

PREVENTATIVE LAW: A LAWYER'S ROLE

By Thomas A. Moseley, Esq.

At the heart of the current financial crisis is the failure of lenders to act in the borrower's best interest. An attorney could have played an important role in protecting and guiding these borrowers in making their important borrowing decisions. In most transactions, an attorney is the only person that is ethically obligated to act in the client's best interest.

Unfortunately, many clients do not seek legal advice until they have a problem. Often, clients perceive lawyers as the last resort solution - after something goes wrong. Attorneys contribute to this perception by failing to place greater emphasis on problem prevention. In addition, attorneys and local, state and national bar associations have failed to promote the attorney's competitive advantage - their ethical obligation to act in a client's best interest. Many people do not understand or appreciate the significant role attorneys could play in assisting them with important decisions. The proliferation of non-lawyer competition and online form services is evidence of this lack of understanding or appreciation by the general public. Non-lawyers are providing advice regarding Medicare and Medicaid, real estate, mortgages, business sales and estate planning among others. Many attorneys complain that the non-lawyer advice the client receives is not in the client's best interest. However, some attorneys have added to the confusion by creating online form services, title insurance companies, real estate brokerage and mortgage brokerage companies to compete directly with other businesses. The client and others are often not sure whether the attorney-owner is acting as a lawyer or as a businessman.

Just as some doctors practice preventative medicine to avoid future medical problems, more attorneys need to practice preventative law to avoid future legal problems. The practice of preventative law is similar to the traditional legal practice of solicitors under British Law. Solicitors were often referred to as Counselors at Law. The emphasis of a solicitor was on understanding the needs and desires of the client and his or her family and using his or her skills and knowledge to achieve those needs and desires.

The practice of preventative law moves the attorney from providing reactive guidance after the fact to providing proactive guidance before the fact. The best time to guide and protect a client in a real estate, mortgage or business decision is before the client buys or sells, before problems arise or before a foreclosure is filed. The time to properly plan an estate is before the client dies or becomes incompetent, before family disputes arise, or before other problems develop.

Preventative law requires an attorney to shift to an anticipatory thinking approach. It requires an attorney to be a better communicator with clients, to better understand the client's social, relational, financial and emotional needs and desires and to structure the client's legal affairs in a way to lessen or prevent problems from arising.

When practicing preventative real estate law, an attorney should become involved early in the transaction, preferably before the contract is signed. The attorney should be involved in all aspects of the closing, including selecting the appropriate mortgage, reviewing all closing documents and reviewing and minimizing title insurance exceptions. The title insurance commitment should be prepared or reviewed early so

that problems can be anticipated and solved before closing. There is a difference between disclosure and understanding. The government requires a number of disclosure documents in most mortgage and real estate transactions. The large number of documents often makes the process all but impossible for the client to understand. An attorney should assure that the client understands the transaction and is fully informed of potential problems.

When practicing preventative estate planning, an attorney should understand the family dynamics and family financial needs and desires. A major goal of preventative estate planning is to eliminate family disputes and to thereby improve marital and family relations. A thorough understanding of the family's social, relational, financial and emotional needs is critical to a successful estate plan. Asset protection can also be an important part of a preventative estate plan.

Many legal disputes can be traced back to misunderstood contracts and commercial transactions. Preventative law for business would assure that the client fully understands such contracts and transactions, their legal ramifications and methods to prevent or counteract problems before they escalate into legal action. The implementation of good managerial practices is also critical.

To compete with non-lawyers and online form services, transactional attorneys must become more proactive. An attorney's ethical obligation to act in a client's best interest should be promoted by attorneys and bar associations. Attorneys perform a critical function in society by protecting clients and facilitating transactions. If mortgage borrowers had consulted with an attorney who practices preventative law, the current financial crisis could have been avoided. Attorneys have an obligation to assure that the public understands and benefits from the ability of legal advice to prevent problems. If an attorney owns an interest in a related non-lawyer business, he or she should clearly indicate to a client whether or not the lawyer-owner is providing legal representation. Attorneys need to provide not only crisis management, but also crisis prevention. As an attorney, you are more than a problem solver; you are a problem preventor. Preventative law will enrich your life both financially and personally as you act more as a family friend, consultant and negotiator.

Thomas A. Moseley is a Board Certified Wills, Trust and Estate Attorney. He practices preventative estate planning, mortgage, real estate and business law.