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Teaching Preventive Law

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BY ROBERT M. HARDAWAY

What is "Preventive Law?" The simplest answer is often given by way of analogy to the medical profession. The medical doctor may practice two types of medicine: curative and preventive. Curative medicine is employed after a patient has become ill. The patient with heart disease may be operated on or subjected to a variety of treatments. Preventive medicine, however, emphasizes prevention of heart disease itself through exercise, diet and the like.

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The medical analogy, though simple, is limited. In medicine, for example, pain or other symptoms provide means of early detection which are not as widely available to the lawyer in the legal context. Thus, preventive practice is much more common in medicine. Nevertheless, preventive law is practiced by experienced lawyers, many of whom do not recognize the principles of preventive law or practice, but nevertheless practice them instinctively. This has led Professor Edward Dauer to lament that preventive law is a widespread practice desperately in need of supporting theory.

In fact, however, due in large measure to the pioneering efforts of Louis M. Brown (who may well be described as the father of the theory of modern preventive law) as well as the efforts of Edward Dauer, a substantial body of theory and scholarly literature now exists in the subject of preventive law. Louis Brown's landmark article, The Practice of Preventive Law in 1951 heralded the beginning of a movement in the legal profession to recognize preventive law as an area of discipline.

Despite the continuing and unflagging efforts of men like Louis Brown and Edward Dauer, however, the need for supporting theory has become more acute in recent years as revealed by the insurance liability crisis, the clogged court system, and the calls around the country for tort reform, all of which have contributed to this country's emerging reputation as the world's most litigious society. Indeed, preventive law is now emerging as a significant factor to be considered in resolving what is now perceived as a national crisis.

Case analysis in a course in Preventive Law is entirely different than case analysis in a traditional course. Take by way of example the case, Lilienthal v. Kaufman. In that case the defendant borrowed money from a lender in California, which does not recognize a spend-thrift legal disability. However, the lender sued the defendant in Oregon, which does recognize such a disability. The lender lost since the court applied Oregon law. A lawyer practicing preventive law for the lender, however, could have taken measures to protect the lender's position in making the loan. A teacher using a traditional casebook approach in the classroom would doubtless analyze this case in the context of conflict of laws. A rule applicable to future cases would be gleaned after an exhaustive socratic dialogue. The teacher of preventive law, however, would ask the student to treat the case like a piece of film: to rewind the film back to the point where the lender is on the verge of making the loan. Instead of making the loan, he consults a lawyer. What advice might the lawyer give at that point? What research might he conduct, what inquiries might he make? In short, what legal insights and advice at this point might prevent expensive and time-consuming litigation later on? The teacher of preventive law might back up the film even further to the point where the lender has not yet been approached for a loan. Rather, he has hired a lawyer to do a "legal audit." Like the medical patient who suffers no symptoms but who undergoes a routine medical check-up, the lender undergoes a "legal check-up." What would the lawyer look for? What problems might he anticipate in looking at the lender's program and records? In the course of such discussions, a periodic legal review checklist might be developed.

To a large degree, preventive law requires considerably more imagination and foresight than curative law. Facts as set forth in appellate cases are sterile, frozen in time; they are deemed to be true because a lower court has found them to be so. Even for the trial practitioner, facts, though subject to two or more different interpretations, have nonetheless already occurred even if not properly set forth or believed. Preventive law, however, deals largely with facts which have not yet occurred. It is probably even safe to say that it deals with facts which might never occur. (The spend-thrift borrower might pay off his loan despite his disability). Proper evaluation of the risk factors becomes paramount in this context, and economic considerations may come into play. (An auto company could build a $100,000 car built like a tank which might reduce 99% of all injuries and potential tort

claims, but very few people would buy it and the company would go out of business).

In order for preventive law methods to be efficiently employed, a lawyer must depart from the comfortable practice of being guided solely by the client's view or opinion as to the problem. A competent doctor would not accept a patient's request for treatment of a stomach ache based on the patient's diagnosis that he must have eaten too many jelly beans. There are simply too many other possible explanations for a stomach ache, such as ulcers, cancer, etc.. The doctor would do a physical examination, take pulse and blood pressure readings and the like. If in the course of his examination he discovered that the patient had high blood pressure, he would certainly bring this to the attention of the patient and prescribe treatment, even though the patient did not come in to see the doctor for that reason.

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In the same manner, a lawyer practicing preventive law who discovers in the course of his counselling that his client faces possible future problems or conflict in an area not yet recognized by the client, will bring this to the attention of the client and prescribe protective measures. Indeed, since the retention of legal counsel for the express purpose of a legal audit is unfortunately still a rarity, most opportunities for the practice of preventive law will arise in discussions with a lawyer of an entirely different problem that are initially raised by the client. For example, an estate lawyer might be retained for the purpose of revising a will to exclude a client's son. In the course of client counselling, the lawyer might ascertain that the reason for the client's request is that the son has been illegally taking money from a partnership, or has been borrowing money from loan sharks. While it would be the incompetent, and hopefully rare lawyer who would not practice some preventive law at this point, the competent lawyer who did so might prescribe protective measures without ever realizing he was practicing "preventive law." Without formal training or experience in preventive law, the scope of his inquiries and subsequent recommendations might fall short.

Already, it may be seen that once the concepts of preventive law are recognized, a host of other issues come to light. For example, what is the professional responsibility of a lawyer to a client who seeks advice on one problem, but who in fact has many others? What is the liability of a lawyer who undertakes a partial inquiry into some other problems, but who fails to ascertain one problem which later arises to the harm of the client? Were preventive law recognized as a legitimate area of discipline, these problems would become more visible and could be more adequately dealt with. At the very least, students exposed in law school to preventive law concepts would recognize such problems as they arise.

Preventive law as an area of the law exists, and should be recognized as such. Practicing lawyers however, will continue to develop preventive law techniques on an ad hoc basis in the course of their experience. A threshold task for a law school interested in teaching preventive law principles is to fashion a methodology for teaching preventive law in a traditional substantive law course, taking into full account existing available resources and the limitations imposed by structural curriculum requirements. Such a teaching plan must by necessity be flexible enough to be used in existing academic courses, while providing the opportunity for development of a more revolutionary methodology in experimental or clinical courses

PREVENTIVE LAW AS AN AREA OF ACADEMIC DISCIPLINE

Areas of specialization in the practice of law are reflected in the curricula of the nation's law schools. Most law schools offer specialized courses in such areas as tax, labor, trusts and estates, criminal law, and procedure. The growth of the body of the law over the past half century, combined along with increased complexity in many of these areas of specialization, has increased the demand for the practitioner who knows, and is experienced in one narrow part or aspect of the law. The role of the general practitioner in the law, like that in medicine, has been greatly diminished.

It has been suggested that the failure of "Preventive Law" to develop as a specialty in the practice of law explains, at least in part, why preventive law has not been fully developed as an area of academic discipline in the law school curriculum. With no demand for the "Preventive Law" specialist there has been little pressure put on the law schools to include it as an distinct area of discipline. Such an explanation, however, fails to take into account the nature of preventive law. It is, of course, not a specialty at all in the same sense as tax or labor law. A lawyer would no more become a "preventive law" specialist than he would become a specialist in evidence, procedure, legal counseling, or ethics. Despite the lack of such "specialties" in the practice of law, however, law school curricula traditionally offer courses in these latter areas, recognizing them as legitimate areas of discipline. Increasingly, however, Preventive Law is being taught as a separate area of discipline in the law school curriculum.

Nevertheless, because concepts of preventive law have emerged as an inherent part of the lawyering process, they are by necessity sometimes taught in the context of traditional courses (often without the teacher even being aware that he or she is doing so). This was, of course, the preferred manner of teaching ethics for many years, until it became recognized that this method of teaching such an important area was at best uneven and difficult to monitor, and often resulted in students graduating from law school with fatal weaknesses in their knowledge of ethical principles.

Scholarly recognition of the importance of preventive law coincided with another, though not entirely unrelated development: namely, the call for skills training and curriculum restruc-

turing. Jerome Frank's landmark article, What Constitutes a Good Legal Education, sounded the battle cry for the counter-revolution of the neo-realists against the Langdellian establishment. Critical of a case method which taught "rules without facts", Frank called for increased skills training. Subsequent critics noted that "Dean Landell's victory may have become too complete," while the Chief Justice of the United States was led to lament that the failures of legal education were "represented to a large extent by treating Langdell's case method of study as the ultimate teaching technique." In the early 1950's, Cantrall declared that at a minimum, a graduating law student should be competent to write a deed, examine a title, initiate and prosecute suits, and be able to perform the routine tasks of a lawyer emphasizing that "(s)ociety looks to the law schools to properly train young men and women to be, upon graduation, lawyers to whom the people can look for adequate, competent lawyer-services."

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The reaction to such critics was vigorous. Hutchins called practical training nothing more than the teaching of "tricks of the trade", while others defended the traditional view claiming that it was beyond the scope of law school training (and in any case too expensive) to prepare students for the practice of law, and that post-graduation training at law firms should be relied upon for such training. Such views continue to be adhered to at a majority of the nation's law schools, despite such protests as those of William Pincus who see the traditional approach to law school teaching as "a classic case of locking the stable door after the horse has escaped, i.e., after a partly educated and untrained lawyer is given a license to practice."

It is submitted that the study of Preventive Law is as much a casualty of the heavy reliance of Langdellian methodology as is skills training, and for some of the same reasons. Traditional legal subjects such as contracts, torts, and property lend themselves particularly well to the Langdellian method: large classes can be taught economically by one professor. Moreover, the Langdellian approach has managed to attain an aura of intellectual elitism, which combined with its economic efficiency, has made it virtually unassailable as a teaching technique at the nation's law schools, particularly since most law schools (unlike medical schools) are expected to be self-supporting.

Comprehensive preventive law training, however, like skills training, does not lend itself as easily to an exclusively Langdellian approach. Preventive law goes beyond simply recognizing and analyzing issues in a case which has already gone to trial and been appealed. Rather, it deals with a published case as a kind of failure, representing an unfortunate breakdown in the system in which parties or lawyers failed to anticipate possible conflict and take preventive measures.

Additional reasons have been suggested as to why preventive law has not yet established itself in the law school curriculum. Teaching materials, for example, are far more difficult to prepare than in traditional courses. Casebooks draw primarily from published appellate opinions, which are readily available and relatively visible. Preventive law, on the other hand, involves the decisions of lawyers which are made long before a case goes to trial. As Louis Brown has put it so succinctly, "In the preventive law area of practice the lawyering process is final and decisive." It has been noted, that "our libraries contain almost no materials concerning lawyering decisions."

Oftentimes (perhaps most often), the lawyer himself does not reduce his decision process to writing. Although the process may sometimes be gleaned from letters to and from the client, or from file memos or interview summaries, such writings rarely reveal the full scope of the process. In any case, such file documents may be confidential and thus not usually a matter of public record, easily obtainable or retrievable by the preparer of course materials. Thus, unlike the scholar writing a textbook on torts who can simply obtain opinions of public record, the teacher of preventive law is faced with what one preventive law scholar has described as "the major task in legal education", namely to "collect examples of lawyering decisions."

A final reason (or explanation) is here posed for the lack of formal preventive law training in the law school curriculum. For lack of a better term, I describe it (perhaps with excessive informality), as the "glamour factor." Dissection and analysis of the reasoning of Oliver Wendell Holmes in a case of grand constitutional dimensions can be just as exciting in an actual law school class as portrayed in an episode of the "Paper Chase." Non-traditional skills training courses, particularly trial advocacy practicums of clinical courses, conjure up the glamour and vision of Clarence Darrow for the defense. Pity then the teacher of Preventive Law who wants to talk about lawyer John Smith, who after consultation and consideration of risk factors, writes a simple document which so reduces the risk of a client's dispute with a partner that no law suit ever results. It is perhaps as exciting as going to a between traditional rivals football game, only to find that the teams have already agreed to a tie.

The irony, of course, is that an ounce of teaching preventive law can be worth a pound of Langdellian casebooks. Far from being reduced to the level of the carburetor salesman who hawks "you can pay me now, or you can pay me later," the lawyer applying concepts of preventive law is rendering a most important service to his client, acting as a true "counsellor at law" rather than as a mouthpiece for a client who has already gotten himself into trouble.

In fact, there is no one way to teach preventive law concepts or the lawyering process. Indeed, innovative techniques have already been developed for teaching preventive law including techniques easily adaptable to a modified Langdellian format. Such techniques enable preventive law to be taught within the context of presently exciting traditional law school courses, thus

enabling the professor to easily adapt such teaching to his present methods. Materials for a course in Preventive Law have already been developed. Many law schools such as the University of Denver School of Law have developed sufficient flexibility in their curriculum to permit modest experimentation in the adoption of "laboratories" or "practicums" in preventive law which can be paired with exciting traditional courses. In addition, the University of Denver offers a rich and varied clinical program, which allows for the incorporation of preventive law into the overall clinical program.

A lawyer would no more become a "preventive law" specialist than he would become a specialist in evidence, procedure, legal counseling, or ethics.

PREVENTIVE LAW AS A COMPONENT OF THE EXISTING TRADITIONAL LAW COURSE

Principles of preventive law can be taught in the context and framework of existing substantive law courses. Existing substantive law courses are usually taught using either the socratic, problem, or lecture method. The "socratic" method is, of course, considered to be the traditional method in law teaching. It has been suggested, however, that the socratic method (at least in its purer forms) is a relatively rare teaching technique even in the traditional law school curriculum. Rather, the socratic method is usually "mixed" with a lecture or problem approach. For example, a professor may often begin a class by asking for a recitation of a case. When the response is satisfactory (and usually it is not), the professor may follow up with questions about the facts or holding of the case. Particularly if the responses are unsatisfactory however, many teachers may at this point "lapse" into a lecture method, correcting or clarifying a students' response. There is, of course, nothing wrong with this approach but it is probably true that use of "pure" socratic methodology is relatively rare. Indeed, many law teachers now do not even claim to use it, decrying its inefficiency in teaching broad areas of the law (particularly in more advanced courses), and its heavy reliance on often unsatisfactory student input.

Nevertheless, teaching techniques have been developed for teaching preventive law techniques in substantive courses using either a socratic, lecture, or "mixed" methodology. Using such techniques, preventive law issues can be raised in much the same manner as ethical issues. For example, take the case which is often used at the very beginning of a freshman course in Procedure: Penoyer v. Neff. A professor using the socratic method may first ask a student to orally "brief" the case. In this instance, the facts are fairly confusing, involving competitive claims to real property which were derived from respective predecessors in interest. Using a purely socratic approach, it may take a full hour just to determine who the plaintiff and defendant are (it is, believe it or not, not readily apparent from a plain reading of the case itself). Eventually, however, the student will glean that title to the property in issue depends upon whether the defendant's claim to title is based upon a prior proceeding which had jurisdiction to transfer title. The question of jurisdiction will depend upon whether due process rights were accorded the plaintiff at the prior proceeding from which he received title, which in turn will lead to a discussion of the requirements of due process and the power of a court to act.

Although the case does not particularly lend itself to a discussion of ethical issues, some ethical questions may nevertheless be raised in light of the fact that the original lawsuit was brought by a lawyer against his client for attorneys fees, and the fact that no effort was made to notify the plaintiff of the original proceedings. These issues can be raised by questions posed by the teacher, or just stated by the teacher.

Primarily of course, the case of Penoyer v. Neff is used to teach principles of procedure and jurisdiction. Once this is done, however, there are several techniques that can be used to introduce concepts and issues of preventive law before going on to the next case. Many of these methods have been developed by Louis Brown over a number of years, but have not yet been adopted on a broad basis for teaching in traditional existing substantive law courses. For want of other labels, I shall divide these techniques into three main categories: 1) "Film-Rewinding", 2) Role-Playing, and 3) Document Drafting.

Film-Rewinding

The "film-rewinding" technique is the most easily adaptable to existing substantive courses, and in fact involves socratic methods. However, the appellate case is now looked at in a far different way. Instead of looking at the case as a story which is frozen in stone, (from which, like an Aesop fable, a moral lesson can be learned), the case is instead viewed as a failure of human beings to avoid conflict and disharmony. It may also be viewed in the same way as Charles Dicken's Christmas Carol, in which the scenario of Scrooge as a despised and hated old man on Christmas day occurs only in a vision and which can be avoided if Scrooge takes preventive measures. In Penoyer v. Neff, the student, like Scrooge in the Christmas Carol, can look at the outcome as a vision only, and be given the opportunity to alter it. In Penoyer, this involves rewinding the film to the story of the man who didn't pay his lawyer's fee. Although the film can be rewound to any earlier point, there are several critical points at which the film can be stopped: 1) the time at which the client comes in to consult the lawyer (What questions would the lawyer ask? What information should he seek? What would be the content of the discussions?); 2) the time during which the lawyer makes a decision (What investigation should be undertaken? What research should be performed? What goals should he seek to achieve? What questions should be asked? What is the range of consequences he should anticipate? What advise should he give?), and 3) the time during which the lawyer negotiates with the opposing party (What offer should he make? What role should he play?)

The reference point for all these places on the film should be the transaction or incident that gives rise to the case. In the strict sense, preventive law relates to preventing the incident or transaction which gives rise to later conflict, and not to resolving the conflict once it arises. (The latter falls into the category of alternate dispute resolution rather than preventive law). For example, when discussing the third point on the film mentioned above (negotiating with the opposing party), we are talking not about negotiating a settlement after the conflict has arisen, but rather negotiating an agreement which will reduce the risk of future conflict. In the case of Penoyer, for example, it might involve an agreement on attorney's fees between lawyer and client which specifically delineates the lawyer's and client's responsibilities, provides a means for outside mediation in case of dispute, secures a sufficiently large retainer to protect the lawyer in case of the client's default, or includes a clause permitting withdrawal of the lawyer upon non-payment.

Comprehensive preventive law training, & like skills training, does not lend itself as easily to an exclusively Langdellian approach.

At this point, it may be objected that a law professor teaching procedure in a freshman class in which he is hard-pressed to cover even the material on procedure or jurisdiction, simply does not have the time for such a digression, particularly since in a case such as Penoyer, the question of the contract for attorney's fee is so unrelated to the procedural question of jurisdiction. It was precisely for this reason, however, that I chose Penoyer as my example. The teacher of a traditional law course must be selective in his choice of cases to use for the teaching of preventive law principles. The discussion of Penoyer shows that virtually any case can be used for teaching preventive law in substantive courses. In the area of contracts or torts, the number and percentage of cases that would lend themselves to teaching preventive law would be higher. Virtually every case in contracts would lend itself to a discussion of the contractual provisions which might have prevented conflict. Take the simple case of a contract for sale of a bulldozer, where in the interval of time between the signing of the contract and the specified date of delivery, the bulldozer is struck by lighting and severely damaged. We know what the case is about: The seller sues the buyer who refuses to pay for or take delivery of damaged property. What clause in the contract could have been negotiated to prevent this dispute before the lighting struck? In representing either the buyer or seller in the transaction, what might the lawyer have advised his client with regard to insurance coverage for the property? For storage of the property in a safe place?

Role-Playing

The preventive law issues discussed above can be taught in traditional courses using socratic methodology with very little change in teaching technique. More traditional teachers may therefore prefer this method.

Teachers who do not adhere rigorously to the socratic method may wish to employ role-playing techniques. Some teachers of existing courses already use such techniques. Students may be assigned to take opposite sides of an issue in a case, and to argue that position before the class in the format of an appellate court. With the professor's role as a teacher temporarily transformed into that of a judge, the polarizing characteristics of the technique make for dynamic discussion and debate, often igniting responses from even the most passive student.

The technique of role-playing can be used, however, to explore and develop preventive law issues. After asking the student to review the film in the manner already stated, the student may be assigned to assume a role at a particular point in time (for example, at the time of the original interview with the client). Thus, the preventive law issues discussed above may be developed through simulation and critique rather than socratic dialogue. Students may also be asked to assume the roles of two lawyers in the office who discuss the factors involved in making a decision or recommendation to the client, or to assume the roles of lawyers representing two clients in a contract negotiation.

Document Drafting

A third technique which can be used in the traditional course is that of document drafting. Such an exercise would normally be assigned as an out-of-class project, and might include the writing of a letter to a client by a lawyer. It therefore includes elements of the two previously discussed techniques, film-rewinding, and role-playing. The student is again told to rewind the film to a particular point, and to assume a role such as the lawyer or client. Rather than acting out the role in the classroom, the student is told to draft a document as an out-of-class exercise to be turned in at a later time. Documents to be assigned might also include a letter by a seller's lawyer to a buyer's lawyer, an internal office memo to a fictional case file, an actual contract (or proposed contract), a waiver of liability, an acknowledgment, or disclosure statement. This technique has the advantage of directly involving all the students in the class; the disadvantage of course is that the teacher may not have the time or resources to critique the exercises.

In sum, the techniques of film-rewinding, role-playing, and document drafting provide useful tools for discussion and exposition of preventive law concepts in traditional law school courses. Which technique is used will depend upon a number of factors, including the willingness of the teacher to depart from familiar methods, the amount of time available to the professor, the number of students in the class, the quality of the students, and the extent to which the course material lends itself to teaching preventive law. Contracts or Property would probably be most suited, while Procedure or Evidence would perhaps be less so. All the techniques discussed, however, should be made available to teachers of traditional courses so that they can make

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following the passage of the Act, and suggestions to minimize risks.

Stephanie Karen Payne, *Beyond the Executive Summary: Reviewing Phase I Reports*, 11 PROBATE AND PROPERTY, Aug. 1997 at 22.

Phase I environmental assessments are an important tool in commercial property transactions in helping to identify potential environmental liability, and can also help preserve the innocent purchaser defense for a buyer. Lawyers involved in these transactions should work closely with the environmental consultant to ensure the report is properly drafted to standards and to protect their client's interests. The author outlines the reporting standards, and suggests a reviewing system, for Phase I reports.

HIGH TECH

Phil J. Shuey, *Mastering the Millenium*, 27 COLORADO LAWYER 2.

The year 2000 presents a "doomsday" of sorts for many computer systems. This article addresses the inability of computer software to change the date to the year 2000 and its specific potential effect on law firms. Some of recommended, simple solutions for avoiding a high-tech Armageddon include: taking inventory of all hardware and software assets; determining whether such assets have the year 2000 problem; testing and resolving a repair strategy; informing all staff members of the problem; and most importantly implementing these procedures expeditiously. ✦

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their own decisions concerning the feasibility and means of teaching preventive law in their courses.

THE LEGAL AUTOPSY

There has been very little written in recent years, about the preventive law technique first treated extensively in the 1955 article by Louis Brown in the *Journal of American Judicature Society*. In that article Professor Brown observed that just as a physician of the highest skill often finds in the post-mortem room that his diagnosis of the patients' disease during life needs ratification, so the lawyer may find ratification of his previous legal judgment and practice.

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?

Law is the only profession which records its mistakes carefully, exactly as they occurred, and yet fails to identify them as mistakes.

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