, when you take him out of the court case, and you stick him in a contracts 101 matter he looks at all the wrong things. So we ended up with a sweetheart contract with about a forty percent margin in there, and fortunately never got caught up in all the dispute provisions.

Audience Comment:

We do that as counselors frequently. I actually did a trick once with a clients permission, but on a client for whom I did not want to bring a lawsuit. Who was very anxious to do it. After having interviewed a few litigators and heard their side, and had the client all revved up and ready to go I asked the client if he would sit through the interview again with another lawyer

that I would supply, but this time pretend to be the other side. And interview a lawyer who was going to come in and take the other side as a litigator, and see how that lawyer was going to be about being on the other side of the same lawsuit. All the sudden a light bulb went on, and he saw that there were actually two sides to the issue. That got us very quickly with different mindset about what the dispute was about, where we could settle it rather quickly.

Audience Comment:

Just two quick footnotes. One is that I think there is an enormous wisdom in Hermione's observation of the counselor. That part of what I will call the delivery process is just at the right level of replicability. It is the kind of thing that can be done with an environmental client, or a business client, or any client. It is just really to me the perfect kind of idea that demands preventive law. The second footnote is, the discussion of waiting is very interesting. I'll give you a coincidence. My homework for this week in the course called health care management is to read Harvard Business school material on waiting lines. The reason I mention that is that there is a literature about waiting lines that has been developed by the organizational theorists that we needn't redevelop. We can go take it. There is really good stuff. So reaching out to some of these literature is a really efficient thing for us to bootstrap ourselves with.

D. 10:45 am– 11:10 am *The Values and Assumptions of Practicing Preventively*  
(Discussion Group: Dave Rowley [[daverowley@home.com](mailto:daverowley@home.com)], Alidad  
Vakili [[avakili@san.rr.com](mailto:avakili@san.rr.com)])

Thomas Barton:

The next segment for us is “The Values and Assumptions of Practicing Preventively,” with Dave Rowley and Alidad Vakili.

Dave Rowley:

My name is Dave Rowley and I am a lawyer. After graduating from West Point I could have been professional soldier, an engineer, or a scientist, but as [one person put it], anybody can be a lawyer if he screws up enough. And I did. I started out my practice as a business litigator, and I was very good at it. I had a very prosperous and thriving practice that I built from scratch, but after less than five years I sold it. I learned that even when you win you lose, and I didn't find a great deal of joy even in winning. Nor were my clients particularly well off, in my opinion, after we won, and I never lost. So, after selling my practice I threw darts professionally for two years. I had a lot of time to think and a I had a lot of time to read, and that is when I discovered Professor Browns book published in 1950 entitled “Preventive Law,” and that changed my life. Shortly after that I actually had an opportunity to meet Professor Brown, and it was even better in person than it was on paper. And it was the beginning of a relatively long dialogue that was never less than fully interesting.

After I meet Professor Brown I decided to go out on a limb and really pitch prevention for the first time to a real client, and I did that in 1986. Bell Sports was going broke winning lawsuits. They are the world's leading manufacture of head gear protection, and they were buried in litigation. I made a proposal that was innovative, I think, at the time. [I was] looking for a root cause analysis of why we had all these lawsuits that we kept winning. When I started at Bell we had about 83 lawsuits pending. From Hawaii to Maine, from Alaska to Florida, and that was a time when we were making about 350,000 helmets a year. When I left Bell Sports in 1986 we were making about 600,000 helmets a month, over 8 million a year, and we still had lawsuits, but you could have counted the lawsuits on your fingers even if you had been in a farm

accident. It was over 240 fold reduction in the claims in litigation experience, and it was a miracle. It saved the company. Not only did we reduce the cost per case per year, we learned and embraced the concept that the only effective way to manage litigation is to manage to avoid it, and that is what we did. And that is what I worked with Louis on doing. How can we actually head these things off before they really become a problem?

I am not sure why, other than for my tie, why I was invited to this affair because I am not really a scholar or an academic. My roots have always been in the business community. I work with clients, and I have not spent a lot of time thinking about the theory of preventive law. I have always been engaged in the practice. I believe, and I am not sure that we all agree what preventive law really is, certainly from my perspective its included the concept of creative problem solving, maybe pieces of therapeutic jurisprudence, but I have found a thread that is consistent throughout my own preventive practice, and it has to do with a paradox in preventive law. That never once in my career as a preventive lawyer has a client called me and asked for preventive services. Never, not once. Every one of my clients that have availed themselves of services in prevention or creative problem solving were the result of contacts I initiated. They don't know when to ask for a lawyer, because if they knew when to ask then they would have the skills of a lawyer and they wouldn't need a lawyer. I have written about that under heading of "Catch 22, How Do You Get From Here to There". Which brings me to what I think is perhaps the topic.

Certainly assumptions and values is way too broad, and in all I have written in the hundreds of pages of unpublished manuscripts I don't have anything under either of those headings. But I do have one called earmarks, and the one at the top of the list, and it applies to both prevention and creative problem solving, is the question of timing. Timing is absolutely everything in the role of, as Hermione said, counselor. Without timing, counselor is just another word for fireman. You have to be there at the time when you can actually make decisions that are going

to be better than the decisions that would have been made without you. In creative problem solving you will have an array of possible outcomes that is much greater if you see it sooner than it is if you see it later, and most lawyers, especially the warriors, see it when it is all in the can. All the facts are as Louis called them, cold facts. It's a done deal. Now what can you make of this? How many angels can dance on the head of a pin?

All of my preventive relationships are exactly that. They are relationships. They are ongoing, they are not charged by the hour, its part of a retainer arrangement where somebody is not afraid to pick up the phone and ask a question. Nobody waits in my office, because I don't have an office they can wait in. I wait in their office. It is amazing if you get out of a law office how much good you can do. Most of my career has been spent in house. Not always as an employee, although I did spend three years as general counsel at Bell, but as outside general counsel working in the trenches side by side not always only with the CEO. Law doesn't live in a compartment in a living enterprise. It is practiced in the trenches. In fact at the risk of hearsay I have advocated in my educational programs with clients that there is no such thing as a legal problem. There are only business problems with legal consequences. Although that may not be technically true, as a practical matter that's the mind set that I want from them so that we can get the conspiracy of competence together to figure out the courses of actions and the alternatives, and then let the business people make the choice. As Murray said, they're the ones who get to choose. The role is to outline the alternatives.

There are lots of earmarks of the earmark of timing, but I mentioned three in the article I had submitted. If you ever hope to get timing in a relationship that is a counselor relationship it is going to take credibility, it is going to take accessibility, and it is going to take some sort of accountability. The accountability is really important, at some point the relationship has to make economic sense to the client are its not going to last. I don't see how you can do something like that without an ethic of care somewhere in a relationship that is ongoing, that deals with things

that are very close to the hearts and minds of these folks. Which ties in with a conversation I had a decade ago with Gresham Bane, who is probably one of the most innovative MD's in the world, who founded a company called Call Doc, where he takes the hospital to see sick people instead of them going to the emergency room. He has a van outfitted with all kinds of stuff to do it. Before health care was in crisis Gresham told a small group of business associates, and I have never forgotten this, "if you want to have competent health care into the twenty first century, there is no substitute for establishing a personal ongoing relationship with a competent physician." No substitute. I would submit that the same is true of the counseling role in preventive law.

Alidad Vakili:

I want to start off by, unless there are any questions, just to say that it is really an honor to be invited to come speak and give my two cents worth. A lot of people here have a lot more experience in this area than I do. I thought I would share some of my experiences early on when I started practicing law, and how it has really come to make me realize what the value of preventive law is, and to really appreciate that there is this symposium, and there are people, and associations that are really getting the word out. I started my own practice fairly early on, a couple of years out of law school I hung out my shingle with a friend of mine. We were doing a lot of different kinds of law. Family law, immigration, business transaction, and litigation work. After a few years what I realized was that I was spending a lot of time emphasizing alternate ways to solve a problem rather than going to court. I think that's really the value of preventive law. It's how can we help our clients get where they want to go, rather than just end up in a courtroom and battle it out, and see what a judge and jury has to say about it. I have done litigation and don't really care for it. I certainly respect the litigators, but I agree with a lot of the comments made earlier in that litigators tend to have sort of a narrower perspective of approaching any particular issue. A lot of times they are dealing with cold facts. They are not

there in the beginning to try and offer alternative solutions or creative ways of approaching an issue before it gets to where people are entrenched in their positions and they don't want to leave their fox hole to try to come into the middle ground and resolve the issue.

I also wanted to go back to what Hermione said about the counselor. I think that is really the lynch pin of what preventive law is all about. It really is more than being a legal eagle, and offering legal advice, and providing technical and legal analysis of any sort of issue a client may call you about. I have had situations where people have come to me and they don't really know what they want. They may have an idea, and a lot of the times that idea may be created by the image they have of what attorneys are there for. They are there to take you to court, rattle a saber, stir up the mud, and get a good result and win, at all costs in some cases.

However, when you start talking to them and looking beyond just the legal issues, for example looking at the dynamics of the relationship such as whether it is a partnership or a company that is being formed, or a dissolution of a family or business—if you start looking at what is driving it or what some of the other issues are, there are emotional issues, there are ego issues, and there are family issues, you start to realize that I am not just there to provide a legal answer. I am actually being asked to play the role of a therapist, a psychiatrist, or someone who comes in there to trouble shoot.

To kind of take it out of just the word counselor. My background is that I am half Iranian and half American. I was born in Iran and lived there for eight or nine years and then I came to the U.S. In the middle eastern culture if you go back in history the vizier was the right hand man in those times, the right hand person now, of the king or ruling person. That embodies a lot of the same concepts as the counselor does in the western part of the world. That person was there to solve problems because the king or queen does not have all the answers. They need somebody they can trust to look out for them, and to trouble shoot, and guide them to a good direction. I think if we could all try and infuse that in our own practices, in our own way of living, not just

lawyering, but take it into a broader philosophy of life, I think we will naturally start doing it in our practice. It is really valuable for our clients. I have seen a lot of clients come to me not because I am a better attorney or have more experience, but just because they experience that this person listens and he's not rambunctious he does not want to just run off to court to litigate. He wants to actually listen and offer something other than what could be a long and drawn out battle, and I think that is really a value that we can offer in addition to the knowledge base and the skills base, that's really the delivery system. These are three great ideas, the knowledge base, the skills base, and the delivery system, but it really comes down to the delivery system. You can be the sharpest brightest attorney and have all the legal answers, but if you do not know how to deliver to the client where is the value that you are providing to that client in the particular issue that you are being asked to help out with.

Audience Comment:

The point that you made so well made me think about something that you talked about when you started the client counseling competition, and that was something that we wanted to teach law students about. Not just solving legal problems, but treating the client as a whole person. One time he devised a scenario where there would be three sets of law students, and each time the client on a day like this would leave her raincoat, and two of the sets of students after the raincoat was left went right on with their post session wrap up, and the third set of students, one of the students saw the raincoat and ran after the client with the raincoat to give the client the rain coat. Lou's point was that that set of lawyers score well in that type of competition, because they were thinking of the client much more than the legal problem. A total person that may have nothing apparent to do with the legal problem comes in. Your point about just being able to have a conversation, to open up so the client trust you enough to discuss what may be on his or her mind, it will appear tangential to the presenting problem, but in fact often it will

lead to much better lawyering. The question for us is how do we calculate that with the future generation of lawyers?

Dave Rowley:

After Ed wrote knowledge and skills I was almost certain that the third word was going to be attitude, but it wasn't. It could be. Perhaps it envelopes them all. You mention the T word, trust, credibility. Earlier on somebody mentioned the survey that Louis hated so much that put lawyers so far down the scale. It's a major issue.

Hermione Brown:

You mentioned something about clients not knowing when to come to a lawyer on your timing problem. One of the things that Louis was so upset about, he had taught at UCLA business school for a year, many years ago. He said that they are teaching the students bits of law. He said, "that's not what they should be learning." "They should be learning when they have reached a point where they have to call the lawyer and talk to them." He never did get that idea into the business schools, but that was in line with your idea of timing, and when do you call your lawyer. That was his idea of where the instructions should start, and perhaps it can start also in law schools from the other point of view looking at the client, and saying when can we be helpful to a client, at what stage do we look at the relationship and say this is where we ought to come in and see if we could be helpful.

Dave Rowley:

There is a counterpart domestically to what Alidad referred to in the East, and it is with the Godfather. The godfather had a consigliere. He knew everything that was going on. He did

not always approve or bless it, but he knew. That, in my own personal experience, is the pretty much the sort of relationship you need to find out what is going to pop, even when you are in house. The fact you are general counsel and you have an office with your name on the door don't mean squat. The stuff that is really happening is out there. The worst thing I ever did was sit in a chair in my office. I think it ended up gathering dust, because nothing is happening in the office. Its all happening out there. If you are there people will ask, and if you are not they won't.

Audience Comment:

Dave, two pragmatic things. The consigliere knew how to keep himself alive, and there are times you take your client on and there are times you don't. Let me throw something out. Mandatory continuing legal education is required of lawyers in California, and I think probably in most if not all of the states in the U.S. Legal ethics is the hardest to find. In other words you can't find those courses unless you do a written one or a tape or something like that. How could we devise a course that would include obligations, or at least with a question mark obligations, dispute resolution field is it a deal to discuss with your client the ADR clause you put in a contract, or is it boilerplate? Do you have to put anything in at all? Now we know that if an offer in settlement comes along you have an obligation to discuss that with your client, but this is more akin to prevention. Is it required for an estate planning lawyer to talk to the client every blank years about the estate plan, or is that soliciting business. Maybe this has been done. I have not seen it frankly. How can we get out this prevention alternative field that has not been engraved in the minds of law professors, law students, judges, lawyers, and certainly not the public.

E. 11:10 am-- 11:35 am *The Role of Communication and Cooperation*

(Discussion Group: Debra Gerardi [[debragerardi@hotmail.com](mailto:debragerardi@hotmail.com)], Soile Pohjonen [[Soile.pohjonen@helsinki.fi](mailto:Soile.pohjonen@helsinki.fi)])

Thomas Barton:

Those are really great issues, and we are gathering ideas. We certainly are. Thanks very much. I think we should move on to the next one. Its “The Role of Communication and Cooperation,” with Debra Gerardi, and Soile Pohjonen.

Debra Gerardi:

I am Debra Gerardi and I live in San Francisco. I just recently moved up there from Los Angeles. I am a critical care nurse at Stanford University Hospital. I do mediation and dispute consulting for health care organizations, and a lot of training of health care providers and mediators in the area of communication and creative thinking.

Soile Pohjonen:

What I will talk about is communication skills, or rather how to create communication. That has got to do with new kind of questions when we are no longer satisfied asking the *why* and *what* questions. Why things are the way they are, and what things are, but now we have started to ask *how* questions. How processes transform, how things perform, and what kind of processes they are. This has brought the emphasis on relationships and connections. Like in brain research, they nowadays don't think the cells themselves are so important but the connections between them, what kind of connections there are. The human resources have been emphasized lately as being very important in every kind of business or profession. So this

has brought naturally all sorts of emphasis to relationships, and these *how* questions when we talk about skills particularly. There are very many coaches' techniques, methods, communication ways or what ever you call them nowadays, dialogue, NLP (neuro linguistic programming) etc. The same kind of techniques have been used in ADR, mediation, preventive law, and contracting. What you mentioned here already is the listening part, and active listening has been very central to all of these mentioned. In mediation, extralegal mediation particularly, it's not only analytical rationality, it's intuition, creativity, and empathy which are needed. Active listening meaning questioning so that we are not anymore doing assumptions. We are really trying to figure out exactly what a person means. Also observing body language and maybe even trying to pace it, to create more connection and thus understanding, helps us to learn more exactly what the other one needs.

This brings me to another brain research thing about emotions and feelings. Which has also been lately discovered that feelings or emotions and thinking are very tightly connected. And if we think about our scientific tradition and Aristotle, his ideal of justice was thinking which is pure of desire (justice as something which could not be otherwise) but he didn't think this was possible for humans. We can say that afterwards that was kind of changed, our scientific culture shared his ideal but didn't realize that human thinking cannot be separated from desire. So they were more or less separated before it has now again been brought up that it is an impossible task. And emotions and desire have been kind of revalued.

It's quite logical, if we think about it, that before we can think something we have to want to think something. I don't begin to think something that I am not at least interested in, I don't even notice it exists. So the first is the desire and the focus, and then we think. So this kind of desire, emotions, I think is an elementary question here, and then how to create desire. In biology the cells are very sensitive about their bounds. If they feel themselves threatened they close, and then naturally if we take an analogy then if we want to open communication we have

to not be afraid and feel threatened, but to be able to open ourselves as we are a collection of cells. So how to do this to help the other one and ourselves to open to communication?

Naturally one person is already listening when the other one feels listened to and being really heard, and accepted as such. I think that other part is equally important, the “to be listened to” part also when it is questions about court decisions or mediation decisions. People feel that they can trust decisions if they feel that they have been listened to, and they have understood what the other has said as well. To create that kind of atmosphere we naturally need appreciation to approach the other with appreciation and respect, and you can’t do that if you have the kind of beforehand ideas about what is good or bad or what is right or wrong. We can’t understand things if we have these kinds of restraints in our minds. And then to be able to appreciate the other we naturally have to be able to appreciate ourselves. So that we know something about ourselves, where we end and the other begins. So that all our hopes and fears and traumas don’t get in the way of us seeing at all the other one.

So we have to feel separated first, I think, to be able to have communication, to have connection. We have to know where the lines are even when we try to be the other in a way. To respect the other person as another and their otherness. For this we may in practice use for example suspending so that we may coexist peacefully. I sit here and talk to someone and I am so irritated, if I then try to say that I am a very happy person, and I like that person and I am not irritated, I certainly will be. I first have to accept it. Okay I am irritated. Let it be, I am irritated, and then I can relax and listen to the other person. So also treat ourselves without judgment. I think that is one of the points, we don’t try to change the other and we don’t try and change ourselves, and then we are able to feel some kind of creative communication. Maybe we have to jump to the unknown, and naturally to do that we need courage and we need the desire to do it. The kind of state of altered consciousness when we have emptied of the old in order to be able to open ourselves to the new, and then I think we have to be able to go beyond the rational mind, the mind of obedience, and the attitudes of how things are or

aren't. If we are able to leave that behind and alter the consciousness, kind of leads to a trance, and by trance I mean a very natural idea, a very natural thing, it's a state of concentration actually, and we all do that and we very often are in trance. Here we come to Deborah's theme naturally. We have not been able to create here a communicative interior design, forms, colors, music or anything like that, but by our own games and play I think these ideas I referred to will materialize well, because doing games we are able to empty the old and able to be kind of playfully open and ready for something new.

Debra Gerardi:

What I did not tell you in the introduction is that prior to moving to San Francisco I performed as an improvisational comedian professionally, and the games that you learn to do to perform improve, such as in "who's line is it anyway," with Ryan and Wayne and all those guys that I had the fortune of working with in L.A. Those games were designed to teach children to be more spontaneous. At a time in the 1930's in Chicago when a social worker realized that children were having a hard time communicating with each other. They were working in factories, child labor laws were not what they should have been, kids were having a hard time communicating with each other, and doing what kids do perfectly which is to be creative and spontaneous. So she developed some games for them to play. One of her interns who was working with her at the time was a woman named Viola Spolin, and any of you who have done any work in theater know her name very well. Viola Spolin looked at these games as a great way to teach actors to get out of their head. All of you have seen the actor who comes onto stage and is going to be the character, and so they pretend and walk through the physicality of who this character is supposed to be, and they are not really responding to the other people that they are on the stage with. So if something happens and someone forgets a line, or the light blows up behind them, or a prop isn't there then they freeze because it is not part of what is in the box, and it is not part of in their head how they have created their character. So she

created these games to help teach actors how to get out of their head, and pay attention to what is happening around you and respond to the moment. She started working with these games and started realizing that this was a really good teaching tool, and her son came along who was performing at University of Chicago, and said its not just a good teaching tool it's a good way to perform as well and make theater accessible to the common person. So they put together a little troop and traveling around the country, and they eventually became Second City.

So all these communication games became a great art form, but they are perfect for teaching exactly what Soile was talking about. One of the principles of improvisation is to show don't tell. So I need two volunteers and we are going play a couple of these games so that you can see just the importance of communication in preventing disputes. So as the two volunteers make their way up here. We are going to play a couple of games. So if you do not get to play the first game then you will get to play the second time. R\_\_\_\_\_ is volunteering so lets give him a hand. We are going to play a game called, "yes and." So why don't you guys just face the crowd here. So what we are going to do is, because its not just two people attending a conference, that's kind of boring, lets give them a relationship to each other?

Audience Comments:

Brothers.

Audience Comment:

They dated the same girl.

Debra Gerardi:

I heard brothers and they dated the same girl. So that's who you guys are, you are brothers who dated the same girl. Where would two brothers who dated the same girl be having a conversation, lets give them a location?

Audience Comments:

They're at the ballpark. Thanksgiving.

Debra Gerardi:

I think the first thing I heard was at the ball game. So we will take that. So two brothers who dated the same girl at a ball game. So that is all you know about each other, and you are going to make up the rest. So the rules to this game are, it is called "yes and," so you are going to make a statement and then the next person will agree with that and add information, you agree with what he said and add information and you will just communicate that way. So agree and add information. Agree with what the other person said and add some information. So lets give them a hand.

Question:

So we can just improvise the facts as we go along?

Debra Gerardi:

Well yes, yes you can.

B\_\_\_\_\_:

So, R\_\_\_, remind me, how many players are there on a football team? Eleven?

R\_\_\_\_\_:

No its 36, but I really enjoyed going out with Maria and I appreciate you letting me have your second helpings.

B\_\_\_\_\_:

She is a wonderful person, and she told me that the first date with you was alright?

R\_\_\_\_\_:

You know that is funny, she told me the first date with you was alright too.

B\_\_\_\_\_:

Have you been on a second date?

R\_\_\_\_\_:

Yes it has been a wonderful experience so far, I think it might last.

B\_\_\_\_\_:

It looks like they are on the thirty yard line, first and ten.

R\_\_\_\_\_:

I don't think they will make it. You know they have been on that yard line many times. What are they zero and ten this year?

B\_\_\_\_\_:

That's what Maria told me about you?

R\_\_\_\_\_:

Gee you know, I appreciate this sibling rivalry we are having it is really pleasant, but I always hoped that you would be the kind of brother I would look up too.

B\_\_\_\_\_:

Well you can. In all seriousness I really wish you well because when I realized the two of you were going out I realized that there was no place for me. Not in the family, certainly there is a place for me in the family, but not with Maria. I don't want to stand in your way.

R\_\_\_\_\_:

That's great, but you have to worry about you in the future now, You know you are older than me and still single, so if I can be of any help let me know.

B\_\_\_\_\_:

Well if Maria has a cousin that I could go out with.

Debra Gerardi:

Okay Freeze. Are these brothers friends? Would you say they are friends?

R\_\_\_\_\_:

It didn't start out that way. It was a little ambiguous.

Debra Gerardi:

Ambiguous. Were they agreeing with each other? Was there a lot of agreement between the two of them?

Audience Comment:

Not about Maria.

Debra Gerardi:

Not about Maria. Yes, definitely not about Maria. And sort of the game kept coming back in. Its like well what about the second date. Hey look they are on the thirty five yard line.

Audience Comment:

Instead of saying that they are friends, I would say that they are competitors. They are both single guys and they are both interested in the same women, they are very definitely competitors.

Debra Gerardi:

What does their body language tell you?

Audience Comment:

They are at a conference. They have to go to the bathroom.

Debra Gerardi:

How are they standing? Are they facing each other.

Audience Comment:

No.

Debra Gerardi:

Not really. They are kind of facing out, which in communication circles is a way to escape. So if you are in a situation where you are a little nervous about being there someone will always point their foot away from the other one as if to be able to move. They are also being very protective. They have got their hands in a very protective place. Part of it may be because

they are nervous about being out in front of a group of people. Maybe also from their interaction with each other

B\_\_\_\_\_:

We would probably flunk as actors.

Debra Gerardi:

No, no, no, and one of the principles I want to add is that there are no wrong answers. In improvisation there is no wrong answers. Keep that in mind in your interactions and your teaching with students. There are no wrong answers. There are higher percentage choices. There are things that work better. But if you go into a conversation or a relationship with the client or anyone that if I say the wrong thing everything is a bust, its going to be. It absolutely will be.

Audience Comment:

They were both quite tentative, and there was some ambiguity in the relationship and I was waiting to see which of the pathways it would follow. I am just curious what are, given that tentativeness, what are some of things that might have driven them down one path versus another. Because you could imagine one path which would be a ruptured relationship and another path that would be a complete accord.

Debra Gerardi:

Possible because they did not have the information that was going to push them one way or the other either yet too.

Audience Comment:

Is the value of one's voice, its kind of a term of art, is that important in your mind? The ability to be real?

Debra Gerardi:

I think so. And a lot of it is not going in saying I have got to speak clearly and loudly, and I have got to look them in the eye. You have to be yourself because you know they are going to see that as your confidence. If you are trying to pretend to be the big corporate litigating lawyer, and that is not who you are personally then that is going to come through as being not certain, or not sure of yourself.

Audience Comment:

Well I think the context they both assumed, they were asking as investigators as though there was a whole hidden agenda here, and they were trying to fish for information. So you know in a way you maintain a distance that sort of contributes to that.

Debra Gerardi:

There was some distrust you could tell just built in just by the premise that they dated the same girl. So you know they are going to be kind of conscious of each other in their approach to each other and getting information because they want to get more information it seems.

Audience Comment:

What I wanted one of them to say was that Maria was doing a graduate thesis in a project and she had just picked them out randomly. They are actually just being used.

B\_\_\_\_\_:

If we were doing this again should we have forgotten the audience and really just made it a conversation, maybe even forgotten the football game part.

Debra Gerardi:

No wrong answers. And you can never forget the audience. And think about it when you are in court you cannot forget the other people in the room. You can never forget the surroundings you are in, and one of the great things of doing improvisation is you use what's in the environment. So, if there is an audience and there is energy you use that energy. If it's a cold room you use the cold, if its raining out you use the rain. Essentially that is creative problem solving. It's the scene from Apollo 13 where they dump everything out onto the table, this is all you have, make it work. I think a lot of times we forget to look in that box of things to use. We think that we can only use this little box of things, and you can't. You can use everything. You can use absolutely everything, and that is what improvising is. One of the phrases that Viola always used is, "Improvise, don't add lib." Ad lib is in your head, you are thinking about things just off the top of your head and you are making it up. It has nothing to do with what you are doing right now. But if you improvise you are like give me that duck tape, give me that pencil, you know we are going to make a nuclear reactor, and you know we will do it out of these six things. That kind of a thing. So you never forget what's happening in your

environment. That's always part of it. That's always part of it. And don't forget that the other people are in the environment too, so they are using the environment too.

B\_\_\_\_\_:

We are going to go out for a beer now?

Debra Gerardi:

Give them a hand. Questions?

I'll just add I gave you packages by virtue of being substitutive, because sometimes it seems a little abstract. Its mostly health care articles because that is my area of expertise. On communication training and cooperation. There is a whole movement toward actually coming forward and saying, "you know what we screwed up we and made a mistake." Rather than trying to defend against that in adversarial relationships with regard to malpractice lawsuits. There are some good training exercises and articles and things like that. Then also an article I did about a training we did at UCLA using these games just to focus to communicate better.

Thomas Barton:

Great, thank you so much. So, taking us up to lunch we have, "Law Reform Building Prevention Through Substantive Laws." David Wexler and Josephine Gittler.

David Wexler:

My talk is going to be very different from the others, and unfortunately more technical. Maybe I need a protective stance. We are moving here in a way away from our topic from preventive

lawyering to preventive law. Preventive lawyering would be the techniques the legal checkups and so on. Preventive law as I have defined it for these purposes, is really looking to see if we could come up with legal doctrines, and my talk would be really court created doctrines, and Josie's would be legislative ones, that can themselves serve a preventive function. At least in the broad sense. Can we have doctrine that help us promote dialogue rather than polarize debate? Can we have doctrines that reduce anger, that reduce contentiousness, that reduce unnecessary controversy. I think we can use some of the developments in therapeutic jurisprudence to really move us in a way from preventive lawyering to create an additional dimension to preventive law, which is truly creating legal doctrines.

So, I have written something that I am going to summarize here that is going to be called, "Lowering the Volume Through Legal Doctrine: A Promising Path to Therapeutic Jurisprudence Scholarship." My interest in this began when I read an article by Natalie Des Rozier, who is a law professor in Canada, a French Canadian teaching in Ontario, and now she is president of the law reform commission of Canada. Some of you probably know her. There was a special issue of the journal "Court Review," which is the American Gender Association journal on therapeutic jurisprudence, last may. There is a copy of it around here somewhere. Natalie had an article in it called, "From Telling to Listening: A Therapeutic Analysis of the Canadian Supreme Court case dealing with Quebec Secession." She was really impressed with the Canadian supreme court case which, unlike prior cases, was very conciliatory in tone and which actually created a legal doctrine that was very well received by Quebec and by the rest of Canada, and that kept things on a kind of nice level when things could have been on a different level. Prior cases really very traditionally the court would say drawing from the advocates this side wins this side losses, this argument is fallacious, this party miss read the statute, miss read are prior precedents. That sort of thing. This case was very different in language, but for my purposes what was important was the doctrine. The doctrine said, it did not really solve anything, the supreme court called for was that a clear vote on a clear question

in favor of Quebec secession. A clear vote within Quebec on secession would confer legitimacy on the issue, and would obligate all participants in the confederacy in the confederation. The rest of Canada, the federal government, the indigenous groups, to try and negotiate some sort of solution. So in essence it was a duty to negotiate. Which Natalie calls a process driven solution. And she at the end of her article says that we ought to come up with a list of process driven solutions that we should offer up to the courts. And she mentioned one, a duty of good faith in labor, and a few others. But it got me thinking whether we could have a kind of body of law that deals with legal doctrines that can promote dialogue, that can reduce anger contentiousness, that can really be preventive and therapeutic, and that is really what this piece is about.

Another interesting case that came down last month was Baker v. Vermont. The Vermont gay marriage case. It was interesting in that the Vermont court did not want to say we have all the answers here. What they did say is that they were a lightning rod. They said, we believe that same sex couples have the same benefits under the Vermont constitution as heterosexual married couples do, and it is unconstitutional to deny them of those similar benefits, but they stopped short of actually saying the marriage laws apply. They simply said, however, we are not experts here. We are going to leave it to the legislature to decide this issue. They can do either a domestic partnership, a marriage, a civil union, or various other options. That sounds very much like the duty to negotiate kind of case, and it too is a process driven solution. However, unlike the Quebec case, this one did not work. It worked in the sense that eventually there was a civil union law passed in Vermont, but the process turned out to be very contentious. Part of it had to do with timing I think. The decision came out in the dead of winter, and those who came out were polarized people who had real strong stances. The moderates don't get up out of cozy fireplaces and say we want a moderate solution here. So, I think that is a very interesting issue in its own right. That process driven solution did not work

so well, so its not just that solutions that ask for negotiation or dialogue in and of themselves achieve that.

So, is there a better way. It struck me that the Miranda decision ,reaffirmed last year in the Dickerson case, had some very interesting language in it, when it came down in 1966. Partly to take the sting out of the decision, and the Miranda case said the following warnings and waivers are required in police custodial interrogation, but they are only required unless or until other effective alternatives are developed by legislation or other means that might equally protect the self incrimination privilege that is jeopardized when we have custodial interrogation. In a way this is a page out of the negotiation theorists work Distinguishing positions from interests. What they did was combine it really in Miranda, they came up with a default provision, they said the Miranda rules are required, but required unless there are other ways that are devised to protect the interest at stake. The crucial interest that is at stake is the self incrimination privilege that is jeopardized during custodial interrogation. We have a position that will satisfy it, it is these Miranda warnings. If however you do not like these Miranda warnings, and can come up with another way of satisfying that interest then that is okay. That can leave doors open, and can take the sting out, and can promote dialogue, and can push the ball back in the court of the critics and say how else might we do it if we do not like the Miranda warnings.

In fact it did not really work that way in Miranda, but I think it is more likely to work now. I think it did take some of the sting out of Miranda, but it did not really get the critics of Miranda to come up with alternatives. Last term in Dickerson the court looked back at a 1968 statute in Congress that said, you know the Miranda court said that Congress could come up with effective alternative ways of protecting the privilege, but this 1968 statute did not do it. This 1968 statute merely sought to turn the constitutional clock back to pre-Miranda days. It did not really offer an alternative, but the Dickerson court reaffirmed that language.

It seems to me that one doctrine that can promote dialogue is a default rule doctrine. Saying the interest at stake here is a position, a legal rule that will satisfy that interest, but other ways that can satisfy interest can and will be considered. If you do not like it, you can work around it. I wonder if the Baker v. Vermont case would have had a better reaction in Vermont, a less contentious one, if it had been passed in the form of a default rule. If in for example the Baker case would have said that gays are entitled to the two equal rights the same as married couples, this legislation that is now on the books will remain in effect for stability's sake for the rest of the legislative session, which the court actually did say. The legislature can say how these interests will be satisfied through domestic partnership, marriage, or civil unions or other ways. The kicker though is that at the end of the legislative session the marriage laws will apply. That will be the position that satisfies the interest, unless the legislature does something else. You see the court was willing to be the lightning rod in saying that gays have equal rights, but then it also created another lightning rod in the legislature. I think it might have been able to avoid that lightning rod in the legislature by creating an ambiance where the legislature were working to get out from under an already imposed default rule, which would have been the marriage laws will apply unless you doing something else. So just this is something that I have been thinking about in terms of a combination of therapeutic jurisprudence, and preventive law in a doctrinal sense.

There can be legal doctrines apart from this area of process driven solutions that also can work to reduce anger and contentiousness, or can exacerbate it. The Miranda case is another example of this or aspect of it. A week after the Miranda case came down a case came down called Johnson against New Jersey, which said that Miranda will not apply retroactively to all sorts of people who are already in prison whose confessions were gained before Miranda came out. That would have wreaked havoc on the system. It will be prospective, it will be applied prospectively as we expect it too. But the court made an error, I think, by saying that Miranda shall apply to those cases beginning the day after the Miranda decision. What that meant was that in the immediate aftermath of Miranda, when media attention was focused on this and the

far reaching ruling of the Supreme Court, and what impact it would have. Immediately courts were required in suppression hearings to suppress confessions that had been obtained a little bit before Miranda that couldn't have complied with Miranda because Miranda wasn't out yet. While media attention was focused on it they would say, this case was just dismissed, this confession was just suppressed. A very visible and a kind of unnecessary adding of salt to the wounds. Had the Miranda court said, the Miranda case shall apply to cases of confessions obtained after the date of Miranda, that would have been avoided, and it seems to me it would have avoided unnecessary misunderstanding, confusion, and acrimony and so forth.

The final example I will give relates to the Mapp against Ohio exclusionary rule. It has always been controversial on the grounds that the criminal goes free because the constable has blundered. That's one of the costs we pay to have a rule that tries to induce compliance with the 4<sup>th</sup> Amendment to the Constitution. That critique has often been answered by the defenders of the rule. Wait a second, critics of the rule say that we should not have the exclusionary rule, we should have some alternative to it, a civil suit, a police review board, a civil rights action, anything but exclusion. Exclusion is too drastic a remedy because it just lets the criminal go free. The defenders of the rule have said, well if you are upset about criminals going free because the constable has blundered and has not conformed with the 4<sup>th</sup> Amendment, you have got to realize that if you are really talking about an effective alternative to the exclusionary rule, something that effectively leads police to comply with the fourth amendment, just as many guilty people should go free. But they will be going free not at the stage where after apprehension, and we have a suppression hearing and the suppression motion is granted. They will go free because the police complying with the 4<sup>th</sup> amendment will not be apprehending, or entering, or searching in the first place. Defenders of the exclusionary rule have been using that argument in a way to try and say that the exclusionary rule isn't so bad after all. I have been thinking about it, I don't really think we have an effective substitute for the exclusionary rule, but if for the purposes of discussion we assume that we did have something just as effective, I think we

should seriously think about using it, because we would then have the same amount of compliance with the 4<sup>th</sup> Amendment and we wouldn't have this in your face problem constantly of trying to explain to the victim why the smoking gun has been suppressed and this criminal is going free. It would be better to diffuse that kind of cost of the exclusionary rule by having certain people who are not searched or not apprehended because the evidence against them isn't sufficient.

So I think there is a potential here for people interested in therapeutic jurisprudence, and preventive law, and creative problem solving to think about doctrines that can reduce tensions, controversy, and anger. I haven't figured out how all this would play out in an advocacy situation, but what I have thought is that this might be an ideal place for amicus curia briefs, and for therapeutic jurisprudence and preventive law scholarship to come up with proposed doctrines, and for certain amicus groups, perhaps amicus groups attached to law school centers, to file briefs. And that this might be a very good way to exposing students to the lawyers role as peacemaker, preventive lawyer, and creative problem solver.

Josephine Gittler:

My name is Josephine Gittler. My topic is preventive law and legislation. I spent most of my professional life, at least after I became a legal academic, working with legislators in the legislative branch. In various capacities, as a congressional staff person, as a state legislative staff person, as a person, to use your word, who is a counselor to individual legislatures and their staffs, and as a person who has organized grass roots advocacy activities primarily aimed at congress, and the state legislature. So, what I am going to say is very much based on my experience, my particular experience and most of the work I have done with legislatures has come to center around issues around children and families and issues surrounding health law and policy. I have a sense that I am with a family whose members know each other, and I am

some what of a brand new person who has come into this family. I am not in any sense an expert in preventive law. I got interested in it through some conversations with Tom Barton, and what that led me to do is read what I could find of the literature, what I could easily find of the literature, and it struck me that at least the literature of preventive law the focus was very much on lawyers representing, assisting, and advising clients on how to avoid legal problems in general, and how to avoid litigation in particular. And what was largely overlooked was the application of what I construe to be preventive law premises and concepts to the enactment of legislation by public policy makers, and my point today is that I think those premises and concepts do have application to the enactment of legislation. I will say just incidentally while many lawyers are in practice and represent clients, many legislatures are lawyers and many legislature staff members are lawyers, and many lawyers are lobbyists who are trying to get legislatures to do something are not do something that furthers the interest of their clients. I think we pay relatively little attention to the fact that there is at least a segment of the bar that is very active in legislative arena as opposed to the judicial arena.

In any event it seems to me that there are two categories of legislation that I think of as perhaps incorporating premises and concepts of preventive law. One category is legislation that has built into it provisions for resolving or preventing disputes that might arise under that particular legislation without litigation. Now let me give you an example, “The Individual with Disability Education Act.” I was involved in part of that legislation which is federal legislation, which you may all know in terms of it providing federal assistance to the state for special education and related services for children with disabilities. It has another component that provides assistance to the states for what are known as early intervention programs, state wide systems, multi-agency in nature, early intervention services for infancy toddlers that have actual or potential development of disabilities, and I picked this because the legislation itself is preventive legislation, it is early intervention legislation.

Now that legislation originally provided that parents who felt that their children weren't getting what rights they had under that legislation could challenge what the state lead agency for the early intervention program was doing or not doing through an administrative hearing, and if the aggrieved parent or parents did not like the decision of the administrative hearing officers they could take him to court, state or federal. About two years ago because of the satisfaction with resolving conflicts between parents and early intervention agencies not only lead agencies but local state early intervention agencies, congress in amending the legislation provided that all state lead agencies must offer parents the option of mediation. Now I am skipping over, and I am going to gloss over, what the relationship is between preventive law and alternative dispute resolution processes of a facilitative nature like mediation, and I realize that I am glossing over that but suffice is to say that I am presenting to you that I think that mediation can have some preventive aspects, whether or not you want to put it in your definitional bag of preventive law or not. Equally important the amendments mandated state lead agency set up mechanisms for resolution of inter-agency disputes. Now remember the programs established in this legislation are state wide, there is a state lead agency, but they necessitate collaboration between multiple agency institutions and organizations at not only the state level but the local level. So there is bound to be a lot of conflicts. If you have ever worked in the children and family service area you know that there is bound to be a lot of conflicts. The legislation went even further and it required that there be inter-agency agreements of a formal nature entered into by agencies as to who is responsible for paying for early intervention services. Also, and I have the language here, these are agency agreements which include all necessary components to ensure meaningful cooperation and coordination. Obviously those requirements were aimed at preventing disputes among agencies, and I think to some extent they did but that is a question for another day.

I think there is another kind of category of legislation where you can see preventive law premise and concepts incorporated, and that is legislation that actually is directed at limiting or reducing

problems that would otherwise probably lead to litigation under existing law. An example of that is a bill pending before congress, its actually an appropriations bill, which will be dealt in the lame duck session because it has to be dealt with in the lame duck session being the appropriations bill for labor, health and human resources, education, and related agencies. It contains some funding to implement, at least in part, recommendations of a recent report by the institute of medicine. This recommended that federal legislation be enacted that would create a mandatory nation wide mandatory recording system for medical errors of a serious nature using standardized data. Why? Well the underlying ideas was that some kind of reporting system would generate data that could lead to identification of systemic problems, and then there could be developed some method of dealing with those systemic problems. These are precisely the kind of problems that might lead to medical malpractice suits in the state courts. So I think that is an example where there is a legislative proposal, and actual response to that legislative proposal in the form of a pending appropriations bill.

I do want to say that I think there are substantial impediments to what I am going to call preventive law legislation. And one impediment relates to what I would call the distinction between authorization legislation and appropriations legislation. The former being legislation that just responds to the matters, it creates a program, it requires something to be done or not to be done. Then there is appropriations legislation which actually allocates funding for particular programs or particular purposes.

The nature of the legislative process is such in my experience that legislation to prevent problems has to compete for legislative attention with legislation to deal with problems that actually exists, and are seen as urgent or pending. And particularly when it comes to appropriations legislation, allocation of limited public dollars, and even in these days of budget surpluses when you look at all the claims on public dollars, public dollars are limited. Legislators find it difficult to allocate dollars to prevention activities as opposed to remedial activities, which are addressed to existing problems that are seen as urgent and pressing. And

the realities are, as they are supposed to do, respond to their constituents, and they respond to organized advocacy by their constituents, or by groups representing their constituency. Advocacy experts tend, in my experience, to be more directed at legislation that doesn't really give high priority to what I would call preventive legislation.

Ed referred to the organized bar. If you work on the Hill, I am talking about in Washington D.C., one of the strongest advocacy groups is the American Trial Lawyers Association. Why is it a strong advocacy group? Because they have one of the biggest PAC's in the country, and they contribute very heavily to congressional campaigns. So they are listened to. And what are they going to be interested in? They are going to be interested in legislation which either creates or preserves the right to sue in court. So I could give you all sorts of examples of positions they have taken which you as a group interested in preventive law, I don't know that you would find it reprehensible, but you would maybe be a little disappointed in them, but after all there are doing their job of representing their constituency the trial lawyer.

Finally, I would just like to say that even when legislation itself is not what I would term preventive in nature, there is a role for the agencies charged with its enforcement, its implementation through regulations and guidelines, to promote preventive law premises and concepts. A prime example of this is the federal fraud and abuse laws, which are numerous and complex. They contain things such as prohibition against fraudulent billing practices and kickbacks for referrals, etc., etc. And violations of these laws carry with them civil monetary penalties, criminal penalties, and other sanctions. There has been a dramatic increase since 1992 of government enforcement of these laws.

The OIG, the Office of Inspector General of the United States Department of Health and Human Services began several years ago issuing guidelines to various sections of the health care industry for something that I know you are all familiar with, corporate compliance programs,

but in the health care industry. Those guidelines have been very useful in giving the various segments of the health care industry an opportunity to do something, if in the event that a violation occurs, to reduce the possibility of prosecution, and to reduce the possibility of serious penalty. In fact modern health law practice today affirms that specialized and in house law practice from the standpoint of representing health care companies, health care corporations spend a very large part of their time on compliance planning and implementation. The impetus being to a large extent the OIG guidelines. Eight of the largest law firms in the country in the last five years have doubled the amount of their health care lawyers, who spend the bulk of their time on government investigations prosecutions and on compliance programs. And today 20% of corporate compliance officers in health care companies are lawyers. So, this is an example not of legislation itself incorporating preventive premises and concepts, but that one of the agencies charged with its enforcement doing things through administrative action which incorporate preventive premises and concepts.

Audience Comment:

My experience would say that health care institutions have cared a lot about what I would call the front of the law prevention, meaning to prevent malpractice, and they have ignored the back of the house preventive law issues of are we moving the papers to the government so that we are only getting paid for what we are entitled to and all those kind of issues. [One acquaintance] has his job as the compliance and business ethics guru solely because the back of the house was allegedly ripping off the government to the tune of about 100 million dollars a year. I think that shows you how many different complexions there are to preventive law. You can focus on what you think is the real job of the hospital, which is to not to make people any worse when they leave than when they came in, and you can totally ignore the back of the house where the real opportunities for mischief are probably rampant.

Josie Gittler:

This is not directly responsive to you, but it seems to me again as a newcomer to this field I want to say very tentatively that the literature tends to focus on the back end which I would consider to be what lawyers do vis a vis their clients within whatever legal framework there is, and not the front end of how the legal framework got there. And I think David was talking about how that legal framework gets there through court doctrines, and there is another way that legal framework gets there, and that is through the enactment of legislation which is equally important.

Audience Comment:

A question for both David and Josie. When we look at the history of law in the 20<sup>th</sup> century, I think it can be described without exaggeration as a history of solving problems by creating rights rather than solving problems by creating institutions for conversations to solve problems. That understates it a little but I think that is probably the flavor. So that we have been covered by a Tsunami of rights since about 1960 particularly, maybe even earlier than that. My question is that tide turning so that the preventive law family may have something serious to do, or is that tide in still here and not turning so that the preventive law family has a challenge that it might choose to mount? Has anything changed, or we going to look at the first half of the 21<sup>st</sup> century as one in which we are going to have more rights and less conversation?

David Wexler:

I think it is more of an opportunity now. We are seeing what Susan Daicoff calls the vectors in the comprehensive law movement. Looking to law that is more bent to care, more psychologically sensitive, more interested in solving problems, and in many ways I think

responsive to a lot of the feminist critique of the traditional legal system, the advisory system, and the arguing culture. At long last we appear to be at a point where we beginning to make important inroads into a legal system founded on notions of autonomy, separation, competition, and a zero sum game. In response to what Deborah Tannen calls the arguing culture there are now a number of forces of respective moving towards a more comprehensive lawyer with an increased emphasis on preserving relationships, connectedness, identifying with a community or culture. So that's kind of where I think things are now, and I think we need to think of how to exploit some of this and very last thing I said is I don't quite understand it. If I am right that even courts may be receptive now to some of these therapeutic and preventive doctrines, it is still difficult to think how they would be advocated in a traditional setting. There may be at least as an interim measure, or maybe as a loose structural need, a need for amicus groups or scholarship to be paving some kind of road and offering these up to the courts. So the courts don't sit out there alone to figure out these solutions. I think that may be the challenge, thinking of new structures, just as I thought that some of the matters spoke of this morning might be beautifully situated in a law school clinic setting or prepaid legal service setting. Managing one where there was based on principals of prevention, or counseling, and where we had these kinds of retainers for counseling, where we had the exit for legal checkup, where we had systems for sending out postcards for someone's next appointment, where we tried to take some of the project maybe financial motivations favor rather than disfavor prevention and checkups. I think that may be a challenge, but I think that's the challenge, because I think the opportunity is to provide a service that [the public] is starting to look for

Josie Gittler:

I will answer about legislators. I think they're very receptive to preventive law incorporating it a long the lines that I have described it. I have caution or concern of making to strict a dichotomy between creating rights on one hand and preventive law on the other hand. Let me

give you two concrete examples. The Disability Education Act provides for mediation services not only when there are early intervention disputes but when there are special education disputes, and having done mediation for the state department of education in rural Georgia, involving school districts on the one hand and parents on the other, and I am not picking out Georgia to be pejorative but I am just telling you that is my experience, I will tell you that there are school district attorney's that wouldn't have even been at the mediation table unless the law had created certain substantive rights on the part of parents with respect to children with disabilities. Another example is I work with the Iowa legislature to incorporate some provisions for comprehensive conflict management that have a prevention component as well as a dispute resolution component that would apply to managed care organizations, they're very receptive to that. However, I will tell you that managed care organizations only begin to listen and be interested in putting in comprehensive conflict management organizations as a result of back lash against managed care, and when there is either legislation or threatened legislation that somehow impinges on what they want to do or what they feel they need to do. So I see the two things as working together. Not as necessarily being opposed, and I see a need to, at least in the legislative context, to strategize about how you put those two things together.

Audience Comment:

I just had a point to add about the whole idea of a patients bill of right. That suddenly patients are going to come into the hospital waving this banner of don't step on my rights, keeps us going down that road. It has never been more contentious at the bed side than it is right now. People are so afraid of everything that they are afraid to communicate. We are currently having a problem keeping our neurosurgeons in the Unit long enough for the family to talk to them, before they get out of the ICU so that the families can just ask basic questions. That whole idea of is it rights based is because we recognize that as the means of motivating people to do preventive things. It's the stick under the carrot, and prevention really needs to start not in how

we put up our big defense mechanisms against these rights lawsuits, but how do we get to the point where we actually have a relationship that prevented a lawsuit to begin with.

A. 1:30 pm--2:00 pm *Entertainment Law*  
(Discussion Group: Harold Brown  
**[preventivelaw@haroldbrown.com]**)

Thomas Barton:

We are going to move now from the morning session which was about rewinding the tape to the afternoon session which will carry on until tomorrow morning which is playing the tape, its current practices in center special areas of law. So starting that off will be Harold Brown Talking about entertainment law.

Harold Brown:

I am Harold Brown, and I guess I am here to talk about entertainment law. I happen to be Lou Brown's son which I guess makes me perhaps the only person that was born to be here. It also makes me a little bit defensive. Not that I am his son but that I end up speaking to any kind of august gathering. But I do practice entertainment law with my mother. So you now know that we only bill on a flat basis which I won't say more about. We do it on a very high level, and we do it for talent. Writers, directors, producers, and actors on my desk, for example, there are five academy award winners and one multiple nominee from last year, and several others that we hope will be there soon. So it really is a high-class practice. And it

occurs to me as I thought about coming here today and thought about Ed's presentation and Jamie's presentation, that there is something particularly appropriate about focusing on entertainment law, and leading off the afternoon and some substantive lawyers with it because we really are a group of practitioners that deal only in hot facts. There are virtually no cold facts in entertainment law. When you think of my dad's favorite expression about cold facts and hot facts, cold facts are those things which exist and hot facts are those facts which you could deal with and shape. It turns out in what I do in negotiating for talent there are no cold facts, there are virtually none. Really one of the first things you think about that is that there are virtually no existing contracts. Now when I say that it is weird, because I spend all of my day negotiating contracts which nobody ever looks at. When I first got the practice 25 years ago we represented B\_\_\_\_, I was handed a stack of contracts and told to complete the negotiation and get them executed. They were all contracts for appearance that had taken place one to five years before. They had never been negotiated. Worst than that I had to negotiate what were nearly impossible terms. B\_\_\_\_ wanted, I did not think I was going to tell this story, but B\_\_\_\_'s deal was that you couldn't rerun any show on which he would appear. But that's bad enough if you say, "Hey I would like to book B\_\_\_\_." Fine, you can book him, but you can't repeat the show because he never wants to be stale. But I had to negotiate these contracts after he had already performed. After the show had been taped, and after the producer had spent whatever he was going to spend, and after the producer in many cases had the expectation of being able to rerun these shows. And it was a major lesson to me, and quite an eye opener, that I could actually accomplish that. It was no great feat of lawyering. All I had to do was demand it enough, and say that if you didn't do what he wanted he wouldn't like you. And whatever expectancy you had of working with him in the future, you probably couldn't have.

What we deal with in that way is we deal with expectations in continuing relationships. Every fact is a hot fact. In that case the fact that he had already appeared in the show under terms

and conditions that the producer had reasonably thought applied, was itself a hot fact that we could deal with. Where in a litigation perspective of course it is an absolutely cold fact. The show exists, the terms exist, they had to exist because he appeared in them. The same thing happens almost always when we negotiate contracts with actors. Some studios these days require contracts with actors actually to be signed. Other studios don't. As I said nobody ever looks at them again. What happens with great frequency is the studio negotiator says I can't agree to this until it becomes moot. A strange concept indeed. If it means anything I can't agree to it, if it doesn't mean anything I will ultimately be able to agree. Let's wait and see. Now the let's wait and see means if it turns out that this whatever it is, is actually meaningful we'll have to deal with it. We'll have to solve that problem when we get there, but I am not going to create the problem today by demanding execution of a document that has it my way, or demanding execution of a document that has it your way. Which has inherent in it the fact that we will in fact be able to solve it when we get there, and that by requiring these conditions we won't be able to solve it today. We'll each be going like this today and creating a problem which we may well be able to avoid.

I often try to contrast this to a typical real estate transaction, or other kind of traditional contract situation. If you are in real estate you negotiate a contract, there is a closing, and you walk away, and that contract will govern your relationship in the future. In the entertainment business, at least the portion of it in which I live, you are dealing in an area of living facts. You negotiate a contract, you enter into it, you have a relationship, and the relationship governs what the contract is in the future. Not the other way around. You very rarely look at that contract, and one of the things you need to know as an entertainment lawyer, which is not obvious, is who will look at that contract in the future, and under what circumstances they will look at that contract, and who won't look at that contract, and under what circumstance might suggest that they don't. For example people in the payroll department will look at the contract. They will analyze it and figure out that under this deal for this actress we need to pay the actor x on such

and such a day, and if the film is successful enough we need to pay z on such and such a day. So as far as the basic compensation terms go that contract does about what you would expect a contract to do. On the other hand the publicity department does not look at the contract. While we may or may not have the right for the actress to show up and do the Dave Letterman show, we don't look to the contract to figure out whether we have that right. We simply call up the actress, and woe be unto us if we ever actually call the legal department and ask if we have that right because the legal department will call somebody and they will call me, and I'll call up the actress and say that they demand that you appear. The actress will go "if they demand I appear just wait and see what they get by way of publicity." So it doesn't work that way. So you need to know the ways in which the contract actually does work, and you need to know the areas in which the contract doesn't work. But it is just some sort of formal often asked governing document in which people won't actually use it to govern their actions unless the relationship turns sour.

The other thing that you need to learn is who negotiates what, because in the example I just gave either the agent or I will be negotiating the price, because the contract governs that and we will negotiate that. But in fact it is the artist himself who negotiates what he will say on the David Letterman show, and what their attitude will be about that. Their lawyer doesn't negotiate that and their agent doesn't negotiate that. Although either of us can shape their opinions and do things about that. This is a world entirely, however, of hot facts. The contract itself is a cold fact, which is why you read all the time in the television business about renegotiations. The cast of Friends goes into renegotiate its existing contract because if they don't renegotiate their contract they will feel bad, they'll get sick, and they won't feel like showing up. In fact its not the economic reality the day you made the contract which governs their relations, it's the economic reality the day you want them to perform which is likely to govern their reactions. That changes to some degree depending on the leverage that they got with the contract. Yes and occasionally lawyers, real lawyers with ties, are actually dusted off

and bring top lawsuits and bring allegations and do those things. But it is very infrequently used, and it is usually a grandstand act, and it is usually to change the leverage a little bit in the negotiating process of what their economic reality is today. But no matter how long the contract was with the television show there is a new reality every year as the ratings go up and go down and as the cast is more or less important. And as the executive producer decides that they will hire in a new second banana who will be more important, and give themselves an out if this goes in a different direction in the future. And the talent themselves are there to continually negotiate different things on their behalf, although they don't necessarily see those things as negotiating, they see those things as doing what they do.

One of the major areas in which we do deal with a certain amount of law, and there is very little law in my end of the entertainment lawyering, there is a lot in the copyright lawyers and some other lawyers, but in the entertainment law area that I deal with there is very little law in a traditional sense. I actually sent somebody a case last year, and they were amazed that they actually still printed cases. Its just not the lawyering business. But one area in which we deal in a great deal of nuance about this is, strangely enough, what your obligations and risk are when a contract gets in being. Because unlike the real estate business in which we know when a contract gets into being, somebody signed a piece of paper and until they signed a piece of paper there was no deal, almost always although there are some nuances here too, there was no deal and no obligation to transfer the property over because that's when it happened. When the contract was signed and some money was exchanged. In the entertainment business, contracts grow in a sort of evolutionary process, because there is never a moment in which the real contract really gets to be. You are often dancing with the people who want to cast the actress, you want to encourage them to some degree to rely on her availability while you work everything out, and at the same time you are encouraging to rely on her availability and to build a picture around her and to not go out and cast another person you are continually negotiating the things which won't matter. Some of which matter, price and billing. Some of which might

matter. Some of which will never matter, but you rarely get to the point where you know that the relationship is binding. At least not until cameras start to roll, and the day that the actress or actor show up to work. That day is probably a day of great meaning, but the day before that there is no contract in effect, or at least there is no written contract in effect, that they are liable to you for the price even though she has turned down 16 other offers for the same time period . And there is no contract on their behalf that says, although they have spent 28 million dollars on reliance building sets and getting ready that they actually have an actress in their picture. It is part of my function to make sure of the risk reward ratio we are dealing with and that the client does not have any unknown exposure to this situation. There is a famous case a couple years ago with Kim Basinger, in which she lost a multimillion dollar verdict after backing out of a picture called Boxing Helena, which backing out of was probably the right thing to do. The other thing you have to do about that, because we are doing with hot facts and because you are only a lawyer, is to keep your ear very close and make sure that other people are feeding you information because the facts are changing. They may have wanted to make this picture. You may have been very comfortable in sitting back and saying they will come to us, and they will complete this deal, and they will start principal photography, and you don't need to worry about your compensation, and let's negotiate for this particular nuance because they desperately want to make this picture. The next week something may change. They may not want to make that picture. They may have changed their mind, and if they do change their mind all of the sudden the whole dynamic which you were building in the situation and the relationship, the economic reality of what happened has changed. And if you are not aware of that, if you don't monitor the facts, your clients expectations will be severely disappointed and your abilities as a problem solver will be severely hampered, because if you can't see the problem as it arises it will hit you like a locomotive, and there won't be any terrifically good solution. Your alternatives will be amongst the worst. If you can sense the problem around the corner, if you can see their attitude change, if you know that management of the company changed, if you know that the other elements that they were going to cast in this picture have

disappeared and therefore they no longer will make it, you can, in appropriate circumstances, take some really unprecedented actions. One that I have advised a client of only once or twice in my career is to sign the god damn contract and send it back in whatever shape it is. You want to make sure that you have some kind of legal obligation if you are dealing with somebody who is about to change their mind, make sure that you grab the legal obligation that they are offering you. Don't over-negotiate for another one. That's the kind of response that you need to deal with in our business in a legal basis.

You also are, at least in the legal area, absolutely the manager of your clients expectations. You very often tell a client when to get mad, and when not to get mad. When they are being treated well, and when they are not. One of the advantages of representing a number of stars, and a number of high end directors, that when a studio comes and says this is what we'll give you, and the director or the star says wait a minute that is all you'll give me, and that's how you will treat me, and my trailer is only 42 feet long, and I have to pay for my own car phone expenses, how dare you. I can at least say, if it is appropriate, you're right, they are being assholes, or you know what, there are seventeen other people on my desk and they only get 42 foot trailers, that's all those pieces of papers say and that's the size trailer they have on their lot. You are not being treated any worse than anyone else, and so relax you are really being treated the way they think of you, as a star. That will change the dynamic of the relationship entirely, and this may hearken back a little bit to the B\_\_\_\_ story. I spent a lot of time over the last 20 years negotiating for Steven Spielberg. It's very easy to negotiate for Steven Spielberg. Not only because he has power, but because I think it comes from power of the way relationships work in this business. I can for example do the following, which is not something that is traditionally taught in negotiating school, I can say to someone who asks for x, okay we'll give you x, not a problem, if that is what you want the piece of paper to say that is what the paper will say, but I will tell you that I have to go to Steven and tell him that you asked for it, and I said that it would not make any difference so we would give it to you, but I thought you

wouldn't like it. Now they get what they want in the contract. They can't complain very much, but what you are doing is you are threatening to bias the relationship, and all of the sudden the dynamic that you often see as lawyers, that is the contract is paramount up here, and the relationship is down here because you buy or sell the property and walk away, and what you have left that is important is the piece of paper, all of the sudden you can turn that on its head and say okay the piece of paper is not what is important here, what's important to you is the relationship between your client and my client, and I can affect that, and by affecting that, I can achieve certain ends for my client, and a certain normalcy in our ability to deal with each other, and you should think what you deal with me about is going to be part and parcel of our relationship together. It is not together, and I have clients where this is an absolute continuum. That is my personality has to be their personality. What I do has to be absolutely reflective of exactly what they want to do, and vice versa.

There are other clients that you can kind of distance yourself from in some fashion, indeed for me there are some clients you have to distance yourself from because part and parcel of everything I am saying is that both the lawyer and the client have a long term reputation and viability in the business. You are dealing in our business with the same people over and over again. You are negotiating with the same people, they are hiring the same people, you represent a number of them. What you can accomplish with them, on a problem solving basis, what you can accomplish with them on a preventive law basis, depends on your and their ability to solve problems, and your and their ability to communicate not on one transaction in one moment, but over long spans of time in a relationship of trust that you build up with them. If you have one asshole client who demands that you do something else, it is not in your clients, plural S not singular S, and it is not in your clients long term interests for you to sacrifice your reputation for ability to solve problems with these people, which is one of the things that we sell is our ability to solve problems with a group of people, to sacrifice your reputation in any given situation.

And one of the ethical problems that we have, and it is not just an ethical problem it is a difficult practical problem, it is how to achieve a legitimate end for a client who wants to use a hammer when a cotton swab would do. How do you solve the problem in the way that that client wants and still have a consistent reputation so that you can solve problems for that client and for other clients. And in fact in our business there are clients that you can't do that for. We have a saying that clients find their own representatives. There are some clients who have a certain personality who can only be represented by an attorney who reflects that personality. In part you find a voice, and you enable yourself to take part of some of those preventive law aspects. In short one of the things, as I looked at Ed's diagram now erased, but not here, of skills, principals and information. One of the things about preventive law which is really interesting and which I leave with those of you who are much smarter than I am to derive some principal, we are like mice in your hands in the health law analogy. We really are a field in which because we don't deal in cold facts, can have the ability to be experimented with a wide range of hot facts solutions, and a wide range of hot facts and tools and skills because that is really the area in which we live. We are really a hot box for that. So I think that's a great preventive law area.

Audience Comment:

How generalizable do you think the point was you made about not putting in contracts things that might not come up? The tradition has almost been the opposite, figuring out anything that might come up and negotiating them before people get into relationship. Is it unique to entertainment because of the fact you described, or is that something that might be more generalized?

Harold Brown:

Well I think in some areas it is certainly more generalized whenever people are going to have to deal with each other, because if you have to deal with someone again, taking a contract and hitting them over the head with it if they are unhappy with the result and if it didn't work the way they expected it is not likely to yield to a long term happy relationship. There are times when we will build in mechanisms for how to solve the problem if the mechanisms just aren't abstract enough that sort of exist in the real world, but I think you could take that as a continuum. I have always felt that the most interesting difference, and I always use real estate, but any area in which a lawyer gets to a clear line from where you move from hot facts to cold facts, and areas where you continue to deal continually with hot facts because I think that changes the relationship and the meat of the contract. I think there is a whole continuum of that and there are ways that you can try to derive techniques for dealing with that, there are lots of techniques that are structured in the business that we have that are problem solving techniques and some others. There are lots of times in our business because I deal with people again and again where there will be something that I can't deal with, and I will call up an executive whose tenure I expect to outlast the problem, which is always a gamble, and I will say well okay we'll agree to this, but you and I have a conversation and here is how you are going to handle this all right, well you have to agree but here is how we would like you to handle it if it ever comes up. And I would like you to know that this is an issue that if it ever comes up you better call me directly, or you are going to create a kind of problem that you don't want to create. Piece of paper that is signed. And we will have all sorts of side conversations about how to deal with a variety of things that might already be covered by the piece of paper just not satisfactorily covered, because the piece of paper won't trump the relationship at the end of the day. There are again other areas in which I know that won't work like advertising. I better have a mechanism to slow down that process, because the executive may just not get the phone call in time. You have to know the business enough to know what mechanisms you have to put in a contract to solve a problem, and what you don't.

Audience Comment:

Harold, your discussion, which was wonderful, describes a somewhat unique area of the law where there is a certain dynamic, a certain continuous personality, a great freedom for creativity on the part of the lawyer. I am also interested in generalizability. To what extent can these lessons be transplanted to other areas of law practice, and to what extent is the flat fee versus the hourly an important ingredient in all this?

Harold Brown: As to the first question I think I will leave it to Ed, and people smarter than I am. I may have some ideas about it, but I think it is the people who have some broader vision than I do to really focus in and have a discussion, which maybe we should do later. As to the second, I think a fee based system is a very important element, it is less important sometimes in the entertainment business because clients even if they are paying hourly, aren't paying attention to how much they are paying hourly. So you do not get to the reckoning of I am billing you this for that. It is clear however that for anyone who is on a taxi meter system, that people stop communicating, because they feel that it is economically difficult to communicate. And it is clear that where we take only long term clients and a long term vision, and our internal office mechanism, unlike many law firms, is not to say how much did you earn off of your clients this year because we understand that our clients go up and down. So that helps too because it relieves us from our side of the "I don't have the time to talk to you basis", to I am making a long term investment in you. But I think that the long-term investment in the client in understanding what he is there about is essential to the process. The fact is that all the contracts that studios issue are about the same, and all of our responses are about difference. That is weird, but I have one client whose principal aim in life is to never be in a film in which animals are treated badly. If I do not know that going in and if I don't see other steer peoples expectations to that fact immediately, sometime down the process its going to be too late and a big surprise. And that is only her, it is idiosyncratic to her. Unless you have a chance to know

your clients, and know how they think, and know that when they get really pissed off they are going to march into a room and slam a table and say, I am really pissed off and I want this fixed in which it will get fixed in which case it will get fixed in one way. Or they are going to fess, fuss, and fume, but never say a word about how much they hate them. And it is going to interfere with their performance, their life, and you better do something else to fix that problem because they are not going to fix it themselves. You have to know the difference between those two clients or you are not doing a very good job. And that isn't something that is taught in law school, and that is not a traditional legal thing, but since the clients are involved in the process you have to know that because you have to know what tools are being used. You have to know whether you are using a hammer, a cotton swab, or a shovel.

Audience Comment:

I want to get back to the question that was asked about flat fee, because it seems as though both you and your mother were saying that that is very helpful in doing preventive lawyering. A couple of people have made analogies to the health care field. What I immediately think about when we talk about flat fee, I think of global capitation, that is to say health care providers getting paid before hand and they then give out to provide x services to x population for x period, and all the trouble that's caused. It has had exactly the opposite effect. In other words because health care providers compete on contracts and they compete on price, sometimes they agree to flat fees so to speak, where in order to make money they have to up their volume of services and so they have less time.

Audience Comment:

It is probably because they get a percentage of how well their clients do. It would be nicer in health care if we could pay a percentage of our health.

Harold Brown:

We used to spend a lot of time in advertising, we don't anymore, but we used to represent advertising agencies. That was not on a percentage basis, but it was a basis where I went to the president of the company and I said look, in order for us to do this it is going to cost x dollars a year, and here is why, and I have to be in charge of this and you just have to trust me, and it is going to be more than you are going to pay anyone else, and here is why because it is the only way I can be preventive. The only way I can be preventive is if the account executive is told that if they have to talk to me on the phone, how ever long they have to talk me on the phone is okay. Otherwise what happens is the account executive calls you on the phone, and eventually they get a bill from the lawyer, and the longer the lawyer was on the phone the higher the bill is. And they have to go to accounting and justify why it took so long. When they have to justify why it takes so long their goal is to get off the phone quickly. When their goal is to get off the phone quickly they don't tell you the facts. And if they don't tell you the facts you can't give them good advice. So you have to relieve middle management of a pressure not to tell you the facts, because you are billing for the time it takes them to do that, and that is a huge impediment whenever middle management calls a lawyer, at least in the areas where I have been associated. And we have trained this system, we have trained lawyers in this country to operate under this system, and we have trained clients to operate under this system. I got a call from the president of P\_\_\_\_. He had an advertising problem. I said I'll tell you what, for \$2,000 dollars I will either solve this problem or I won't, and it will either take me an hour or it will take me 10 or 20. Or I won't be able to do it but it is going to cost you \$2,000, and my reputation is on the line whether I can solve it or not. He said fine, and in about 27 seconds I solved the problem. Which was a good hourly rate. I called up and asked for my fee and he referred me to the accounting department. The accounting department said you have to fill out form 32-b and it says what was your hourly rate and what did it cost you or how long did it take you. So I said it took me 27 seconds, so my hourly rate is therefore \$42,000 dollars an

hour and I solve the problem, which was enormous problem for this company, I mean they had millions of dollars riding on this problem. I got a call back, you bet how fast I got a call back from the company, saying you can't charge us 42,000 dollars an hour. I said it took me 22 hours to solve this problem and I got minimum wage, are you happy. They said yes, I guess we would be happy with that. I said fine, I'll fill it in, just note that I filled it in both ways, and check with the president please. And they had no system for okay we made a deal our problem could be solved for x, they had a system of regulations set up. This is client side; this is clients who structure the way they want to pay their lawyers. I always think this is funny because as a law student we knew that there were some firms that billed 20 hours a day and there were some firms that billed eight. The firms that billed 20 were cheaper.

Audience Comment:

I have done a lot of work in alternate billing. I think if we look at capitation in the medical industry, the way they make money is to get a fee and then not do the work. Essentially what clients and patients want is that they want to be paid for an event. The old paradigm the legal profession and the existing paradigm for the legal profession is that the value of what has happened is determined by multiplying the amount of time you have worked by your hourly rate. What clients want is the formula that says value equals quality divided by time. That is the higher the quality of what happens and the less time the more valuable it is for the client. The client wants the event to happen, they want it to be a high quality event, and they want it to happen as quickly as possible. If you look at the quality as Harold indicated it exists really of two components. The q is divided by t but q is also multiplied by p the value of the product which is multiplied by the value of the relationship. If the relationship is no good, no matter how good the product is its valueless to the client. If you have a great relationship but the product is ineffective then it is still 0 times 10,000 is still zero. I think this is where preventive lawyers

really have a great advantage in what they are doing if they will market it as we make things happen faster and of higher quality than maybe another approach to problem solving.

Audience Comment:

I think that more than hourly rate there are two more things that are really important to a lot of people in terms of fees. One is predictability, particularly in a business context where it is often easier to predict how much it will cost. Sending a business client even a justified fee that is five times what they expected is going to hit a business client in an impossible way. The other is trust. I mean one of the things that we are talking about is not how much money you cost them, but whether they trust you that what you were doing was giving them good advice and not looking at your own pocket book when you did it, and it is not all about your own economic self interest. It's a basis of trust. One of the things our fee arrangement allows us to do, and there are other ways, is to take that number off the table in the negotiating so we can focus on the relationship in the cost department. But if you build the trust high enough the dollars probably won't make any difference. My doctor can charge me whatever he thinks is fair because I trust him that he is doing it in a way that, he did not render the service to me because he was going to bill me, but we don't look at our lawyers that way and often we don't look at our health care that way.

Thomas Barton:

Thank you. Next we have preventive law and commercial transactions with Helen Haapio and Jeff Schneider.

Jeff Schneider:

Helen has a whole professionally done presentation concerned specifically with international commercial transactions. I am just going to try and make it brief because I think that we are running a little over time. My brain is turned upside down after Harold's presentation. Harold described in a positive normative way, this is how it, I don't know if he is saying this is how it should be. I got a stomachache thinking how I would be able to live, an anal-retentive lawyer which most of us are, living without that security blanket of a contract. He has put my whole reason for living at question, and I am flustered and I am really going to digest that tonight and see if I could unfluster. About a week and a half ago I was up to three o'clock in the morning working on a transaction, and the transaction did need to be documented, and it needed to be documented right away. I took the approach which I generally take in my approach to transactions and documentation, that where you have some lawyers approaches will be, they represent a buyer lets say in a sale's transaction they have their one contract let's call it a zero, if they are representing a seller they have a ten, and that is what they start off with and then there is this dance and this process and then you end up somewhere between three and six or seven. I generally don't do that anyway, but especially in this case we needed to get it done, and the days of me doing those all nighters physically is pretty much over. And I prepared, it was a beautiful piece of work, because I frequently represent buyers and sellers in this type of transaction, and it was a seller finance transaction, and I knew what the issues were, and I wrote down a fair way of addressing all the issues. I would have signed it no matter which side, and the client if you are worried about the ethical issues was on board with this approach. Early that evening I thought we were going to get it wrapped up, with the lawyer from Los Angeles, who is usually the culprit, or New York. We talked about it and I said you see what I am giving you here, if there are any unique issues maybe we can address them and then we can wrap it up. He said, "Yes it seems like a very fair contract Jeff, but I have to make a living." Swear to god that was his response, and then we spent the next day from early afternoon to three o'clock in the morning justifying him making a living. He just said it bold out.

Let me back up and tell you what I do. I am a transactional lawyer and a counselor, a counseling lawyer. I am not a litigator. The counseling I do which is more of a percentage of my work than the transactional, is not what my clients think they have hired me to do. This goes back to a few comments ago, and this is really a great conference for me because I love to figure out how to integrate it all, but there are so many commonalities here. One of the words that kept coming up in one way or another is this idea of being proactive in preventive law. Clients generally, even relatively well experienced well trained clients, do not call to ask me what are you going to prevent me from getting in trouble this time, I would like to just check up with you. Our clients are very busy people, and they will call with a transaction in mind, and I cannot be effective wearing my preventive lawyer hat unless I proactively nudge them into telling me all I need to know so that I can truly help with more than just that one transaction, and so that I can truly help in that one transaction, because sometime we discover together the client and the lawyer that this transaction doesn't appropriately fit in their long-term plans or their goals

Someone had mentioned three characteristics. One being proactively or another word for that, and another was accessibility. Another characteristic in a counselor that is going to be helpful in preventive lawyering is also the source of a great deal of the stress in my profession, which is having to be constantly accessible, plugged to the cell phone. Because when the client does have a moment we may be able to help them in going the right direction. I don't mean in an arrogant way that we are going to tell them the right direction, or I can give them the right direction, but that together we can work on developing the right direction. If you are not there, boom they have moved on. It is not an issue of dis-responsiveness and their upset with you because you are not there, that is a different issue, it is that you are upset because they went forward with a deal or a path that is now somewhat irreparable and you were not there for them. That happens to be one of the sources in the profession that makes a majority of the lawyers, based on those sources we have seen, unhappy with their profession. I do not know

what percentage of you are practitioners, I think it is a relatively small percentage, but I think we are all aware that most practicing lawyers are unhappy in their careers and most of them are probably litigators. I happen to be in the minority, I am one who really loves seventy percent of what he does, and the other thirty percent is dealing with lawyers like the one I described. Maybe five percent is dealing with the client, but as Harold said clients find their own, lawyers find their own, and over time you shed yourself of clients that don't take the same general approach, or with whom you are not congruent.

I wanted to just very quickly throw out thoughts on what the roles in the transaction are necessary to be fulfilled in preventive lawyering. One of the things I thought, before Harold's discussion, was the most obvious and baseline--it does not get you to be an excellent lawyer it gets you to be a competent lawyer--is to appropriately document a transaction in a way that is sufficiently comprehensive the odds are that whatever comes up is going to be appropriately addressed, clearly addressed, comprehensively addressed with the recognition that you are not going to get one hundred percent, and if you do you are never going to get a deal done. Probably fall in the eighty twenty range, and twenty percent of the time get eighty percent of the issues done and that yields his job. I need to rethink about whether there is a way that that isn't necessary, but it allows me to sleep at night.

The second little more subtle thing, I think, is using that transactional process to establish a relationship least likely to result in conflict. That leads to some counter-intuitive negotiations or approaches to transactions I think, and therefore a minority of practitioners use it. I will give you some examples. One is what I would call the Sneak It By You. A lot of times the client on the other side, or the lawyer on the other side does not pick up some great little gold nugget you put in there for your client. I believe the common approach by lawyers is to not raise that issue with the other side. Did you see what I did there, did you see what I did there, do you want to talk about that? But in fact I believe that ironically that is not the appropriate and successful

approach to documenting or negotiating a transaction, because if it is truly snuck by them it is going to come up in a way that is going to pose conflict on a personal basis, the human level, as well as the legal level. What we all know from teaching or studying the law is that just because a contract says what it says does not mean that it is going to be enforced. How often are we sitting there teaching our students, “why is it that what is clear as day is not enforceable in the courts?” The point I am trying to make is that there needs to be clear communication and above board communication in the entire process, not a hiding the ball process. I think there also needs to be clear communication of expectations whether or not it is documented, and I think that is really what Harold was describing as a relationship of expectation management. I believe that is an integral part of the documentation negotiation process. I believe that contracts aren't just meant to be pulled out when you are in a lawsuit. I think that contracts are primarily meant to remind us what we did agree on, what were our expectations, because our clients sure have a heck of a time remembering down the line. I think most conflicts arise not because someone is lying but because there truly is a different recollection or different expectation of the facts.

There is also the temptation to get that last nickel. It is easy to use the nickel metaphor, but it could be not just monetary but used for any connotation. The idea is that from that transaction, get that last piece out. That is something that certainly helps in a long-term relationship, and whether it is static versus dynamic contract. I think the contracts that Harold was describing were dynamic, like a landlord tenant relationship is dynamic, it is over time. An employee employer relationship. A franchise relationship, very difficult to document a franchise agreement, it is a very troubling area of law because both parties have to grow and change, but the contract doesn't. They haven't yet developed that computer program that allows documents to evolve. That is a problem that needs to establish conflict resolution methods which could include the obvious arbitration or mediation, or they could have some more subtle or customized methods within the contract. I think that a big part of effectively shepherding the

transaction involves the counseling process, which I am trying to keep out of this brief talk, but as part of that counseling process you already have drawn out your clients desires, goals, fears, paranoia, and exploring with your client the question, “is this deal something that is worth doing?” Is the relationship with this other person, or other entity worth doing? Have we truly weighed the cost benefit? The risk with being that kind of lawyer is that we get branded with being a deal breaker if for some reason we were the proximate cause of the deal not going forward. Lawyers do deserve some branding of that for certain characteristics, but not for exploring with the client and waking the client up to the moment. Letting the client stop the train just for a moment so that the client can determine what is the proper direction and do we want to keep on the same track.

Two more points as quickly as I can. One is, and this relates to what you will discuss tomorrow perhaps with the educational aspect, to be an effective transactional lawyer and frankly I believe to be an effective counselor as well, the lawyer needs to understand the clients business, which has nothing to do with law, and although you hear once in a while from your client, “You’re my lawyer you’re not my business consultant,” that is very rare. Our clients are looking for and do need us to really understand their business, and this is where I struggle on the educational process: how we can be effective to learn someone’s business by experience. I am sure Harold did not learn, the entertainment, what you just described is really a business, its not a legal area of law it’s a business and you do not learn that in law school. It’s about relationships, and it’s experience, and somehow I think you need to explore the process by which a lawyer graduates from law school and eventually becomes an effective counselor and effective transactional lawyer. Finally I just want to address something that poses some ethical issues, and again I think Harold touched on this, which is the client versus the clients plural. It’s the ethical issue of when can we as a transactional lawyer take into the account the impact of our negotiation process on our own reputation, and our own other clients. It poses a great deal of ethical, theoretical ethical issues, and I would just suggest that in the practical world it

shouldn't pose the difficulties, because if we are to benefit our clients through our own reputation then the easy answer is to be not representing the clients that are detracting from our reputation. Therefore we have to turn away business between now and then for the benefits for ourselves and the benefit of our clients. That is my two cents.

Helen Haapio:

My name is Helena, Helena Haapio. I am here by coincidence really. I went to the ABA meeting in 1997, I think and met Ed Dauer, and since then I have been named a preventive lawyer. I have been a preventive lawyer all my life, but I did not have a name for it before I ran into him. Around that time I got a hold of a book which was Lou Brown's book, "Lawyering for Life." A wonderful book. I had tears in my eyes when I read it. Even though he was not a woman, he had to fight like a woman. In the seventies when I began as an in house counsel for a major manufacturing company, because I was obviously one of the first women in that profession and the profession was relatively new, so I did not really know what was expected of me, but I was fortunate to be in a company where there had been lawyers before and the culture was really a preventive culture. I never went to court, and I haven't been to court since. I have been a preventive lawyer. When people came to ask me what I did, and I said what I did they said, "Yes, you're a lawyer, you litigate," and I said, "no." After having bumped into Ed and this book I knew that there was a profession, and it was a reputable acceptable profession to be a preventive lawyer, and that is what I am. The way I found preventive law though was not only through Ed. After 20 years of Lawyering, in house counseling, and international contract counseling, I started to study. I went to a quality management course, and that quality management course and the Internet, and Lou Brown's work, really changed my life. I found, one of my favorite quotes, and this is not Lou Brown because I know everybody knows what he said, but here is something that may qualify. My favorite quote is by Mr. Crosby who said, "business consists of transactions and relationships. Quality management

purpose is to cause all transactions to be complete and correct, while all relationships are to be successful. If we understand those two sentences, we know all we need to know about quality management.” I think he is speaking about preventive law there. Quality people immediately buy in, when I work together with people in charge of improving processes within companies, they buy into this, but they have never heard of preventive law. Be that in Finland, in Europe, in Asia, or here. Preventive law is just not known as it should be, so there is a lot for us, everyone of us, to do there.

I have tried several ways to make preventive law more marketable to engineers and the people who make the contracting decisions on a daily business, at least in my country. I have tried proactive contracting. It sounds a little less preventive than preventive law to people who do not know about preventive law. When they know what it is then they do not mind the name, but for some reason the first impression is not what it could be. I guess when you get used to it, and we have a lot of work for people to get used to it and have more exposure to it, then they will know what it is. I have tried proactive contracting, I have tried value-added Lawyering, I have tried quality contracting, and contractual risk management. My current one is safe sales. Safe sales is kind of short. It has certain connotations in other peoples minds to other things that are the same letters. So it is kind of a way to lure marketing people and sales people, and even probably managers and quality people into what proactive contracting or preventive law is about.

Just in case you do not believe what I said, I have facts with me. I have a case. This is a real life example. A German company and a US company. They commenced negotiations. It was a deal, and a German company acted as a middle man for purchases of steel bars from a Ukrainian steel mill. February 15<sup>th</sup>, 1999, and I picked this case because it is rather recent, and otherwise you might say that this doesn't happen, but it does, it did a year ago. Two purchase orders were made by Magellan. Four days later Zasketa sent it pro forma order

confirmations. The attached general conditions differed from those that had been attached to Magellan's orders, for example with respect to two dispute resolutions which were flawed. There were other discrepancies as well, but I thought these were interesting. While negotiations to solve the conflict between the forms were underway, Zasketa began to press Magellan to open its documentary training for the transaction, threatening to cancel its order. Relying on Zasketa's assurances that all remaining issues were solved Magellan had the 1.2 million U.S. dollars issued on March 26<sup>th</sup>. Four days later Zasketa recommended that the document and the credit be amended, and Magellan in turn requested modification to the specifications at that time. At that time 60 percent of the order was manufactured. OK, it should never have gone that far, but it did. As in every day life, at least in my experience, happens all the time. Doesn't make sense to a lawyer if you look at it from the outside of the in house business, but that happens. And even the remainder was under production. It is not a surprise that things went sour. There is the legal relationship, and there is the relationship issue. Magellan recommended documentary credit to be canceled and said that there was a breach of contract. And then Zasketa has been attempting to sell the steel to Magellan's customers in the United States. There is not much we can do as preventive lawyers now. An action is brought, and a motion to dismiss also. As for choice of law, because the transaction involved the sale of personal goods, steel bars, it was the CISG, but even that was not clear.

The court went on, and we had an interesting discussion of several things, and this is a real case. But more important than outcome of the case is really that fact that this happened, and what is it that we can learn from this. This case really is just a typical example of things that happen in real life that should not happen. That don't make sense when we look at them afterwards, but when do we ever learn. How can we preventive lawyers prevent these things from happening? They should not be happening but they do. The parties were eager to enter into a long term relationship but they didn't because they hurried into the deal, and they only, and this is I think is one of the lessons from this case, only after everything went sour did

somebody think of lawyers. Really as the very last resort, and thousands of contracts like this are really are formed every day on a basis of quotation and offer, or order and acceptance, and in those cases federal forms easily happen. The very basic steel matter and what we could do I think as preventive lawyers now is a very appropriate moment for us to offer what we have, because we know that these things have been happening before but people who need these things now are probably first timers. The issues are old, but the people facing them are probably first timers. So the basics, even the basics need attention, and we could help these people taking their business into cyberspace so that they have a safe transition. So contracts have to manage potential of helping business people do better deals and make safer sales. And if contracting is still as a process and managed as such, we can avoid plenty of disputes that follow. So this transition to cyberspace is an appropriate moment for us to have people listen to the message we have got. One thing that I would like mention at the end of my presentation is that I am also grateful to Ed Dauer because he encouraged me to write for the American Corporate Counsel Association, and I did it, and they published my paper. They probably did not notice that it came from Finland and it was on preventive law. It is called Safe Sales in Cyberspace. And Tom Barton kindly published it in the papers or at least an abstract from it. So I am really very grateful and happy that I can be a member of the preventive law family.

Tom Barton:

Once again I am sure we have at least a couple of minutes for questions. If not I guess we could catch up.

Audience Comment:

I cannot resist. Listening to Harold, Jeff, and Helena, makes me realize that there are different ways of dealing with different settings, different problems. Contrasting what we do with law

with what I have begun to learn about public health leads me to believe that there is something that we are just not doing that they are doing. In medicine and public health people collect information about what works and doesn't, and they compare it with each other, and they share it, and they publish it, and they do studies, and they find out that this kind of thing works 80% of the time, but not in this circumstance here because they have contrary indications. We do not do that do we? Does anybody know any place where we are collecting your experiences to be able to say, or Helena's experience to be able to say that documentation prior to some moment in time is appropriate when we have this kind of diagnostic picture, but it is not appropriate when we have this kind of diagnostic. Can we generalize from experience? And if we don't have that information is there a practical way we can get it? Are lawyers so competitive that they won't share?

Audience Comment:

My malpractice carrier sends me that kind of information.

Audience Comment:

Is that where it is? Is the insurance company collecting that kind of information.

Audience Comment:

I think there is a role for, what you are really talking about is the kind of case studies that other people do outside of law. When we talk about cases it is *law* cases. Actually the social sciences do case studies and I think medicine does case studies like that, and I think lawyers and law students would find them greatly valuable. To see how law is working in practice.

Audience Comment:

In the therapeutic jurisprudence/preventive law cases we have talked about concepts like legal soft spots and preventive law, the cycle of legal soft spots and therapeutic jurisprudence, which is what kind of psychological fallout is likely to accompany some legal measure or maneuver. And, what kind of strategies are lawyers able to come up with to deal with that and avoid hurt feelings or anxiety, or whatever. We have tried, and watch out for the hurt feelings. We have tried to come up with a form for lawyers to fill out to record their experiences. The notion is to be interactive about it. The chapter tries to give some examples and convey this schema so that they will understand and see things a little differently. It also allows them to teach us by recording some of their experiences that we can then start gathering and discussing. So at least in the therapeutic jurisprudence area of law we are talking about the psychological fallout that accompanies legal stuff.

There is an attempt now to deal with it. This was published in a Cal Western Law Review originally, with a form there saying fill it out, and it was connected to the University of Nebraska Law Psychology program. Fill it out and send it in, and they actually have gotten some. The ones that they have really gotten is when they have captive audiences working, say a clinic, and the instructor says to her clinic students you will record your experiences and I will send them in to Nebraska. Bruce and I talked about how we would do it in a continuing education workshop, set this model up. And get the lawyers in the audience to fill them out. I think that this can be done, but from the little experience we have had so far it requires a captive audience to do it. I think you need to do it in the context of a meeting with a cooperative audience. I think if you say take it home think about it and send it in is unlikely to work.

Audience Comment:

Will the insurance companies have the kind of information that we should be trying to access to be able to make some generalized ideas about differential diagnosis. How do you like that phrase. I learned that one last week.

Dean Smith: Well, yes and no. I think they have some problem areas, but to have anything like what medicine has is a huge undertaking. They have the advantage primarily. They have the pharmaceutical companies with billions of dollars to spend gathering, and a lot of those data are really tied to some device or drug or whatever. The other thing is where research occurs outside of pharmaceutical companies is in medical schools with huge grants from foundations and the federal government. As you know the grants to social science and the law related grants are small or it is a gift. Part of it is that if we are going to get those kind of data, which I think would be very helpful, we either have to find some way of enormous funding, or much more efficient way of gathering real data in large enough numbers that it has some meaning. I think its very complicated, like questions about medication and medical information, but it takes enormous amounts of money to do it reasonably, studies like that.

Audience Comment:

This is a very important issue, and it is certainly one that is on all of our collective agenda. We have all written about the pursuit of a new social science empiricism of the legal profession and how good lawyers act. To do things like case studies, and to invite people not only in the legal profession but in psychology and other disciplines to comment on for example some of the psychological soft spots. How should lawyers deal with, for example, denial in a lawyer client relationship? This is stuff that none of the legal literature addresses, but I think it needs to if we are going to be taking a further step in these directions. We really have to be more empirical, we have to collect case studies, and we have to have more dialogues in continuing education meetings about what lawyers do, and what works and what doesn't work.

Audience Comment:

Yes, I think in transactional practice in fact we really do run that way. I think some of the things that Helena learned from her mentors she applied. I think that if anything is done that is new and innovative and helps clients and business practice, it is very quickly adopted by other lawyers. I think one of the real problems with legal education is we study cases where things have gone wrong, and we always study what happens when people do not do good preventive Lawyering. There is a model where actually looking at people who are really good at what they do instead of creative leadership which has a branch here actually studies people who are really good at what they do and tries to develop how other people can develop their personal attributes and their skills and their relationships so that they are able to do as well. We have just started a 501(C)(3) which hopes to do the same kind of thing with the legal profession by studying the excellent lawyer to see how they succeed. I think the research while expensive is not going to be as expensive as medical research.

C. 2:30 pm–3:00 pm *Diverse Business Practices*

(Discussion Group: Daniel Hapke **dhapke@elawforum.com**], Soili Nysten-Haarala [**nysten@iiasa.ac.at**], Rafael Rafaelli III [**chochito@juno.com**])

Thomas Barton:

Next up we have Diverse Business Practice, but we may be able to carry this conversation forward in different context yet. This is Dan Hapke and Rafael Rafaelli and Soili Nysten-Haarala.

Soili Nysten-Haarala:

I am from Lapland, Finland. I am only a law professor. What I have been educated in is to discover problems which I hardly ever can solve, but I think in research it is very important to find these problems. The last three years I have concentrated on studying the social transition, which means Russian transition from planned economy to market economy. They try to reach their rule of law and democracy. There I have discovered this problem, and how sad it is when the preventive aspect is forgotten. The main problem is that we have the lawyer's world and then we have the businessman's world. I talk about Russia, if I compare it to my own country I would have drawn it a different way. We have the lawyer's work and we have the businessman's work here. They are on the same level somehow and they interact also. In Russia the problem is transition, and of course the legal culture, and the business culture, and the morality. The problem with transition is that they would really like to make it work. They would really like to transfer the country into a market economy, and a democracy. There's no doubt about it. But they want to do it very quickly. The tradition has been lawyers are those who draft, or design the laws. These lawyers have lived in a separate world, they do not know about this world of the businessman. In a way they are ahead of their time, because they would like to make Russia a market economy so they draft laws that are designed for a market economy. The present company act came into force in 1996. And the rule for LLC's came in 1997; it is also quite modern. But it is not the way the company's function in Russia. Somehow the legislation is far ahead of the practical situation. We could say that the way they try to make this transition function is this way, and this is what the President of Russia believes. He is very far from the rule of law. The lawyers think that they should make the business men work in their way, that they want it to look the way that they think a market economy looks.

First of all, we have to know who these people are: Russian lawyers. The law in Russia is from the same origin of the Scandinavian countries or German law. There is a very old tradition

already for what we call conceptual law, or the law of concepts. Legal positivism in a very old fashioned form. So for instance the only source of law in Russia is written law. So cases are not so important at all. So its only the written of law, the wording of this legislative act that is important for lawyers. It is a qualification country as well, like Germany. They think that everything has to be qualified. There has to be written law for everything. For instance all kinds of contract have to be somehow defined in this written source. They have this so-called seminal law, which is a qualification in almost all private law. So contracts and commercial questions have general rules in this code. When they drafted this civil code they decided, these prominent judges and prominent lawyers who drafted this new law for market economy, they decided that business practices are not important. So when a case is decided in court it is the civil law which matters, the printed law. If there are business practices they are treated as not important. The reason which was given was that Russia does not have good business practices yet, and that we need to create business practices along this whole market area. The reason which was not written down is that business practices in Russia, as stated by the lawyers, is that business practices in Russia are not business practices they are criminal acts. So the attitude to this businessman is that they are not communicating. If they create some business practices they are illegal. This is not a very fruitful attitude for preventive law. The problem here is when we come to preventive law is how to make good contracts which will function in such circumstances where the environment is changing all the time. So it is quite sure that the circumstances are going to change. How can we build up a contract that lasts? Because the circumstances are made for short term contracts, and it also increases. People just want to get some benefits for their situation. Try to earn money very quickly and then disappear so they do not build long-term contracts yet.

Dan Hapke:

I am Dan Hapke, and I have practiced for about 26 years. Nearly all of which was in house for three American corporations. I got good news and bad news while I was sitting here today. The good news is that now that I have heard from a lot of you I think I can put some comments better into contexts. The bad news is that everything I wrote last night someone has already said, and in each case said it better than I wrote it or would have said it. I am going to plug on anyway. I guess one of the reasons why there are a lot of opportunities to practice in house in companies today relates back to something Ed Dauer said when he used the expression, "The Tsunami of Rights." In the 60's and 70's. Well clearly in the United States there was a Tsunami of regulatory activity, a lot of which was directed at labor and business, and so there is a labyrinth of rules and regulations that companies try to follow, and that is why they have people like me. There is another expression, I think it was Josephine who made a reference to the trial lawyers and their lobbying. That is another reason why we have in house lawyers is to try and protect companies from the plaintiff's bar. Nothing against those people, but I just don't like it when they have me as the target defendant or have my company as the target defendant.

So I decided I would not say anything that was in my note. What I wanted to do was tell a couple or three stories from my past life. The first corporation I worked for, as I think I mentioned this morning, was a large architecture and engineering company. An outgrowth of those nine years that I spent with them is that a school of architecture asked me if I would come each semester and teach half of the professional practice course to the architectural students. This was the course where they were supposed to learn how to get licensed, practice across state lines or international borders, and all the different back of the house stuff you need to know to be a successful architect. I guess I had been a lawyer for about five years, and I had done sufficient public speaking either in court or in meetings and seminars, that I thought I was an adequate speaker and that I could pull this off. Well I showed up for the class that first time and I had a ninety minute class once a week, which gave me adequate time to prepare and try

to get witty and try and bring it into context and all that good stuff. Well I sat there in front of this classroom of about thirty students. The back row was all asleep. The row on the window side was all studying the leaves falling outside. The middle group, they were good architects, they were counting the acoustic tiles in the ceiling. Out of the corner of my eye I see this kid in the front row, and he is just writing like crazy. So I say, I got one I only got to get twenty-nine more. The next week I come back, we still got one kid who is scribbling and the rest are just starring at the ceiling. I finally took a good hard look at what this student was doing. For the second week in a row he was using my class to balance his checkbook. Not knowing in 1980 that I was trying to practice preventive law, or teach preventive law to these students I quickly learned that I had to do something to get this into context. Because what I was supposed to be telling these students about was proposals, contracts, licensing, partnerships, corporations, bonds, and insurance. They were bored to death. They could not see how any of those subjects were important to going to the boards and drawing a building, or calculating loads, or calculating how many toilets you had to have if the human population of the building was going to be 1600. What I learned was the difficulty of taking my world and having it have a slightly larger overlap with their world, and to put some of this into context. They let me teach that course for five years, so I guess I must have gotten slightly better. It was a required course so I guess that is why the students hated it.

So then in my next life I was with General Dynamics Corporation for thirteen years. The last stop with that corporation they transferred me to Groton, Connecticut, where I was the general counsel of a shipyard that builds nuclear submarines. This is a very old business, that shipyard had been in business for a hundred years. Many generations of people. No one ever walks in for the first time and gets a job. It is sons and daughters, and grandsons and granddaughters, and nephews who work there. So I was one of the first people who was transferred in from of all places California, and these people do not like anything that starts with a C, unless it is Connecticut. They think that people from California are just wild radicals, which we may

believe. In any case, I get there, and because this job carries with it a vice president title I am sent to my office on the top floor. I don't overlook the bay, but I overlook the parking lot. Which is just as well because you can watch the cars get stolen. In any event I sit there, and there is a little bit of a back log left over from my predecessor who had been terminated, but the phone never rings and nothing ever happens. Until one day, I think he must have dialed the wrong number, the director of facilities called me up and he said we are going to sell a piece of property across the bay would you like to be involved. I said Charlie I would love to when do you want to get together. He said how about two o'clock. I said great, I will be in your office at two o'clock. Well there was this long silence, and he said you'll be what. I said it is always my practice to try and get out into the factory, or get out into the shipyard, and get out into whatever and go to your place. A couple of weeks later the director of purchasing, that wasn't even in the shipyard but in an old grocery store three miles away, he calls up. And he assumes that I am going to summon him to my office, and then we our going to do our business. I said to Don, Don I'll get into my car and I'll be at you office at whatever the hour is. Well, I suddenly became the department rainmaker. People were bringing me all kinds of things to look at. To look at in advance of consummation. So we were able to convert ourselves from being just a reactive force, to being proactive or preventive, or whatever P word you want to use. It is just amazing how simple it was to change a practice my predecessor had, which was he came to work every day, took and elevator to the tenth floor, and he never moved. Well that is why he had an empty office and a quiet telephone. I think this was a comment that Dave made about getting out to see the client, and not just sitting in the office. It is amazing how a small little thing like that can move you upstream in matters, and give you a chance to act in a preventive matter.

My last story is from my last job. I was the general counsel of a publicly held aerospace component manufacturer. We made all kinds of things that go into airplanes. One of the things we made a lot of was fasteners. This would be a big fastener. We made a lot of little widgets.

We had a division that made fasteners, and we probably did 500 million dollars a year in fasteners. We needed a lawyer to do the lawyering for that little company, because we had lost the person that was handling that business. So I had a little search going. I had recommended to me a woman who had practiced in the United States Air Force as a civilian attorney for eleven years. She was Phi Beta Kappa undergraduate, she was a number one graduate in her law school class, I mean she had wonderful credentials. She presented herself very well. Very personable, and obviously very bright, and so we assigned her to the fastener company. Well the problem was she had a great deal of difficulty converting herself from a government entity, where the inmates in management are all extremely risk adverse. Their only goal in life is to achieve the points in life required to qualify for a pension. In the fastener company we had big customers. We had Boeing and Ford and some really tough customers to do business with, and customers far larger than we were. So what I tried to get Lisa to understand is that you do not negotiate those contracts to death. You just take the contract, and in the actual performance of it you somehow got to perform well enough to make money despite the contract terms. Because if you get into a dispute with Boeing they are going to ignore the words, terminate the contract, and take their business someplace else. That is just the reality of it. For some reason Lisa never understood that. She would be given a ten-page contract to review and she would write a fifteen-page memo on all the things that were wrong with the ten-page contract. That was not practicing in the context of the level of risk that that little subsidiary was willing to assume, because that is the nature of that market. That is the nature of that industry when you sell a million of these little things for every Boeing 747 that flies. The biggest sin a fastener company commits is to not deliver on time. The biggest sin is not your pricing structure, it is not selling a few hundred bad ones in a box of a thousand, because they will just throw them away anyway they only paid a penny for them. But the biggest sin was delivering late. So you have to try and understand that context if you are going to then effectively practice some kind of preventive law in that business, which in that business all the principles the lawyer

needed to embrace were exactly the opposite of the principles that a lawyer in a government agency would normally develop over time. Thank You.

Rafael Rafaelli:

I am Rafael Rafaelli, and I am in private practice in New York. My practice is mostly transactional, real estate and some bankruptcy. I used to focus on litigation, and those of you who want to know why I no longer do that you can stick around for the video tonight and you will find out. In any event like Dan, I can say that many of the people here today said many of the things I was hoping to talk about. But I think that is a very good sign because it means that we are all thinking alike about this concept we call preventive law. I think the Browns would be happy to hear that my letterhead identifies me as a counselor of law. That is in a large sense what I do, and what I am increasingly enjoying doing. I think someone else mentioned the concept of the counselor, and I have a clientele that is largely immigrant, and some of my clients actually call me that, their counselor. I want to talk about a couple of intellectual property issues that managed to reach my desk, even though that is definitely not an area that I practice or have any expertise in.

I had one client who came to me, he wanted to trademark the logo, this man is a professional clown actually and he performs at parties, and he also opened a restaurant named after this clown character that he plays, and he wanted to register the logo of the clown. So he brings me the logo, and it is this clown's face bordered by these golden arches which are his eyebrows. So here was a great chance to start practicing preventive lawyering just like Helena was saying that she had been doing that for many years without knowing that that was what she was doing. I gave him my best preventive lawyering and said no Gold. So he actually registered it as a blue arch, or a blue face. Nevertheless he went ahead and opened the restaurant, and on the awning of the restaurant he had golden arches. So he did not take my

advice, and eventually he got a cease and desist letter from McDonald's and I told him you better comply this time. But actually they did not refer to the golden arch they just referred to the arches. So they did not even want any color of arches, no arches period. So I told him you better chop of the bottom of the M or separate the eyebrows. Do something.

Another client of mine came to me, and this was an example of a slightly different angle, he was a music promoter who had managed a band that was a spin off band from Columbia. The original group had put out about twenty CD's in this country, and the spin off group were former singers from that band and they were continuing to play songs from when they were from the original group. The original group was called [Spanish Name]. I don't know if anyone has heard of them. The spin off band was going by the name [Spanish Name], which is kind of similar and uses the same name. So it created a lot of confusion, and they too got a nasty cease and desist letter from a Los Angeles lawyer, and because they were already my clients he started sending me all the letters as well. I actually told my client, you know I think they are right here. So I think you should stop playing, at least in this country, under that name. But then when we got the final letter, I would have agreed to it if that was just it, but it turned out that the lawyer also wanted 15,000 dollars in legal fees for their troubles. I'll assume they'll probably file a lawsuit and that will be the end of that. Because it is a group in Colombia I do not think there is much they can do in terms of enforcing any judgment if they get one. Those were two extremes I wanted to talk about.

On the other side of my practice which is mostly real estate, we have a different set of issues. A lot of times a great place to practice preventive lawyering is when you are representing a seller of property. New York is a bit different from the rest of the country. I think it is just New York and New Jersey who use lawyers who clear up title issues. I think they have what they call an escrow agent out here to deal with it, but in New York it is the lawyers that have to deal with it. A lot of times there is a private second mortgage on a property or a bank primary

lender assigns a mortgage, or you have a refinancing situation where you have consolidations of mortgages. A lot of times, especially with my immigrant clients who are not up to snuff with American laws, a document is not filed. You finish paying off a second mortgage, but you do not file a satisfaction of mortgage with the county clerk. Assignments are not filed by banks. When this happens, later on when you try to sell your property you are going to run into a problem. So if you can advise your clients before something like that happens you are doing your job in a good way.

Other times I like to try and interject a little preventive advice for free. I throw it in for my clients. It is very common in New York to have an illegal occupancy in the house. Everybody has extra rooms and they want to get some extra rent, but inspectors are really cracking down. The problem is a lot of people think these inspectors are the equivalent of policemen and they can just knock on your door and come on in, and all of the sudden you are facing thousands of dollars in fines and violations. I tell all of my clients look I do not approve of you having this illegal occupancy it is dangerous for you, but you do not have to open the door for them either. They are not the police. That is the preventive advice I give them. At least if you do not open the door, you have a chance to get the tenant out, correct the situation so that if you do let the inspector in later you will not be facing all those problems. So that is another area where I can practice some preventive law.

Another area that I wanted to talk about is a concept I have sort of fleshed out, where I am in a situation where I see that my adversary is not such a good lawyer, and I see a potential for some problems. I try to act preventively by trying to remind them of things they have to do. Of course you do not want to insult anybody, but sometimes if you are just leaving a message on their phone you get a sense that some people are never in their offices or they have no idea what they are doing, you might want to leave them a message just to be safe. So I did that as well recently with a lawyer, I made sure to leave a message telling her to make sure an have an

up to date pay off letter so that when we get to the closing table you can pay off the loan. I left the message and sure enough she did not, I do not know if she did not get it or if she ignored it, but we had a big problem at the closing because her payoff letter was way out of date. And her bank turned out to be one of the five percent which refuses to give updated figures over the phone, so we had a big problem that day. I like to call this preemptive preventive law. Drawing some conclusions from this, I think this was along the lines with the delivery systems Ed was talking about at the beginning. Delivery systems and human insights. We have to be concerned about getting our preventive information to clients, and we have to get our clients to be aware that they need our counsel, that they should seek us out before acting. Sort of developing the concept of the family lawyer, the counselor. Also Jeff was talking about this too, how do we get people to talk to us before they act, it is almost like we have to nudge them like he was saying. Then the hardest part of all, which I learned with my client the clown, getting the client to actually follow our preventive advice once we deliver it to them. Finally, one last thing I wanted to touch on. Like the Brown's I work a lot on a flat fee basis, however it is not a very lucrative flat fee basis because many of my clients are blue collar. Many lawyers, I don't count myself among them, when you are working on a flat fee basis just to deliver the product we have been hired to deliver and that is it. No freebies. No preventive advice. It just occurred to me that perhaps there is an incentive lacking for a large body of lawyers to dispense with preventive advice. Then it occurred to me to what extent is there an ethical obligation to act preventively, and wouldn't it be a good thing if we could get this somehow into the ABA canons. Because as far as I am concerned, I think preventive law is going to make everybody's lives better, and I think we should give that advice as we can. On the other hand we have these lobbying groups, such as the Trial Lawyers Association that would not be too interested in preventive law, but I think there should be some sort of consideration to be had by all lawyers in this area. On that note I will finish my presentation, but since I do have the question I just wanted to ask Helena a question. She talked about how the Internet has

changed here life, and I just wondered how it could be that one could apply preventive law in an Internet transaction? Could you give us an example of that?

Helena Haapio:

Thank you very much. What I had in mind at that time was really finding the National Center of Preventive Law website, and finding Professor Brown's production through it. But what I had in mind is really if we as preventive lawyers could build in preventive law into the steps and documents that go on line between the companies business to business world. Where I work there is so much that we could do now in the US there is this directive taking effect in a year and a half, so there are steps that need to be built in. This business to business and particularly business to consumer, so being proactive now and taking those steps is going to help companies avoid to that trouble. And also several details that I would be willing to discuss with you later, that the transition is asking us to deliver so that we can help automate contracting and automate good contracting in cyberspace rather than after the fact trying to solve the issues that are bound to arise.

D. 3:15 pm--3:40 pm *Immigration and Human Rights*

(Discussion Group: William Aceves [[WAceves@CWSL.edu](mailto:WAceves@CWSL.edu)], Lilia Velasquez [[livel@k-online.com](mailto:livel@k-online.com)])

Thomas Barton:

We now have Immigration and Human Rights with William Aceves and Lilia Velasquez.

Lilia Velasquez:

My name is Lilia Velasquez, and I am actually an alum of California Western School of Law, which is good and bad. Sometimes I am a source of pride, and sometimes I am a source of embarrassment. When I do good things then the law school says yeah, but when I my name appears on the front page for being arrested in some demonstration they pray that it does not say she is from California Western.

I have been in practice for 18 years, and I am a certified specialist in Immigration Law. I have been doing this all my life, and this is all I know how to do, because it is not really a transferable skill. Immigration law is highly technical, it is policy related, it has to do with the politics of congress, and immigrants in general. After 18 years you could say that I became well established. I carved my niche. In fact, some people labeled me as the goddess of immigration, which label I never corrected. I embraced it.

Things were really good for me and I was very happy. Business was good, money was coming in, clients were coming in and waiting outside my door. It is a good feeling when you know that you have made it. I really felt that after 18 years I could just sit back, put my feet up on my desk, look at the bay view that I have from my window, and just coast through the rest of my professional career. But something happened. September 1996, Congress woke me up from my fantasy. They changed the law. It was the most sweeping, the most punitive, the most Draconian piece of legislation ever, and I have been in the business a long time so I know. All of the sudden immigrants had no benefits, and they were stripped of many of the rights and benefits they had prior to the reform. People that committed offenses, even though they were minor offenses many years ago, now became deportable under the immigration reform, because retroactivity is allowed in our practice because deportation proceedings are not considered to be criminal in nature. Therefore the constitutional guarantees that would normally attach in retroactive legislation did not and do not apply in immigration civil proceedings. Therefore, the immigration service today could knock on someone's door at 6 o'clock in the morning and take

them into custody for a violation that was committed 15 years ago. It is the most offensive aspect of this immigration reform. The notion of fairness and justice just flies in the face of most lawyers. This could not be that the immigration or the department of injustice, as I call them, could do this. To live in a state of siege, that at any time they could come and knock on your door and take you away for something that was not a deportable offense when it was committed back then.

So, like most practitioners I went through a phase of frustration and depression, when clients would call me and I would have to give them the bad news over and over again. There is nothing that I can do for you. This conviction that you committed ten years ago is unforgivable, it is zero tolerance, one strike and you're out. It got to a point where my clients would ask me in frustration, "what is it you can do now? What is your role as an immigration attorney?" That hurt, because it really made me reexamine how do I help immigrants now, given this new legislation. I went through the three phases of anger. First I was angry, then I was angrier, and then I became violent. I think there were a couple of times I called William Aceves and I said, "William I am having that urge again to throw a grenade at the federal building of immigration." Of course he is a pacifist, and he would say, "Lilia take a deep breath stay on the line with me, and don't do anything." Eventually I would vent and feel better.

I want to give you an example of cases where prevention could have avoided the problem. It is true that if someone committed an offense, it now becomes a deportable offense. That is a cold fact, and there is nothing I can do. So if they call me, and say, "gee, am I in danger." I would probably say, "do not apply for citizenship because they will get you. Do not travel, don't move, and lie low." But there is nothing I can do to change the fact that they have this deportable offense. But in many of the cases I can prevent the harsh immigration consequences. So we have a case recently where a woman, who was undocumented and married to a U.S. citizen, was a victim of domestic violence. Husband was an alcoholic, beat

up this woman, put her in the car, drove her across the border into Mexico, and then dumped her in Tijuana, Mexico. So then she calls in tears, what do we do? The first thing that I ask myself is could I have prevented this problem? Does this woman know that she is protected, that we have the Women against Violence Act, and that she has some rights even though she is undocumented by virtue of being married to a U.S. citizen? And even though I am not Jewish, I always feel guilty. If something happens to a client, I think I could have done something to prevent this, and I didn't.

Another situation is children's health. Part of the problem that came to light with this new reform was that people were afraid to come forward and get even the basic health needs for their children, even though their children were U.S. citizens. So what happened in the Imperial and San Joaquin valley is that many parents failed to take their child in to be immunized, and they died. Even Senator Feinstein came forward and made an announcement, "please do not endanger the lives of your children simply because you are afraid to come forward because of the immigration service." So there again I felt that I could have done something to prevent those children from dying if I could have gotten there in time to advise the parents that in fact the children were allowed and entitled to receive the basic health care benefits.

We also have a client this minute, in fact my associate is completing a writ of mandamus, that is a U.S. citizen, is in custody, and has been in custody for forty days. Why? Because the U.S. immigration service does not believe that he is a U.S. citizen. Just like many people who were born in the United States, and then lived in Mexico most of his life, then come back, and then they say gee your English is not that good, I don't think you are a U.S. citizen. He has been sitting in custody for forty days because they lost the file. Again, how could I have prevented this from happening? If I could have reached this person, and said, "look, get yourself a U.S. passport. It is so very simple, it is fifty bucks." There again the guilt taking over. Hopefully we will be getting him out of custody by Monday.

Lastly, we have a situation where a 64 year old man who is a double amputee-he was a diabetic and had lost both of his legs-while assisting his daughter with her homework, registered to vote thinking it was just a homework assignment. Unbeknownst to this person, the registration was sent into the registrar of voters, and the next thing you know he has a ballot. He actually goes to the precinct one day and says, "I have a green card, I am not a U.S. citizen, can I vote." He was told not only you should vote, but if you don't you can be deported. Big mistake. So you have an ignorant person, and an ignorant provider of information. Subsequently, when this man applied for citizenship and they asked have you ever registered to vote? He said, "Yes and I am very proud." Have you ever voted? He said, "Yes, and I have my little flag to show for it." Instead of being a happy moment for this person, he was taken into custody and put into deportation proceedings for violating the new law. Again retroactively applying to this person. It was a big thing and eventually we won the case in court through the media, but there again a perfect example. If we could have advised this person that the law had changed, and now it was a violation of immigration law and a deportable crime, then he would not have voted. The trauma and legal expenses of representing him in deportation proceedings would have been avoided.

So congress made me change my role as a lawyer. I feel that if the impetus for the change was the legislation, that is fine, because if I have now become a preventive lawyer, how I got there is not important, but that I did. I have now become a disciple of all the people here that also practice preventive law on a daily basis. I have always been big on informing the public and educating my clients. I feel that is my role and responsibility as an attorney. But nowadays given the climate, and given the legislation that we have to deal with, it is not just an option that I should look at-Something that I can say gee maybe I should do this-it is really a must that I have to practice preventive law on a daily basis. In fact I feel it is like a vitamin. "An act of preventive law a day keeps the I.N.S. away." So what do I do now? Instead of being this top notch litigator, which was actually quite satisfying-take your brief case and you walk into court

and you tell your client, “lets go get them,” you know it is a good feeling being a litigator- now I have to change my perspective, and if my goal and the goal of defending immigrants is to protect their rights and to provide them with access to justice, then I have to do something else. I had to reexamine the skills I have, and how I can best achieve that goal. So now I go on the road, and preach the word of the new immigration reform. I don’t tell people do you know where you come from, but I tell them do you know about immigration law, and they listen. So I have been doing public service announcements on the television, I have been doing radio shows, I write a column in the newspaper advising people of their rights under the new immigration reform and how to protect themselves. Basically I do everything that I can. The only thing that I haven’t done is go door to door, because I would be competing with the Jehovah Witnesses’, and I do not get up that early anyway. I did, however, think of this idea of creating this pamphlet that says, “Avoid the Hell of Deportation.” I thought that would really get people’s attention. So, I think that it is not a luxury to be a preventive lawyer. It is really something that we have to do on a routine basis. And for me I am doing more informing and educating than I am doing litigating. And maybe I am putting the interest of my clients above my own. You can say, “well gee, if prevent all the problems possible what sort of clients am I going to get.” But oddly enough I still have a thriving practice, because whenever Congress changes a law it really generates more litigation, and we know that. So now all the circuit courts and all the appellate courts are tied up with litigation that this legislation has generated. But down the line it has really made the population of immigrants more vulnerable to the harsh consequences of the reform.

So I am no longer considered the “Goddess of Immigration”, now my label has changed to the Flame of Justice. I go around preaching the word. I like the flame of Justice. My role has changed and my life has changed. That is all I have to say, I will give it over to Professor Aceves.

William Aceves:

It is always really difficult to follow Lilia. When Tom asked me to talk about the preventive law in the context of international law and human rights, I first thought it would be extremely easy in the sense that having had a lot of experience with human rights, I thought that maybe I could look at a couple of agreements international treaties and it would stand out immediately. It turned out to be a lot more difficult than I thought it would be. I did finally find one treaty that I thought might apply, and the title suggested that there must be preventive law principles in there. I am going to focus on the genocide convention. The official title of the genocide convention is, The Convention on the Elimination and the Protection and the Prevention of the Crime of Genocide. So I thought since it had prevention in the title, it must have some preventive aspects inside. But when I went to look through the agreement I was really struck by the fact that there weren't any true preventive aspects in there. It really talked exclusively about punishment. What are we going to do to punish people that commit acts of genocide?

Looking at the provisions of the agreement, I wanted to just highlight two of them in particular. There is the term prevention in there, but then again it really is secondary. I think the principle focus of this agreement, and I use the genocide convention as an example, I think we would have the same problem if we looked at other international agreements, and I think it is indicative of some of the problems we face in the international community in trying to promote a preventive view point. Article one of the convention, "the contracting parties confirm that genocide, whether committed in time of peace or in time of war is a crime under international law which they undertake to prevent and to punish." So article one recognizes the importance of prevention there, but also talks about punishment. So I thought lets look at the rest of the agreement there must be some more there. Well, Articles 2 through 7 of the Convention provide no commentary on prevention, it is all about punishment. What are we going to do

when we locate individuals that have committed these types of atrocities, and the answer is that we are going to punish them. I think that one could make the argument that punishment can be viewed as a form of prevention, in that we are using it as a deterrent to try and prevent atrocities from being committed. But when I think about what we are talking about when we are talking about genocide, I think if you have to punish someone you have already failed. I was thinking in the context of the Rwanda Genocide that happened in 1994, where 800,000 people were massacred in the span of about 60 days. There is now a fairly elaborate punishment regime in place both with respect to an international criminal tribunal that was established by the United Nations security council, as well as domestic tribunals within Rwanda that are prosecuting the perpetrators. But my concern is that again, in this situation where you have such a large number of people that were killed for no other reason than they were a different ethnic group, I think that if punishment is the only avenue available then you really have failed.

Article 8 of the Convention does mention prevention. “Any contracting party may call upon the component organs of the United Nations to take such actions of the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of Genocide, or any of the other acts relating to article three.” Well, it doesn’t say to state parties what examples of prevention there are available, and it seems to me that there were so many missed opportunities there. Establishing some type of education programs, some type of domestic monitoring programs, some type of international monitoring programs. It is troubling to me to think that you have an international agreement titled, the Genocide Convention on the Prevention and Punishment of the Crimes of Genocide, that does not provide states with any insights on how to prevent it, only how to punish it.

In the context of the Rwanda genocide it seems to me that our discussion is not just an academic exercise, that there is some practical application there. If you look at what happened

in the Rwanda genocide, as I mentioned it began in April of 1994. It is amazing to consider the fact that United Nations actually had military personnel in Rwanda before the genocide began in the beginning of April of 1994. So there were military personnel on the ground the day the genocide began. The response of the United Nations, the minute the genocide began, was to remove the military personnel from the country. It is amazing to think about that. There were military personnel there that could have done something about it, but once the atrocities began the United Nations pulled those individuals out there. Because they had no plan in place, they had no idea how to use them, and how to prevent the atrocities from occurring. So they could have used the military personnel on the ground there-the United Nations military personnel on the ground there-before the atrocities occurred, when they had fairly significant notice that the atrocities were going to happen and that it was only a question of when it would take place. But they did not use that information to their advantage. So the atrocities began, and the U.N. pulled their troops out. Again, it just strikes me that we have this agreement that was designed to try to prevent these things from talking place, and yet it does not provide states with any insight whatsoever with what to do to respond.

I don't think the genocide convention is unique in that respect. I think that there is a broader problem within international organizations, international agreements, in terms of how to respond. And as I look through a number of these agreements I came up with three different limitations that they tend to have. One, they concentrate on unitary solutions. In the context of the genocide convention it was punishment. They were going to focus on punishment as a mechanism for trying to prevent these types of atrocities, as opposed to trying to think of some other types of solutions such as education, monitoring, or state awareness. The second limitation, I think in terms of preventive law with respect to the human rights community at the international level, is that they focus again on punishment. I think that punishment is one mechanism, but it certainly cannot be viewed as the only mechanism. The third concern that I have had is that these agreements are more reactive than proactive. Again, I think you can

make the argument that punishment can be used as a form of deterrence, but it truly is reactive. It does not try to predict what is going to happen, it does not set up any type of mechanism that states can reasonably look to and reference, and say that we can look to that as a basis to try and prevent acts of genocide in the future. Again, it is not limited just to the convention against genocide. If you look at the convention against torture and other forms of cruel and degrading treatment you find that limitation there as well. I think given what has happened during the second world war, and given what happened in the past ten years in Rwanda, Kosovo, and Bosnia, it is troubling that we still have so much of a focus on punishment, and we fail to recognize what prevention can actually do. I would hope that in the coming years we would recognize the limitations that we see in place in many of these treaties, and we would try to either amend them or craft new remedies and new solutions so that when a state wants to legitimately try and prevent these atrocities from occurring, they do not have to create them in an ad hoc manner, but they can look to these agreements that were created specifically to address those concerns, and hopefully they will provide some solutions to these types of international problems. Thank You.

E. 3:40 pm--4:05 pm *Physical and Mental Health*

(Discussion: Steve Ciceron [[steven.ciceron@bms.com](mailto:steven.ciceron@bms.com)], Dan Groszkruger [[Dgroszkruger@chapinlaw.com](mailto:Dgroszkruger@chapinlaw.com)], Steve Smith [[SSmith@CWSL.edu](mailto:SSmith@CWSL.edu)], Bruce Winick [[bwinick@law.miami.edu](mailto:bwinick@law.miami.edu)])

Thomas Barton:

The next session is Physical and Mental Health, with Steve Ciceron, Dan Groszkruger, and Steve Smith, and Bruce Winick.

Bruce Winick:

I think I have been asked to start, and to start by explaining a little bit about what Therapeutic Jurisprudence is, and how it might relate to this area. We have all heard a bit about therapeutic jurisprudence this morning and today, and I am sure many of us know quite a bit about it, but I have a feeling many of us may not. Basically it is an interdisciplinary approach to the law that focuses attention on law's impact on the people it affects, most particularly its impact in regards to their physiological well being and their emotional health. Often law functions as a therapeutic agent to the negative, sometimes to the positive. Therapeutic jurisprudence suggests that we should systematically study those consequences of law with the tools of the behavioral sciences, and use the insights gleaned from those studies to reform law in the direction of being less anti-therapeutic and more therapeutic. Just as law and economics might suggest that we should do economic impacts of laws, we are into doing therapeutic impacts of law.

Now how does this all fit with preventive law. A few years ago David Wexler and I and Ed Dauer and Dennis Stolle got together and talked about what amounted to being an integration of these two fields therapeutic jurisprudence and preventive law, with an aim really of trying to benefit both. Preventive law gave therapeutic jurisprudence a tremendous opportunity to apply its principals in the real life context of law practice. I think before that it had been rather an academic enterprise that was largely written in scholarly journals. But here we have an idea that can be applied in the real world. Therapeutic jurisprudence focuses not only on the way the rule of law has impacts, but also the way the roles of various legal actors like judges and lawyers have had impacts on emotional well being. What does it bring to bear for preventive law? It actually does a lot on the skills aspect of Ed's diagram. How can the preventive lawyer actually apply his or her craft? Obviously preventive law has invented a number of techniques; the rewind technique, the legal audit, the legal checkup, etc. But therapeutic jurisprudence I think focuses attention on the psycho-dynamics of the lawyer client

relationship, and tries to bring psychology into the picture a bit. To suggest that to be an effective preventive lawyer you need to be one who is good at personal skills that can understand the psychological dimensions of the relationship, good relational skills to be a good affective lawyer in order to be an effective lawyer.

Well, what does any of this have to do with health and mental health care and the like, and let me just use as an example the advance directive instrument. It seems to me that of course an important mission of preventive law is to facilitate the clients ability to plan for the future. Lawyers as planner as Brown and Dauer's book title itself suggests. The Advance Directive Instrument came to pass not that long ago in the context of a living will, but now has spread considerable beyond it to affect a whole variety of areas in which people can engage in advanced planning for their health or health treatment. As in nursing homes admission. It provides an opportunity for individuals to do some advanced planning about how they would like a variety of issues to be dealt with in the future, perhaps at a time in the future where they may be incapacitated. We are of course a rapidly aging nation and people are becoming incompetent and experiencing mental illness and Alzheimer's and other types of dementia. The point is how will I deal with some of those issues in the future? Well, to the extent that I have views on it, I can plan now for the future with an instrument that will be legally effective. That provides a new role for lawyers as well as health care professionals, but it provides an important area for the lawyer, but in doing that I think we have to realize that this is a very sensitive area for lawyer/client discussions. The client who comes to see a lawyer to talk about a variety of things in a legal checkup might not want to tackle the question of future death or incapacity or even a nursing home admission. Again it brings to the fore the question of what can therapeutic jurisprudence do to help the lawyer to engage in those very sensitive conversations. I mentioned earlier that I have written an article about dealing with denial in the attorney client relationship. Well, this is certainly an area where lots of clients will wish to procrastinate or will otherwise resist the advice of their attorney about the need for instruments

of this kind. How can the lawyer recognize psychological denial and understand how it functions, and how can a lawyer cope with it? Basically, because there is not much time, the lawyer needs to be a good listener, to establish trust and confidence, to display empathy, and to not to be pushy with the client or coercive with the client, but to give the client a big measure of choice here. In order for the lawyer to be an effective counselor the lawyer needs to have some psychological skill to understand and to sort of be psychologically sensitive. I often say that just as antitrust lawyers need to understand some economics to be effective, good preventive lawyers need to be able to understand some psychology. That is really the contribution that therapeutic jurisprudence makes to the preventive law enterprise. It brings to bear a variety of interpersonal skills that can, and I think must be used for the lawyer in this context to be effective.

I mentioned the Advance Directive instrument, and a lot of what Harold Brown talked about this morning applies in this context with wills. It is not just that piece of paper, in fact this is a dynamic relationship that exists over time. The lawyer has to understand not only what the client wants, but how it will figure with the family's desires, and how to motivate health care providers to give a fit to those instruments. Lots of health care providers ignore what the statistics show us. I think this too is a role for an effective preventive lawyer, lawyer as planner working with the dynamics of the relationship in creative ways, the way Harold works with the dynamics of the relationship in the entertainment industry. Anyway those are just a few thoughts to share with you. We have three other speakers, and scarcely enough time so I think I should stop.

Dan Groszkruger:

Good afternoon. Unfortunately I did not get to join you earlier, so I missed a little bit of the lead in to this. Let me see if I can hone in on one little part of this preventive law issue, that I

could perhaps share some personal experiences with you. My name is Dan Groszkruger, I am a litigation attorney by profession and by experience, but my avocation is health care risk management, and dealing with health care clients, provider clients who I represent. What I am trying to do is keep them out of trouble, and essentially to fulfill that role as a preventive counselor and advisor and to maybe have a few less lawsuits and litigation in order to solve things. Sometimes it is not really that clear what that advice should take, and in order to illustrate that point let me just mention to you something that is in the news right now, and has been for the last couple of years.

That is medical errors. Medical errors have made the press within the last couple of years. Perhaps some of you will remember the Institute of Medicine report that came out about a year ago. The estimate that was given in that report was that something on the order of 100,000 lives are lost to medical errors, many of them being pharmaceutical or medication type errors, and these are in hospitals or doctors' offices for people who are just undergoing treatment of one phase or another. From the preventive point of view what would you think? Obviously, the objective would be let's get that error rate down, and how do we advise our clients on doing that? To set the tone for this, and my remarks will be brief, but let me see if I can involve the whole group. How many of you are comfortable with trusting your personal health care, and that of your spouse and your family to an HMO? A couple. The vast majority would not. Why? Because the press coverage of HMO's over the last couple of years has been almost 100% negative. The view of the public in general which is guided by this type of coverage tends to make you very distrustful, and perhaps rightfully so, of the idea of bureaucrats and bean counters being the decision makers in regard to your health care. How do those two tie together, that is the issue of medical errors and the public perception of HMO's? What is being proposed as the solution to get that error rate down is reporting of some type. What we have now is voluntary reporting. Where we are apparently heading in the medical and health care industry is mandatory reporting. The thinking among many is that the more reporting that is

done, the more likely it is that that error rate is going to fall, simply because more information, more shining of the light of exposure on the subject by itself going to produce some beneficial effect. But think of it from the patients perspective given that level of distrust and lack of confidence in our medical decision making. The fears on the part of many are that if we do have mandatory reporting, instead of having more reporting we may have less reporting or we may drive the entire subject underground. I do not know what the answer to this is. I just raise it as one illustration of the difficulty we have as lawyers in terms of advising our clientele as to what is the best role for prevention. Do you report or not report? If you have a situation where you may get tagged with a medical malpractice case, or some type of bad faith delay or denial of benefits case do you want to advise your client to make a voluntary disclosure of that? On the other hand if you advise handling it some other way, are you really meeting the needs of the community in terms of raising the level of medical care? That whole subject is the subject matter of days and days of conferences one of which I just came back from. Unfortunately we have much more questions than we have answers, but I think it does illustrate those competing policies which are sometimes not showing us a clear avenue. I will turn it over to Steve.

Steve Smith:

Thanks very much. I am pleased to be with such a distinguished group. I must say that so many of the people in this group have been academic and practice heroes of mine, and to talk about health law, and how it relates to preventive law. First of all the analogy of preventive law and preventive medicine is there. Secondly, risk analysis and risk prevention has been a part of the medical practice involving lawyers for a long time, and there should be a head start. But as Dan has pointed out there is some reason to think that it has not been entirely successful despite a lot of effort. Part of the point is to look at what has gone wrong with risk prevention in the health area. I am really going to make three quick points about what we might learn about preventive law from the health law, and mental health law area.

The first is that systems do matter. Really what Dan is talking about is do we really want to get a lot of information about what is going wrong in the health care system, and why it is producing so many errors. Huge numbers of errors in the delivery of medicine. Well if we want lot of information on which to change the system, we probably do not want to force a lot of individual reporting, because individual reporting tends to drive information underground. It has some advantages, but it tends to drive information underground making systemic changes especially difficult. So to some degree, as satisfying it is to get the culprits who make mistakes, and to drive a few people out of the profession, it may be more important to get information about the system to make systemic change than it is to try and identify a few individuals. If that is the case then thinking in a policy standpoint in a public preventive law standpoint about whether you want a FAA, as Ed Dauer always points out, where you can self report without penalty and indeed kind of immunize yourself, may be worthwhile. The cost of that may be worth while in terms of what it might tell us about the system. So systems matter, number one.

Number two, I think preventive law on the ground matters. It is really Bruce's point about Advance Directives. If you look at an intensive care room the implementation of Advance Directives is much different than we talk about in the classroom. You can have the most perfect legal documents known to the law, and it will make absolutely no difference in the care of the patient in many cases, and in the majority of cases that is true. They don't get on the chart. The people who make the decisions are not judges of course. They are intensive care physicians. And they do not ever know what the instructions are. Secondly, the instructions are so broad that they do not make heads or tails of them. Third, they do not believe them. They just disagree with the choice of the decision maker. There are a number of us who have watched intensivists make critical care decisions at a major hospital in the Midwest, a terrific hospital with a huge intensive care operations. And at points they just disagree. The nurses and physicians just disagree with the selection of a surrogate decision maker, and simply said we are depending on the family instead, despite the fact that from a legal standpoint that was

absolutely in print. Well, you can make all the threats you want, the intensivists are going to do what the family wants if they just do not like the decision maker. The point here is that we can have all the preventive instruments here we want, but it is how they work in practice that matters, and that really gets back to the point that we need to know more than we do now about what is effective in terms of how some of these instruments are implemented by the people, often not lawyers, who have to implement them.

The final point that I think comes through to me, at least through watching some of the preventive aspects of health care is that this really does need to be an interdisciplinary enterprise. By and large we are lawyers in the room. The reference to psychiatrists and psychologists, I think that is enormously important. Understanding some of the therapeutic aspects, but understanding human nature as well. The last conversation I had with Bill McGill (Jamie Cooper and I had lunch with him shortly before he died), Bill spoke to the center for creative problem solving. Bill said one of the things you all are going to have to deal with (Bill was a psychologist), is that people just need to fight sometimes. If you have these wonderful mechanisms for avoiding making them fight, that may be terrific, but it just may not satisfy their needs. If you are going to have these mechanisms then you need some outlet for the psychological push when they are angry, frustrated, and hurt, of finding some way to fight, and you do not want to displace the law by having them go about and return to the physical violence that the law in fact replaced.

So that is one simple illustration of the fact that preventive law must be broadly interdisciplinary. With that I close with only one point, and that is an optimistic point. That I think the world and our society are moving toward an openness to preventive law, because as Jamie mentioned, there is such a political hassle going on that our minds turn toward politics. Jaime mentioned my favorite political philosopher during lunch, which is Dan Quayle. I thought I would close with my favorite statement of his which is the following, "Nicaragua is on an irreversible path toward

freedom and democracy, but that could change.” We are in the same shoes. I think we are on an irreversible path toward more preventive law, but that too could change. It really does matter whether we find ways of teaching our students about preventive law, and improving the research that underlies what we do with preventive law. It really does matter how seriously we take it and how aggressive we are in promoting it. Thank you.

Steve Ciceron:

I have some questions actually. Directed towards Steve Smith. There were two types of preventive lawyering discussed today. One actually having to do with actual injury, preventing the actual injury, and the second with preventing someone who has a legitimate claim from pursuing the claim. The first one has clear social value and good, and the second one I am not so sure of.

Steve Smith:

Well, I'll take half of it and Dan can take the other half. The first half is that preventing true injuries does have great social purposes. The second part that lawyers, the answers lawyers would give is that our responsibility has primarily been to help our clients avoid legal problems. The fact that that does not solve a social problem has not been a concern of ours immediately. I think an ideal solution, in the long run, where someone has been injured but has not decided to sue or not, is to go to the person, make an apology, and offer a settlement. I don't know that that is consistent with what most lawyers believe should be done, because if you look at the data, a very small portion of the people who are injured through negligence in health care institutions actually file any sort of claim. So if you start going to every one who is injured through negligence and offer them a settlement then the cost is going to be substantial. So I think that it is a tough question and Dan can answer the hard part.

Dan Groszkruger:

Well, actually let me just compliment the question and the questioner, because I think it is a better question than I have an answer for, but let me just take a stab at it. One of the basic problems that we have in health care right now that is really illustrated by the captivated insurance model HMO type delivery scheme which is upon us. Instead of looking at the individual patients needs, or the individual client if you talk about a client coming to an attorney for service. If you are looking at that individual's needs it is really not that difficult to bring knowledge and science and all the other resources to bear to figure out what the solution is. Unfortunately we are not allowed to take that focus and make our decision based on that, because now we have to include the welfare of this greater society, and particularly the financial welfare of the group that is represented by that membership, and weigh those two. Take as an example the end of life decision that Bruce brought up. I mean how do you weigh putting more resources into intensive care for a 105 year old person as compared to spending the same amount on immunizing a child. Just to give you the polarity of that type of comparison. It is an unresolvable conflict for every medical care provider that has to deal with individual decision making and yet have this responsibility to the community. It is just as much a conflict for us in trying to figure out who are we serving? Are we serving our individual client, or are we serving the community at large by our conduct, or are we really trying to establish some middle ground. That's the best I can offer. It helps me to try and understand it. It is something new in health care which has been under fee for service really very much directed towards the individual and assessing the individuals needs. And how we compare these apples and oranges is going to be the challenge for the future.

F. 4:05 pm-- 4:30 pm *Family Law and the Courts*

(Discussion Group: Janet Bowermaster [**JBowermaster@CWSL.edu**],  
Mike Town [**towno@lava.net**])

Thomas Barton:

Let's move now to Family law in the courts with Janet Bowermaster and Mike Town.

Mike Town:

The end of the day is tough. We were told to wake you up, to be controversial, and I do not think that would be hard. On behalf of the state judiciaries, although I have no real portfolio with them, but for the last twelve years I have been going around the country talking about unified family court. And I was reminded of what Mark Twain said, that he was glad to learn at thirty that he had been writing prose all his life. I became a judge 21 years ago, and I would like to think that I have been trying to dispense preventive justice, therapeutic justice, and restorative justice, although I did not know the various terms. There is some very good news on the horizon. I have been outside--and I was honored to be a part of this process--the conference of chief justices of the fifty state courts, and the district of Columbia, and I think Puerto Rico, put out a resolution in support of problem solving courts, August of this year. And you need to read it. You can see some compromises there, but basically it is a very powerful resolution. It is one that has gotten no publicity. I'm shocked. I tried to find it on the internet. The national center of state courts kind of staffs that group, but it is there and you had to learn about it from some judge from the smallest little state in the country out there in the middle of the pacific.

Secondly, our own chief justice Ronald T.Y. Moon has promoted by resolution, a resolution promoting restorative justice. It came out a month ago. So you got, I think, some movement here by some judges. And there should not be a disconnect between the academy, the bar, and the bench. I think the bench is on the move. Judges really want to do the right thing, and they are. And they are willing to take what ever bully pulpit they can, especially when their robes are off. And I think the reason for that is the bar is not always on board. The reason is the court of public opinion. The court of public opinion wants this. Your honor we find the defendant guilty the court room jammed, the docket overloaded, the calendar crowded, the jails overcrowded, the system appalling, what can you do? Judges can be proactive. Judges can go out there and do it, and over 1/3 of the filings in America, are family court fillings. Our families and children. Families are coming to court. The are coming pro per. The family law bar. When I took the bar and went to law school in California, I do not think we had family law at that time, and yet it is filling up our courts. I was chief judge of the Hawaii family court, which is a very unified family court, but we had 42,000 filings a year. We had a budget of 15 million. We had 400 employees and 20 judges, and as result of the unified family court, I believe, and I am not sure that I can prove it, it is the way our society held itself accountable for the well being of our families. The way that court is structured is a way of holding ourselves accountable for the well being of our families and children, and I am going to suggest to you that the way the courts are structured in America, particularly with families and children, are killing mainly women and children, bankrupting people, and causing what doctors call Iatrogenic disease. And I am going to segue to my new friend Deborah here. What is Iatrogenic effect or disease?

Deborah Gerardi:

It is getting more than you bargained for essentially. You go in for one procedure, for example we are going to do a surgery on your bladder and we nicked your bowel, and now you have an infection because of that little slip up.

Mike Town:

Doctors call it medical mischief. It is an inadvertent harm caused by the care. It is exactly what you are talking about. Medical error. I coach teenagers Hawaiian canoe paddling. I hurt my arm and the doctor had to operate, and I said, "Oh I have to go to the hospital." He said don't even think about it, you are going to H\_\_\_\_, and we would not get you near it. Unless I *had* to put you in the hospital I would not do it. I said why? And he said iatrogenic effect. So I used to give this talk and the doctors would get mad at me, and they said go get another word. So Judge Town invented another word, jurigenic. Forgive me, I am a wordsmith. Maybe Mrs. Malaprop is alive and well, as I think she will with whoever our next President is. Jurigenic is the inadvertent outcome of people who want to go through either to visit the lawyer or to go through the judicial system, and we need to be real intentional about what we do in that regard, because if it causes harm that is not expected or bargained for-if the family that does not divorce is bankrupted; if we don't assess the woman who is being abused, and don't give her a good safety plan, and don't lock the right guy up or do whatever we need to do; if we put a child on the witness stand that does not need to be there--we are hampering them and we are not taking responsibility. I could go on and on and on. I teach...usually I get a group--I was just in Colorado--and I had a group. I wanted to have them spend 10 minutes, and 30 minutes later we were [still] talking about jurigenic effect.

One of the interesting things-I am going to talk in a minute about the unified court-but after 21 years of doing this work I no longer believe in the dysfunctional family. I think it is a middle class, overeducated word to marginalize our families. We like to say it because we can then

feel real good that we are helping the great unwanted families. But this is a New Yorker cartoon. This family is way too functional. There's dad, and the kids, and that is not my family. We don't quite look at that when we sit down. I am not sure that there is any-what did Dostoevsky say, he said all happy families are the same, and unhappy families are all different. I have learned that families have terrific strengths, and we can build on their strengths in a court system that is therapeutic. And we can do it by getting lawyers out of the way, and judges out of the way, if they can devise sane ways to solve their problems. Maybe by mediation, by arbitration, by family group conferencing, which is a brand new thing that is out of the chute and doing quite well.

Very briefly I did want to go a little bit over the unified court. I wrote an article on it. They are not handed out, but they are going to be published. I wanted to introduce you to the very typical family that we find in court, and it is not exotic. Mary and Frank are married, they have 15 year-old Daniel, they got separated, but Mary gets another son Sam by Ben. Daniel the teenager is neglected. Mary, the mother, is staying out late, leaving Daniel at home. Daniel starts stealing and running away. We don't know where to put Daniel. Sam the two year old may be developmentally delayed, maybe from drugs or alcohol. Usually at this point-if I ask for additions to this-Daniel is supposed to be pregnant. Teen pregnancy is a big deal that we see in family court. Ben wants paternity of Sam-he is the boyfriend that had the child through Mary out of wedlock when Mary was married. Mary want divorce and custody. Frank the father of Daniel wants divorce and custody. Mary wants a restraining order because Frank allegedly beat her up when she was visiting, and guess who the witness is, Daniel. In a unified family court system there would be a one stop shop. A court house with many doors. A significant portion would be emergency room type work, where you have to turn around an order in 24 hours and life and death are in the balance. Roughly a million to two million years of women a year are going through hospital emergency rooms, and somewhere in upwards of a thousand to two thousand die, and everyone in the court has to know. The unified family court would pull

all these in. I am going to kind of wrap it up real quickly. Initially we used to talk about system change, but we could not do it without a philosophy, a preventive law philosophy. Without a concept of therapeutic justice-I call it an ethic of care where the court staff, and the attorney's, and a judge can drive it. The rules of judicial conduct say that a judge must be patient, courteous, and dignified. And require the attorneys and the staff to be like that, and yet I have appeared in court where it is not like that. It should also be restorative. Try to restore the relationships, not let the rule of law run amuck over these families. Exactly what you were talking about Harold, the relationships are key. Because these families are going to keep functioning one way or the other when we are done with them, and we ought to at least do no harm. We are really stuck on time. So, I have a lot more that I would add. I think that questions might be helpful. This is a huge chunk of the folks that come to see the lawyers and then come to court, and I think that we are abusing them and neglecting them in many ways, unwittingly, systemically, for a whole lot of reasons.

Janet Bowermaster:

Unlike Dan and Rafael I don't think I am going to be in any danger of saying anything anybody else has said. That is because I want to raise a voice of caution. One thing I want to do is distinguish Mike, and the things that he talks about, from some of the other things we have been talking about. He is talking about judicial action, judicial approach, and judicial attitude. And we have been talking a lot about lawyering. He has a power that lawyers don't have. When we start talking about family courts, and interdisciplinary approach to bring in psychology; when we start talking about a therapeutic jurisprudence approach, we need to act with caution so that we do not end up with a psychological state backed up by the coercive power of the law. That is dangerous. I am a fan of counseling. I am a fan of mediation, but let me talk about a few ways that systemic family court approach has slid a little bit off the track, and as we look at it system wide we can see these cautions. For example, basically a therapeutic approach or a

psychological approach may be incompatible with a legal approach. We have lots of evaluations that are done by psychologists in custody proceedings. And the therapeutic approach is not to ask questions about what you do. We want your Rorschach, we want your MMPI, we want to hear things your neighbors and friends have said about you that your spouse and family said, but if we made this information public to the parties, it could really make their relationship very difficult from here on out, so it is confidential. The parties may not see it. That is therapeutic. The law does not look kindly on secret evidence being used to make decisions about parties. Incompatible. I am very much a fan of therapy. When it is coercive I think it takes a different approach.

Let me give you an example from a local case. We had a case of a well to do couple, and there had been some mild physical violence, but with a good bit of domination and control going on during the marriage. After the marriage, because she had been a stay at home caretaker for eleven years she got about 75% of the child's sharing time, dad had 25%. During the dad's sharing time with the children he acted out violently with one of the children in front of the others, and really frightened the other two children, and the one that he physically acted out with. The psychologist who was involved in this case had a professional stance that joint custody was the ideal. Notice that does not comply with the law in California, there is no presumption in favor of joint custody, but he started with that. It was very difficult to do when the children were afraid of dad. So the two little boys were put in conjoined therapy with dad to get over their fear of him. Dad was ordered into anger management and parenting classes. The eleven year old daughter, who by that time had sort of bad attitudes about dad, was forced into psychotherapy to alter her bad attitudes about men. And mom was forced into therapy to get over her anger about dad, which although she never said anything or did anything sort of radiated out like radon gas. So, this whole family was in thousands of dollars of forced therapy. I think the law and psychology do not meld well when it is coercive. And while that does not

happen when lawyers are doing it, judges have power, they have the power of the law behind them.

I am a fan of mediation. Here is an opportunity. I think when the cases come to Judge Town's court the problem is already there, the family is splitting up. So, we are looking for what we can prevent. If we can get parents to cooperate, if we can get them to come to agreements by themselves then we can avoid a good deal of the animosity that goes on. So mediation is one way we can do that. So, in California we went system wide, and said mandatory. You cannot get your custody dispute to a judge until you go through mandatory mediation. That really did help settle some cases. Well you know it did not settle all the cases. Then the court said you're the mediator and you have spent hours with these people, it seems a shame to waste all the effort you have put in with them. I think maybe if they don't come to an agreement you tell us how you think it should turn out. You make a recommendation to the court. We had a study that was done in San Diego in the early eighties that judges were following the mediators decision 75% of the time without change. Which suggests that they have become de facto the decision makers. It is recognized in San Diego. People pay 150 dollars an hour to go into a professional that prepares them for their mediation session. And the value of that mediation session has just about gone out the window. What are the qualities about mediation. It is confidential, you can say what you need to say, vent your emotions we will deal with it. Not now. You walk in the door and you are jockeying for positions because that person is your decision maker. So, now we have lost a lot of that value of that mediation that we had to begin with, and now we have decision makers who are making decisions behind closed doors, and off the record. So, for example, one woman who was in a mediation saw a report, and the report said I recommend custody to the father in this case, and amongst the justifications was something that the mother had said in the session. The mother came to the lawyer and said, "I never said that." Now here you have the word of a disgruntled parent against the word of a

court appointed professional. No record. No way to prove it. That violates our notions of due process. And I have lots more.

Let me wind up with just one thing, because I think this is very interesting. It is sort of a creative preventive approach that the American Law Institute has taken in their principles of family dissolution, and that is they recognize from a therapeutic point of view it is best when parents can agree. If they cannot agree, however, then rather than stringing out these long disputes we could have a proxy measure of what they would agree on if they were not in conflict with each other. We go back to a time when they were still in love, when they still liked each other, and they were making decisions about what they thought was best for the child. We are going to go back and look how they did it during the marriage, and that would be the proxy for what they would agree upon now if they did not have all of these emotional entanglements. So that is just kind of a closing thought. The caution is that as when we start looking at the courts we have a different kind of power, and that systemically as we try to work through some of these therapeutic jurisprudence notions we also have to have a deep and abiding respect for the rule of law, and to keep our eyes on both balls all the time.

Thomas Barton:

Last session. Training Preventive Skills with Leary Davis, Janet Weinstein, and Mark Weinstein.

Leary Davis:

Many of you who are into creative problem solving will recognize this puzzle. Box drawn with 9 dots the puzzle is connect the 9 dots by drawing 4 straight lines with out breaching the puzzle. The solution to the puzzle, the only way to solve the puzzle is by going outside the box. This is

where the idea of thinking outside the box came from. The good thing about going outside the box is that we expand our perspective. It is interesting to me that when people solve this problem they will always extend this line past the dot. I think the reason that they do that is that they want to build a larger box. They want to create a new larger box. They want to build a larger tool box. They want to create a larger conceptual frame for problem solving. If the box is essentially a hammer this expanded box will turn into cotton swabs later, that Harold was talking about. What we want to do is expand your perspective about skills training in one regard. Well Ed talked about knowledge, skill, and delivery, which I would call competent delivery. And then he talked about implementation, insight, and mid-level principles here. The extent that I want to extend your perspective is that it used to be that we thought about knowledge and skill equaling competence. But we all know lawyers who have excellent legal knowledge, excellent technical skills, but for some reason they cannot or will not deliver high quality legal services in timely manner, and at an affordable price, and in a way that makes their clients feel good about their representation after it is completed. That is knowledge, and skill are necessary for delivery and competence, but they are not sufficient. What else do we need. Dave talked about attitude.

Knowledge and skill don't equal competence. Knowledge and skill plus personal attributes do equal competence. It's the personal attributes that allow us to translate knowledge and skill into competent representation. Or it may be our personal attributes that may prevent us from using that knowledge and skill that we have. What are these personal attributes? But I think the three most important are knowledge of self, knowledge of others, and knowledge of the environments in which we operate. Because this is what really allows us to develop the self management strategies and the strategies for dealing with other people that allow us how law firms and our clients to be successful. That is the good news. The bad news is it is really difficult sometimes to develop some of this knowledge. A few years ago I asked Jim White. Jim White from Michigan that is the negotiation pioneer, if he could do just one thing that would

enhance the diplomacy of his students' negotiations, what would it be? And this is what he said, "If I could just tell them some things that I know about them from observing them participate, but there is no way they could understand what I was talking about." Somewhere in my right brain I knew what that meant, but I really wasn't able to articulate it. So that I could not use it at that time, but I can now and I am going to share that with you. I am going to do that by telling you a story about myself. But first I am going to tell you another story that is coming up, about medical care. About 15 years ago a famous university hospital very close to me hired a very good creative preventive lawyer. This was of course at a time when the legal profession was different and the medical profession was different. She allowed us to get access to one of the questions that Steve Smith asked, because what she decided to do in order to lower claims was to have the doctors and the nurses-whoever made the mistake-go to them immediately and tell them about the mistake. What they found out was that if they reported these-if they talked to these people immediately even fewer people sued, and their claims went down dramatically. Now, what do you think happened? What do you think happened as a result of this? Fast forward and think about what consequence this might have? The doctors and nurses talking to patients. Well, they got rid of her. They changed the policy to the old policy. We might think about why that is. That sort of knowledge of others, and how they might act might help us solve a problem. It will continuously improve the quality of what we are doing.

What I want to do is tell you about myself. We have a nice house with a bedroom and a living room. Sort of this nice little suite. And everything was all right with my relationship with my wife even though I tended to keep the library kind of messy until we added on. And we added a sunroom which sort of became the kind of den. So whenever any one would come and visit us they would walk through the library into the den, and we had guest one time right after we had it done. I had books all over the sofa and the desk, and every where else, and Joy was really upset with me about that. She wouldn't let us have company again for a month, but when

we did about a week before they came she said, “Leary the library is a mess you really need to do something about that.” Well every day, “Leary the books are on the sofa.” I was going to get it done, and then the day the company was coming I was held late at the office. I got in about 30 minutes before the company would be there. She walked up to me, she said Leary-she’s a trained counselor, she is a school counselor, they are nasty people, they speak in declarative statements, they smile at you when they do. She said, “Leary the books are on the sofa.” And you know what I said-I really blew up-I said, “Well, how in the blankity blank did you expect me to, you know if I did not have to do all the shopping in the house.” And then I realized-you know I had gotten milk from the Short Stop, and I was supposed to do that the day before. So, like any good lawyer, now I need to go on the attack. So, what I said was, “how in the world do you expect me to keep this library clean when you can’t even keep the inside of your pocket book straight.” And then she smiled, she turned, and she walked away. And I thought why did I do that? Have any of you done that? Have any of you had that done to you? We all have. Well why do they do that? It is the same reason that Jim White could not tell his students things about themselves. It is that we have self-concepts. And our whole being is tied up in protecting and defending that self-concept. So we automatically reject any inclination that is inconsistent with our self-concept. And this is my self concept. I am someone who is industrious, truthful, competent, and good. So when Joy said to me, “the books are on the sofa,” what was her message? Industrious/lazy, truthful/lying, competent/bumbling, good/bad. That is not what she meant, but that is just what I interpreted it as. Now in truth she did not mean that, but that is the way I took it, and that is the reason I responded the way I did. In fact, I was not as lazy as she communicated to me. I was truthful, I had intended to do this on time. If in fact I wanted to become more competent, I wanted to deliver better husband services, I needed to change a little bit. I did not need to change a whole lot, but it is just really difficult for us to get this information that is inconsistent with our self-concept unless we get it in one of three ways. And we are going to do an exercise which may or may not show us something about that. We can better accept information that is inconsistent with our self

concept if we have three things. One, get this information in small doses. You cannot take a lot of information that is inconsistent with our self concept. The good thing is that most the information that is given in feedback is really consistent with our self concept, it is just that it is information that we knew. I mean all of you knew that knowledge and skill did equal competence. You knew that those were personal attributes that served as the catalyst that allowed us to translate knowledge and skill into competence. Yet it may be that this might have been sort of a surprise to you. It is stuff that you had in your right brain and you used it in practice, but now that we have articulated it we can use it in developing skills courses. We have got essentially a better theory of perhaps competence and delivery. So most of the information we are going to give people is going to be consistent with the self concepts, it just has not been articulated well. But if it is inconsistent it has to be in small doses. Secondly, the information needs to be objective rather than subjective. It is not good enough that Joy told me that, that is the subjective, but if I get this information from a valid and reliable source I can accept that, or if I get that from a skills provider as feed back. Which our skills providers are doing throughout the country. Or finally if we get that information in a supportive environment. We can receive that information much more openly. If we get it in a hostile environment we are in fact going to reject it, and a lot of people think law school is a hostile environment, maybe except for the skills trainers.

Janet and Mark Weinstein:

We are going to pass out paper, please everyone please take one piece and pass it down. What we are going to do, is we are going to build on what Leary was doing. And that is you have had a long day, listened to a lot of people talk, and now it is time to sort of put some of the things into practice. As a result of that. One of the things that we think is very important in preventive law is getting back to basics. And one of the basic things that happens is when lawyer meets client for the first time. The idea is to re create that initial dynamic. So, what I

would like you to do is pair up, quickly, because we do not have much time. And the person you choose as the person you are pairing with the key is you must sit back to back with them.

We have not told you what to do yet, so all you have to do know is pair off. You can do it standing up it does not matter. From each group I will need a volunteer. I want my volunteer to draw a picture on that piece of paper. You do not need any artistic skill whatsoever. Let me know when the picture is done. Hold it closely to you chest. For the person who has not drawn the picture, the one with the blank page in front of them, your job is to recreate the picture by asking questions. And what we are trying to see is how accurate your visual model will be with the one that was originally drawn. ... [people do the exercise].

How many people were able to recreate their partners drawing? How many of you started off by asking a series of narrow questions? Part of it is empowering your client. The point behind that was to allow the client to create the picture for the lawyer as opposed to the lawyer attempting to draw the picture based on their own assumption.

Yes, of course probably the most precise way to do it is, would you please draw your picture for me. Which is just what we want the client to do. So even in this wonderful open ended question I pointed out to them, did you ask about size, where things were located on the paper, which side of the house the dog was on, those kinds of details in a client interview could make a difference in how you are perceiving the story. So, I think it is always dangerous to assume that we have the complete and accurate picture, and actually asking the client to draw the picture for us is the best way to get the accurate picture.

## **II. PLAYING THE TAPE: Current Practices and Emerging Ideas**

### **A. 9:00 am-- 9:30 am *Corporate Compliance Programs***

(Discussion Group: Gary Boyle [[Gary.boyle@williams.com](mailto:Gary.boyle@williams.com)], Richard Gruner [[rgruner@LAW.WHITTIER.EDU](mailto:rgruner@LAW.WHITTIER.EDU)], Paivi Nygren

Gary Boyle:

As senior compliance counsel for the Williams Company I am involved in a number of things. I have responsibility for corporate training for legal matters for non-lawyers, and I also have legal responsibility for compliance programs. I do investigations, criminal work, fraud, discovery, and all kinds of things of that nature. But rather than tell you about our corporate compliance program I wanted to share with you a couple of insights that I had yesterday. These were things that struck me as we went through yesterday. Several of you I heard complain about how clients do not really come to you and ask you for preventive law. And how do you work that in? Well, I have the luxury of being hired by a company to do preventive law. It is a wonderful luxury, and it is something that I did not realize was a luxury until I came and heard you talk about the frustrations that you suffer. I am also in the enviable position of having worked for the company for ten years as a lawyer, so I really do understand my clients needs and wants very intimately. I work with them every single day. I know what their businesses are about, I know what their goals and aspirations are, and those are two luxuries that I am hearing in the room are not shared by everybody. You also did me a big service yesterday when you described all the difficulties you had with preventive law, you reminded me in part why I left private practice and went to a compliance program. So I felt good about myself. I think that is the therapeutic part of the law. But you also made me a little jealous of those of you are academics who can think these lofty thoughts of the profession. Those of us that work for companies are in law firms do not usually have the time to think these lofty thoughts, and collect them, and put them into lists and things. I am also very grateful for the fact that at least for two days I get to share in that exercise, because I think it is very valuable.

Many things hit me yesterday, and we will go through some of those as we go along. My thesis is really fairly simple, and it is built on what really smart people have said throughout the years. I am going to show to you some things that come to me that really smart people said. “Try not to become a man of success, but rather a man of value.” That is kind of the conundrum there. Who do you suppose said that, anybody know?

Audience Comment:

Not a woman.

Audience Commentator:

That was Albert Einstein who said that. I thought he was a really smart person so I thought he would know what was going on. How about this one. “Happiness is the state of consciousness which proceeds from the achievement of one’s values.” And I will give you a hint, this was the one from a woman. Ann Rand is the one who said that. I want to talk about values obviously. As you notice values was in both of those quotes. My thesis is that preventive law as it is practiced in corporations today does not mean much unless it is based on an articulated values system. We talk about insights, principles, and information. I am going to talk about a little bit of each of these today. The principle we are talking about here is that you need to have an articulated set of values in order for preventive law to really work in a corporation. The insights are the values themselves, and we will talk a little bit about those. The information is some anecdotal information about how Williams value system works. What it does. What it does not do. How it is put together, and so forth.

The first concept is what role do values play in the corporation. And they address a number of the issues that we talked about yesterday. Somebody said, “what do we do, we cannot answer

all the questions that come in?" Well, hopefully the values give you a process to problem solve, and the problem solving then becomes in part the responsibility of the client. The client has a value system, in common with his other colleagues and you, that he can rely on to help him answer questions when you are not immediately available. They are not going to answer all of the questions obviously. We also heard yesterday, wouldn't we be better off if we had an injury in the medical sense, if we went to the patient and said here is something wrong we did, and here is the settlement. Well, value system takes care of that, because it allows you to admit and settle when necessary, or when advisable. Depending on what your value system is like, it allows you to take care of that. It solves a number of these other problems that we have talked about. It brings together management theory. Management theory is very strong on the concept of values, of articulated sets of values in the workplace. So if we as preventive lawyers encourage our clients to adopt these value systems, and to write them down and so forth, then we are harmonizing management theory with the practice of law that we are involved in. It also, in that sense, makes this value system extraordinarily valuable to the client. And it solves then one of the other conundrums we talked about, and that is the marketing conundrum. How do you get people to want preventive law? My suggestion is that if the preventive law you practice is in tune with the way they think, then they will suck it up. They will be like sponges, and they will want this stuff. So, I think the role that this plays is that it solves a bunch of the unsolvable problems that we talked about yesterday.

So what does a value system look like? What does it need to be, what are the characteristics of an appropriate value system. One of them-and this is fundamental, but I thought since I am making lists instead of thinking I better list all of them, the values have to be good values. If your client's values are we steal things from other people, you are not going to do much prevention. But of course how much preventive law is going to help that client. In my business, in the corporate world, we have to articulate them in some way. And I say articulate them because I hesitate to go farther. At the Williams company we articulate them and we write

them down, and you share them and you communicate them. Now with Harold's clients you do not have to articulate them, because they articulate them to you. You know what B\_\_\_\_\_ 's values were, and you know what your actress values were that did not want to be in movies that harmed animals. That is because you worked closely with them. Same concept, because you are dealing with one client you probably do not have to write them down, but you still have to articulate them. And those clients have articulated to Harold what their values are. At the Williams companies we have articulated for the entire company what the value system is all about. The articulated part is that you actually express those values somehow. Going very closely with that is the communication part of it. And communication has a bunch of aspects to it. It deals with the communication from the client to the lawyer, the communication from the lawyer to the client, and in large companies the communication among the client group about the values. So that is kind of what I am talking about. A statement of values. Those are the parts of it, I think that is what is critical, although you could go on for hours about exactly what it ought to contain.

The anecdotal information I want to share with you is the Williams companies values and beliefs. I think you will see that although they are at the insight level, the concept that the values articulated on is at the principle level, and our particular expression of those is really at the information level. At the bottom of this thing is the value of integrity, and at the Williams companies we think that that underlies everything we do, that is the foundation on which we build the company, and the foundation on which we do everything we do, and the foundation on which we function. Then up here there are a couple of scales, and we have a number of balancing acts we have to do. We have four constituencies that are named in our core values and beliefs. We have customers, shareholders, employees, and community. And each one of these has a separate value stated about it. Shareholders, we want to provide them consistent sustainable superior returns. Customers, we want to partner with them and make them happy. Employees, we want to recognize that employees are our most valuable resources, and make

their lives good at the Williams Companies. Communities, we want to be good citizens. We want to do the things for the communities that we often do. Then on the outside of these are what we call polarities that we are trying to manage. And I heard a lot about that yesterday. About what do you do at the two ends of the spectrum. Well, you manage the polarities. One of them has to do with autonomy, and that one gets managed with efficiency. We have lots of operating units, and we want them to operate autonomously so that they can operate quickly and take advantage of things. But we also want them to operate efficiently, and to use synergy. On the other side we have an entrepreneurial spirit, which is part of our core values and beliefs. And the concept of operating quickly and efficiently as a small organization, even though we are a large organization. Over the top of all these is a core value and belief based on change. We embrace change for the opportunity it brings. And these are the ten core values and beliefs. The concept is that you have to have an organization like this of your core values and beliefs. And what the Williams Company did when they wrote them down was that they got the big guys together in a room, and they took post-it notes out and put them all over the room with all kinds of different potential statements of the core values and beliefs, and worked as group of four or five senior executives and came up with those ten in that organization. And that is really what needs to be done. This needs to be a recording process of what is really in play in the corporation. Not something new or different, but you need to record it, you need to put it in an organization that is understandable, and you need to communicate it to your organization. If all that stuff happens, then you eventually get to a point where you have found the meaning of this whole thing. The one ultimate truth here. That is because an ounce of prevention is worth a pound of cure, an ounce of values is worth a pound of prevention in my theory. And that is what we do at the Williams Companies, and I think it is extraordinarily important. And if you practice preventive law without that value system in place you are just spinning your wheels.

Richard Gruner:

My name is Richard Gruner. For those of you who do not know me, I am a professor teacher at Whittier Law School in Costa Mesa. I am also long time researcher and writer about preventive law topics. It is wonderful to see so many old friends of preventive law here. I was lucky enough to know Lou Brown in the last few years of his life, and he influenced my thinking about corporate law tremendously. Indeed he and I co-authored an article which addresses some of the topics that I am going to talk about today. When we wrote the article we were recommending certain changes in the law, and I am happy to state as part of the presentation today that the sorts of changes that we were hoping for have now occurred in many areas. In fact, in areas beyond those that we had hoped for back when we were writing it. The specific topic I want to talk about is the impact of corporate compliance programs on substantive liability of corporations and corporate related parts.

In corporate law we refer to preventive law in all kinds of these programs. Gary referred to them in his presentation. I have to say in passing that I think I can trump Gary, in that I have in my own background as an IBM lawyer many of the same sorts of experiences he was describing as an inside counsel. The notion of knowing your client in great detail, the benefit of thinking preventively and long term, guiding clients as they put into place practices that have long term benefits. But on top of that for the last 15 years I have been in academia, and I have had a chance to rethink all those practices and processes. And think about preventive law and inside corporate practice, and corporate law in that sense of how we might influence corporations to better manage legal risk, and preventive sorts of activities.

Fortunately, substantive law is driving corporations in that same direction. Compliance programs matter, and matter greatly. In terms of the criminal liability of corporations, the civil liability of corporations, and related civil liability of corporations that might be lax about overseeing corporate compliance efforts. And what I wanted to do today-in the brief time that we have available-is sketch for you the several different substantive law areas where

compliance programs, really in the last five years or so, have blossomed into the level of significance both in liability imposition decisions and other related decisions such as prosecutorial charging decisions.

Well, let me start with just a sense for you of perhaps the most important impact of compliance programs affecting corporate liability, that is simply that compliance programs work. The notion that preventing an incident of legal conduct should have great worth to a corporation because the penalties at stake for each of those corporate offenses has grown dramatically. There are really two trends in that regard. One is that we now have corporate sentencing guidelines at the federal level that provide for quite large fines, but more importantly prosecutors are increasingly pursuing corporations in cases where they might earlier have only gone after the individuals involved. Engaging the significance of compliance programs in this preventive regard, in other words, preventing certain amounts of fines or gauging how much a given incident that is preventive might have caused trouble for the corporation, you have to realize that we move to a system at the federal level in which corporate fines are now truly astronomical now. No matter what figure we see as the current record, there is one that seems to trump it within a few months. The current record is a half billion dollar fine. The L\_\_\_\_\_ company, a vitamin cartel anti-trust case. If you did not think that was large enough, one of the other co-conspirators in the case received a 225,000,000 dollar fine. So merely cutting off that activity would have benefitted those companies to the tune of tens if not hundreds of millions of dollars. These kinds of preventive benefits are increasingly coming home, as more and more companies see their fellow companies, or companies in other industries, suffer these devastating criminal fines. So, part of the change that has occurred in this area is that there is just a lot more interest because there is a lot more at stake. The corporate criminal field is a rapidly rising penalty area.

But more importantly, corporate compliance programs can now be a means to avoid liability all together. Even where an offense has already been committed. There are two ways that that might occur. One is under corporate amnesty programs. More particularly an amnesty program being operated by the federal anti-trust division, under which a corporation that engages in a compliance program, detects an offense, gathers information about that offense, stops that misconduct, and comes to prosecutors, and is the first to reveal what is yet undetected kind of conduct, meaning prosecutors have not heard about it from coconspirators or some other source. That first party in the door gets complete amnesty, as do their executives and cooperating individuals within that company. What this has meant for many companies is extensive savings in fines that would have otherwise been imposed. For example, in the case that I was mentioning before, the one involving 500 million dollar fines for one and 225 million dollar fines for another. The reason that was brought was that a third concern had gone to the prosecutors and obtained complete amnesty for what probably would have been a fine in the hundreds of millions of dollars. So these kind of offense detections, even where the offense has happened, are tremendously valuable in the sense of cost savings because they open up this opportunity for amnesty, and the opportunity to cooperate with prosecutors at the stage where the company can completely avoid liability. And that is a new development. The anti-trust division is at the forefront of that process in that it gives essentially a guarantee to the first party in the door-the cooperative spoils, the first corporate party, and the executives of that party-a complete amnesty from criminal liability for the offenses that were committed.

Other portions of the federal government have not been that concrete, and have not gotten the benefit of compliance programs. But they still recognize that it is an important feature of charging decisions. The federal department of justice has established corporate charging guidelines that indicate that every time a prosecutor has corporate executives, or corporate employees that have committed an offense and the prosecutor is considering, “should I also charge their corporation with a crime,” that part of that charging decision should turn on

whether the company, at the time the offense occurred, had compliance programs in place that would have directed employees how properly to avoid this kind of offense, that would have focused on monitoring this kind of offense, and whether similar offenses were happening, whether the company was systematically trying to prevent the type of offense that occurred. If so, prosecutors are instructed to at least seriously consider not charging the corporation. Again if that is the decision that is made the corporation is held entirely free from criminal liability. The individuals will probably be pursued, and pursued strongly, but the corporations have this tremendous criminal fine that is lifted off them.

In addition to these sort of prosecutorial standards-amnesty and what have you-in addition to that, at the federal level there are sentencing guidelines for corporations in which compliance programs, how strongly the company pursues preventive efforts, affect the magnitude of corporate fines dramatically. Indeed there are two types of cooperation that are aided by compliance programs. One type of cooperation is the mere existence of the compliance program. In other words, a company that is convicted of an offense, but can show that it had a substantial compliance program in place gets a dramatically lower fine under the guidelines as a consequence of that compliance program. The compliance program directly relates to substantial lowering of the recommended fine. Beyond that, if the corporation had detected the offense and is able take the knowledge it gains out of its compliance program and go to prosecutors, even if it has been charged and convicted, that cooperation and self reporting justifies a substantially lower fine. So compliance programs can actually have a double impact in a given case. One in that you ran one, and second that it was successful enough to detect an event and provide you with the opportunity to self report and obtain that further sentence reduction.

Under the federal sentencing guideline, one of the most onerous types of sentences now allowed is the corporate probation sentence. And a corporate probation sentence is literally a

court order dictating what a corporation will or will not do for a certain period of probation. The most detailed version of this, to give you a sense of how broadly this may stem, a company was required for a five year period to submit its environmental law compliance practices to the scrutiny of a law compliance monitor, essentially an environmental law specialist from outside the company, who was directed by the court to essentially dig through any records he felt like in the company, to scrutinize how the company was addressing law compliance in the environmental area. Indeed he took an aggressive stance in that regard, and ended up interviewing thousands of employees, thousands of managers, issuing six major reports to the court. So essentially digging deep into the companies practices, and I think the company benefitted. But to many companies this kind of outside scrutiny and perhaps direction of its affairs would be very onerous. One way they can avoid this is to get one of these compliance programs, and put them in place before sentencing. A company that has adopted a substantial compliance program will not be sentenced to one in the probation sentences. The idea of the probation sentence is that if the company will not do it, the court will bring it to that point regardless.

Finally, I wanted to mention just one other kind of benefit that is critical now in the mid term level of liability. In our corporate system where a company has been penalized, penalized over hundreds of millions of dollars, there is naturally shareholder reaction that why should we be the ones ultimately damaged because our corporation is worth less after that time. Shouldn't we be able to lay off that loss on the executives that were really responsible for it? The answer is yes. There is now a view within corporate civil law, that derivative suits against individual corporate directors should be able to lay off the amount of the fine, essentially transfer that loss, to executives that were negligent or inattentive about compliance programs. Not ones that were directly involved in the wrongdoing, but rather did not try hard enough to prevent that wrongdoing. So the theory of liability is inadequate compliance programs, or inadequate compliance attention by corporate executives. That theory has been supported by the

Delaware Supreme Court, which in corporate law is the primary source of this kind of standard. Once again compliance programs matter on the civil side as to executive liability.

Paivi Nygren:

Good morning everyone, I am representing an industrial insurance company. Our clients are the biggest industrial clients in England. Our clients are also big internationally. I have been involved in risk management for about the last few years. In England we do not have compliance programs, but we have had risk management for about 15 years now. They are very time consuming and need a lot of work. We have a lot of work and there are not many of us in our department. So we have developed this new tool which takes one day for the client and one-day for us. It is called liability *askial* ["step" in English] mark. ... It is based on questionnaires, and because we have only one day, we have only about 100 questions we go through with our clients. The answers are evaluated in points, and we ask about risks and they are evaluated from zero to one. We give points from zero to three on the risk management procedures. We interview the key persons and the management. It is very important that we are interviewing the people that are actually are doing the work. This is because the management always has too good answers of how things really are. Then we make a report, and evaluate the risks and procedures, and then we make recommendations for the client. When we put this in the machine we get certain diagrams. And this is one example of the diagrams we get. If you have red here that means that it is bad. The more you go to green the better things are. The first one here is management. There is some red there. For this corporation the most important matters should be contractual risks, which are here, and the risk management efforts you have made on a contractual basis. As a basic principal, if you have a lot of risks, you cannot abolish all the risks. So the more you have red here, you should not have red on the risk management side. And here are the risk areas we look for. They mainly follow deterrence guidelines, except for general management which evaluates how they have

done their job. Of course we go through general liability, product liability, contractual liability, professional liability etc. We start here from the kick-off meeting. And then we give the information to the person who is going to be interviewed. This is very important for us because people should be very honest with us to get the right results. It is also important that when you go to interviews that you have the right attitude, that you are not going there to point to someone that they have not done their job carefully. We are there to help our clients, and we have mutual problem sharing. Then we make the interviews, the summary report, the informational report. It is very important that the clients should take this in a program so that it could be followed every second or third year so that we could see how it develops. Is it going in the right direction or getting worse? As an insurance company we have a lot of knowledge about our clients because we have their losses, and of course when we evaluate their contracts we get a lot of information. It is very important for us and the client that we together could realize the risks. Thank you.

B. (Discussion Group: Jim Frierson [**frierson@ACCESS.ETSU.EDU**], Jerrilyn Malana [**JMalana@littler.com**], Scott Rechtschaffen [**Srechtschaffen@littler.com**])

Thomas Barton:

We should move now to the switched session, “Employment Law Issues” with Jim Frierson, Jerrilyn Malana, and Scott Rechtschaffen.

Jim Frierson:

Hi, I am Jim Frierson I am actually a business professor at East Tennessee State University. But I have dealt in preventive employment law. In fact one of my books for the Bureau of International Affairs is, "Preventing Employment Lawsuits." The role of plaintiff's attorney in employment disputes, is really the old traditional role. They wait for clients to come to them, and then they make claims or bring lawsuits. But the role of attorneys for corporations or for employers is a perfect area for preventive law. In fact, I am not sure if in any area of business you could do more in employing of preventive law. One factor is just that there are a variety of laws. It is amazing when you start dealing with employment law. Talking about discrimination law, state and federal; race, religion, and national origin; sexual harassment cases, sexual orientation, and marital status. The lawsuits just keep going and going. You have employee pension benefit law, family medical leave act, worker safety laws, workers comp, unemployment comp, wage and hour, National Labor Relations Act, treatment of whistle blowers, and then the always favorite employment at will doctrine, and the numerous exceptions to it. Contrary to some areas of law, say like in commercial law where a lot of the preventive work would be in the way you draw up the documents, in some ways I think employment law is like entertainment law. You cannot do too much in advance. There are written forms that are important. You can sometimes use non-compete agreements, or agreements to arbitrate, or releases pursuing breach, discrimination, or whatever. But the real problems in employment law usually come up because of the words and actions of untrained legal people, that is managers and human resource departments. So the key really to preventing employment law suits is education of these types of people.

Looking at some of the employment law seminars, some of the speakers are talking about pre-action advise maybe, but they are not really talking about preventive law advise. For instance there is a major employment law seminar that has been given several places in the United States, where one of the speakers advises employers when they fire an employee not to tell them the reason that they are discharged. I think his reasoning is that if you give a reason it

might come up under one of the exceptions to the employment at will doctrine. So it is safer not to give a reason, so that later if you get sued the lawyers can think up a reason that does not violate the law. But obviously that kind of advice is what's going to drive a now ex employee to see an attorney. They are upset enough that they got fired, but fired for no stated reason sends them to the attorney.

Another seminar I attended recommended that if you discharge an employee, always make sure that you escort him to his desk or locker immediately to get his belongings, and then escort him out the front door. Well, that is usually done in plain view of other employees. So, again you have advice that is going to create lawsuits. I know two or three lawsuits where the plaintiffs actually said that they were not going to sue for being discharged, but they were so outraged by the manner of the discharge and how it looked to the other employees that they brought the lawsuits. So pre-action advice is not enough, you have to have pre-action advice that really does prevent legal problems, and lawsuits to be good employment law.

I will give you another example. Some attorneys in employment advise when they enter a service of process for a lawsuit, that their recommendation is to not turn over any information at that point. Just a general denial if it isn't already a filed lawsuit. That is kind of stupid advice. If you have got a signed release, or an agreement to arbitrate, or you have good reason say for a discharge of employee, some supporting documentation, you should send it to plaintiff's attorney immediately. Plaintiff's lawyers work on contingency fees primarily, they do not want to handle a case that looks bad. So the quicker you inform them that their case may be weak, the quicker that you destroy legal action. Maybe without having to go through deposition. So, I guess my thesis is that pre-action advice by lawyers, if they are still lawsuit oriented, is not preventive advice. It takes a frame of mind to basically think of ways to avoid the legal problems rather than win lawsuits if it ever comes up.

The change needs to be made starting in law school. Talking about cold facts yesterday: In studying cases students get trained in having problems that have already occurred and looking at what happens in court. We need more training in how you prevent problems in law school. But also for us who have long been out of law school, we need more seminars to get people thinking about how to prevent legal problems, rather than how to you can prevent losing cases. If we did that, especially for corporations obviously they would be winners, but I would think lawyers would be winners also. Instead of being treated as hired guns, who defend by any means possible, lawyers can be treated more as trusted advisors that get you out of problems before they start. That would definitely have an increase in the reputation of attorneys. Thank You.

Scott Rechtschaffen:

I cannot tell you how much, having been a practicing employment labor attorney for 15 of 16 years, how much I agree with just about everything Jim said. Particularly the notion that employment law is so well suited for preventive approaches. I am with the law firm of Littler, Mendelson, which has about 400 attorneys nationwide doing nothing but Labor law. It has become a daily part of our practice to handle those phone calls from the client saying, “we are about to fire so and so, what should we do?” It is remarkable how often the question is, well what is in the personnel file. And they say let us check and we will get back to you. And then you never hear from them because there is nothing in the personnel file. So it has always been an integral part of the practice recognizing that. Preventive law for us has always been working on employment handbooks, arbitration agreements, manuals, releases. Then we started getting into HR training, training of executives. That led to doing management training, and over the last ten years we have run dozens if not hundreds of sessions throughout the country. Going in there and training their managers. This was becoming so successful, and I should say potentially lucrative. And I say potentially because law firms, as you know, are not the best at

figuring out how to do things in a cost effective manner, and in order to get out there and train the hundreds or thousands of managers that companies have, you have to offer them something more than standard rates that lawyers charge in order to even be able to do the training. So Littler created something called Employment Law Learning Technologies. It has since spun off as a completely separate company, it is sort of leading the wave of the new multi-disciplinary practice that you have all been hearing about, or involved in.

So ELT was created about two years ago. We have since created a live training program we called an in person training. We have now trained thirty or forty thousand managers and employees, at about 150 to 200 companies. Ranging from small mom and pop organizations to fortune five hundred companies. A lot of work with online clients, insurance companies, banks, manufacturing, and heavy industry. Inevitably when I do a presentation or we send out trainers, and we always send out attorneys to do the training, the question then becomes well we are doing a great job in reaching out to your managers to teach them about discrimination, harassment, and effective hiring, and how to terminate lawfully without the elements of unfairness that Jim was talking about. But how do we get in and work with your employees. The Supreme Court and the EEOC has said that training is one of the most effective steps in pleading your affirmative defense against claims of harassment, but isn't it also important to let your employees know what your companies policy is? The reaction has always been you think we are going to bring in a lawyer to stand in a class room in front of thousands of employees at your regular standard rate. We realized that a technology solution had to be created. Originally we had a dream of streaming video coming in off the Internet. High quality Hollywood caliber production, working with the Hollywood greats and creating something that really reached through the screen so that it was as if you were watching "Law and Order," or "Ally McBeal." Of course, every IT department in the country we talked to said, "you are not running that through the Internet." So we came up with a sort of first step. Hopefully in two years when broad band is more used we will be ready to do that, but for now we sort of have a

baby step. This is a technology program called “working people.” It is story based, it is somewhat engaging, probably not as engaging as full motion video, but it is close. It can be delivered right to a learners desktop at any time. For exempt employees it can be delivered right to their home. It could be watched by people traveling on the road for the company in their hotel room. It all comes in off of our website. It also can be delivered over CD-ROM. It can be loaded on a companies Internet, it can be delivered in a number of different ways.

We have right now modules on harassment, we have an employee version, and a manager version. We have even gone beyond that, we have a version that is used by people with hearing deficiencies, so that it is all text. We have a Spanish language version. We are working on different industry segments. Our goal here is to reach as many people as possible to eliminate the barriers that now exist for employees and managers to get this type of learning. We have a module on harassment, workplace conflict, and violence. Same thing we have employee and manager versions. One thing that is sort of new and on the horizon is cyber-liability. The enormous ramifications of the growth of technology from the employment perspectives. Whether it is the leaking of trade secrets through those transparent walls, whether it is harassment that is going on over the Internet, or a number of different possibilities. So we have a program that actually customizes itself to a company’s particular electronic resource policy, and then creates a training program for the company on that policy. We have modules coming out on diversity, on hiring, on performance management, on unlawful terminations. Beyond the employment field we have been asked by our clients for programs along the same methodology for contract compliance, for antitrust, for federal sentencing guidelines. Unfortunately right now we are employment lawyers, so we are not going to get into those areas, but it is part of our plan at some point to start brining in subject matter experts from other fields to bring this to light. Let me stop talking so I can show you a little example.

So, what we did to create this was we took the content from the law firm. The learning points they came up with 250 essential learning points. From that we brought in HR professionals, we brought in instructional designers, we brought in psychologists, we brought in Hollywood scriptwriters, to make compelling stories and to make it designed for the adult learner. This is not what a learner would see, this is simply a navigation page for my benefit, and I am going to show you just a little bit of the introduction that a learner would see. [show introduction]

Understand this is not to designed to be viewed in this format. It is designed to be viewed at your desktop where you are up close, so it is a little hard to read some of the text. We rely upon this flashing arrow. The user has to keep clicking the arrow. The user cannot sit back in television mode like they would if they were home. They have to interact as if they were at their desk. Interacting with the program about every ten to twelve seconds. [demonstration] I am going to jump right into the story so that you get a little better feel for the thing. We want the user to learn by someone else's mistake. [demonstration]

Most people who are unfamiliar with harassment think that it is like that scene in the hotel in Little Rock where the senior executive pulls down his pants, that's harassment. What harassment really is, is this. When we talk to HR people we find out that seventy to eighty percent of harassment cases start out this way. That's the way the conduct evolves and then it escalates. So we have tried to really mirror reality rather than dealing with the obvious examples. So the question now is how should Jessica handle Bob's advances. As in real life employees do not necessarily go to HR or to their manager to discuss these incidences, they go to a friend, a colleague, they go to a spouse or roommate. We give the user many options throughout the process. When it is delivered over the Internet the user can bookmark where they are and come back later. We have a tracking system on this that tracks completion, and gives us some very good statistics. We have found that 85 % of users complete it the first time through, and do not use that bookmarking option. They just get into the story and they want to hear more. I would be happy to answer any questions about it.

C. 10:00 am-- 10:30 am *Preventive Law in the Community*

(Discussion Group: Art Campbell [**ACampbell@CWSL.edu**], David Hobler [**DHobler@aol.com**], Sue Manheimer [**SManheimer@ci.sanmateo.ca.us**])

Thomas Barton:

I think we will have to hold our questions to the coffee session, and move now to “Preventive Law in the Community,” session which is Art Campbell, David Hobler, and Sue Manheimer.

David Hobler:

I am David Hobler, and I want to thank all of you for the learning experience that I have had so far here, yesterday and this morning. Also Tom Barton and the school for having me come down here. I am going to talk briefly about something that I would like to say is distinguishable from anything else we have heretofore talked about today, Drug Treatment Court. The reason that I think it is unique is that it combines therapeutic jurisprudence principles involved and preventive law, in action, and it combines them in court. Heretofore we have talked primarily about how to avoid the adversarial process, how to avoid court, but what I am going to tell you today I know, because I have been there. I have been practicing law for thirty years, primarily as a trial lawyer both in criminal justice and in civil litigation. I have taught on two law faculties and I currently work as a consultant to drug treatment courts. I want to just read a few things from my notes and pay respects to some of you. What I am asking, sort of rhetorically, what do these concepts have in common. From Ed yesterday reference to the medical case analogy.

What can we draw here from that discipline, in terms of what actually works? Harold's reference to hot facts, the currency of the issue hot facts? Debra yesterday with the improvisation, calibrating spontaneously. Woody talked about the client library, the no waiting time, no wasting time. Dave talked about timing as a value. Hermione talked about the counselor concept. Larry talked about self concept change, and the components of that, which are small dosage, objective communication, and safe environment. Murray said something that struck a cord with me, he is not here, but he said he was a recovering attorney. I like that. My long time friend Mike Town talked about how restorative justice is occurring in the court house, in the courtroom, and his role as a coach. I did not hear that term from Mike, but I have seen him in action, and I have seen drug court treatment judges, they are judges, but in essence they are coaches. So what I have tried to do here briefly, is to take each one of your living examples from your contributions yesterday and today and just say, "what do they have in common." They all apply to drug treatment court, which is about a ten year old phenomenon.

Briefly, how does this all work? It is part of the criminal justice system. Someone needs to be arrested and charged with a drug and or alcohol related offense. Typically it does not involve violence. Typically the individual does not have an extensive criminal record. They go through a screening process by someone affiliated with law enforcement, a drug treatment court coordinator. They come to court with their defense counsel, and they are given an option. Do you want typical criminal prosecution, or do you want mandatory drug treatment? The easy way out for the individual is to select typical criminal prosecution, because given the individual's background, typically they're going to get a plea bargain disposition, they are going to get unsupervised probation, they are going to get no probation time, and they are going to formally disassociate themselves with the criminal justice system in four to six months. That is the easy way out. The more difficult path is that of recovery. Why would anyone select recovery, and why is it more difficult. It is more difficult because it takes twelve to fourteen months, it takes regular court appearances, it takes formal agreement to a contract which involves random

urinalysis testing, it involves intermediate sanctions for failures to comply. Why does someone initially say yes to that option? Because you are going to get a clean record if you satisfy these requirements. So there is going to be dismissal of these charges.

Now that is the formal framework. Why does drug treatment court deserve your attention? Why do I like to think I am here speaking to you? Because the principals of recovery from active addiction involve the principals of therapeutic jurisprudence and preventive law. They do not only commingle, they collide. There is an absolute resounding resonance when these two interdisciplinary and theoretical fields come together. Why? Because staying clean and sober from drugs and alcohol is much tougher than getting clean and sober. Most people at that point in the continuum have tried by self reliance and self will to figure out what it is about their drinking and using that continually results in adverse consequences, and they have tried things on their own. By opting for drug treatment they begin to give up denial that they can do it alone. They begin to accept help from a supportive collaboration.

The research studies show that not alone does the client begin to recover, and I use the word client because what happens philosophically and practically is that the defendant is the accused. We do not use that term anymore. We do not use “individual” or “participant.” We use client. We change the word judge to coach. The prosecutor and the defense attorney belong to the same law firm all of the sudden. They have a common client. The treatment provider that is in court becomes part of the collaborative team as well. The psychological healing that begins is that denial begins to diminish with this acceptance and need for a court system.

How about the preventive law aspect? Getting clean and sober is easy, staying clean and sober is much tougher. Relapse prevention is a critical piece to a meaningful drug treatment protocol. I have got lots of ideas of where this movement needs to go. One of the novelties about recovery and addiction is this, that once someone begins to develop a healthy lifestyle of

recovery through this program they begin to get better than they ever were before they got sick. There is no other disease that can claim this phenomenon. Recovery from active addiction puts the individual in a position of better than they used to be, and here is why. Recovery is lifelong, it is progressive, and it involves a component of service work. So to those suffering addicts and alcoholics who have not come into the criminal justice system, here is a living example of how recovery works. That is preventive law. That is getting the message beyond the court room. Concerned significant others who are also victims of active addiction. Family members, loved ones. Addiction kills people who do not have it. Addiction kills concerned significant others. The denial of addiction kills the individual. I do not know how many of you saw Nicholas Cage in "Leaving Las Vegas." I recommend it to you highly because it is a vivid, accurate portrayal of the progressive impact of alcoholism.

I have coined the term judicial capital. We have the adage that the sum is greater than the parts. The parts are coach, collaborative lawyers, treatment provider, client. The sum is recovery. Judicial capital is bigger than the sum because it gets the message out of the courtroom to those suffering. It helps heal and restore families. What I suggest to drug treatment courts is you take this individual, you graduate them, but there is a component of service. They come back to court, and they speak to the newcomer that is coming into the drug treatment program, and they work with them. Because in terms of what I have learned here yesterday and today, I have learned from this fellowship. The message of your recovery permeates through community and fellowship. So I urge you to get back to me after this weekend with any specific questions. I live and work in the San Francisco area. Already I have made plans to contact Debra who is in my geographic vicinity. I am going to Miami in January to speak to the national drug court professional association, and improvisation for kids and humor is a very healing communicative method. So imagine taking a youth who has gone through juvenile drug court, and having that person come in and sit in the middle as I stand here

in the middle of you, and talk recovery to those kids who are just coming into the program. It works, and it also saves thousands and thousands of dollars from our prison system.

Susan Manheimer:

Thank you David, that was wonderful. David and I had a chance to meet up in the Bay area just prior to talking today, and I was looking for just a little bit of guidance. I am coming from the front end, as opposed to most of you coming to this issues from the back end. I am a police chief. I was appointed just six months ago as one of the first of three female police chiefs in California. Prior to coming down to San Mateo I spent 17 years in San Francisco working my way up through the ranks and having a chance to do some phenomenal stuff in every rank that I had there. My last assignment prior to assuming chief of San Mateo was as the captain of the Tenderloin task force, which as Mark Twain once said is the worst place west of the Mississippi. I was so proud of that that I had it on my wall, and my officers loved it. I spoke a little bit on camera just a little bit earlier. I know Jamie as well, thank you Jamie for having me, from a mutual family friend. And it was just wonderful meeting him and as we happened to talk, Jamie, and I realized that we were doing the same types of things but at different ends of the spectrum. It was really wonderful just to make a connection and then we met Dave and got drug court, which from being in the front lines and directly in the trenches, drug court is one of the things that works and decreases our workload on the front end which is one of my interests in being here. I think if we talk about community policing and problem solving the sole mission of that is to reduce our workload and to actually create a better quality of life in areas in neighborhoods to cut down on the factors which we deal with everyday, which is crime.

I'll just give you a little snippet of kind of how we came full circle in policing. It used to be back in the 1800's, the 1900's, I'd submit even from when I was growing up in the streets of New York City in the 60's, in the 50's, the neighborhood cop knew everyone, and if little Susan was

out late, she knew to get her butt home because they just knew everything about the neighborhood, who belonged, who didn't belong, what the stores were, the general flow of business, and then we got the police vehicles, and then we got our hand-held walkie-talkies, we got 911, we got better ways of communications, and we became in our vehicles driving around reacting to 911 calls. We kind of became report takers coming in when the situation was heated and having to make these split second decisions. From the jail, paddy wagon, taking a walk around the block, whatever the case may be. Having a lot of discretion afforded us a lot of opportunities to handle things. But rarely did we have the tools or the resources to handle them on the front end or make different kinds of determinations. It was either jail or take a walk around the block. It very often resulted in jail and there was this revolving door which very often didn't treat what were the basic pathologies which were the addictions and all of those things that were behind a lot of the crimes. And so we continued to come back to addresses and come back to the same offenders, time after time after time. And really lost not only our effectiveness but our connection and thus a lot of our trust in working with the partnerships in the community.

So we came to the earlier 80's with crack cocaine and an increasing down turn in the economy even through the 90's in which urbanization, urban areas particularly, found violent crime on the rise and a tremendous, tremendous pressure on law enforcement and the criminal justice system react to this. And so the police using their tools of jail or no jail just flooded the criminal justice system. To the point where they'll need more prisons and more jails and very ineffectively dealing with the repeat problems which strained the resources of everyone. And really continued to cause terrible tensions in the neighborhood. Police became apart from the community, not a part of the community. As we struggled to get ahead of that curve there came that whole rebirth of community policing. Everything old is new again. They starting coming up with some really phenomenal ideas about that old beat cop who knew the neighbors, knew the neighborhood, knew where to take someone when there was some trouble. Maybe that had

some relevance again, and maybe we better try to get ahead of this curve and get back out into the neighborhood and start to work with some solutions rather than deal with just the tail end of it. Because police are kind of stuck in the middle. We deal with the problem and then we ship it off to the criminal justice system. We do not really see it after that, we do not have much impact on that, and very often we are frustrated right in the middle, and that source of frustration rather than being a continuum of sort of vertically solving these problems together in the criminal justice system is what made us frustrated for a very long time. So what we tried to do with community policing was to identify what are the causal root factors of crime, and continuing police strain of resources and areas. And how could we effectively work with other parts of the criminal justice system to deal with those problems either before they occur, or after they occur.

One of the things we developed was a method of looking at areas and identifying environmental factors that contribute to crime. The old broken window theory, I am sure probably you have heard of that. If there is a broken window, then there is graffiti, and then there is someone drinking there, maybe gangs will start to congregate, and you will have more and more contributory factors to a sense of disorder, a sense or perception of fear in that community. Ultimately before you know it that whole community goes down hill. Community policing looked at dealing with those quality of life issues on the small basis, the every day broken window, and working with the community and with parts of the criminal justice system, particularly the city attorney with code enforcement matters, and trying to turn around that quality of life. That is reducing the crime in those neighborhoods. That is where we are today, and now I would argue that we need to go to that next step. We can still go and arrest criminals. Tenderloin was an area of open area drug dealing. Just predatory criminals coming in from outside the area, dealing with and selling to all of those who are down on their luck, an area where there are five thousand children, immigrant families, and elderly citizens. We looked at how do we effectively deal with that issue. I think the common perception among law

enforcement today, if you could believe it, is no longer taking them away in the paddy wagon but unless we reduce the demand for and the market for drugs, we will never, there will always be another drug dealer to take the drug dealers place. And so what we needed to do was deal effectively with drug abuse.

So maybe we weren't going to take everyone who was buying drugs on the corner and send them to jail, maybe we needed to find places to treat those pathologies and thus reduce the demand in the marketplace. There's several leading programs, there's a lot of federal money, a lot of state money going into this right now. But the problem that we're finding here as front line law enforcement people involved in this dealing and creating a place for treatment and more effective and creative solutions is I don't know if the other parts of the criminal justice system are there yet. I would argue that there need to be drug courts for all the different pathologies. The domestic violence abusers and any of the others who happen to deal with other issues that happen to deal with drug addictions or pathologies. Because what we found is locking them up in prison and allowing them to sort of permeate in that culture for awhile does not bring them out, as David said, as reformed, as recovered, as better than when they went in. I would argue that it probably makes them much worse. So I think where we need to go and if you look at preventive law and at city attorneys, district attorneys, with those career in counseling, mediation dispute services, bringing together all the different components that are sort of at the front end of dealing with these issues before we go back to those traditional, lock them up and throw away the key. We will not only reduce the load of the criminal justice system but we will more effectively deal with those problems together in the front end.

And the last little plug, and the reason I think you saw so many line up against this Proposition 36 is David said something very important, drug treatment doesn't work unless it's mandatory. You can take, and I've arrested myself thousands and thousands of abusers, they will take jail any day of the week over their treatment program because that is a long term commitment and

why wouldn't they rather spend their afternoon in jail and get out to get their next fix rather than go through this. People who come into criminal justice are people who can not help themselves. If they are unable to help themselves, we need to be able to help them help themselves. We need to do it in a humane way but I would argue that mandatory and compulsory treatment are the only ways in which we will actually effect change. I've seen that on a personal basis and a day to day basis. And those things such as proposition 36 which doesn't have that mandatory testing and that get tough component on the end of it will be highly ineffective. So it's not a personal pitch for Prop 36 one way or another, it's just to say that when you have these types of creative programs, keep in mind how you can actually make sure that they are effective and that we can do the same thing on the other side and make sure that they are curable. Last comment, there are a ton of ways in which law should effectively work with the police and there are risk management, early warning systems and identifying civil rights issues and identifying laws which are no longer effective and cause police to have the types of lawsuits and other issues and we've most effectively seen it in mediation and dispute resolution, so that we can take some of the smaller offenses out of the criminal justice system and put them back into the courts and preventive law. Thank you very much.

Art Campbell:

I just want to help to get us back on our schedule again, and to make the observation that both David and Sue gave really solid workable economically feasible illustrations as what I consider to be to classical components of preventive law. That is getting in on the problem early and dealing with its real truths.