

# THE LAW OFFICE—A PREVENTIVE LAW LABORATORY

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In 1870 Christopher Columbus Langdell became Dane Professor of Law at Harvard Law School. A year later he published his classic *Selection of Cases on the Law of Contracts*.<sup>1</sup> This event marked the beginning of the case-method in law school instruction. It probably also marked the beginning of the break from law office apprentice training to professional school education.

In 1870 another development appeared on the horizon. Before then, "both in their own eyes and in the common opinion of laymen, lawyer's distinctive business was contest in court. . . . The years after 1870 showed . . . increasing effort to use law and lawyers preventively."<sup>2</sup>

These two apparently unrelated events tore law education away from law practice. While law educators were concentrating attention on the development of teaching techniques using the Langdellian invention as a starting point, lawyers, probably by virtue of demands by their clients, began to develop advice and consultation as integral parts of the practice of law.

The schism between law education and law practice widened as law practice developed newer methods to meet clients' demands.<sup>3</sup> The case method of instruction, in relying upon appellate reports of decided controversies, concentrates study upon unalterable historical facts—facts created by the parties, re-enacted as testimony in the trial court and solidified in the reporter's transcript. The facts of a reported appellate case are the cold, dead, fixed, historical facts of the record on appeal. "Cold" facts are the basic ingredients in the traditional use of

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1. HURST, *THE GROWTH OF AMERICAN LAW* 261-62 (1950).

2. *Id.* at 302.

3. The current debate between practitioner and professor is being carried on in numerous articles. See Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?*, 38 A.B.A.J. 907 (1952); Orschel, *Is Legal Education Doing Its Job? Brief of Amicus Curiae*, 40 A.B.A.J. 121 (1954); Stevens, *Legal Education for Practice: What the Law Schools Can Do and Are Doing*, 40 A.B.A.J. 211 (1954). Langdell set the pattern for the debate that has continued ever since. He said, "What qualifies a person, therefore, to teach law is not experience in the work of a lawyer's office, not experience in dealing with men . . . not experience, in short, in using law, but experience in learning law. . . ." HURST, *op. cit. supra* note 1, at 263.

the Langdellian case method of instruction. While they continue to devote attention to re-creation of legally material facts at trial, lawyers began eighty-five years ago to give some attention to another, and vastly different, kind of fact. The other sort of facts are the hot, live, alterable and current facts of a client's immediate affairs. "Hot" facts are the focus of attention in preventive law.

Preventive law probably began with that far-seeing client who, realizing that he would find it necessary to retain a lawyer if litigation developed, determined that he might engage counsel ahead of time. As a minimum, counsel could be better able to assist if future litigation developed. At best, counsel might prevent and avoid litigation.

A law office is the habitat of the preventive lawyer. It is, among other things, a workshop of preventive law. Effective use of this workshop involves at least two fundamental prerequisites: one, that facts be presented to the attorney before they are cold, and two, that there be legal techniques available to practice preventive law upon those facts.

#### THE ACTOR-AT-LAW

An attorney can practice preventive law only if he is permitted to work with facts before they are cold. The use of an attorney preventively presupposes that the potential client knows when his contemplated activities may involve a legal problem.<sup>4</sup> It is obvious that only some activities involve a sufficient connection with law to warrant advice of counsel.<sup>5</sup> Furthermore, there are times when activities, though they involve law, are not of sufficient importance to warrant advice of counsel. A man who purchases a suit of clothes is doing a law-creating event (he becomes legally liable to pay), but the legal importance of the activity is relatively small. Every person in our society must be able to determine (a) whether his activities do or do not involve law, and (b) if they do, whether the activities are sufficiently significant to engage professional guidance. He must first be able to determine when he is an "actor-at-law,"<sup>6</sup> *i.e.*, performing a law-creating event.<sup>7</sup> Second, as an actor-at-law he must determine (or have

4. Brown, *The Education of Potential Clients*, 24 So. CALIF. L. REV. 181 (1951).

5. It is arguable that each activity of a person is of legal significance because, theoretically, law involves "no right" as well as "right." HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (1923).

6. The term "actor-at-law" is used because there seems to be no word in our language to describe the concept of a legal entity (person, corporation, etc.) performing, or about to perform, an act having legal consequences.

7. A "law creating" event is any fact or happening to which legal consequences attach. The desire here is to be more practical and include only those facts which give rise to significant rights. Every person (or other legal entity) is an "actor-at-law" at those times when he is doing an act to which practical legal consequences attach.

determined for him) the seriousness of the law-creating activity and whether professional guidance should be obtained.

These determinations involve facts and law. The actor-at-law, we assume, has knowledge of the facts; that is, knowledge of what he is doing or about to do. Knowledge of legal consequences of those facts resides primarily in professional guidance.

The practice of preventive law by actors-at-law presupposes that there are guideposts or warning signals to enable a person, based on his own experience and knowledge, to determine when he is an actor-at-law, and that there are rules of legal hygiene which he may safely follow.<sup>8</sup>

Frequently the actor-at-law is incapable of self-help in preventive law. Professional skills are necessary or advisable to gain the full benefit of preventive measures. Preventive law encompasses even a third area—the position of society as a whole in considering methods of preventing the spread of large scale legal trouble.<sup>9</sup>

This paper is confined to the lawyer's role in applying preventive measures to his client's affairs.

## PREVENTIVE LAW TECHNIQUES IN PRACTICE

### 1. *Determination of legal consequences*

The practice of preventive law requires prediction and foresight. Legal consequences of a contemplated course of action must be made known to the actor-at-law.

Fortunately, in spite of all the polemics on the uncertainty of predicting legal results, there is far greater certainty than uncertainty.<sup>10</sup>

8. The rules of legal health are not included in this paper. See BROWN, *MANUAL OF PREVENTIVE LAW* cc. 3 & 4 (1950). Another area of preventive law of importance to actors-at-law are rules of first-aid. These are rules that help the actor-at-law determine what he should do in an emergency before the lawyer comes; e.g., the things which a person should do immediately after an auto accident to preserve evidence. See *id.* c. 24.

9. Bradway, *The Family Watchdog*, 86 U. PA. L. REV. 823 (1938) illustrates public preventive law. Based on the thesis that "preventive law is as important in the handling of human problems as is preventive medicine," Bradway suggested that marriage annulment litigation could largely be prevented by state investigation of facts before a marriage license is issued. See also Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176 (1955).

10. Much has been written about the uncertainties in predicting legal results. See, e.g., Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1240-50 (1931).

In FRANK, *COURTS ON TRIAL* 26, 27, 410 (1949), Judge Frank considers four stages at which a lawyer may be called upon to predict a decision: (1) when a client, having signed a contract, asks what are his legal rights thereunder; (2) after events giving rise to litigation occur; (3) after a trial but before the trial judge's decision; (4) after the trial court's decision but before an appeal. Judge Frank apparently regards prediction at the first stage as the most hazardous. He says, "Guessing legal rights before litigation occurs is, then, guessing what judges or juries will guess were the facts, and that is by no means easy." *Id.* at 27. It might seem,

For in the practice of preventive law we are not so concerned with what a trial court or jury will find upon presentation of conflicting testimony (and what an appellate court will do after that), as we are concerned with molding hot facts so that later testimony is not conflicting, and with molding hot facts so that if the legal consequences of a given set of facts appear doubtful, the doubt can be avoided.<sup>11</sup>

## 2. *Advice in the practical (non-legal) realm*

Anticipated legal results are not enough. The actor-at-law desires a practical result as well. An attorney can adequately advise a client that a building contract he is about to sign for the construction of his home is legally binding, but there is a real difference between a legally binding contract and its performance. The building contractor, though legally bound, might default. The carefully experienced lawyer may advise his client that a completion bond will help to assure performance, and mechanics' lien indemnity will help safeguard the client's financial position. However, advice can sometimes go further. It may not be the attorney's province to help determine that his client has the funds to pay for the construction, but assuredly, if the client does not his affairs may end in litigation. Or, if the contractor is not financially sound, legal hardship may result. Preventive practice frequently takes into account evaluation of practical extra-legal, as well as legal, considerations.

On a practical plane it may be more vital to predict what people will do than to predict what courts will do. It may be more important

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if Judge Frank is right, that preventive law is virtually impossible, for it poses problems of predictability even prior to Judge Frank's first stage. Prediction at the fourth stage is the least hazardous because the facts are fixed so that the only remaining prediction concerns a "law" prediction. The problem for the practicing preventive lawyer is to fix the facts during their creation so that later fact dispute is eliminated, or at least minimized. Preventive law includes the notion of control of the facts while they are happening and the control of the likelihood of dispute regarding the facts. Although preventive lawyers are not trial lawyers, they must have a keen awareness of the law of evidence. They must establish the evidence long before a trial; sooner—long before a dispute arises; even sooner—when it does not appear that a dispute is likely to arise.

The uncertainty of which Judge Frank writes is uncertainty of facts, rather than uncertainty of law. Preventive practice can and does eliminate uncertainties regarding facts. Thus, preventively, a written contract is usually better than an oral one. A properly signed receipt in the seller's possession is better evidence that goods were delivered than naked oral testimony. A cancelled check is better evidence of payment than oral testimony of a cash payment. In short, Judge Frank overlooked the really first stage at which a lawyer may be called upon to predict: that is, even before the client has "signed a contract."

11. For example, where the income tax consequences of a contemplated transaction are doubtful, one party can avoid the doubt by shifting the tax burden to the other. Brown, *Shifting the Burden of Income Taxes by Contract*, 96 U. PA. L. REV. 822 (1948). For numerous suggestions in real property transactions, see Flick, *Preventive Law in Real Property*, 29 NOTRE DAME LAW. 583 (1954).

to predict with accuracy that a promise will be performed than to predict the legal result at the completion of a law suit. Sometimes the accurate prediction that a law suit will not be commenced is more significant than the prediction of the outcome of a suit that is commenced.<sup>12</sup>

### 3. *Planning affairs—molding facts*

#### a. Molding facts

Attorneys can practice preventive law so long as prediction of the future is possible and "hot" facts can be molded. Facts can be molded when actors-at-law consult counsel before the facts are cold. This is not always possible. For example, it is not possible prior to a specific auto accident to consult counsel regarding its legal consequences, and it would seem absurd to believe that a driver could avoid an auto accident by having a lawyer advise him while he is driving. There are some portions of tort law where prevention is better left to safety engineers and fire prevention experts, or where the best preventive advice is a recommendation to purchase appropriate liability insurance. There are times when the Golden Rule is as apt a guide for prevention as any. Yet there are many fields of the law which are within the scope of preventive law practice. In any situation where lawyers are, or can be, consulted in "hot" facts situations, the practice of preventive law is possible. Planning is a key concept. Perhaps planning has shown the greatest impact in the tax field. In income, gift and estate taxation, the public and the profession both have come to believe that preliminary advice is valuable. It may be that the requirement that an annual income tax return be filed has done more to cause this awareness than any other factor. The legal consequences (liability for a tax) is certain to occur in the immediately foreseeable future (usually next April 15).

The broadest possibilities for preventive practice lie, however, in the vast fields of property law<sup>13</sup> and contract.<sup>14</sup> Whenever an actor-

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12. Where an attorney is preparing a contract between a father and son, it may be unrealistic to rely on a law suit for enforcement because, depending on the relationship of the parties, neither party would sue the other. In such case, it is especially necessary to consider non-law suit means of assuring performance, *e.g.*, acceleration of obligation in event of default, enforceable security and arbitration.

13. See Flick, *supra* note 11.

14. From a preventive point of view, contract law can engulf much non-contract (tort) law. The purchase of tort risk (*e.g.*, public liability) insurance converts a tort risk into a fairly ascertainable contract liability. Confronted with a possible tort risk, the preventive lawyer should consider contractual means of protecting against or reducing the risk. The typical methods are purchase of insurance or contractual shifting of the risk to another, as for example, where the buyer of goods obtains a covenant from the seller that the seller will guarantee the buyer against patent infringement.

at-law is in a position to do or not do an act and whenever, furthermore, he is in a position to conduct a contemplated course of action in various ways, preventive practice is possible.

#### b. Predicting

We can mold "hot" facts preventively if we can predict with reasonable certainty the legal and practical consequences of the molding. It is sensible to advise a husband and wife how they should take title to property only if we are reasonably certain of the legal consequences of alternative methods of taking title.

#### c. Planning affairs

It is possible to plan the legal consequences of a contemplated course of action. Choices of action are almost always possible. Abstractly, it is always possible to do or decline to do an act. In practical affairs, it is frequently possible to accomplish a desired objective in more than one way. The details of future events can often be handled in several ways. A person can start in business as an individual entrepreneur or a sole corporation. Two people can marry with or without an ante-nuptial agreement. A person can start negotiation for a contract by making an offer or a request for an offer. And these things can be done with numerous variations. Affairs can be planned by evaluation of both the extra-legal and legal consequences so as to reduce practical and legal risks to the lowest feasible amount. Risks are always present, but minimizing risks is likewise feasible.

Negotiation of contracts is a phase of fact molding.<sup>15</sup> Each party can receive greater protection and subject himself to fewer risks if his negotiation is well-planned. Negotiation involves, among other things, an awareness of legal possibilities and alternatives. A landlord negotiating a percentage lease with a tenant receives greater protection if he obtains a valid covenant that the tenant will not operate a competing business, but the landlord is unlikely to obtain such a covenant if he is not aware that he can request it. An attorney-at-law can assist the actor-at-law in determining the available legal possibilities and alternatives in consensual relations.

#### d. Drafting

Drafting of documents is a specialized application of the technique of planning. In general, the purposes of adequate drafting are: (1) to establish in legally binding form the expectations of the parties, and (2) to establish solutions in the event these expectations are frustrated.

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15. BROWN, HOW TO NEGOTIATE A SUCCESSFUL CONTRACT (1955).

The lessening of the possibility of future dispute is one of the objectives of preventive law. Careful drafting helps accomplish this objective. Future dispute is lessened whenever the parties know in advance the performances expected of them. However, law does not close with a statement of expected performances. Actors-at-law expect the law to supply answers in the event their expectations are frustrated; that is, when default in performance occurs.

Definition of legal rights and remedies when default occurs can be left, of course, to general principles. But sometimes such remedies and rights are vague; sometimes they are incomplete; frequently they are unknown to the actors-at-law. Drafting not only can supply answers but can make it easier for actors-at-law to apply the answers. Thus, solutions to possible future disputes can be made more automatic and certain so far as legal consequences are involved. A thoroughly prepared contract can cover all foreseeable future contingencies. Nevertheless, there are practical limitations. Almost no contract covers all future contingencies because practical affairs rarely require such ultimate foresight and because contracts, being bilateral (or multilateral), often must leave room for some "give and take" of legal, as well as practical, problems. Even a unilateral document, *e.g.*, a will, does not always cover every foreseeable contingency either because the client cannot now solve the future problem or his affairs are not sufficiently extensive to warrant the time and attention to do so.

#### 4. *Legal Process*

Litigation is not confined to the re-creation of cold facts. There is also "hot" facts litigation, notably declaratory relief. A person now legally in doubt as to his marital status need not subject himself to a divorce action to test the question. A declaratory judgment can solidify his status. The declaratory action can enable a person to avoid his own breach of contract by clarifying his obligations. The expansion of areas of declaratory relief affords opportunity for enlarging preventive techniques. For example, it might be possible by enacting appropriate legislation to pre-litigate a will contest by permitting a living testator to test his competence and to determine his freedom from fraud, undue influence and duress.<sup>16</sup> Why wait until he dies—when the facts are cold? Why not allow a testator to be assured during his lifetime that his will is free from attack?

Even litigation which concerns itself with "cold" facts may have elements of "hot" facts. Settlement of litigation involves current

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16. Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440 (1934).

negotiation looking to compromise. In this era settlement is a prevalent practice.<sup>17</sup> Where settlement is achieved, litigation is avoided, and the ends of justice are often better attained. In close cases of fact or law, the court's judgment for plaintiff or for defendant means that one party is entirely right, the other entirely wrong—either all black or all white, although sometimes courts can grey the result by curtailing the amount of damages or the extent of the relief.

The likelihood is that litigating parties are not themselves all white or all black. There are many balancing and greying factors which, in justice, should be considered. In law courts, contributory negligence may mean judgment for defendant. But the strict doctrine of contributory negligence is not necessarily "just." Settlement, too, can weigh and evaluate conflicting versions of facts without the necessity to determine that one side is wholly truthful and the other wholly fallacious. In short, settlement may be far more "just," quicker and less expensive.<sup>18</sup>

### 5. *The Exercise of Initiative*

The practice of preventive law involves the interplay of live facts and law. Facts must be brought to the attention of counsel, and law must be brought to the attention of the actor-at-law. The detection of early symptoms of legal trouble is an important facet of preventive law. If legal trouble is early detected, minimizing legal risks is more nearly assured. These early symptoms are rarely self-evident to the actor-at-law. To some extent we can educate the actor-at-law to detect these symptoms.<sup>19</sup> But detection frequently requires extensive knowledge of the law and knowledge of the client's facts. The lawyer can, by diligent initiative, assist his client in detecting these early symptoms. For detection of symptoms and for other preventive pur-

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17. MINN. B.A. 5TH ANN. MID WINTER INST., HOW TO SETTLE A LAWSUIT (1955) (mimeo.).

18. The earliest American writer on legal ethics said, "A very important part of the advocate's duty is to moderate the passions of the party, and, where the case is of a character to justify it, to encourage an amicable compromise of the controversy. It happens too often at the close of a protracted litigation that it is discovered, when too late, that the play has not been worth the candle, and that it would have been better, calculating everything, for the successful party never to have embarked in it—to have paid the claim, if defendant, or to have relinquished it, if he was plaintiff. . . ." SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 109 (5th ed. 1896), based upon his lectures delivered at University of Pennsylvania Law School in 1894. Canon 8 of the CANONS OF PROFESSIONAL ETHICS provides, in part, "Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation."

19. BROWN, MANUAL OF PREVENTIVE LAW (1950) is an effort to educate the layman to recognize warning signals of possible future legal trouble; see also Brown, *The Education of Potential Clients*, 24 SO. CALIF. L. REV. 183 (1951).

poses, there must be a blending of facts and law, of law and facts. The blending can take place in the law office when the client with knowledge of facts meets with the lawyer with knowledge of law.

The lawyer assuredly knows nothing of the client's live facts unless and until he is told about them. Unless the client is half-lawyer, how is he to know when the live facts are legally significant? Indeed, an actor-at-law may have pursued a course of action for years without running afoul of the law, and yet a recent case may outmode the course of action. But the lawyer may be as totally unaware of his client's course of action as the client is of the recent case. To illustrate: A California case<sup>20</sup> held that, in spite of common practice to the contrary, a seller could not recover sales tax from a consumer-buyer where the sales contract was silent as to the tax. The omission is a symptom of legal trouble. For preventive law it is important for that seller and all sellers to correct the omission. Correction of the omission is vital even if a particular seller never before included an appropriate sales tax clause and never before had legal trouble because he failed to do so. To derive the maximum benefits from preventive law practice, the attorney must blend his client's live facts with the recent case. Such a blending can occur where the attorney, with knowledge of the recent case, takes the initiative to call it to his client's attention. Lawyers who work with cold facts are not called upon to exercise that kind of initiative. Since our legal ethics grew up in an atmosphere of litigation (dead facts practice), there is scant recognition of the role of initiative in the ethics of our law practice. Fortunately, our ethics permit (perhaps obligate) the attorney to exercise initiative where new law outdates a client's existing will,<sup>21</sup> and our ethics expressly permit an attorney to call his regular client's attention to new legislation and regulations which may affect the client's affairs.<sup>22</sup>

The ethics of exercising initiative in a client's affairs should not be confused with the ethical prohibitions against advertising and solicitation. The attorney may, without running afoul of any ethical prohibition, exercise preventive law initiative for clients who have engaged him for that purpose. But how does a potential client know that twentieth century attorneys are capable of rendering preventive law service? Although an individual attorney may not advertise the services he is prepared to render,<sup>23</sup> a bar association may advertise.

20. *Pacific Coast Engineering Co. v. California*, 111 Cal. App. 2d 31, 244 P.2d 21 (1952).

21. ABA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion No. 210 (1941).

22. *Id.* Opinion No. 213 (1941).

23. DRINKER, *LEGAL ETHICS* c. 8 (1953).

Opinion 179 of the Standing Committee on Professional Ethics and Grievances of the American Bar Association affirmatively states:

“Advertising (by bar associations) which is calculated to teach the layman the benefits and advantages of preventive legal services will benefit the lay public and enable the lawyer to render a more desirable and beneficial professional service. It may tend to decrease rather than increase the sum total of remuneration received by lawyers,<sup>24</sup> but because of the trouble, disappointments, controversy, and litigation it will prevent, it will enhance the public esteem of the legal profession and create a better relation between the profession and the public.”<sup>25</sup>

An attorney is not advertising when he advises a present client of recent cases, statutes or regulations which may affect the client's legal position. We may, in good taste, invite a client to review a will drawn two or five years ago. We may, when a client is in trouble, help him to discover ways to prevent its recurrence. One attorney told me that a client repeatedly fell into a type of transaction which unnecessarily gave rise to trouble. Without being asked by the client to do so, he prepared a check-list of points for his client to follow and most of the trouble, that would otherwise have arisen, vanished. Some of the future trouble vanished because the check-list helped the client to determine when he should consult his attorney in a preventive capacity.

There is, of course, considerable merit in the independent private practice of law where the attorney's office is removed from his client's business. With the growth of counselling skills and the need to blend facts and law, there has developed a merging of an attorney's office and the client's place of business. Argument has been made that house counsel or resident counsel is a less honorable way to practice than for the attorney to pay rent in an office building<sup>26</sup> but, in the preventive

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24. There are no statistics indicating whether this observation is correct. It is an open question whether preventive practice will increase or decrease the total use of lawyers' services. Experience in other fields indicates that preventive services increase the need for professional skills. Preventive techniques in dentistry and medicine probably require more, rather than less, need for professional help. Fire prevention and safety engineering apparently have not decreased the need for firemen and engineers.

25. Brown, *Preventive Law and Public Relations*, 39 A.B.A.J. 556 (1953). The Philadelphia Bar Association conducts preventive law workshops for high school teachers of commercial and business law. See ABA COMM. ON PUBLIC RELATIONS, *PUBLIC RELATIONS FOR BAR ASSOCIATIONS* (1953); see also Brown, *The Practice of Preventive Law*, 35 J. AM. JUD. Soc'y 45 (1951).

26. N.Y. COUNTY LAWYERS' ASS'N COMM., Question 251; W. H. TAFT, *ETHICS OF THE LAW* (Hubbard Lectures 1914); both references are quoted in CHEATHAM, *THE LEGAL PROFESSION* 59-60 (1st ed. 1938). It is evident, however, that the prestige of house counsel is on the ascendancy as indicated by the House Counsel Institute held at University of Wisconsin, August 1955.

area, the house counsel can render far more effective service than is otherwise possible.<sup>27</sup> He is close to the live facts. He knows his client's activities. He is in a position to detect future legal trouble and at all times to lead his client to safer courses of action. He can be charged with meaningful responsibility to take the legal initiative. This is no easy task. It frequently is far more difficult to exercise the legal foresight required for preventive law than the hindsight of the legal consequences of dead facts. Among other things, foresight requires a careful evaluation of extra-legal as well as legal consideration.

### THE FUTURE DEVELOPMENT OF PREVENTIVE PRACTICE

Few written materials on preventive law are available for study. The massive literature of law is that of curative practice. The fundamental authoritative material, the recorded judgment of an appellate court, is a "cold" facts decision. It serves to provide an answer to a dead facts dispute and to state a rule for the answer to future litigation, but does not determine how disputes could have been avoided. The most vital materials of preventive law reside unrecorded in law office practice rather than in the recorded litigated case.<sup>28</sup> Vast materials for the study of preventive law are hidden in files in lawyer's offices and in the memory and experience of lawyers. The law office is the workshop of preventive practice and the laboratory of uncatalogued, unclassified legal preventive experiences.

#### *The Law Schools and Bar Associations*

The legal materials with which law schools have, for the most part, been concerned have been written reported cases. The impetus starting with Langdell has been carried forward with remarkable intensity. Law schools, their faculties and facilities can well be credited with development of the case method and legal research based upon written materials. We are reminded that since about 1930 there has been an expansion of teaching materials to include related fields such

27. Maddock, *The Corporation Law Department*, 30 HARV. BUS. REV. 119, 122 (1952).

28. "Another line of activity would be the collection of materials relating to matters which happen in law offices, but never get into courts. If law schools could become clearing houses for knowledge and developments in such matters, they might be of great value to the profession, and might in the process develop a whole new category of materials which would be of direct use in classroom teaching. Our classroom materials are still made up, to a considerable extent, of the opinions of appellate courts. These opinions are conveniently available, and they have served well. But it has long been recognized that they do not alone provide a wholly adequate fare for legal education." GRISWOLD, *THE LAW SCHOOL DEAN'S REPORT*, HARVARD UNIVERSITY, 1951-1952, at 3 (1952).

as economics, sociology and psychology.<sup>29</sup> While law schools for the past eighty years concentrated on improvement of the Langdellian case method of dead-facts law, law offices began the development of live-facts law. The divergence is unfortunate. An organized body of knowledge of preventive law practice can hardly be expected to develop in law offices. There is need to correlate and organize the separate experiences found in law office archives. The settlement process deserves serious study. We ought to have a body of knowledge that will help us determine when settlement is advisable, how it is best accomplished, how much it costs and when it should not be used.<sup>30</sup> The initiative which lawyers should exercise deserves serious study. When and how should it be employed? How often is initiative now employed and in what ways? What new preventive practice techniques can be developed? In what ways can the practice of law be improved so as to reduce the cost of legal services and increase the effectiveness of the service attorneys render?<sup>31</sup> How can attorneys best function to reduce their clients' legal risks?<sup>32</sup> What methods can be developed so that attorneys can help their clients (actual and potential) discover incipient legal trouble? Methods for periodic check-up of legal health<sup>33</sup> might be made known and used but, if so, what are the techniques of such a check-up?<sup>34</sup>

There is some agitation for a Ministry of Justice<sup>35</sup> to be operated by state legislatures or law schools to review existing legislation and

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29. "Casebooks" appeared which heretically departed from the stripped model of Langdell's *Contracts*, and included sizeable text material, much of which sought to place the legal problems in their social and economic setting." HURST, *op. cit. supra* note 1, at 269.

30. A method that can be used to pursue such study is stated in Brown, *Legal Autopsy*, 39 J. AM. JUD. SOC'Y 47 (1955).

31. See Brown, *Legal-Cost Insurance*, 354 INS. L.J. 475 (1952). Legal cost insurance (compare medical and hospital insurance) would spread the cost of lawyer's services among the policy holders. More importantly such insurance would provide some financial help for costs of suit and investigation expense (for example, deposition). With such insurance, lawyers who represent persons in poorer financial circumstances would not be so seriously handicapped by lack of funds for proper pre-trial investigations.

There may be ways to increase the effectiveness of preventive advice by enlarging upon the principle that legal advice in some areas insulates a client against liability. See, Brown, *Advice of a Tax Adviser as Insulation Against Penalties*, 1951 So. CALIF. TAX INST. 497.

32. Currie, *The Materials of Law Study*, 8 J. LEGAL ED. 1, 55-60 (1955).

33. Periodic legal check-up is suggested in BROWN, *MANUAL OF PREVENTIVE LAW* 35 (1950) and predicted to be included in law office practice during this decade in Brown, *The Practice of Preventive Law*, 35 J. AM. JUD. SOC'Y 45, 47 (1951).

34. The State Bar of Michigan announced in November, 1955, that it intends to publish a series of articles on periodic legal check-up to encourage the use of this technique in law office practice.

35. The idea of a Ministry of Justice was first expressed by Cardozo, *Ministry of Justice*, 35 HARV. L. REV. 113 (1921). A recent expression is in Keefe, *A National Ministry of Justice*, 40 A.B.A.J. 951 (1954).

promote improved and more just legislation. There ought also be agitation for a Ministry of Law Office Practice fostered by bar associations or law schools to promote greater efficiency in law offices, to avoid duplication of attorneys' efforts and to help us streamline our practice of preventive law.<sup>36</sup>

Certainly, if law schools had not started when they did and we were now to commence the development of law schools, the law office would be one of the starting points of research as, indeed, the law office was when Langdellianism commenced. What lawyers and actors-at-law do, or fail to do, as well as what courts do, or fail to do, can form the basis for education. Even a cold-facts law office is a laboratory where the past mistakes of others can be investigated to determine what should have been done to avoid the mistakes.<sup>37</sup> A live-facts law office is clearly a workshop where techniques of prevention can be tried out and used. There is not available in social research that scientific kind of laboratory where controlled experiments can be conducted. But the law office is a place where legal life is lived, and it should be possible to correlate, to integrate, to organize and to study

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36. Some modest suggestions along these lines are: reducing the paper work in law offices by further enactment of legislation so that customary provisions could be inserted in legal documents by incorporation by reference, *e.g.*, it is no longer necessary to spell out corporate powers in articles of incorporation for California corporations because the Corporations Code takes care of the matter. The same statutory technique could be used for trust powers in a testamentary or inter vivos trust. Perhaps some acceptable standardized forms of agreement can be "adopted" so that the more frequent use of ready-made, printed agreements can be encouraged for less complex transactions. In any event we ought to gather information as to the habits among lawyers regarding their use of ready-made agreements or their preference to tailor-make each contract. Is the desire to charge greater fees at the bottom of the reluctance of some attorneys to use printed forms or is it the feeling that a client believes that he is not being given personal attention if a printer rather than a typist puts the words on paper? Also, we should examine the extent to which lawyers' services can be made less expensive by the use of specialized services. For example, it appears less expensive for a land buyer to obtain an insured title policy than to use the older form of a lawyer's title abstract. Study of the cost of rendering legal service in a law office should be made and compared with the cost when that service is performed for lawyers: for example, in qualifying a foreign corporation consider the cost of using an incorporation service (Prentice-Hall Corporation Service, Corporation Trust Co., U.S. Corp. Co., et al.). What other new specialized services could be brought into being?

We can learn a great deal about how appellate judges decide cases, but we learn remarkably little about how other lawyers practice law. McCARTY, *LAW OFFICE MANAGEMENT*, first printed in 1926 and now in its third edition, is a reminder that when an attorney learns something of value for the improvement of law practice, he ought to let others in on the "secret." Recently, bar associations seem to be giving some attention to the study of law office practice. Occasionally one finds a law school course on law office management. Such a course is offered at the University of Southern California School of Law. *The Practical Lawyer*, a publication sponsored by the American Law Institute, started in 1955, is a splendid endeavor to draw attention to the function of the lawyer at work. The emphasis which the Continuing Education of the Bar program in California places on law office law as distinguished from judge made law is in the same direction. See address by Stumpf, American Bar Association Annual Meeting, Philadelphia, August 1955.

37. For a method designed to study law practice after "cold" facts are litigated, see Brown, *Legal Autopsy*, 39 J. AM. JUD. Soc'y 47 (1955).

a body of preventive law experience from the numberless experiences occurring there.<sup>38</sup>

Fortunately, we appear on the verge of a convergence of law education and law practice. One law textbook on legal drafting,<sup>39</sup> another on the business of constructing a building<sup>40</sup> and another which devotes pages to practical planning of estates,<sup>41</sup> are clear indications. The teaching of preventive law is not only possible by the use of a case method,<sup>42</sup> but it appears that some use is now being made of it.<sup>43</sup>

In the future it can be hoped that preventive law learning will be accorded due recognition in the law schools, that young lawyers as well as seasoned practitioners will have a fund of preventive techniques at their command, that continuing education of the bar will include discussions of preventive methods, and that as a result of these and other efforts, we will constantly move forward to legally healthier actors-at-law and a legally healthier society.

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38. "So much every instructor must seek to do if he is to make the case method much superior to textbooks or to lectures which emphasize abstractions and use cases as illustrations. But after the student has become accustomed to this process and has acquired a sufficient background in the fundamental subjects of the first year, he should be required also to approach the problem of the case from a different direction. . . ."

"Now turn to the conduct of the lawyers. . . ."

"If the controversy grew out of a consensual transaction, how could the dispute have been avoided? If the transaction were oral, would a reduction to writing have clarified it? Would a suggested method of avoiding a dispute have created another, equally more perplexing? Would an insistence by the losing party upon a phrasing which would have avoided all dispute have prevented any agreement, and if so, which result would have been foreseeably better?" Morgan, *The Case Method*, 4 J. LEGAL. ED. 379, 385-86 (1952), a report prepared for the Survey of the Legal Profession.

39. COOK, *LEGAL DRAFTING* (1951).

40. MUELLER, *CONTRACT IN CONTEXT* (1952).

41. CASNER, *ESTATE PLANNING* (1953).

42. BROWN, *Educational Aspects of Preventive Law*, Harv. Law School Record, Dec. 20, 1949.

43. Morgan, *supra* note 38.