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Preventive Law and the Legal Autopsy: For Legal Profession as a Whole, It's a Learning and Research Tool

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For legal profession as a whole, it's a learning and research tool

By ROBERT M. HARDAWAY
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Andrew Jensen had heard about "Legal Autopsy." As senior litigation counsel for giant US West Communications, Jensen was interested in it as a possible addition to his in-house training program.

The request for a presentation on the subject of "Legal Autopsy" came to this writer as a result of being a participant in the Institute of Preventive Law. Jensen was specific on what he wanted to know about "Legal Autopsy," as his letter shows:

> '. . . It should not take long to persuade our lawyers of the value in post-mortems . . .'

Dear Professor Hardaway,

The topic we would like to have you treat is why and how to conduct a "post-mortem" or "legal autopsy" on a case after its resolution. We would prefer more emphasis on the "how" since it should not take long to persuade our lawyers of the value in post-mortems. Nevertheless, on the subject of 'why,' we would appreciate your thoughts on the purposes of legal autopsies with regard both to education of the client for preventive-law purposes and education of the lawyers involved in the case and to learn how to do their jobs better the next time, as well as how to appropriately involve the lawyers in pro-active management of the client's business.

On the subject of "how," we would greatly appreciate expert instruction on the best and most efficient ways to conduct a legal autopsy, including, if you think it appropriate, a checklist of things to do and consider in the process. We are concerned that legal autopsies be conducted in a manner that is as non-threatening as possible, both to the lawyers that handled the case and to the employees and officers whose actions or omissions may have affected the case. In other words, we would prefer not to conduct legal autopsies as though they were an inquest to determine fault for the purpose of punishing the wrongdoer. If you have any wisdom on how to make the process positive instead of negative, we would be anxious to hear it.

One other issue on the subject of "how," which you might wish to address, is the question of prioritization. Most of our labor and litigation lawyers are very busy with ongoing caseloads of their own, especially as we move more and more to handling cases in-house, as opposed to referring cases to outside councel and acting as a manager of the outside counsel. My own experience, which is shared by many of the other lawyers at US West, is that once a case is over, I would just as soon forget it and go on to preparation of my next case, rather than revisit the case in a post-mortem setting. What incentives and systems could be implemented to motivate both lawyers and clients to seriously undertake legal autopsies in the face of pressing, current obligations?

After receiving this invitation, my first thought was to seek out the thoughts and suggestions of Louis Brown, who first introduced to the legal profession the ideas of legal autopsy in his 1955 article "Legal Autopsy," published in the *Journal of the American Judicature Society.*

He not only gave me most helpful suggestions, but supplied me with copies and cites to the available but difficult-to-find literature on the subject. Almost all of the available literature, it turned out, had been written by him. His response deserves inclusion here:

Your presentation, so far as I can recall, will be a first. Nobody ever asked me to describe and discuss legal autopsy although, of course, I have mentioned it in talks that I have given on preventive law. Also, there has been very little written on legal autopsy. A copy of the short article I wrote that was published in 1955 is enclosed. Chapter 24 of my autobiography summarizes some of the work I have done on that subject. Copy enclosed.

A long time ago, in 1968, I prepared a draft of a description of legal autopsy research that I and some of my students had done. It was never published. A copy is enclosed for whatever value it may be to you.

In addition I enclose page 10.3 of The Legal Audit: Internal Corporate Investigations *(Clark Boardman Co., 1990) which I wrote with Anne O. Kandel. She, by the way, was a student in one of my law classes at USC many years ago. That page from the book tells a little*

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story about a trucking company. On second thought, I am enclosing the entire Section 10.01 of the Legal Audit Book. Please observe that so far as the trucking company was concerned the work done by the lawyers was generally satisfactory. I say this particularly because the letter you have cautions that "we are concerned that legal autopsies be conducted in a manner that is as non-threatening as possible, both to the lawyer that handled the case and to the employees and officers whose actions or omissions may have affected the case." The trucking story shows a post review which is non-threatening to the truck drivers, non-threatening to investigators, non-threatening to the lawyers.

Of course a legal autopsy may point out deficiencies in the way in which a litigation was conducted; 20/20 hindsight vision may disclose omissions or practices that were not evident at the time the litigation was in process. The other important aspect of legal autopsy concerns the process as a whole thus, by analogy, the process of driving a truck. In the labor field, one might find that there are aspects of the general organizational pattern that might be the underlying cause for individual problems. Legal autopsy is not only the process for lawyers. It is also a process for management. One question is whether management is willing to devote additional resources to enable the legal autopsy process to go forward. In the trucking story, the trucking company actually devoted additional resources to the investigation.

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The lawyer practicing preventive law often explains his goals and purpose by making an analogy to preventive medicine. Just as the doctor practicing preventive medicine seeks to prevent a disease from occurring in his patient, rather than simply trying to diagnose and treat the disease after it has occurred, so the preventive lawyer seeks to prevent his client from facing a dispute that will have to be resolved through expensive and time-consumig negotiations, mediation, or worse, litigation. The theoretical foundation of preventive law, as well as many of the methods and techniques of its practice, have been set forth in a wide body of literature, including the *Preventive Law Reporter.*

> 'One question is whether management is willing to devote resources to enable legal autopsy . . . '

There has been very little written in recent years, however, about the preventive law technique first treated extensively in the 1955 article by Louis Brown in the *Journal of American Judicature Society.* Entitled simply "Legal Autopsy," this article set forth the basis of the analogy to medicine: "Even a physician of the highest skill often finds in the post-mortem room that his diagnosis of the patients' disease during life needs ratification. The knowledge he obtains thus he supplies in future cases to the advantage of other patients."

On the law side of the analogy, however, it has been noted that the law is the only profession which records its mistakes carefully, exactly as they occurred, and yet fails to identify them as mistakes.

Louis Brown envisioned the use of a legal autopsy as a means of raising and answering a wide array of questions about how and why a case or lawsuit was initiated and conducted. For example: Why was certain evidence and not other evidence introduced at trial? Why were some witnesses called and others not? Why were some witnesses cross-examined and others not—but most important, why was the case initiated in the first place? This in turn leads to such ultimate questions as what was the initial mistake that led the client into trouble, what led the client to seek the advice of counsel, and what advice was finally given to the client. Was the advice given by the lawyer sound, particularly the advice on whether to proceed to the litigation stage?

Issues raised by such questions usually lie dormant forever in the typical case—doubtless to the relief of many a practicing lawyer alarmed by the increasing number of legal malpractice lawsuits and fearful of any procedure or process that might reveal otherwise hidden mistakes and miscalculations. Indeed it might appear that there are already more than enough opportunities to find lawyers' mistakes in the official records. A lawyer's mistake in failing to file a timely answer, or file a complaint within the statute of limitations, is clear on the face of officially filed documents.

The incentive for a lawyer to allow his mistake to remain buried must therefore be as great or greater than that of a medical doctor who would just as soon have his dead patient cremated or buried without an autopsy that might reveal a misdiagnosis or inadequate or inappropriate treatment. And yet, the medical autopsy remains in medicine as an invaluable and widely used tool, not only in determining the cause of a patient's death and comparing that cause with the doctor's diagnosis during lifetime, but in the advancement of medical knowledge generally.

The office of general counsel of a large corporation appears especially suited as a laboratory for experimentation with legal autopsy. First, the feat of exposing a mistake which might be the basis for a legal malpractice action is less justified in such an environment since the legal autopsy investigation, though reaching out to sources beyond that of the client, can nevertheless be conducted internally. Second, a general counsel's office is more likely to have the resources to conduct legal autopsies as part of a broader and already developed training program. Finally, the closer association of the general counsel with the client enhances the cooperation necessary for successful investigation, and makes the legal autopsy a more useful tool in the process for management.

Louis Brown refers in his letter to the story of a client trucking company which first dealt with the problem of trucking accidents and liability in the traditional way: that is, a lawyer was hired, representation was satisfactory, and most of the cases were settled. Someone in management initiated an investigation that perhaps would have been initiated by the lawyer himself had he been trained in the art of preventive law.

This investigation focused on the cause of the accidents themselves, as well as how the costs of litigation might be reduced. The investigation revealed that a large percentage of the accidents involved the making of a left turn by the truck driver. A solution was ultimately proposed that all drivers be required to execute three right turns rather than one left. As a result of this investigation and the resulting solution, the number of accidents was substantially reduced, and the increased costs of longer driving times was more than off-set by reduced litigation expenses.

Although it is not clear from Louis Brown's story whether the solution in the trucking case was the result of a formal legal autopsy, the case provides an excellent example of the kind of solution a formal legal autopsy may provide. "The legal autopsy seeks to examine a decided controversy (or series of controversies) in order to explore, among other things, the *root* causes," say Brown and Kandel.

Before embarking on the legal autopsy, a few preliminary matters should be considered. First, it should be remembered that the primary purpose of the legal autopsy is to *learn*: in the short term, to learn the causes of the ultimate conflict, what mistakes were made and why, and what new internal procedures or handbooks could be developed to avoid those problems in the future; in the longer term the purpose of the legal autopsy is to foster the development of legal science. It is important that all participants in the process be made aware of the purposes.

No legal autopsy can achieve a beneficial result if it is used as a means of determining or assigning blame. If any participant in the case examined is made to feel that this is even a secondary purpose, the honest and unguarded input so essential to a productive effort will be denied to the legal pathologist. For this reason, it may be desirable that the first legal autopsy undertaken be a case with a successful outcome for the investigator, since it may, as a practical matter, be far easier to deal with discovered mistakes and errors in a successful case. On the other hand, there may be more to learn in an unsuccessful one.

Second, care must be taken to ensure that no participant's rights of confidentiality are violated. In the case of a "horizontal autopsy" (discussed below), this may involve the procurement of appropriate written waivers, particularly of clients on the opposing side.

Third, a legal autopsy should, by definition, involve a truly "dead" case—not one that is still alive and kicking. In a litigated case, it should be one in which a final decision has been rendered and any and all appeals have been finally decided. In the case of controversies resolved by negotiation or mediation, any agreements or settlements resulting therefrom should be fully implemented or executed.

> Most important are analyses of the decision-making process and the role of the lawyer.

This basic outline of the legal autopsy, from which this article is derived, is taken from the unpublished monograph of Louis Brown entitled "Legal Post Mortem, An Available Research and Teaching Technique, 'Monday Morning Quarterback'" (1968).

With these preliminary matters understood and discussed by all participants, an outline should be made of all the phases that will be included in the legal autopsy. In a technique known as "film-rewindings" the final phases are considered first, and the "film"then rewound to a point in time before the controversy occurred.

As outlined in Louis Brown's seminal article on "Legal Autopsy," the phases examined should include:

- *The Appeal.* Issues and questions raised should include the decision to appeal, whether the chances of success in light of existing legal authority justified the expense, and whether any legal issues or arguments were overlooked. The quality of the legal brief should also be examined for clarity, accuracy and persuasiveness.

- *The Trial.* Questions raised should include the decision to go to trial: Was litigation justified in light of the chances of success? Even if the case was successful, were the fruits of success unduly outweighed by the costs of litigation and the risk of failure? Did the evidence at trial achieve its intended purpose of persuasion? What available evidence was overlooked? In addition, the clarity and persuasiveness of the opening statement, direct and cross-examination and closing argument should be analyzed and examined. Even more important than a critique of trial techniques, however, is an analysis of the decision-making process and role of the lawyer. How did the client influence the process? Was the advice of counsel accepted, and if not, why not?

- *Settlement Negotiations.* Were there such negotiations? If not, why? What offers of settlement were made, and why were they accepted or rejected? Were emotional factors significant and, if so, did they result in rejection of offers which were later shown to be reasonable? What were the tactics and timing of negotiations? What were the factors and motivation of the participants? Would rejected offers, if accepted, have resulted in a more advantageous outcome, particularly when the costs of litigation, both financial and emotional, are taken into account?

- *Discovery.* What discovery devices were employed, and why? Were all procedures employed cost-effective? Were cheaper and more cost-effective procedures available but not used? Was discovery used by either side as a tool to intimidation or as a means of financial leverage? If so, were

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they effective? What were the ethical implications of such use? Did a conflict of interest exist between the lawyer's use of discovery devices—particularly depositions, which may have provided a comfortable and relatively risk free (to the lawyer) means of running up a sizeable legal bill—and the interests of the client?

- *The Pleadings and Motions.* When were the pleadings and motions filed, and was any prior notice or indication given by the plaintiff to the defendant? What were the motivations behind the filing of the action? Were the pleadings themselves timely, clear and accurate? Was the timeliness, or lack thereof, of the filing of pleadings a factor in ultimate strategies employed?

- *Pre-Dispute Factors.* This is the point at which the "rewound film" is ultimately stopped. Why did the dispute take place? What measures could have been taken which might have prevented the dispute from occurring? Were the causes of conflict as revealed in the courtroom the same as those perceived by the clients prior to trial?

It is the "pre-dispute" phase which is most important in the legal autopsy, for it is during this phase that decisions and actions by both the client and attorney might have prevented or at least mitigated the extent of the dispute. For example, if the dispute centers upon the extent of damages caused by a breach of contract, which breach both parties concede occurred, it might be determined that the inclusion in the contract of a clear and enforceable liquidated damages clause might have mitigated or even prevented a dispute which ultimately required an expensive, time-consuming and emotionally draining process of resolution.

Identification of the ultimate source of the dispute, as well as the legal device which might have prevented it, can in turn lead to changes and improvements in future transactions. From a management viewpoint, internal procedures and guidelines can then be established to prevent disputes.

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The Process

Location of the "dead body." Selection of the "body" should be made with a view toward identifying which case will provide the most useful opportunities for learning. The case should be recent enough that any lessons learned will still have application, but old enough that the egos and emotional scars of the participants will not unduly inhibit free investigation and analysis of the post-mortem.

Examination of public files. This will be the easiest part of the post-mortem investigation, since public files are generally available, and there are no problems of confidentiality. Examples of such files include the pleadings (if not sealed by special court order), the trial transcript, appellate briefs (if any), and of course a reported appellate decision if the case was appealed.

Examination of private files. Although this is the most sensitive part of the process, it is also the most critical. Such files will inevitably reveal the theories and motivations which the public files do not reveal. In the case of a "vertical" autopsy (i.e., an autopsy of only one side of the case), a general counsel need only gain the cooperation of his in-house client. In a "horizontal," or complete autopsy, examination of an opposing party's or lawyer's files can be obtained only with his permission and cooperation.

> What is ultimate source of the dispute and what legal device might have prevented it?

Interviews and reports of lawyers. Interviews with lawyers involved in the case can provide insights and emotions not revealed in the private files. This part of the process can be time-consuming since it involves correspondence. The process can be accelerated, however, by personal or telephone interviews.

Interviews and reports of litigants. Interviews and reports from litigants can be especially revealing to the extent that they reveal motivation, assumptions, and emotions that differ significantly from those of the attorney.

Interviews and reports of witnesses and experts. The witness often sees a case from an entirely different perspective than those who are more interested in the outcome. Their perception of the lawyer's preparation and role in the proceedings provides useful data to the legal pathologist.

Interviews and reports of the judge and jurors. Judges are often most willing to provide their perspective on a case. Severely restricted during a trial in the opinions they can give, many judges welcome the opportunity to "spill their guts" about the case. Jurors, too, though never required to talk about a case after it has been decided, are often willing to give their thoughts.

As a former litigator, I never missed an opportunity to gain the perspective of as many jurors as possible. Often their comments and critiques were extraordinary. Unlike an appellate argument where a dialogue about the law and record can occur, a trial provides little or no opportunity, after *voir dire*, to interact with jurors, or determine what they deem to be most important or relevant. (I was often very surprised to find that a juror considered a piece of evidence, which I thought to be inconsequential, to be the decisive factor in the case.)

The litigator, unable to determine what is going on in the juror's mind during the proceedings, may never learn what the juror considered important. Hearing the juror's comments after the fact may not help the client in that case, but it can provide valuable insights which will prove useful in future cases. I recall being particularly shocked by a juror's comments to me after I prosecuted a sexual assault case. The juror told me that she found the defendant not guilty because I, *as the prosecutor*, had failed to call to the stand *the defendant*, who she thought could have given important first-hand information to the jury.

The final stage of the legal autopsy involves analysis and recommendations for future practice. Louis Brown has

suggested the uses to which legal autopsy might be put in his 1968 article "Legal Post Mortem: An Available Research Technique, 'Monday Morning Quarterback'."

Since this article was never published, I set forth his conclusions here:

- *Legal autopsy as research.* As a research tool, autopsy tends to explore intensively and reveal the role and function of a lawyer in a particular case, to employ hindsight observation on professional accomplishment, to re-examine the relation between litigants and their legal representatives. Legal autopsy may also help get at the cause of litigation, especially where the cause is not revealed in the litigation process, and may by employment of hindsight observation indicate principles of preventive law—that is, how the litigation might have been avoided. The individual case is, under the common law system, capable of giving rise to a general rule of law. Perhaps, also, general rules can be derived from a single autopsy, although greater comfort would result from general principles derived from a series of legal autopsies.

- *Legal autopsy as a learning device.* A legal autopsy investigation appears to be a splendid vehicle for learning and reliving the experience of lawyers, as well as judges and others. One of the problems in legal education is to find viable methods of teaching lawyer skills. While the legal autopsy is not actual clinical experience, it approximates actual experience on a rational level. Legal autopsy is not the doing (performing) of the experience, but it can be rational re-living, re-thinking, of that performance. The performance of a legal autopsy by a researcher is vicarious clinical, and actual, learning.

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Who should conduct the legal autopsy? Ideally, it should be conducted by a lawyer who had at least some contact with the case so that he has a broad perspective. Where the autopsy is conducted by a general counsel's office for a large firm, however, it would be preferable that the legal pathologist not be the chief counsel for the case, since conclusions and recommendations should be disinterested. Much of the legwork (interviews, correspondence, etc.) can of course be done by staff members, and non-legal solutions and recommendations should be solicited from management. The legal autopsy itself, however, should be signed by a lawyer investigator.

> The juror asked why
> I as prosecutor hadn't
> called the defendant
> to the witness stand.

Virtually any case, whether reported or not, can be the subject of a legal autopsy. In reviewing recent labor law cases of possible interest to US West, I came across the case, now much-publicized, of *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). In that case, a woman manager in a large accounting firm became a candidate for partnership. The firm's Admissions Committee, after receiving the comments of other partners, recommended that she be denied partnership. Comments considered by the committee included that the applicant was "macho," that she "overcompensated for being a woman," and that she ought to take "a course at charm school."

One partner advised that the applicant should "walk more femininely, wear make-up, have her hair styled, and wear jewelry." The applicant sued Price Waterhouse under Title VII of the Civil Rights Act of 1964, charging that the firm discriminated against her on the basis of sex. Although the Court of Appeals decision in favor of the plaintiff was later remanded by the Supreme Court on issues relating to the question of burden of proof, this case, if made the subject of legal autopsy, could provide many other insights as well.

If conducted by the defendant firm, for example, its conclusions might dictate that the firm's personnel handbook be re-written, that guidelines be prepared outlining the parameters of appropriate comments, and what would be inappropriate criteria for promotion. Indeed, a recommendation might include a restructuring of the entire promotion and review process.

The legal autopsy can be a careful learning and research tool, not only for the individual practitioner, but for the legal profession as a whole. A complete (or "horizontal") autopsy which includes an investigation of both sides of a case can be expensive and time-consuming to prepare. In many cases, practical consideration may dictate a more limited (or "vertical")—but also useful—autopsy investigating only one side of the case.

Louis Brown first proposed the performance of legal autopsies 28 years ago. It is time now for the legal profession to revisit this concept as a tool for both learning and research. □