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Thinking like a **client**

*The renaissance of
preventive law*

Mieux vaut **prévenir...**

*Une recette
applicable
au droit*

- Tango locateur-locataire
- Real estate revolution
- The articling gauntlet
- Tomorrow's law libraries

Bayo Odutola, Ottawa

Cover story · De la une



12 Thinking like a client

Lawyers who practise preventive law help their clients plan their lives to avoid legal problems in future. The clients love it — and so do the lawyers.

By Susan Lightstone

Features · Articles de fond

18 Logement : un autre front où le Québec se distingue

Par comparaison avec d'autres, les mesures québécoises en matière de logement penchent nettement en faveur des locataires. Cette protection est-elle encore justifiée?

Par Indra Balassoupramaniane



Columns · Chroniques

From the Editor · Du rédacteur en chef

Quiz show 3

From the President · Mot du président

Your eyes and ears..... 4

Comments · Commentaires

Tuition: once more, with feeling 6

Leading Change · Changement

Speed: the secret to success 8

Marketing · Marketing

Be wise, advertise 9

Profit & Prosper · Prospérez

Those old emotions..... 10

Cyberespace · Cyberspace

Des fichiers qui « restent » 11

The CBA and You · L'ABC et vous

London 2002 in review 43

Not Quite Contempt

What's that you say?..... 48



22 Articles of faith

Law firms have overhauled the way they assess, interview and hire articling students. But not everyone is convinced the new way is an improvement.

By Susan Goldberg

Real estate revolution

Alvin Toffler's *Third Wave* has a critical message for Canada's real estate lawyers: innovate and integrate today, before time runs out.

By Mitchell Kowalski



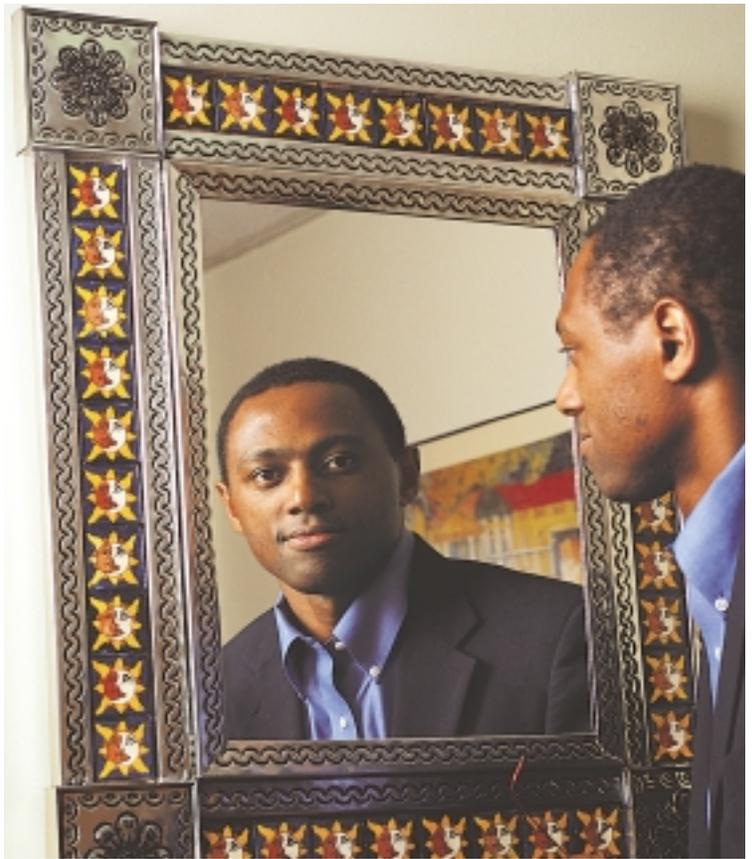
37 The knowledge managers

Law libraries have seen tremendous changes in the way legal information is stored and referenced, but law librarians have been equal to the task.

By Elizabeth Raymer



Cover photography: Mike Pinder



Thinking like a client

*Preventive law is the newest version of an age-old truth:
when lawyers immunize their clients against future
legal problems, everyone wins.*

By Susan Lightstone

Not long ago, a local fashion designer walked into the office of Bayo Odutola, an Ottawa-based intellectual property and information technology lawyer. The client was seeking some legal help with incorporating a business. But he came away with much more.

Odutola spent extra time with the client — time he didn't bill — learning about his business, helping him become aware of some of the legal issues he could face in future, and providing tips on how to address those issues before they become problems.

During their conversation, Odutola discovered that the designer hadn't trademarked his name or his line of clothing. "How much does your computer cost?" he asked the client, pointing out that the price of trademarking would be about the same. And then: "How much will it cost you if you lose your name?" The client agreed that trademarking today would help minimize the chance of a real legal mess tomorrow.

Odutola was engaging in preventive law — a new buzzword for a long-standing style of law practice that many practitioners may have forgotten about, but that's catching on again with more lawyers and clients every day. Preventive lawyers and their clients work together to develop methods for anticipating and preventing legal problems, in order to avoid future conflict and expenses.

MIKE PINDER

The traditional legal practice typically deals with “cold facts,” things that have occurred in the past, with the lawyer called in to help clean up the legal mess. Preventive law works prospectively, with “hot facts”— things that might arise in the future. The lawyer teams up with the client to help shape future events and create good legal health for the client.

Like some other practitioners of the art, Odutola doesn't much like the current terminology. “I don't call it ‘preventive law’ anymore,” he says. “Clients are reactive, and to many, ‘preventive law’ sounds like a cash grab.” He explains to them that it's the opposite — clients are saving money in the long run by reducing the risk of expensive litigation.

Odutola talks in terms of risk management. “I ask them, ‘What would it cost you if this were to go wrong?’ I phrase it in economic terms and tell them, ‘Let's reduce the risk now, so you don't pay me three times as much later to go to court on your behalf.’”

Bayo Odutola, Ottawa

“Let's reduce the risk now, so you don't have to pay me three times as much later.”

« Réduisons le risque maintenant, de sorte que vous n'aurez pas à me payer trois fois plus, plus tard. »

British legal consultant and visionary Richard Susskind has a succinct way of describing the appeal of preventive law. “Clients want a fence at the top of the cliff,” he said, “not an ambulance at the bottom.”

A wide spectrum

Dalhousie Law School professor Stephen Coughlan says simply planning ahead for the purpose of

winning future disputes is not preventive law. Odutola's approach — taking proactive steps with the goal of eliminating future legal risks — hits the mark. Preventive law is akin to a good risk management program that assures quality and reduces the possibility of errors.

Louis Marquis, Dean of the Faculty of Law at the Université de Sherbrooke, believes there's “quite a large spectrum of application” to preventive law. That's why a brand-new preventive law course, to be introduced this fall to the university's undergraduate law students, will reflect the breadth of the subject.

“Preventive law refers to all kinds of techniques that could prevent parties from being obliged to go to formal adjudication,” says Marquis. “It goes from very, very informal discussions of an issue, to a situation where a third party is involved in an issue between parties, but where that third party brings some kind of flexibility to the table when applying legal norms.”

Learning the public aspect of preventive law has taken on new urgency in Québec. New legislation amending the *Loi sur la justice administrative*, for example, mandates ADR in certain procedures of administrative tribunals. Accordingly, the university's preventive law course will have both theoretical and practical components, aimed at both the private and public level.

One of the main goals of the course, however, is to teach students ways to go beyond the traditional limits of applying the law — what Marquis calls “globalizing” the application of legal rights.

He gives the example of a contractual dispute where one party has committed a breach. “The task of a judge is to decide if that breach is real or not, and that's all,” he says. “With preventive law, it's possible to go beyond the simple breach and have the parties ask themselves, if the contract was breached, is it time to consolidate or [improve] the contract [to avoid future breaches]. It changes the perspective on the relations between the parties.”

Proactive planning

Murray Tevlin is a believer. An employment law practitioner with TevlinGleadle Employment Law Strategies in Vancouver, he drives home to his clients that in the world of preventive law, the client gets to call the shots. But if the client gets into arbitration or adjudication, that decision-making power shifts to a third party.



Barry Effler
Deputy Registrar General
of Manitoba, Winnipeg

“Preventive law follows from the generalized acceptance of ADR.”

« Parfois, un client ne gagne pas en gagnant. »



Maria Holman
Beechinor, Baker & Hall, Vancouver

“You can’t advise a client properly unless you’re practising this way.”

Le droit préventif devrait s’intégrer à tous les genres de pratique.

Tevlin educates his clients to handle their own business relationships by holding “frank, adult discussions” with their employees, customers, suppliers, community, stakeholders — whatever and whomever. He and his clients develop a plan that allows them to work long-term with these parties in ways that avoid future problems — and hopefully, never brings him into the discussion.

How does he accomplish this in a world of time-stressed and money-tight clients? As one example, he gave a seminar to his corporate clients on recent caselaw that could place vicarious liability on employers if one of their employees sexually assaults another.

“If I’m talking with line managers, it’s not even in their minds that the employer might be sued by the victim,” he notes. “They need to know that they’ve got to ensure full due diligence, to make sure that they don’t have that sort of thing happening.”

Despite his best efforts, some of Tevlin’s clients do end up headed towards court. Applying preventive law techniques, he works diligently at altering that direction and resolving the issues before all-out litigation occurs.

One of his methods is an innovative approach to expert witness. “A lot of lawyers hire experts to help them cross-examine at trial” — way too late, in Tevlin’s book. “I get experts going

before I do my pleadings. That way, I’m working from the vantage point of information and I understand whether there’s a cause of action or not.” Retaining experts early in the process, he believes, can help avoid court altogether.

Similarly, he assembles an interdisciplinary team at the beginning of a file, such as a recent matter involving a potential pension dispute. He started by hiring an actuary to help him understand the intricacies of pensions. “Life is getting more complicated,” says Tevlin. He believes you should learn about things before you launch into litigation — “think one or two steps ahead.”

Settlement first

Barry Effler, Deputy Registrar General for Manitoba and Chair of the CBA’s National ADR Section, has a theory about why we’re now hearing more about preventive law. Back in the early ‘80s,

LURENDA MASTRONACCO

when Effler was attending the University of Manitoba Law School, advocacy was the school's powerhouse program. "I [graduated] ready to walk into a courtroom," he says. "I heard very little about mediation or arbitration."

Today, the school still teaches advocacy, but dispute resolution has become one of its stellar courses. The new graduates Effler works with possess a clear understanding that "sometimes a client doesn't win by winning," and that the best solutions can often be achieved without litigation.

Mopping the floor with an adversary in court costs plenty of time, money and personal grief for all concerned, he notes, and often destroys any possibility of the parties working together again in any constructive way.

"Dispute resolution has become mainstream — it's a part of everything everyone does," says Effler. "Preventive law follows from this generalized acceptance of ADR." In fact, it takes the approach one step further, by emphasizing the management of facts and events to prevent unwanted legal consequences and future legal problems.

Effler believes that thanks to ADR, many lawyers are increasingly "paying attention to stuff that may not be intuitively obvious." But he also acknowledges that many lawyers have long relied on planning and consultation to best serve clients' needs, rather than looking to litigation as the primary solution.

Standard procedure

Indeed, some lawyers think "preventive law" is simply old wine in a new bottle. Maria Holman, a solicitor with Beechinor, Baker

and Hall in Vancouver, begins with a basic assumption: preventive law is nothing new. But it's still fundamental to providing your client with the best advice.

Holman says a solicitor's traditional job is not only ensuring that a contract or will is litigation-proof, but also "ensuring that it's what's needed by the client to achieve his or her overall business or personal needs. ... You can't advise a client properly unless you're practising [this way]. To say preventive law is something new is quite surprising."

But Holman also worries that a preventive law-type approach might be stymied at the outset, because too many lawyers have bought into the public perception that lawyers are simply "vultures waiting to swoop in." The stereotypical client believes the best lawyer is a tough, adversarial advocate, rather than a sensible, thoughtful risk manager. If clients or lawyers have in fact bought into that myth, then Holman thinks it's time to change clients' perception of what lawyers actually do.

Accordingly, she works diligently with new clients, learning about them and telling them how they can both work together. "We sit down and I find out what they're doing and how they're operating," she says. "It's part of getting the entire picture of the client."

For example, "if they're in a business where health and safety issues might apply, I tell them about that. If I incorporate somebody, I don't just send them out the door with their books. I tell them to call me with questions before they turn into problems. [And] my clients do call me." She tells them there's no cost for an inquiring phone call; if it turns out there's a potential legal

Prevention first

Here's how to transform your practice using the principles of preventive law.

1. Think big.

Take off your lawyer's hat and think like your family doctor: preventive law serves the same goals as preventive medicine. It's been called the legal specialty of preventing the disease of litigation — a serious malady that weakens its victims both financially and emotionally. Use your common sense to think about the broad issues and changes that might affect your client in the future, and not just from a legal perspective.

2. Work with your clients.

A critical element of preventive medicine is the teamwork between doctor and patient. Similarly, the traditional relationship of lawyer and client, with the lawyer firmly in charge, won't work in a preventive law scenario. Both must work together, on an

equal footing, with the end goal of ensuring the client's legal health. The lawyer must develop an understanding of the client by taking a continuing interest in that client and her affairs.

3. Stay in regular contact.

Keeping in touch allows you to see where changes in a client's operations or affairs might have legal ramifications. Regular "legal check-ups," even a simple phone call, can achieve this goal. Depending on your practice, you might develop a legal checklist that allows your clients to take their legal temperature. Check out the American Bar Association's Website at www.abanet.org/lpm2/newsletters/leader/w98checkup.html for an example of a "personal legal checkup" designed for an individual's personal affairs.

4. Give it away — free.

Clients who want to contact you with questions might hesitate to do so if they think the meter flips on the minute you pick up the phone. To develop an ongoing relationship, take the non-billable time for these conversations and client check-ups. It's an marketing investment that aims to make you their "lawyer of choice."

5. Anticipate trouble.

In our adversarial world, there will always be disputes that can't be anticipated or avoided. So include a good mediation or arbitration clause in any contract you prepare. Check out sample clauses — usable in all provinces — just released by the ADR Institute of Canada.: www.thisURLstillto come.com.

Tous y gagnent à parer aux ennuis

Vieille ou neuve, qu'importe, l'idée du droit préventif fait des adeptes.

Bayo Odutola, un avocat d'Ottawa, a pris le temps qu'il faut. En cherchant à mieux connaître l'entreprise de son client, un designer de mode, il a pu lui faire prendre conscience des dangers qui le guettent et suggérer les meilleurs moyens de s'y attaquer avant qu'ils ne se concrétisent.

Me Odutola applique le « droit préventif », cette approche qui vise à prévenir les problèmes de nature juridique en vue de réduire les risques éventuels de conflits coûteux. « Combien cela coûterait-il si telle chose venait à tourner mal? demande-t-il à ses clients. Réduisons le risque maintenant, de sorte que vous n'aurez pas à me payer trois fois plus pour vous représenter en cour plus tard. »

Et cette approche, d'abord surprenante pour le client, séduit de plus en plus. Richard Susskind, consultant et visionnaire britannique l'illustre en quelques mots. « Les clients veulent une clôture au sommet de la falaise, pas une ambulance au pied. »

Traditionnellement, les avocats sont appelés à la rescousse après le fait, pour se pencher sur des événements passés et tenter de réparer les pots cassés. Le droit préventif exige une attitude prospective.

Attention, précise toutefois le professeur Stephen Coughlan, de l'Université Dalhousie, il ne suffit pas de planifier en vue de gagner des batailles judiciaires futures. Le véritable droit préventif s'attache à prendre des mesures pour éliminer les risques de différends en germe.

À l'Université de Sherbrooke, la faculté de droit vient de mettre sur pied un tout nouveau cours dont l'un des principaux objectifs vise à apprendre aux étudiants à déborder des limites traditionnelles d'application des droits. Le doyen, Louis

Marquis, explique que le droit préventif englobe toutes sortes de techniques qui peuvent éviter aux parties d'avoir à recourir au processus décisionnel formel habituel. « Cela peut aller de discussions très informelles concernant un problème, jusqu'à la situation où un tiers intervient tout en faisant montre de souplesse dans l'application des normes légales. »

En droit préventif, dit Murray Tevlin de Vancouver, ce sont les clients qui doivent mener la barque. Ce praticien en droit du travail offre des séminaires d'information à ses clients d'affaires pour leur faire part

L'épithète de nouveauté qu'on tend à accoler au droit préventif fait sourire d'autres juristes.

de changements législatifs récents. Il les encourage aussi à avoir des « discussions adultes et franches » avec leurs employés, clients, fournisseurs et autres intéressés.

Pour Barry Effler, président de la Section nationale de l'ABC sur les mécanismes de règlement des conflits, le nouvel engouement pour l'approche préventive provient de la croyance ancrée chez les nouveaux juristes que « parfois, un client ne gagne pas en gagnant ». S'affronter en cour coûte temps et argent, en plus de ruiner, le plus souvent, toute possibilité de relation future entre les parties.

L'épithète de nouveauté qu'on tend à accoler au droit préventif fait sourire d'autres juristes. Pour Maria Holman de Vancouver, qu'il s'agisse de contrat ou de testament, le travail d'un conseiller juridique implique toujours de s'assurer d'être à l'abri de contestations judiciaires futures. Elle-même encourage ses clients à l'appeler s'ils ont des ques-

tions afin de pouvoir déceler, en temps utile, les problèmes latents.

Toute nouvelle ou simplement recyclée, peu importe, l'idée du droit préventif devrait s'intégrer naturellement à tous les genres de pratique. Il s'agit d'une excellente façon de recruter et de conserver des clients qui en viennent alors à considérer leur conseiller juridique comme un partenaire impliqué, soucieux de leurs affaires autant qu'eux-mêmes.

Voici quelques conseils pour prendre le virage « droit préventif ».

1. Débordez du corset juridique et envisagez les problèmes de nature commerciale, économique ou autre qui risquent de toucher votre clientèle.
 2. Travaillez *avec* vos clients. Il s'agit d'un travail d'équipe. Intéressez-vous à eux et à leurs affaires.
 3. Gardez le contact. Vous pourrez ainsi mieux détecter les changements susceptibles d'avoir un impact sur les affaires de vos clients et réagir en temps utile. Même un simple appel téléphonique à intervalles réguliers peut laisser entrevoir des difficultés imminentes.
 4. Prodiguez vos conseils sans frais; il s'agit d'un investissement marketing. Calmez les appréhensions de vos clients et encouragez-les à vous appeler en cas de doute ou d'interrogation.
 5. Faites montre de prévoyance et incluez une clause de médiation ou d'arbitrage dans tous les contrats que vous préparez.
- En prime, vous pourriez augmenter votre degré de satisfaction envers votre profession. « J'aime beaucoup plus parler avec mes clients de leurs relations d'affaires, dit Me Odutola. La partie la plus stressante de la pratique arrive quand d'autres avocats se mettent de la partie. Les choses deviennent alors beaucoup plus compliquées. »

problem that needs to be addressed, that's when she'll start billing.

Tevlin agrees wholeheartedly with this approach. New clients often phone him seeking help with a problem already in existence. In addition to dealing with the issue, he'll always ask the client: "Why did this problem happen? Do you have a system in place to avoid future problems like it? Let's sit down for an hour and figure this out."

Odutola checks in with clients regularly by phone — he finds it more effective than sending a letter or newsletter ("clients are often too busy to read"). He alerts them to specific changes that could affect their business or personal lives, noting that the advice "has to be tailored to their situation, or else it won't sink in." Not only are problems anticipated in advance, Odutola finds these phone calls to be an effective and inexpensive marketing tool.

Real benefits

Clients are extremely positive about the preventive law approach. They come to see their lawyers as partners in managing their daily affairs and planning for the future, and believe that their lawyers have their best interests at heart. It's a powerful way of recruiting and retaining clients.

But lawyers benefit in areas other than the bottom line, as well. If preventive law is indeed simply a fundamental principle of lawyering recycled with a new name, still it's a principle that many lawyers may have forgotten. By rediscovering this

approach, preventive lawyers are also rediscovering the job satisfaction that has long eluded them.

Odutola finds that preventive law makes for a happier practice. "I'd much rather talk to clients about their business relationships," he observes. "The most stressful part of practice is dealing with other lawyers who just don't understand the whole picture. When lawyers get involved — particularly those who don't grasp the interrelationship between business and law — things get much more complicated and drawn out."

Tevlin agrees. "I became a lawyer to help people, not to show them what a big pain in the butt I can be when I'm cross-examining," he says.

Lawyers balking at a preventive approach shouldn't fear the unknown, he adds. "You're not working yourself out of a job. You're working up into bigger issues." Tevlin's clients now consider him part of the team, bringing him in at the creative, brain-

storming start, not the problem-riddled "cold facts" end.

"People talk about the unhappiness in the legal profession," but practising preventive law is "a good way of heading off that problem," he says. Thanks to preventive law, "I really like being a lawyer." •

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Susan Lightstone is a freelance writer based in Ottawa. For more information on preventive law, read the CBA's March 2002 Emerging Professional Issues Initiative at www.cba.org/CBA/EPIIgram/March2002.

"Clients want a fence at the top of the cliff," says Richard Suskind, "not an ambulance at the bottom."