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TOWARD A JURISPRUDENCE FOR THE LAW OFFICE

by Louis M. Brown* and Thomas L. Shaffer**

Brown is the founder and foremost exponent of preventive law jurisprudence. Shaffer has dwelt in recent books and essays on the parallels between humanistic psychology and the life of lawyers. In this dialogue they focus their somewhat diverse insights on law as living; on their agreement that lawyer-client decisions are law in any functional sense of the word; and on the premise that an explicable jurisprudence is implicit in the process of law office decision making.

BROWN: My experience in law has been as a lawyer, which is part of our total system of the delivery of the law. The lawyer's function is complex. My personal emphasis has been on preventive law, where the lawyer's purpose is to guide his client so as to minimize risks, and maximize rights. Its purpose and effect, then, is to avoid possible dispute.¹

The forum is the law office rather than the courtroom. The legal matter rarely reaches a courtroom. The final legal determination takes place in the law office. The legal decisions are finalized by the lawyer. In this context, the decisional process of the lawyer is as significant for a particular client as would be the decision of a court for a litigant.

SHAFER: That suggests two novelties one does not ordinarily find in the literature of jurisprudence—(1) lawyer as decision maker,² and (2) lawyer as

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¹ L. Brown, *Planning By Lawyers* (1967); L. Brown, "The Practice of Preventive Law," 35 *Jour. Amer. Jud. Soc.* 45 (1951); L. Brown, "Legal Autopsy," 39 *Ibid.* 47 (1955); L. Brown, "The Law Office—A Preventive Law Laboratory," 104 *U. Penn. L. Rev.* 940 (1956); L. Brown, "Law Offices for Middle-Income Clients," 40 *Jour. St. Bar Calif.* 720 (1965); L. Brown, "Legal Audit," 38 *So. Cal. L. Rev.* 431 (1965); other citations in L. Brown, *Articles On Preventive Law* (1969).

² The greatest of all common law judges described something of the dilemma of decision, and hinted at the affective loneliness of it when he rejected easy analogies of property ownership in an appealing wrongful death case, in *Hynes v. New York Central R. Co.*, 231 N.Y. 229, 131 N.E. 898 (1921); "rights and duties in systems of living law are not built upon such quicksands." In enlarging upon the process, he said—B. Cardozo, *The Growth of the Law* (1924), p. 99:

The vigils and the quest yield at most of few remote analogies, which can be turned as easily to the service of one side as to the service of the other. What are you going to do to persuade? What am I going to do to decide? Perhaps we shall, neither of us, be fully conscious of the implications of the process. Much that goes on in the mind is subconscious or nearly so. But if, when the task is finished, we

counselor (what Carl Rogers would call a "helping person"). It suggests a challenge too: If jurisprudence cannot address those professional realities, it cannot learn from lawyers and it cannot teach lawyers about their personal-professional lives.

My special concern is the human relationship within which this law office decisional process occurs, and out of which law office legal decisions emerge.³ As decisions here parallel judicial judgments, I suggest that the legal counseling relationship parallels relationships between judge and jury,⁴ or relationships between judges as makers of law and legal custom or other branches of government as makers of law.⁵ We do not have a jurisprudence of counseling.

Legal counseling develops much of its jurisprudence from modern humanistic psychology. The counselor relates at a person-to-person level in which feelings (his own and his client's) are relevant *as facts*. And he operates within a set of concerns in which counselor behavior is more useful than conflict (advocacy) behavior. Rogers⁶ generalizes these concerns as:

acceptance of the client ("unconditional positive regard"); understanding of the client (empathy); and self-awareness (congruence).

The jurisprudence implicit in the image of lawyer as helping person is an optimistic jurisprudence. The Rogerian model is that people are resourceful enough to amend and repair their lives. Humanistic psychology seeks to tap

ask ourselves what we have done, we shall find, if we are frank in the answer, that with such equipment as we have, we have been playing the philosopher.

If one seeks something a bit more pragmatic by way of explanation, he may find guidance to the judicial process and analogies to the affective content, and the limits, of a decision made by a person or consortium of persons in a lawyer's office. T. Shaffer, *Readings on the Common Law* (1967), p. 42:

Government has undertaken to resolve private disputes out of nothing more recondite than the demand made upon government to keep the peace. And it has found that some consistency and objectivity is needed in resolving disputes—perhaps because Browning's king, or Calaban [in "Pippa Passes" and "Calaban Upon Setebos," both literary analogies suggested by Pollock], or the theocratic judge of colonial Massachusetts were not in practice capable of keeping the peace for long. (That is a pragmatic way to describe an aspiration to objective decision. Most men would probably find it hard to achieve a description which did not include the word "justice.")

³ Most of my work has been in the "estate-planning" practice—e.g.: *Death, Property and Lawyers* (1971); *Planning and Drafting Wills and Trusts* (1972), Ch. I; "Three Models for the Estate-Planning Counselor," in the *Proceedings of the 1972 Estate Planning Institute*, University of Miami. See R. Grismer and T. Shaffer, "Experience-Based Teaching Methods in Legal Counseling," 19 *Cleveland State Law Review* 448 (1970).

⁴ L. Green, *Judge and Jury* (1930); see Reid, "A Peculiar Mode of Expression (Judge Doe's Use of the Distinction Between Law and Fact)," 1963 *Wash. U.L.Q.* 427; cf. T. Shaffer, "Appellate Courts and Prejudiced Verdicts," 26 *Univ. of Pittsburgh L. Rev.* 1 (1964).

⁵ Cf. L. Fuller, "Human Interaction and the Law," 14 *Amer. Jour. Juris.* 1 (1969).

⁶ C. Rogers, *Client-Centered Therapy* (1965); see C. Rogers, *On Becoming A Person* (1961).

human resources, as the physician taps physical resources, in the hope that the human psyche regenerates.

But the helping-person model⁷ in a law office jurisprudence narrows and professionalizes this humanistic view of clients. That is where Rogers' insights are tempered by your preventive law concept; viewing the law office product as a legal decision suggests the qualities of foresight and comprehension. The optimistic view of man is specialized into a prudent view of man; because of his counselor, the client understands the consequences of his actions. He agrees in advance to the consequences of his decision in the law office, in an interpersonal instance of Dewey's logic-of-consequences concept.⁸ Law office jurisprudence is like conflict jurisprudence, but different because it is also a helping-person jurisprudence. It is like the helping-person philosophy prominent in nonlegal counseling, but different because the law office process is a process of decision making.

The decision in the law office is assented to by at least two people, but, like "justice" writ large, it depends for its validity on a consensus that reaches beyond the law office. A litigated decision must be "just"—that is, it must satisfy most of the people most of the time. A law office decision must be preventive; it must satisfy the people who live with its consequences. Nonlegal counseling can afford to pay less attention to consequences and consensus. It aims at information and at the facilitation of decision making by the client.⁹ But legal counseling is always done in the shadow of external, even institutional, validation. The legal counselor has to make up his mind; other counselors often do not.¹⁰

One further consequence of law office jurisprudence is the social effect of the law office decision. A lawyer who advises his corporate client to sail less close to the winds of the Internal Revenue Code is making a decision with accounting consequences, risk consequences, and social consequences analogous to the consequences of the same sort of decision being made in the Tax Court.

BROWN: The legal counselor is frequently mentioned in texts on professional responsibility,¹¹ usually in the context of dispute resolution. The lawyer consulted regarding dispute resolution is also a helping person. I do not think

⁷ The model is developed more advertently in T. Shaffer, note 3, *supra* (U. Miami).

⁸ J. Dewey, "Logical Method and Law," 10 *Cornell L. Quar.* 17 (1924).

⁹ These generalizations are developed in L. Tyler, *The Work of the Counselor* (3d ed. 1969).

¹⁰ See E. Porter, *An Introduction to Therapeutic Counseling* (1950).

¹¹ V. Countryman and T. Finman, *The Lawyer in Modern Society* (1966), p. 310-313; E. Cheatham, *Cases and Materials on the Legal Profession* (1955), p. 220-227. See also Llewellyn, *The Modern Approach to Counselling and Advocacy—Especially in Commercial Transactions* (1946), p. 167; Redmount, "Humanistic Law through Legal Counselling," 2 *Conn. L. Rev.* 98 (1969).

that either of us means to exclude this sort of counseling function, though we would try to differentiate the litigating (dispute resolving) lawyering function from the preventive law lawyering function. The litigating lawyer, in the last analysis, can and frequently does rely upon a lawsuit for resolution. He may counsel a client, but he does so against a backdrop of ultimate court decision.

You point up a social consequence of law office, preventive law jurisprudence. There are social consequences, as you say, of law office decisions. One of the specific social consequences of effective preventive law counseling is that it tends to reduce the incidence of legal trouble.

We assume that some alternatives are legally safer than others. There is a jurisprudential foundation for this premise. It lies within a formula which can be diagrammed as FACT → LAW (or legal consequence). There can be no legal consequence save that which rests upon some factual occurrence(s). Change or alter facts and you may modify legal consequences.¹² It does make a difference in legal consequences whether a person does or does not sign on the dotted line. One set of words, rather than another set of words, can

¹² "Every right is a consequence attached by the law to one or more facts which the law defines. . . ." O. Holmes, *The Common Law* (1881), p. 214.

"When a rule of law has been reduced to words it is a statement of the legal effect of operative facts; i.e., it is a statement that certain facts will normally be followed by certain immediate or remote consequences in the form of action or non-action by the judicial and executive agents of society." A. Corbin, "Legal Analysis and Terminology," 29 *Yale L.J.* 163, 164 (1919).

"Every legal proposition that contains a norm attaches a command or a prohibition to a given set of facts as the legal consequence of the latter." E. Ehrlich, *Fundamental Principles of the Sociology of Law* (W. Moll transl. 1936), p. 194-195.

"A legal directive can be expressed in the formula: If F, then C, where F stands for facts and C for legal consequence indicating how the judge shall judge." A. Ross, *On Law and Justice* (1959), p. 214.

"The power thus conferred on individuals to mold their legal relations with others by contracts, wills, marriages, etc., is one of the great contributions of law to social life; and it is a feature of law obscured by representing all law as a matter of orders backed by threats." H. Hart, *The Concept of Law* (1961), p. 28.

"The vast majority of legal norms are correctly regarded as hypothetical statements establishing that if certain facts are found, certain legal consequences follow." J. Stone, *Legal System and Lawyers' Reasonings* (1964), p. 199.

"Every rule of law is predicated on the existence of the facts on which its operation proceeds, its function (or 'the lawmaker's intention') being to attach legal consequences to those facts. Different rules attach different consequences to different facts; which rule we apply, then with its consequences, depends on what facts are found." J. Stone, *Social Dimensions of Law and Justice* (1966), p. 734-735.

"To a certain set of facts (a broken contract), this rule appends certain consequences (a particular measure of damages)." Friedman, "Legal Rules and the Process of Social Change," 19 *Stanford L. Rev.* 786, 787 (1967).

"For if you analyze any body of facts interpreted as 'legal' or somehow tied up with law, such as . . . a judgment, a contract . . . two elements are distinguishable: one, an act or series of acts—a happening occurring at a certain time and in a certain place, perceived by our senses: an external manifestation of human conduct; two, the legal meaning of this act, that is the meaning conferred upon the act by law." H. Kelsen, *The Pure Theory of Law*, 2d Ed., M. Knight transl. (1967), p. 2.

make a legal difference in the rights and duties of the parties. Because legal consequences are constructed on facts, preventive law guidance is possible. The helping lawyer seeks to guide the client so as to maximize his rights and minimize his risks.

SHAFFER: An example from my observation in the practice: We had a corporate client with large industrial plants in the Deep South. Our client was a fourth-tier contractor with the federal government, which meant then that he had some, but very slight, duties to racially integrate his workers. Our client had discussed this with my senior in the firm, who asked me to research the client's duties under a presidential executive order on equal employment opportunity. I drafted a memorandum outlining the client's minimal duties. My senior, with my memo in hand, telephoned the secretary of the corporation; he said we had reviewed the situation and that our advice was to fully integrate the plants. This advice had all of the jurisprudential clarity of *Brown v. Board of Education*.¹³

This law office decision was beyond the letter of the law, as most law office decisions, from income tax to the corrupt practices act, are. (That may be a difference between counseling and a sort of technical journalism.) I have often wondered why my senior gave the advice he did:

1. He may have been putting his own social opinions into his legal counseling;
2. He may have believed that the law was in a process in which it would soon reach this client with full integration requirements;
3. In addition to "2" he may have assessed the economic and human costs of compliance, which were great in this case, and have decided that early compliance was cheapest.
4. He may have assessed the moral implications of full integration, in terms of the client's ethical situation. This is my preferred speculation; it involves consideration of a wide array of factors—the conscience of the executives we were advising, corporate image, the welfare of the workers (especially black workers), the social posture of the South and of the nation at that time, and, most important, his perception of the moral openness of the men he was advising. Any of these factors implies a role for the corporation as moral leader in the community.

¹³ 347 U.S. 483 (1954).

This man's legal counseling style was consistently effective. He was and is a supremely successful lawyer. His style obviously has everything to do with his success. More to our present point, though, is the fact that his decision-making process considered "the logic of consequences" with a comprehension at least equal to that of the Supreme Court of the United States.¹⁴

BROWN: The example you give reveals the tremendous significance of law office decisions. Examples also come in less complicated circumstances. Every testator makes decisions in connection with testamentary provisions or a lawyer makes decisions on his behalf. These provisions may very well later affect lives and conduct of several persons. Every time a client consults a lawyer regarding a proposed course of conduct, the decision reached affects lives.

SHAFFER: We have been talking about social consequences. A great and grand lawyer under whom I practiced law, Kurt F. Pantzer of Indianapolis, used to tell us that our planning and draftsmanship in the corporate and "estate planning" practice had to respond to an "equitable sanction." At its simplest level, I suppose, you could ask of your work product in the profession, "Is it fair?" But the question has deep implications. What is fair? I suppose a practicing lawyer's answer to the question would be that what is fair is what works, and I think that implies what we have been calling consensus. A fair decision is one that will be accepted and implemented without litigation. Litigation is to the bad office decision what armed rebellion is to the bad judicial decision.

The counseling function itself seems to operate between the poles of blocked decision making and paucity of information. A teacher of counselors, Professor Leona E. Tyler of the University of Oregon, has expressed this range of functions in terms of what the counselor sees as the immediate demands of the relationship.¹⁵ At the inception of the situation the counselor may perceive that his client is in need of information. His function would then seem to be to survey possibilities for the client, with information, so that he acts as a kind of lecturer. He presents the alternatives and the client moves to a choice based on them. This function assumes that the client has sound mental equipment and a well-tuned ability to receive and act upon information. It concludes, as you carefully emphasize, with a survey of the consequences of decision. Foresight is central to the legal counselor in this sort of case. Professor Tyler calls this a "choice case."

¹⁴ Of course behavioral insights are not explicated—or at least not usually. Beginning perhaps with Brown, it has become legitimate to explicate those in opinions of the Supreme Court of the United States.

¹⁵ *Supra*, note 9.

At the other extreme, the client may be unable to decide, so that he is not receptive to information because he cannot use it. I think this situation arises most often in cases where the real dilemma is not on the table; an example I use in teaching legal counseling (and which I think I borrowed from you) is the client whose apparent issue is how to take title to residential real estate but whose real issue is his marriage. Another example (which I borrow from Professor Harrop Freeman)¹⁶ is the client who thinks he needs to decide whether to sue his neighbor over a property dispute, but whose real dilemma lies in his relationship with the tough guys in his life, in his own inability to recognize and act upon his outrage at being dealt with unfairly by those around him.

In this kind of case, what Professor Tyler calls the "change case," the counselor's function is more delicate. Obstacles to decision have to be removed, new possibilities created. In the examples I use, the issue of the marriage has to surface and the possibilities of dealing with it, rather than with the red herring of title, have to be explored. In the property dispute, the fact is the client's need for someone to fight his battles for him. Either situation calls, much more than the choice case, for the array of counselor skills as Rogers gives them—acceptance, empathy, and understanding.

There are intermediate categories, of course, and I suspect that most of a lawyer's work is in intermediate situations. Professor Tyler puts these situations well when she says that the dilemma they present is that the "client's present possibilities cannot be evaluated without greater understanding of him." The counselor needs to search, study, observe, and test his own reaction and his client's.

In the property dispute example, the client's inability to face down his antagonist is at bottom a special kind of fear. To the extent that the lawyer accepts the invitation to fight the client's battle for him, he will create an indefinite dependence. It resembles what the psychoanalysts talk about as the patient's "transference."¹⁷ Maybe what the client really needs is to stand on his own two feet; I believe the lawyer who contributed the case to Freeman's book was left with the nagging impression that it was this dependence which was the real *fact* at issue in the case, and that his analysis of the fact in more traditional, litigable terms led him astray.¹⁸ He didn't do the client any service when he threatened suit and forced settlement. The client had

¹⁶ The case of "The Barricaded Road," in H. Freeman, *Legal Interviewing and Counseling* (1963), p. 215.

¹⁷ See T. Shaffer, *Death, Property, and Lawyers* (1971), Ch. VII.

¹⁸ The lawyer who contributed the case said, note 16 *supra* at 216: "Now, I'm a pretty forthright man. I played football in college, I don't believe the bogeyman goes away by hiding your head. I was pretty disgusted with my client. . . ."

his easement, but he didn't have his manhood. Consideration of the client's emotional equipment as a fact which influences the direction of decision in the law office is an awesome demand on a mere lawyer's talents. But a decision which ignores this fact, or misperceives it, or cooperates with the client in ignoring it, is likely to be a bad decision. And by "bad" I mean that it will work less well—will have worse consequences—than it would if the fact had been taken into account.

BROWN: In curative law, we seek to determine and manage past facts, and attach the desired legal consequences to them. At this level legal consequences can be attached without any consideration of the client's emotional involvement. In general, the client's total emotional equipment is not usually part of the word formula in codes of law. I believe, though, that the total environment does become involved in the lawyering process. That process includes, but is not limited to, the law \rightarrow fact formula. An elemental translation of that formula leads to the question—what is the applicable law or legal result? But, and here is where I come to agree with you, the answer to that question is often insufficient for lawyering. In earthy terms, the client's questions are: What do I do? What course of action? What decisions must I make, or do you, as my lawyer, make?

In preventive law practice the law \rightarrow fact formula provides the legal consequences to a proposed course of action, but does not provide the answer to the ultimate decision, that is, for example, should the client sign. In litigation practice the lawyer may make or decline to make a prediction of an attainable legal result if his client, or potential client, brings a lawsuit, but the lawyering (and client) decision is whether and when to bring the suit. That decision and determination, does, as you suggest, include the consideration of the "client's emotional equipment."

SHAFFER: The irrational facts—the emotional and feeling facts which Barrett¹⁹ attributes to our Judaic tradition—may well be the greatest distinction between office lawyering and what you call "curative law." In this connection, I find useful your recognition that law office decision making is a vastly more complex (and, if I may say so, more openly emotional) environment. Three preliminary points should be made about that distinction, though.

First, litigation decisions, especially those we in retrospect regard as historic, have never been confined in conception or consequences to the facts in the record. They have always reflected what Holmes called "the felt neces-

¹⁹ W. Barrett, *Irrational Man* (1958).

sity of time.”²⁰ And, I think, good legal counselors take the emotional climate of a case into account when they act or advise in reference to probable judicial (or, for that matter, legislative) decisions in the case. You and I know that the fact that a child is black is not a legitimate (constitutional) consideration in his assignment to public school, and would so advise a Los Angeles school official who wondered if he could segregate schools. But, as we discovered recently,²¹ the child’s race would be a perfectly legitimate consideration if we were desegregating schools—and I suppose we both would have predicted that decision, despite our belief in the absolute that the Constitution is color blind. Predictive law is an art not entirely unlike predictive psychology.

Second, litigation law (law which comes from the fact → law continuum) is not very useful, and is rarely dispositive, in legal counseling. Part of the reason is that good law office decision making comes from a preventive law stance in the lawyer; and that “lawyering” stance always takes broader account of human factors than predictive law does. Another part of the reason is that the client who is making a law office decision is being counseled toward an ability to choose as well as toward choice itself. The legal counselor is in what our friend Robert S. Redmount²² calls a *facilitative* posture.

Finally, the law office decision depends for its soundness and survival on acceptance and validation in people and in places where factors relevant to litigation either don’t count, or don’t count enough.²³ An example is a dead man’s will which depends in its operative phase on the largely emotional consent of family members who take or fail to take under it.²⁴ The factors relating to judges’ law in both of these examples are usually, literally, irrelevant.

BROWN: If I, or any lawyer, want to know what the law is, his sources of information about law are the same whether he is lawyering in litigation or preventive law. For me, on an analytical level, the difference between preventive law and litigation lies not in a difference in *law*. Rather it lies in a difference in *fact*. If a philosopher would say that facts exist in space and time, then the difference is in the *time* aspect of fact. This is, some events have already occurred, they are in the past. Other events will occur in the future. At least, I think that we can agree that facts or events have a time

²⁰ O. Holmes, *The Common Law* (1881), p. 1. See B. Cardozo, note 2, *supra*; J. Dewey, note 8, *supra*; E. Levi, *An Introduction to Legal Reasoning* (1958).

²¹ *Swann v. Charlotte-Mecklenburg Board of Education*, 91 S.Ct. 1267 (1971).

²² See R. Redmount, “Humanistic Law Through Legal Counseling,” 2 *Connecticut L. Rev.* 98 (1969).

²³ S. Macaulay, “Non-Contractual Relations in Business: A Preliminary Study,” 28 *Am. Soc. Rev.* 55 (1963), and S. Tilles, “Understanding the Consultant’s Role,” 39 *Harvard Bus. Rev.* 87 (1961), both reproduced in L. Brown, *Planning By Lawyers* (1967).

²⁴ M. Sussman, J. Cates and D. Smith, *The Family and Inheritance* (1970); see my review at 18 *U.C.L.A. Law Review* 844 (1971).

characteristic. We place facts in time, as well as space. In these time phenomena, the litigating lawyer primarily is concerned with some existing dispute arising out of past facts which I sometimes identify as "cold" facts. He wants to know what happened in the past that gave rise to the dispute. The substantive legal consequences are determined by the law as it applies to those previous facts/events.

Preventive law is chiefly concerned with future facts, that is, facts which have not yet occurred and which in some writings I have labelled "hot" facts. Earlier I said that I assume alternative possibilities of action, that is, a choice of facts. Preventive law is concerned with the exercise of the choice so as to minimize risks and maximize rights. Whatever facts occur (or fail to occur) there will be some legal consequences. Signing one's name on a legally significant document, e.g., a check) gives rise immediately to certain identifiable legal consequences. Not signing that same check gives rise, analytically, to certain other legal consequences,²⁵ i.e., a body of negative legal consequences, "no-rights."

When we consider the practice of law, we put another dimension into the process. The lawyer practicing litigation law practices in the realm of resolution of disputes arising out of past facts. His practices, procedures, and processes, however, are concerned with some current and future events, that is, the resolution of the dispute is a future event. In the resolution of that dispute, he may work with the current human environment, for example, as you put forth, the client's emotional equipment. Or, he may feel the need in highly critical controversies reaching appellate courts to make some measure of "the felt necessity of the time."

In the practice of preventive law, the lawyering process can be more complex. Elementary preventive law practice appears relatively simple; that is, the lawyer describes (predicts) for a client the legal consequences of a proposed course of action. The lawyer informs a client about to sign an apartment lease already signed by the landlord that his client's signature creates, in the usual situation, a legal obligation (to pay rent, etc.) and some legal rights (to occupy the premises, etc.). But a more extended preventive law practice might be addressed to predictions in a different realm. The preventive law issues can become predictions as to whether a dispute will likely arise in the future, and if a dispute arises, then a prediction as to the behavior of the parties during that dispute, and a prediction of the legal consequences of that dispute. When we think in terms of potential disputes, we are concerned with only the "minimizing risks" aspect of preventive law practice. The practice

²⁵ The nature of such consequences is outlined in W. Hohfeld, *Fundamental Legal Conceptions* (1923).

of "maximizing rights" complicates the process. It is at this point that the lawyering creativity stretches one's imagination. The issue is not confined to determining which alternative course of action presented by the client for the lawyer's consideration is best calculated to maximize the client's position; but, in addition, whether there is or might be another (as yet unstated) course of action even more appropriate, and which may further improve the client's legal (and practical) position. It is in this realm that I find correct your statement that litigation law is not dispositive in preventive law counseling.

Preventive law contemplates a prediction, as I said, as to whether a dispute will arise. That is a prediction of human behavior. Further, even if a dispute should arise, there is need to consider (or predict) the probable effect (or procedure) regarding that dispute; for example, will a lawsuit result. Preventive law is concerned, among other things, with a prediction as to whether a lawsuit will be brought because preventive law practice seeks to minimize risks, including the practical risk that a client may later be required to defend a lawsuit. Furthermore, in terms of lawsuits (acknowledged to be a costly process in our society), we seek to minimize the risk that our client will find it necessary to become a plaintiff, i.e., to sue in order to seek his substantive rights.

Now this whole area of the prediction of dispute, and prediction that lawsuit will be brought, is almost wholly ignored in jurisprudence, in empirical research, and in legal education.²⁶ In a short paper, I once sought to begin an exploration of the decision to file a lawsuit. One of the factors, of course, is the litigant's view of the likelihood of legal success,²⁷ but I would guess that such a factor is only one of several. There will probably not be a lawsuit unless preceded by a dispute, so that prediction of dispute—another human environmental phenomenon outside that fact → law continuum—needs in-

²⁶ But see F. O'Neal and J. Derwin, *Expulsion or Oppression of Business Associates* (1961).

²⁷ Among the factors that might be considered as motivating the filing of a lawsuit are the following:

- (a) File a lawsuit whenever a client has an assertable claim.
- (b) File a suit in order to bind the attorney/client relationship.
- (c) Easier to get a fee if suit is filed.
- (d) If I don't file suit, another lawyer will.
- (e) Client insists on filing.
- (f) It's easier to handle the client if suit is filed.
- (g) The client's interests are better protected by filing suit.
- (h) Must file in order to attach or garnish.
- (i) Client's settlement posture is improved by filing.
- (j) We should take the initiative, so we should become plaintiff, rather than risk the possibility that the other side will sue and we become defendant.
- (k) If we sue, we have a better chance to determine the forum.

vestigation. Given the same external facts, people may well act differently. One will sue now. The other will wait. A third may ignore the situation.

* * *

SHAFFER: The office analogue for social climate, I think, is interpersonal climate. It bears on decisions. It is to office decision what social climate is to judicial decision. (As, at least in part, client feelings are to office decision what facts are to judicial decision.) The heart of counseling effectiveness, wherever it falls on the spectrum from pure information to pure "therapy," is the client's ability to trust the counselor. A climate of trust is what Rogers means when he talks about acceptance, understanding, and empathy. The issues of trust, dependence, choice, personal growth, and client maturity all turn on the climate which the counselor creates. Many lawyers are poor at building a healthy, constructive, nonmanipulative law office climate for the people who come to them with worry and trouble and doubt.²⁸

Two issues involved in the creation of interpersonal climate are troublesome to the law students I work with on legal counseling. Both bear on your discussion of law office environment. One issue is self-awareness; the other is what modern applied behavioral scientists (with an unacknowledged debt to electrical engineering) call "feedback."

A law and psychology class I had several years ago spent three sessions on role-playing excursions into counseling, planning, and bargaining. One student developed an elaborate, well-thought-out system of negotiation tactics; a team of students presented a practical exercise in persuasion behavior; another team presented a psychodrama of the counseling opportunity.

When it was all over, I had the conviction that our focus had been wrong—that we had been looking at the client side of the relationship, which was unreal because none of us was a client; we had been avoiding our own feelings; and we had been fooling ourselves as to the psychological importance of the elements of the counseling relationship which were right in front of us.²⁹ It was for some reason easier to talk about the not-present, not-timely (and therefore unreal) client psyche than to talk about our own:

A common mistake is to ignore the emotional factors. The man [read "lawyer"] who pretends to himself that he is a rational calculating machine, moved only by ideas and concerned only for correctness, suffers from a grave illusion. He may have ceased to recognize his feelings, but emotions have not ceased to stimulate his glands and to twist his guts. He cannot

²⁸ See R. Grismer and T. Shaffer, note 3, *supra*.

²⁹ "Emotional Problems in Groups and Organizations," *Reading Book, Laboratories in Human Relations Training* (N.T.L. Institute, 1969 ed.), p. 7.

live a sane life until he relaxes his severe repressions and becomes once again able to feel.

* * *

In effect they [lawyers] say, "We have work to do. Let's lay aside ill feelings and buckle down to business!" All that happens then is that feelings are forced to operate under the table. What is said on the surface may resemble the give and take of ideational ping-pong balls, batted back and forth; but under the table, if your ear is attuned to it, you can hear heavy bowling balls being rolled by participants at their opponents.

The test of a good decision, one which will be carried out wholeheartedly, is not whether it has been unemotionally made, but rather whether all of the emotions involved have been expressed, recognized, and taken into account. Innumerable business decisions are bad because they have been devised on the assumption that feelings can be laid aside or ignored.

* * *

It is not surprising that people who for years have pretended to others that they feel what they don't really feel, should lose their ability to discriminate among their own emotions.

* * *

One of the values of the feedback which we give one another . . . is that it tells us about some of our feelings which are more apparent to others than to us.

I had the impression that many of us in that class undertook the study of law and psychology in order to understand the people we deal with professionally—clients, brothers at the bar, judges, juries, etc. But one of the principal lessons I took from our classroom demonstrations was the importance of learning about ourselves. In the practice of law, I learned, we have to find out about the person doing as well as well as the person done to.³⁰

"Feedback," the second issue, is a difficult art for most lawyers. The goal of good feedback to a client is to show him the consequences of his style and the subtleties of what he is doing. The idea is to help him gear his behavior for effective movement toward his goals. The trick is to *help* him without *judging* him. And it is hard for us lawyers to be nonevaluative—mostly, I suppose, because lawyers are moralistic people before they come to law school. Our moralistic temperaments were attracted to the study of law.³¹ Law school—with its dark labyrinths of fault, malice, breach, good faith, and dogs who know the difference between being stepped over and being kicked—reinforces our tendencies to pass judgment.

³⁰ See B. Glaser and A. Strauss, *Awareness of Dying* (1965); C. Jung, "The Psychology of the Transference," 16 *The Collected Works* (Ballinger 2nd ed. 1966).

³¹ A. Watson, "The Quest for Professional Competence: Psychological Aspects of Legal Education," 37 *Cincinnati L. Rev.* 93 (1968).

But good law office climate needs a lawyer who will level with the client about what the client is doing, what the client's style is, and what the interpersonal environment is really like, but do it without adding to the client's feeling that he is either stupid or bad. "In almost every phase of our lives . . . we find ourselves under the rewards and punishments of external judgments," Rogers says. "'That's good'; 'That's naughty' . . . Such judgments are a part of our lives from infancy to old age."³²

Applied behavioral science suggests these are some skills needed for effective feedback.

1. *It should describe, not evaluate.* The client should be free to use it or not use it, as the client sees fit. If one pursued that idea in law practice, he might decide finally that the traditional ideal of lawyer independence is overblown, or at least misapplied. A moving and personal argument for that possibility was made recently by a young poverty lawyer. Here are some thoughts of his:³³

The dominant attitude in law school is that the client is a troublesome pain-in-the-neck. Occasionally, the law student hears hints that he should present his clients with the legal alternatives, among which the client should choose. Many lawyers are now aware that *people should control their lawyer*, and are beginning to present alternatives from which their clients can choose. But the control which poor people should exercise over their lawyer is much greater than that of merely selecting among his proposals. . . . (B)ecause they know what is helpful to them and possible for them, *they can and must structure their own alternatives and make their own choices.* . . .

* * *

The lawyer may know what the law can do; the people know what needs to be done, and what can be done. (Emphasis added.)

Mr. Wexler's insight will shock many lawyers, I think. Most of us, accustomed as we are to being guru, shaman, and Delphic Oracle to our clients, will not be able to accept it. But it could be the ultimate humanistic climate to which a sensitive study of the law office encounter would lead.

2. *Feedback is specific.* "John, you're trying to dominate me" may be a true observation, but it is less likely to be acted upon than "John, just now, when you and I were discussing that lease, I had the feeling you were not listening to me. I had the feeling, just then, that you want me to agree with you, regardless of what I thought."

³² C. Rogers, in *supra*, note 6, at 73.

³³ S. Wexler, "Practicing Law for Poor People," 79 *Yale Law Journal* 1049 (1970).

3. *Feedback takes needs into account*—needs of client as well as needs of counselor. A lawyer acts, in the nature of things, from a position of enormous interpersonal power.³⁴ And pushing people around gets to be fun. We all know an occasional sadistic lawyer who uses his influence over clients, and junior colleagues, and clerks in public offices, for entertainment. Paradoxically, though, a person cannot move toward action with sensitivity for others until he recognizes and accepts the demands of his own needs.

4. *Feedback is directed toward behavior the client can change.* It won't do anybody anything but injury to tell a client that he is stupid or evil or old or infirm. What is really involved when a "helping person" takes that tack, of course, is misdirected *aggression* in the counselor. Compare the classic model of a Socratic law teacher, who abuses law students, perhaps because he lacks enough status or enough opportunity to abuse his professional peers as much as he wants. Another side of destructive feedback is that it is usually a *misperception*. The client I perceive as impotent because old or infirm may simply be coming across that way. He may, out of some need of his own, want to *appear* old or infirm; that may be *his* manipulative device ("poor little me"). If that is so, and I am perceiving accurately, it may do him a world of good to have the benefit of my perception. (Can I give it to him without appearing judgmental?)

5. *Feedback is best when solicited.* Not all law office situations imply a desire in the client for honest reaction, but many do—and the best feedback comes to him who wants it and says so. Another and more helpful way to put the point is that the most useful reaction is in terms of a question the client asks for himself. I must say, for myself, that it often takes courage to answer questions such as "Do you think I'm being selfish?" or "Does it seem to you that I'm fooling myself about this matter?" or "Do I seem to you to be vindictive?" I hope for the courage to deal with that sort of question honestly, to deal with it in a way which leaves the client free to act, and to help him without making him dependent on me.

6. *Feedback is well timed.* The time to answer personal questions (like those above) is when they are asked. That's when the counselor's reaction is most honest. Delay suggests evaluation.

7. *Feedback is checked.* An honest reaction, based on an immediate perception may, for all its candor, be wrong. One way to find out, consequently to keep personal channels of communication intact, and to guard against evaluative feedback, is to ask if the perception seems right to the client: "Yes, I have a feeling that you are being vindictive. Does it seem that way to you, too?"

³⁴ A. Watson, *Psychiatry for Lawyers* (1968); Ch. 1.

The jurisprudential point is the hope that counseling—and especially legal counseling—will be a process which produces freedom. It should help the client to broaden his horizons as a social creature, to be freer. As Rogers says, counseling should “permit the other person to reach the point where he recognizes that the locus of evaluation, the center of responsibility, lies within himself. The meaning and value of his experience is in the last analysis something which is up to him, and no amount of external judgment can alter this.”³⁵

I don’t intend to supplant the lawyer’s expertise as an informed professional. I am talking about the climate in which he uses his knowledge.

BROWN: The lawyer/client consultation is a mixture of law and counseling. Both are always potentially present. The legal consultation is in a human context so that it cannot avoid or eliminate the complexities of psychological interrelationships. However, there are times when a client consults a lawyer concerning some nonlegal matter so that the person consulted is essentially not acting in a strictly lawyer capacity. I would say that such a consultation is not a lawyer/client consultation even though the person being consulted is a lawyer. Such an observation, of course, gets us into a definition of “legal” and “nonlegal,” which harks back to the fact → law formula. If the factual content of the consultation concerns practical legal consequences then it includes a legal matter; otherwise it does not.

The other side of the dual aspect of consultation is more important: Every legal consultation includes human relationships. This was a neglected aspect of my formal legal education, and has been a significant aspect of my lawyering. In my education the emphasis (oversimplified) was upon knowing the law and analyzing and applying it to a fixed (or relatively fixed) set of facts.

Where the lawyer/client consultation concerns preventive law, the final decision making often occurs in the lawyer/client context. In the field of wills to which you have given so much attention, consider the finality of law office decisions. When the testator signs a will, he has in the usual situation (subject only to a subsequent testamentary document, and to the rare occurrence of a successful will contest) committed an act of legal decisiveness as binding as any final court judgment. The selection of an executor is fixed. The presence or absence of a spendthrift trust provision in a testamentary trust fixes that aspect of the trust. Because the decisional aspect of preventive law lawyering takes place in the context of the consultation, because such decisions are numerous, and because such decisions are not solely grounded upon

³⁵ C. Rogers, *supra*, note 6.

"the law," I have come to believe that jurisprudence, especially a jurisprudence of preventive law, must take into account the lawyer/client relationship.

In the opening paragraph of your previous statement you mention that the human factors may be the greatest difference between decisions in litigation and decisions in legal counseling, and that law offices may be more like courtrooms than we think they are, or want them to be. Comparisons of the decisions made are a rich source for imagination, analogies and distinctions that can lead to important jurisprudential developments.

The ultimate decision in law courts is judgment for, or against, the litigating parties. The facts upon which the judgment is made are admissible facts brought to the decision maker. In the traditional case, the decision is in monetary terms. The decision in civil cases does not directly compel action; it neither compels the judgment debtor to pay, nor the judgment creditor necessarily to do anything more. Equitable relief has generally been regarded as an exceptional remedy. Equitable judgments can have longer term effects and provide for continuing influence on conduct of litigants. Judgments (sentencing) in criminal cases can provide for continuing effects on future human conduct. Generally, all the decisions of courts concern pre-existing disputes and impose a decision concerning the legal consequences of such disputes.

The law office decision can be much like the court decision. If we had a good historical account of law office practice it likely would show that the basic role of the lawyer was that he was employed to pronounce or predict probable court decision regarding a client's pre-existing dispute. A lawyer might, however, not be obliged to make such prediction, but rather only to present the case (i.e., present the dispute) to the court for its determination.

The lawyering profession has long since broadened its decision processes. The lawyer is no longer confined to the presentation of dispute to a judge; nor even to the prediction of the outcome of so doing. Lawyering decisions involve a variety of value judgments, some of which do not lie within the fact→law formula. Even in the traditional litigating role, the lawyer may be, and usually is, involved in the decision to litigate. The lawyer has a wider area for decision making, e.g., a decision not to use the litigating procedures. A trial court, by comparison, may not decline (except on jurisdictional grounds which itself is part of the fact→law formula) to decide, i.e., to give a legal judgment, concerning the dispute. The alternatives available in the lawyering process are more numerous than available alternatives in the judicial process.

In addition, the lawyering process includes preventive law lawyering, a realm that rarely, if ever, is present in the litigation process. In dispute resolu-

tion, the facts that gave rise to the dispute are past facts so that the basic decision (the fact \rightarrow law decision) concerns past facts. In the preventive law process, the facts are being made. The lawyer's decision process includes decision among alternative or multitermative³⁶ (if I may be permitted to coin another word) facts. The lawyering process is further complicated because all available possibilities are not necessarily presented to the lawyer. His function includes not only decision among choices presented by the client, but also includes the creation and development of possibilities.³⁷ The lawyer not only helps make the decision that the testator presents, e.g., whether his wife or a trust company should be designated the executor, but the lawyer often extends the alternative into multitermative possibilities—e.g., that the wife and trust company be coexecutors, etc.—and then helps make the decision.

The litigating lawyer is primarily concerned with dispute. His client is involved in some unexpected difference with one or more other claimants. The occasion for human tension is built into the environment. The lawyer need not be the resolver of the dispute. In the litigating process the lawyer may shield himself personally from deciding the dispute because the resolution of the dispute can be referred to the judge.

In preventive law practice, the lawyer sometimes works in a unilateral environment, for example, in performing estate planning functions. In this context, open dispute is virtually absent,³⁸ although other psychological factors are most certainly present. You are the forefront in demonstrating the depth of human feelings involved in estate planning counseling process.³⁹

Other aspects of preventive law practice involve bilateral, or multilateral situations, some of which may give the lawyer the view that the problems of bilateral planning, e.g., purchase and sale of property, are synonymous with dispute resolution in litigation. The observation that many lawyers believe that these are similar comes from numerous discussions with litigating lawyers, and some discussions with upper division law students. Law students educated with traditional dispute resolution teaching materials—the appellate case—come to believe that they are studying the totality of the real world of lawyers,

³⁶ See Brown, "The Case of the Relived Facts," 48 *Cal. L. Rev.* 448 (1960).

³⁷ Cf., with reference to planning of a transaction by a tax practitioner, B. Bittker, *Professional Responsibility and Federal Tax Practice* 61 (1965). "The Case of the Relived Facts," note 36, *supra*, was derived from the actual facts of a case in which I was one of the lawyers representing the taxpayer in the litigation. The case was settled. The approach argued in the article was used in settlement negotiations and may have been a factor in reaching agreement.

³⁸ This comment is not meant to neglect the notion that there is always a mathematical possibility, remote as it might be, for dispute. The potential for dispute, though remote, is always present. A will contest is always a theoretical possibility, but the likelihood of dispute is remote and it is especially remote where professional guidance follows the customary patterns.

³⁹ See e.g., T. Shaffer, *Death, Property and Lawyers* (1970).

and the law. I believe that they carry this view forward into law practice. When I teach planning materials to upper division students, one of the problems is to put students in a legal frame of reference different from dispute resolution. There are several differences.

Contracting parties negotiating a proposed future contract are doing so for the purpose of determining whether they can arrive at a common ground. Litigation is not an agreeing function; it need not resolve its differences by reaching common ground between litigating parties. But, of course, settlement of disputes which does seek a common ground solution is one of the significant facts of litigation. The backdrop, against which dispute settlement is negotiated, is however, that unsuccessful settlement continues to refer the dispute to judicial decision. The result of nonaccord in preventive law negotiations is that the differences remain unresolved—the parties “walk away.”⁴⁰

The mechanisms (tools) by which the lawyer functions in these two different areas of law practice are different, although the law in the books is the same. The techniques and rules for dispute resolution are, generally speaking, provided for in the statutes and decided cases. Not necessarily so for the preventive law lawyer. Dispute resolution decisions do not provide answers for negotiations potentially leading to agreement, nor for counseling in unilateral situations.

Predictions. The basic prediction which the litigating lawyer is called on to make is a prediction concerning the likelihood of victory or defeat in litigation. The area of prediction of the preventive lawyer is different. The gut question concerns the likelihood, based on the planned program of action, whether a dispute will likely arise. This is essentially a prediction of future human behavior. The secondary question is, “If there is a dispute, what is the probable outcome?”

Legal issues. For the litigating lawyer the legal issues often come ready-made. Where the lawyer represents a prospective plaintiff, the client will often state the dispute in such fashion that he frames the legal issue. Where the lawyer represents the defendant, the legal issues are generally framed by the plaintiff's pleading. In this area, the preventive law lawyer has a much more difficult problem. He must imagine how a dispute might arise. The preventive law lawyer might not even know who the future adversary is.⁴¹

⁴⁰ There may be some interesting exceptions when management/labor negotiations break down. Our society does provide a mechanism, conciliation, that seeks to resolve the differences. The labor law that forces bargaining simultaneously providing sanctions for “unfair” labor bargaining does come close to the dispute resolving functions of the litigating process (see 28 U.S.C. §§ 158 (a) (5), (b) (3) (1970)).

⁴¹ In *Heyer v. Flaig*, 70 C.2d 223, 74 Cal. Rptr. 225, 449 P.2d 161, the defendant was a lawyer sued by those who would have benefited from a will which had been incorrectly drawn, had he drawn it correctly. Compare also the problems of the defendant's lawyer in

Creativity. The creative function of the litigating lawyer lies in the realm of inventiveness regarding the manner of presenting legal issues, and the restatement of facts derived from historical events. The preventive law lawyer exercises his creativity in the development of new facts, the guidance of future conduct to accomplish client objectives, usually so as to avoid future disputes, and yet maximize client rights.

* * *

SHAFFER: I recall the Mock Law Office Competition finals at your law school in 1971. Three teams dealt there with a business client whose narrow legal problem was whether a security interest could be found in computer "soft-ware"—in this case, security in the plans and diagrams and thoughts the client had for fashioning a computer program for a bank. The bank's legal department doubted that it could get a security interest under the Uniform Commercial Code in that sort of "property," and was therefore not willing to loan development money to the client. The client saw the problem as a typical lawyer's quibble. For some reason, he brought with him to the lawyer's office the bank lawyer who was giving him the most trouble.

The lawyers (finalist teams from three different law schools) had a very difficult counseling assignment. They had all of the usual human dimensions of a new client, complicated by the fact that the client came in resenting obstructionist lawyers and even brought the other side with him. All of the elements of lawyering we have been talking about were present—understanding the client, building his attitudes into the law office decision, mediating between two quarrelling parties without losing the good will of the one (the bank) or the loyalty of the other (the client). All three teams did a credible job, but—and this is the crucial part of the image—each of them approached the situation in a unique way.

I showed parts of that film to my class in legal counseling at Notre Dame in the fall, did not tell them how the judges decided the winner in the competition, and asked them to decide who won. One of the teams had approached the problem with great determination to maintain control of the situation (the lawyer's game—in Eric Berne's sense of game—that I call "I'm in Charge Here").⁴² Another team showed less concern about control but decided on a competitive strategy which showed the client that the lawyers were on his side and which put the bank lawyer on the defensive. The third team showed least concern for control, most concern for a flow of communica-

predicting his client's adversary in *Williams v. North Carolina*, 317 U.S. 287 (1962) and *Williams v. North Carolina*, 325 U.S. 226 (1945).

⁴² "Estate Planning" Games, *Notre Dame Lawyer* (1972).

tion among all three corners of the meeting, and the least amount of competitive feeling in the client's behalf.

My students, overwhelmingly, thought that the second team—the strong advocates—did the best job. It will come as no surprise to you that I thought, and still think, my students were wrong. (So, as it turned out, did the other judges in the finals.) What interests me, in looking back on my class and on the finals themselves, is how I find myself defending my choice. It says a lot about me, a lot about the way I approach legal education, and a lot about the hopes I have for a lawyering jurisprudence.

One way to look at the M.L.O.C. finals is in terms of what a counselor—any counselor—is supposed to be able to contribute to his counselee. In a phrase which merely summarizes what I have been trying to say throughout our dialogue, the counselor is there to move his counselee from hang-up to action. The counselee (client) is stymied, frustrated, maybe confused. For some reason he cannot act. The counselor is there to deal with that freeze in human activity. In a psychologically serious case, as the discussions of Tyler emphasized, it may be necessary to help the client move to behavior in which he is able to choose. Lawyers cannot always avoid dealing with such situations. But, usually, psychopathology is not a pressing problem; what the client usually needs is a new perspective on his options. We M.L.O.C. judges chose the third team in the M.L.O.C. finals—in this analysis—because the third team, which was least concerned about controlling the action, least concerned about maintaining their own ascendancy in an inevitably competitive setting, did the best job of opening up options for the client, and for the bank lawyer. They talked (as I recall) about several alternative ways to secure the loan from the bank to the client; they talked about renegotiating the entire arrangement, so that it became a development contract rather than a loan. Most crucially, they interested the client and the bank lawyer in these optional avenues of solution. They were really good at assessing and illuminating the fact→law continuum in this case and at creative preventive lawyering.

A second way to defend us M.L.O.C. judges from the Perry Mason reactions of my students is to assess that law office situation in competitive terms. There is a strong current of competition in any counseling situation.⁴³ Legal counselors are less likely to avoid a competitive atmosphere than most other kinds of counselors are, because we lawyers are attracted to competition, develop it, seek it, and—most of us, most of the time—act it out with clients in some variant of the “I’m in Charge Here” game. The M.L.O.C. problem which you presented aggravated this tendency to competition by bringing both sides of the controversy into the room at the same time, and by putting a situa-

⁴³ J. Davis, *The Interview As Arena* (1971); see T. Shaffer note 3, *supra* (U. Miami).

tion in which the lawyers felt they had to take one side. The first team handled that (and not well, really) by insisting on the domination of both sides. The second team handled it by clearly siding with the client. The third team stayed much closer to the center of the spectrum of competitive strategies from "I'm in Charge" to "We'll Sue." They performed well, in this analysis, a mediative function, without seeming to make the client feel they were not his lawyers. (I must say this experience tends to blur, for me, the distinction you maintain between mediation and preventive lawyering.) They also exercised a kind of unarticulated but precise foresight; they seemed to see that a successful law office decision depended on the good will—more than that, on the active assistance—of the bank lawyer. They did not court him, but they involved him, so that his best talents were involved in helping to solve the problem rather than in resisting the lawyers' solutions to it. Negatively, if this bank lawyer had not been engaged in this fashion, or at least neutralized, the lawyers would have exposed their client to one or the other of two risks. Either the whole deal would have fallen through, and the client would have lost a piece of business he needed, or the deal would have been set up on the shifting sands of hostile attitudes; as you know so well, the chances for breach, misunderstanding, litigation would then have increased. The third team avoided those risks with a foresight which illustrates well your discussion of the predictive element in preventive lawyering. They also avoided the destructive edge of counseling competition.

A third kind of analysis in defense of our decision would be an analysis which looks upon counseling as a collaborative activity. I can best illustrate that negatively. A dominating style in the counselor (I'm in Charge Here) discourages collaboration; it implies that the good ideas come from the counselor. That means that the law office decision will depend for the most part on one set of talents, insights, and sensitivities—the lawyer's. It shuts out all of the human strengths in the client (and, in the M.L.O.C. case, the other lawyer). When the problem is tough—and most law office problems are tough, and not all of them are solved well—two, or three, heads are better than one. Another negative way to put it is that a "We'll Sue" stance in the three-cornered encounter we had in the M.L.O.C. finals cuts out the talents of the lawyer for the other side. The winning team (which, I should say here, consisted of Mrs. Dawn Philips and Mr. David Harwood of the University of Michigan Law School) were superb at avoiding resistance from the bank lawyer, but, more to the present point, they were even more superb at saying to him, successfully, "This is *our* problem. Let *us* solve it."⁴⁴

⁴⁴ The most useful inspirational book on this kind of legal counseling that I know about is J. Simons and J. Reidy, *The Human Art of Counseling* (1971).

To sum up my defense of us M.L.O.C. judges, I think we see, more than my students do, the human, economic and social advantages in involving people rather than defeating them. The enlistment of people in the law office, the collaborative strategy, involves the way feelings are acknowledged and accepted. And it involves the way feelings are written into the law office decisional process. In almost any analysis of the M.L.O.C. finals, the best thing our lawyers had going for them was the bank lawyer's feeling that the security problem was soluble and that he wanted to help solve it.

* * *

BROWN: This leads me to express some thoughts about the future efforts and researches and speculations that might be made in furtherance of some of the concepts discussed in our dialogue.

Implicit in our discussion is the notion that the role of the lawyer is a significant aspect of the total process of law in our society. We express some notions about the jurisprudence of the lawyering process. What needs doing, among other things, is further identification and definition of that process. It seems to me that the label "lawyer" is neither conclusive, nor necessary to identification of that role. If in one social system an activity is identified by the label "lawyer," and in another by the label "notary," neither label is conclusive. What needs doing, or at least attempting, is basic definition of the functions and activities undertaken.⁴⁵

If our first step is differentiating lawyering activities from nonlawyer activities, a next step is differentiation, or categorization of lawyering activities. There is a tendency to separate the activities of lawyers in terms of legal encyclopedic headings—torts, contracts, procedure, constitutional law, and so on. I suggest that there be at least two other kinds of distinctions. We ought to look at law practice using humanness as the basic common denominator. What are the different human interrelationships in various different aspects of lawyering?

The lawyer who engages in estate planning practices in a human environment that is different from a lawyer who engages in say, a vigorous divorce, or in a management/labor contract negotiation. We should try to differentiate the lawyering process in terms of the human characteristics that are involved. On a practical level this sort of analysis can be far more significant than the areas of specialties being considered by bar associations, such as taxation, workmen's compensation, criminal law. It is more significant because new legal knowledge is more readily acquirable than is a new (change of) personality. A lawyer can suit his mental (knowledge) equipment to his person-

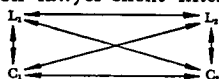
⁴⁵ See Brown, "Comparative Lawyering: A Proposal for the Study of the Functions of Lawyers in Different Jurisdictions," 23 *Revue Hellenique de Droit International* 1 (1970).

ality more readily than he fits his personality to the needs of a particular kind of law practice.^{45b}

Another separation which we should explore pervades our dialogue. The differences between litigation practice and preventive law practice could be approached as an empirical research project. What do lawyers now do? How much time is devoted to these two areas of law practice? What are the indications of increase or reduction of lawyers' efforts in these fields? Identification of these lawyering activities might help make available for law school teaching materials derived from law office experiences.⁴⁶ We need all this, and more, in order to help us do another undertaking—evaluation of the lawyering process.

Next, we need speculation, and hopefully some crystallization, of the criteria for evaluating performances by lawyers. In law schools we are concerned, in part at least, with the education, and more recently also with the training (I distinguish education and training) of persons who will be lawyers. We know that good lawyering includes more than knowledge, and more than legal reasoning. These are difficult enough to evaluate. Now throw into the mix the other activities of lawyers, and ask for criteria that help to evaluate all those activities. In M.L.O.C. you experienced the problem of comparing three different consultations with a client. You found, as have others who endeavor to judge and compare lawyer/client consultations, that we have scarcely begun to develop a method of analyzing consultations. We scarcely know what goes

^{45b} This chart on lawyer-client interaction suggests the interpersonal possibilities in a bilateral situation:



⁴⁶ Professors Taswell and McDougal have enumerated the tasks of lawyers to include:

Drafting, promoting, interpreting, and amending constitutions.

Drafting, promoting, and interpreting executive orders, administrative rulings, municipal charters, and so on, and attacking or sustaining their constitutionality.

Drafting and interpreting corporate and private association charters, agreements, dispositive instruments, and so on, and attacking or sustaining their validity.

Drafting or otherwise resolving causes or controversies, and making other decisions which affect the distribution of values, as judges, executives, administrators, arbitrators, referees, trial examiners, and so on.

Bringing to, or obscuring from, the attention of decision makers the facts and policies on which judgment should rest.

Advising clients on how to avoid litigation and controversies and on how to make the best possible use of legal doctrines, institutions, and practices for the promotion of their private purposes and long-term interest. (Clarifying, *inter alia*, intentions as to property disposition, business transactions and family relations.)

Consulting and negotiating with clients, businessmen, opposing counsel, and decision makers of all kinds.

Reading, digesting, and reinterpreting the decisions and reasoning of past decision makers of all kinds.

on, and should go on in that activity; and so we know even less about its evaluation.⁴⁷

Lawyers, we know, make some decisions. We should begin to identify those decisions. Can they be put into categories? Are some types more important than others? What is a decision? In traditional law school education we highlight the ultimate decision of the appellate court, e.g., judgment affirmed or judgment reversed, then seek to analyze it, evaluate it, and so on. We might be able to further law school education of the lawyering process by identifying the ultimate, or basic decisions in the lawyering process. Then we might be able to express methods to analyze those decisions. Maybe we can get some help from mathematicians.

Mathematicians have developed some decision theory.⁴⁸ There are distinctions between decisions under certainty, and decisions under uncertainty. When applied to the lawyering process, one question is, certainty or uncertainty about what? The answer for me is "about fact and about law." Some uncertainties we have are uncertainties about law, that is, what is the law now and what will it be at some future time. Law school education is largely concerned with the law and its uncertainties. The other element of uncertainty concerns fact. What are the facts? What will the facts be? The lawyering process is concerned with decisions under both kinds of uncertainty and the indications are that factual uncertainty often presents the realm of greater difficulty. Yet law school education scarcely includes much reference to factual uncertainty, and therefore very little about the lawyer's decisional processes and techniques in dealing with such uncertainty.

Briefly, in preventive law the lawyer must be concerned with uncertainty about facts in two respects. He is concerned with future facts, for example, whether a promisor will perform the promises made; whether his client will be the defendant in some future lawsuit, and so on. He is also concerned with minimizing the risk of uncertainty regarding present (or past) facts. Since factual uncertainty (or fact dispute) may give rise to legal trouble, the pre-

⁴⁷ Professor Gary Bellow, formerly U.S.C. Law Center, currently Professor, Harvard Law School, and I have discussed from time to time in the context of the lawyering process the problems of evaluating the performance of a lawyer. My research disclosed nothing definitive with respect to such evaluation. In connection with the Mock Law Office Competition (see Brown and Bonanno, "Inter-Scholastic Mock Law Office Competition—A Description and an Invitation," 15 *Student Lawyer Journal* No. 6 (February 25, 1970), p. 25) it has been necessary to set up standards for judging the lawyer-client consultation but this only involves some of the numerous skills and decisional processes of the lawyers. See also L. Brown, "The Lawyer-Client Consultation" (California C.E.B. Tape 1970).

⁴⁸ See *inter alia*, Cowan, "Decision Theory in Law, Science and Technology," 17 *Rutgers L. Rev.* 449 (1963); Shubik, "A Game Theorist Looks at the Antitrust Laws and the Automobile Industry," 8 *Stan. L. Rev.* 594 (1966); Comment, "Games Bargaining: A Proposed Application of the Theory of Games to Collective Bargaining," 65 *Yale L.J.* 660 (1956).

ventive law lawyer often can reduce the risk of such factual uncertainty. For example, if he puts an agreement in writing, rather than in oral form, the words are no longer in dispute; he can, for a second example, provide a mechanism for the preservation of factual evidence while the facts are being made.⁴⁹

We need to consider criteria for evaluating all kinds of lawyers' decisions. The easy answer that comes to mind is that, for the litigating lawyer, winning a judgment is always a plus and losing is always a negative. That answer is both too easy, and not sufficient. It fails to take into account evaluation of the alternatives, for example, settlement; it fails to consider a number of side effects, e.g., if defendant lost the judgment the defendant may have gained beneficial delay. It fails to take into account the human elements of victory and defeat—in short, the effects on the clients.

Equally, let us not accept too easily the criterion that preventive law lawyering fails if litigation results from a transaction. The client whom a preventive law lawyer represents may be better served by having some arrangement, even one that results in foreseeable litigation, than in having no arrangement at all. For example, it may be better to have an ambiguous labor/management contract than to have none at all. At the other extreme, the absence of subsequent litigation is an insufficient determinative of preventive lawyering ability. Such a criterion fails to consider whether the lawyer (or his client) gave up too much in the preventive law stages (by failing to seek certain rights, or make other demands) in favor of reducing the risk of later litigation. Or perhaps the preventive law lawyer was so cautious that he barred a transaction from being made, although hindsight indicates that his client would have been better served by a less cautious approach.

In my explorations of preventive law, I have come to believe that the practice of preventive law seeks, among other things, to minimize the risk of legal trouble. Legal trouble lies at the root of litigation. What is "legal trouble"? The striving for preventive law is, affirmatively stated, a striving for maximizing legal health. What is good legal health? The absence of litigation and the absence of known dispute are unsatisfactory and incomplete criteria. In your principal field, wills and estates, you can reliably assert that the failure of a particular person to have a proper will is ill health although such failure is unrelated to litigation or dispute of any kind.⁵⁰

⁴⁹ An example is the provision made for the taking of depositions in California where "the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice" (Cal. Code Civ. Proc. § 2017). On the use of psychologists to assess the mental condition of a testator prior to a possible will contest, see Redmount, "The Use of Psychologists in Legal Practice," 11 *The Practical Lawyer* 23 (February 1965).

⁵⁰ See Brown, "Toward a Definition of Legal Health," *Preventive Law in the Lawyering Process* (Brown ed.) mimeo. University of Southern California (1963).

When we seek the cause(s) for dispute, the cause(s) for legal trouble, we should consider the philosophical implications of "cause." Search for cause can be a never-ending pursuit. Each item identified as a cause has itself some precedent cause.⁵¹ The cause of the plaintiff's claim may be the collision of two automobiles. But what caused the collision? The litigation process stops such causal inquiry at some point.⁵²

But when we think in preventive law terms we are confronted by such questions. In developing consensual relations, e.g., purchase and sale of property, we try to visualize the likelihood that dispute will later arise so that we can now minimize that risk. So we must understand what the factors are that can give rise to dispute. Those factors are essentially human characteristics which the formal law might not regard as relevant.⁵³ They are, however, part of the stuff of law practice in preventive law and included within the factors which must be evaluated to help determine a particular client's course of action. We need to take into account our client's characteristics, and also the qualities which go to make up the other legal entities with whom our client is now developing a consensual relation.

The inventory of available techniques which go to make up the tools of lawyering activities must be organized into a body of discoverable (researchable) information. The inventory in litigation law, the alternatives available in litigation practice, are currently more readily available than that in preventive law practice. We have yet to identify, organize, and classify the techniques of preventive law practice.⁵⁴

Much of the content of our discussion concerned the relation of lawyer and client. That is a relationship that has little been exposed to investigation, research, analysis, and evaluation. Partly the absence of exposure is due to the apparent confidential lawyer/client relation. Partly it is due to the fact that appellate court decisions are recorded and publicly available and so these public decisions easily supply ingredients for study. We have, I believe, been led too easily to assume the relative importance of judicial decisions, and too little to recognize the importance of lawyer decisions because of the accident of in-

⁵¹ See generally H. Hart and A. Honore, *Causation in the Law* (1959).

⁵² "'Proximate cause' . . . is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an act go back to the discovery of America and beyond." (W. Prosser, *Handbook of the Law of Torts* (4th ed. 1970)).

⁵³ E.g. the refusal of the court to enforce racially discriminatory restrictive covenants in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁵⁴ For an analysis of some preventive law techniques see L. Brown, *Preventive Law in the Lawyering Process* (Mimeo, University of Southern California 1963); L. Brown, *Manual of Preventive Law* (1950). See also Cavers, "Legal Education and Lawyer-Made Law," 54 *W. Va. L. Rev.* 177 (1952).

formation or lack of information about them. Assume a society, if you will, in which lawyer decisions are recorded, but court decisions are not. One may venture the guess that a study of such society would assert the relative importance of lawyering decisions. We need, in my opinion, to do as much as we can to get at lawyers' decisions. Empirical research of various kinds is needed. We need tools for doing that research. Court processes do not expose lawyer decisions.