A Memorandum on Nonadversarial Law Practice and Preventive Law

by Louis M. Brown*

TO: Leonard Janofsky, Esq.
FROM: Louis M. Brown
DATE: 18 October 1978
SUBJECT: Nonadversarial Law Practice—Preventive Law

You invited me (phone call of October 11, 1978) to consider activities which the American Bar Association could undertake in connection with preventive law and law practice in nonadversarial matters. You indicated examples of certain projects and suggested that those, and others, should be considered.

It seems to me that in order to address the subject you put, I should give you a summary of the whole scope and status of preventive law as it might relate to the objectives you set. First, therefore, a summary of background, all of which is not directly applicable, but which should be helpful in determining the direction which the American Bar Association might pursue.

I. A Bit of Theory

Preventive law is differentiated from curative (dispute resolution) law by reference to (1) the nature of the facts being considered and (2) the ultimate source of decision.

Facts. The preventive law concept focuses on facts which have not yet occurred—present and future facts. The lawyer in nonadversarial practice guides a client concerning facts yet to be developed—future facts. The lawyer molds the client’s factual behavior. I have sometimes identified such facts as “hot” facts.

The litigating lawyer dealing with “curative” law focuses attention upon a dispute arising out of past facts. The lawyer’s ultimate activity in representing the client is that of an historian who “writes” the history of the facts in a courtroom in the manner permitted under the rules. I have sometimes identified such facts as

* Professor, University of Southern California Law Center. A.B. 1930, University of Southern California; J.D. 1933, Harvard University; LL.D. 1977, Manhattan College.
“cold” facts.

The distinction, comparisons and similarities of the factual content and direction of the lawyer’s activities open up significant areas of theory and practice which I do not explore here.

Decision. In dispute resolution matters, whether in a tribunal or court, arbitration, or in an administrative hearing, the ultimate decision is to be made by a designated third party. The decision is referable to a third party.

In preventive law matters, there is no such third party. The ultimate legal decisions applicable to the situation are made by the lawyer. The law office is the institution in our society which serves to make the legal decisions. An example which is often used is the preparation and making of a will. Decisions must be made regarding the desirability of a will and numerous aspects of the content of the will. These decisions on legal (and sometimes extra-legal) matters are made in the law office. The decisions are not referable to a third party.

The importance of the law office is vast. I have often been fond of saying that by far there are more decisions affecting human behavior made in lawyers’ offices than are made by all the trial courts of the land.

The full import of this observation is beyond the needs of this memo, so that I do not explore it here.


II. Current Development and Future Needs

a. One author states that the practice of preventive law commenced in 1870. “The years after 1870 showed . . . increasing effort to use law and lawyers preventively.” Hurst, The Growth of American Law 262 (1950). There is no need to identify its earliest beginnings. Observation of the practice of lawyers seems to indicate that there has been a constant growth of such practice.

Though practice had at least 19th century beginnings, it was not until mid-20th century that discreet recognition was given to the subject. In law school education, some beginnings of separate treatment took place in courses identified as estate planning and
business planning. While experimental preventive law courses began in the 1960s, it is only now that there appears to be significant effort to put together course materials for the separate approaches which nonadversarial lawyering requires.

Post-law degree continuing education has accorded the subject earlier recognition than the law schools. The practicing lawyer's need for materials and instruction stemmed from the actual practice of law. The absence of instruction and materials in law school education may have added to the need. The willingness of the practicing bar to disseminate its know-how enabled such education to begin and enables it to keep going. The continuing education programs, although they have supplied valuable specific courses and materials, have not supplied a theory and framework for the subject.

At the beginning of the last quarter of this century, we are in the position to go forward with the development of theory and practice. Some of the needs are in basic thinking, others in research, and others in application. The eye of the profession, in my opinion, should be directed to the public that is to be served by improvements and developments.

Without suggesting any order of importance, what follows are a variety of researches and inquiries which might be considered by appropriate institutions and persons. Many of the thoughts are not appropriate for direct undertakings of the American Bar Association, yet the American Bar Association might stimulate those that it deems worthwhile.

b. A profile of the law office as a preventive law institution. Some studies have been made of the law office and others are going forward. I do not profess to know the entire scope of such projects. It would be helpful to know the extent and nature of nonadversarial law practice. How much of a lawyer's time, attention, and compensation concern such practice? In what categories does such practice occur? My guess is that substantial amounts of such practice in private law firms occurs in large law offices where clients are relatively large business enterprises and wealthy individual clients. However, relatively small amounts occur in law offices practicing for middle income clients, virtually none occurs in law offices for poor clients. If this surmise is correct, we may consider the causes for the difference. Those who favor the expansion of preventive lawyering for middle income and poor clients might be better able to develop means for doing so.
c. Profile of the public. A purpose of preventive law is the maintenance of legal health of people. We know remarkably little about the legal health of our population. We scarcely have any definition of legal health. Studies of the legal needs of our population reveal the felt needs of individuals for certain legal services, usually of a dispute resolution sort. We do not even know, so far as I can ascertain, the number of law suits filed in our numerous courts, nor in gross the nature of these claims, their costs to the parties involved, and so on. I doubt that we know the number of pro se appearances as compared with lawyer representation. We know even less about the number and nature of disputes that come to lawyers’ offices that never reach the courts. Without detailing other facets of our ignorance, I suggest that we ought to try to find out as much about the legal health of our population as, by comparison, we know of medical health.

d. Causes of disputes, and their prevention. Court decisions are not necessarily concerned with the basic causes for disputes. These decisions are often concerned with the way trial courts process the claims, rather than the basic nature of the claim. Without going deeper into this subject, I suggest that we could use some effective research into the causes for disputes, and into the preventives. Sometimes the preventives lie outside the lawyering techniques (I doubt that auto accidents can be prevented by lawyering methods, but quaere); at other times, mostly in the transactional realm, lawyering techniques are available. As a research methodology, I have suggested and occasionally used a technique I dubbed “Legal Autopsy”, 39 J. Am. Jud. Soc’y 47 (1955). As an example, not grounded in legal autopsy but having real cause as the fundamental objective, see O’Neal, “Squeeze-Out” of Minority Shareholders: Expulsion or Oppression of Business Associates (Callaghan and Co., 1975).

e. Behavioral Aspects. Preventive law includes that aspect of law practice which seeks to guide clients into legally healthy channels of conduct. It may be that we need to understand much more than we now do about human behavior and motivations of our clients. Certainly such motivations are as much a fact as the objective facts which go to make up law school and bar examinations, and often are more important to the client. This is the stuff of counseling (my teachers in this regard have included Professor Thomas L. Shaffer and Dr. Robert Redmount, among others). Furthermore, for preventive law purposes, we seek, among other things, to mini-
mize the risk that a client will become party to a dispute and party to the litigation process. We need to know more than we now know, why it is that plaintiffs bring lawsuits. Observe that people, not courts, bring lawsuits, and that people, not courts, maintain them. To a considerable extent, preventive law is a people oriented subject—more so than one gleans from the study of appellate cases.

f. Decisions by lawyers. The lawyering process, both in curative law and preventive law, involves the making of decisions by lawyers. We have done remarkably little to identify, collect, record, index, and understand such decisions. In litigating law, we have scarcely, if at all, studied the decision not to file a lawsuit. My interest in this area is in the nonadversarial realm, where we also have not exposed and studied the low visible decision processes of the lawyer. (For methods to be used to law schools, see my article, “Teaching the Low Visible Decision Processes of the Lawyer”, 25 J. Leg. Ed. 386 (1973).) The problem is difficult enough if we had ready access to the decisions. But the decisions are made in the low visible environment of the law office, and are usually privileged and confidential. We must find a way to get at lawyers’ decisions, study them, find out the factors that lawyers take into account, classify them, and record the decisions together with the processes involved in making them.

g. Preventive law techniques and methods. Although lawyers have practiced in the nonadversarial realm, we have scarcely begun to identify the basic methods employed. In addition, there is need to become inventive, so as to develop techniques and methods not now in use. So far as I know, the only collection of this information is in Chapter 7 of Brown and Dauer, Planning by Lawyers. Among the principles identified are: securing future rights, predicting human behavior, planning the future stages, pre-trying potential disputes, and policing performance. The newer techniques are periodic checkup and legal audit. The techniques, whether old or new, need further study, research, and development. Older principles need to be identified. Newer techniques need to be improved. We need to encourage the creation of new ideas. We should expect that some ideas will take hold better than others. The ideas of the “Insured Legal Opinion”, 36 Cal. St. Bar J. 411 (1961) and “Lawyer’s Prescription”, 38 Cal. St. Bar J. 388 (1963) might have stimulated some thought, but they have not specifically been adopted.

h. Research techniques. We need to find ways to get at the low
visible decision processes of the lawyer. Partly, this involves obtaining the cooperation of practicing lawyers. Two such techniques, or approaches, might be considered. "Legal Autopsy", 39 J. Am. Jud. Soc'y 47 (1955) could dig into the decision processes of the lawyer, the causes for dispute, the probable preventives, and help develop guidelines to determine lawyer competency. "Comparative Lawyering", 23 Revue Hellinique de Droit International 1 (1970), which was designed to compare the lawyering process in different societies, is applicable to the study of the delivery of legal services among lawyers in the same society, and even in the same law firm.

i. Examinations. Nonadversarial law is scarcely tested in bar examinations. Bar examinations have a tremendous influence on law school education in at least two ways. They influence the curricula including the selection of courses by the students. They influence the approaches and teaching methods. There is at present some consideration given to post-law school examination for specialties, and for continuation of the license to practice. Nonadversarial law practice should be part of all such examination. As a sidelight, it has seemed to me that the current efforts to increase the competency of litigating lawyers has overlooked the phenomenon that most disputes are not ultimately determined by court process; they are determined by settlement accomplished in law offices. The settlement process needs far greater attention on examinations, and in the education of law students and post law school training of lawyers. In order to develop teaching and training materials, and ultimately to prepare examinations, we need to delve into the nonadversarial processes, accumulate case studies, organize the material, and select appropriate situations for education, training and examination purposes.

III. Proposals for the American Bar Association

a. Central Agency. We do not have any central place or organized effort which collects information, programs, projects, publications, and so forth concerning preventive law. (The only effort along these lines, so far as I know, is my own desk, which scarcely is adequate. The annual Preventive Law Newsletter is only a mea-

** Later version, entitled, Comparative Lawyering: Visits to Lawyers and a Proposal for Continued Study. A Hitherto Unpublished Diary of Visits to Lawyers, was published 4 J. OF LEG. PROF. 7 (1979).
A Memorandum

ger effort in this direction.) One of the difficulties is that preventive law is not, with rare exceptions, separately indexed in legal literature. There are, of course, gray areas in the distinctions between adversarial and nonadversarial law practice. One of the functions of any central source of information is to define its scope. This alone can be a valuable contribution.

Continuing education of the bar, through various organizations, produces materials properly classified as nonadversarial law practice. A few bar projects appear. Some of the educational efforts designed to reach the lay public are in this category. Bar programs and committees may spring up. A central agency to collect data, organize it, answer inquiries, and so on, could serve to stimulate further worthwhile efforts in state and local communities.

b. Educational models for the profession.\(^1\)\(^2\) (This was one of the specific ideas you mentioned.) The national association could set up models for education and training programs which could assist state and local associations, and other institutions, to develop appropriate programs for each area. These educational models, directed as they would be toward improvement of lawyer competence, could include:

(i) Lawyer-client relationship. We are just beginning to consider this subject in law school education. Three books have recently been published, each of which is useful in post law school education. In law schools, a project which has reached significant national proportions is the Client Counseling Competition, administered by the American Bar Association, Law Student Division. It can be used as a model for lawyer training. Some of the areas generally regarded as coming within the lawyer-client relationship are: understanding the client; creating and maintaining an appropriate lawyer-client relationship; fees; fact finding and fact organizing; decision making; negotiation; and drafting.

(ii) Each of these subjects is a subject in itself. For exam-

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1.1 The ABA Consortium, through the leadership of David Binder of the University of California, Los Angeles, Louis Brown of the University of Southern California, David Herwitz of Harvard, and Bea Moulton of the Legal Services Corporation, is developing a course on interviewing, counseling, and negotiating in the context of business and estate planning practice. It can be the laboratory for developing office skills training, just as NITA was for trial skills. The ABA Consortium conducted its first pilot office-practice skills course in 1980 in Berkeley, Chicago, Boston, and Seattle. Their teacher-student ratios were a laudatory 1:4--6 instructors for a section of 24 students.
ple, decision making includes the inquiry, whose decision - lawyer or client?

(iii) Negotiation involves timing, including determination of the extent to which lawyer or client should be involved, and numerous aspects of lawyering skills. There is a growing body of materials on negotiation, some of which concerns nonadversarial negotiation, although much of it concerns dispute resolution negotiation. There are some similarities and differences in these two areas of negotiation.

(iv) Drafting is a necessary and significant skill. Drafting in the nonadversarial context includes the preparation of transactional and other documents requiring the signature of clients. It includes communication to clients and other non-lawyers. It usually does not include other areas of drafting, such as pleadings and briefs.

(v) Periodic Review. Models for training should include the methodology of periodic review (periodic check-up and business legal review), so that lawyer competence in these areas can be developed and improved. Cost conscious lawyers should seek to find ways to perform such functions for fees appropriate to the client’s view of the value of the service. The service is not now customarily rendered. There is sufficient material so that an educational model can be developed (see Brown, “Periodic Check-Up: Report of a Law School Term Paper Project”, 29 J. Leg. Ed. 438 (1978)).

(vi) Professional Responsibility. Generally the Code of Professional Responsibility is derived from and concerns litigation practice. There are, however, numerous difficult aspects of professional responsibility that occur in nonadversarial practice; perhaps made more difficult because of the absence of adequate attention to that area of practice in the Code. Some of the material on professional responsibility aspects is collected at various points in the Brown/Dauer book. (On the basic criticisms and suggestions for improvement of the Code in this respect, see, the article by Brown and Brown in 10 Valparaiso Univ. L. Rev. 453 (1976.).)

(vii) Educational models in separate fields. Nonadversarial law practice includes, and cuts across, many conceptually designated areas of law. There are nonadversarial aspects of such fields as real property transactions, business planning, family law and family property, insolvency planning, labor relations, taxation, consumer matters, and others. Educational models could be developed for each of these separately. While some of the general principles of nonadversarial practice apply to all (by way of analogy, we can say that there are some principles
of litigation practice that apply, although the substantive areas of litigation differ), yet the substantive knowledge in each field varies. Also, often, the nature of the attorney-client characteristics may vary because, in part, the client characteristics vary. For example, labor relations negotiation, looking to reaching agreement on a management-labor contract, may have some resemblances to property settlement agreement in marital relations, yet there are not only vast differences in substantive law, but there are also likely to be vast differences in client characteristics. (The Brown and Dauer book contains some beginnings of educational material for lawyers as well as law students in some of these areas).

c. Bar Projects. It may be possible to develop projects which state and local bars could adopt to local environment. An illustration is the project currently in operation at the Beverly Hills Bar Association - Counseling for Newlyweds. A good journalistic account of it was reported in *Los Angeles Times*, October 5 1978. In essence, it is a project which provides, through lawyer reference service, free legal counseling in a law office for persons newly wed, or who are soon to be married, and for unmarried persons living together. Other somewhat similar projects, with or without fee, might be developed; for example counseling for persons who reach legal adulthood (18 in California); counseling for persons soon to retire from employment; counseling for persons newly moving into the state; etc. In military service, for example, counseling is sometimes provided for persons soon to return to civilian life.

d. Delivery of Layer Services. Developments and changes are occurring in methods for the delivery of lawyer services. Mostly in the middle income area the services seem to be with respect to disputes, crisis, and litigation. Some efforts could be made to encourage the development of lawyer services in nonadversarial matters. For example, periodic legal checkup might be more appetizing if means can be developed to speed up the process and reduce cost. Most of the time involvement concerns fact gathering. Conceivably the fact gathering process can be centralized in each community, so that solo practitioners could more readily provide the service. We might modify lawyer delivery methods by having certain repetitious legal skills, like fact gathering of the data for periodic checkup, centralized in an independent unit set up to serve lawyers. Conceivably we might encourage the development of independent service units for other purposes, like the preparation of trans-
actional documents. The dominant lawyer service is the exercise of judgment by the lawyer, a service that can scarcely be delegated, although often the work collateral to the exercise of lawyer judgment may be performed by others.

e. Committees. To date these does not appear to be any committee of any bar association designated as a committee concerned with preventive law. There may, however, be committees that include the subject within the committee work. Development of committees seeking to specialize in, or at least emphasize, nonadversarial law practice could be encouraged. In the American Bar Association, consider committees within such Sections as Anti-Trust; Corporation, Banking and Business Law; Family; General Practice; Labor Relations Law; Legal Education and Admissions to the Bar; Patent, Trademark and Copyright Law; Real Property; Probate and Trust Law; Taxation; Young Lawyers; and Law Student Division.

When the time is reached that several sections include such committees, there may be within the Association the ability to combine, or centralize, the work of these committees.

f. Lay Public. The end objective of preventive law is the improvement and maintenance of legal health of people. It is the layman to whom, and for whom, the profession should direct its preventive law attention.

(i) General educational models. There is now some amount of information given to the public concerning law. Often it comes from indirect sources like newspaper accounts of criminal trials, and television, motion picture and dramatic showings of lawyers in a litigation context. Some amount of professionally generated education occurs, but generally, so far as I can observe, such education concerns the valid subjects of constitutional law, an understanding of the adversary system, areas of criminal law, some aspects of consumer protection. Mostly this is geared to the litigation approach. There is some general education concerning wills (usually with respect to upper income persons) and occasionally real estate transactions.

What is needed is a good deal more emphasis on legal health maintenance. We need, among other things, to identify and develop and make known the rules of legal health. We need to inform people when they can properly act in nonadversarial matters in pro per (people do it all the time), and when it is beneficial to obtain professional guidance (which upper income people do rather well, but middle to low income people
seldom do). (My earliest publication in preventive law was meant to begin to do this, but the effort seems not to have yet been adequately realized. The 1950 book on Preventive Law went out of print. The article, “The Education of Potential Clients”, 24 So. Cal. L. Rev. 183 (1951) never had the influence I hoped.)

(ii) Formal education of non-lawyers. So far as I know, the profession has not concerned itself with the vast amount of law education offered to non-lawyers in colleges and universities. There is great opportunity to encourage the infusion of such courses of the preventive law approach. Many such courses, though they often profess to suggest that they do not substitute for a lawyer’s expertise, rarely get deeply into the employment of a lawyer, the scope of a lawyer’s work, the cost of lawyer services, the range of lawyer decisions, the proper requirements for a person to be an adequate client, and so on. This community college, college, and university area of education is heavily attended. The standards and scope of such education seem not to be of any concern or interest to the organized profession. It may be that often the courses are taught by non-lawyers (as certainly they are in public schools) with the content mostly on summaries of substantive law (which may include the law of corporate mergers and acquisitions). One can wonder about the broad educational effect of members of the lay public with respect to the advisability of engaging a lawyer’s services. As a minimum the organized profession should, I believe, pay more attention to these courses, their number and scope, the number of students enrolled, the content of the course and so on. Specifically, some attention should be given to the development of educational models.

g. Specialization. A comment here. There are currently strong public statements made regarding the need to improve competence in litigating skills and even to limit the profession so that only those who have met stated requirements may engage in certain of the litigation processes. I do not at this point engage in this discussion, but I point out its effect on the nonadversarial realm. There is no effort to set up a separate specialty for preventive law practice. I have expressed a concern that the emphasis on, and public pronouncements concerning, litigation drives attention away from the nonadversarial lawyering. My views were expressed in the paper, “An Inquiry Into Whether Preventive Law School Be Ranked As A Specialty”, published in Specialization Monograph No. 2, Legal Specialization (American Bar Association, 1976).