The Voice - July 7, 2010 VOLUME 9 ISSUE 27

In This Issue

DRI News
This Week's Feature
And The Defense Wins!
Legislative Tracking
Quote of the Week
New Member Spotlight
DRI Cares
DRI CLE Calendar

Links

This Week's Feature

Practicing Preventive Law
By Kenneth Ross
***Bowman and Brooke LLP*, Minneapolis, Minnesota**

I have devoted most of my legal career to the practice of what is called "preventive law." Preventive law is somewhat of a misnomer, as not all litigation and other legal problems can be prevented. However, the term, which has been around since the 1950s, is the most succinct and descriptive term for this concept. More recently, some lawyers have started referring to it as "risk management."

Preventive law is more than "legal compliance" in that one can comply with the law and still have legal problems. And preventive law also does not stop at compliance with a company's business ethics policy. A company can be ethical and still have legal and business problems. The key is you want to prevent or minimize the risk of a legal problem but also be prepared to deal with it if it occurs. In that sense, part of preventive law is planning for litigation before the event occurs.

Preventive law is both proactive and reactive. It can be done before an event, a transaction, or sale of a product. Or, it can take place after a legal problem arises. A product recall is reactive but meant to prevent future liability. And trying to fix the product so that it doesn't have to be recalled in the future prevents future liability. In fact, litigation technically falls under preventive law since its goal is to prevent liability in that case, but also not to increase future potential liability.

I started practicing in this area when I became an in-house lawyer and was asked to help my businesses prevent accidents, thereby minimizing the risk of future litigation. I had no idea how to do that – this was not something that was discussed or taught in any organized way in law school or in law firms.

Much of law school and legal training over the years focused on resolving legal problems after they occurred. With the exception of transactional lawyers and lawyers who counsel

in legal compliance, in many areas of practice, such as product liability, there was little precedent for lawyers being involved until the legal problem arose.

As a result of my interest in learning more about preventive law, in the late 1970s, I created a product liability seminar sponsored by the Practising Law Institute that mostly dealt with how to prevent product liability litigation. The preventive concept was a hard sell to litigators who were hired after the accident occurred or lawsuit filed. It was even hard to convince many in-house lawyers that there was a proper counseling role for them in helping their clients try to prevent the problem or minimize the chance it can occur. They were, as I was, mostly involved in managing the defense of litigation.

Why so much resistance or lack of interest? First, most business people think of hiring a lawyer after a legal problem occurs. So the demand for such services was not robust, especially decades ago. Second, lawyers were not comfortable giving such advice because preventive law was perceived as very speculative and not directly based on case law, regulatory law, or even transactions. After an event has taken place and a legal problem arises, we have an event or a transaction, a place, a time, and known parties. With preventive law, none of that is known. The proactive part of preventive lawyering means that the event has not taken place and therefore, we have an unknown event, time, place and parties. How do you give useful legal advice without such information?

What my clients are asking me to do is help them comply with the common law and regulatory law where nothing has happened yet. And to do so in all 50 states and around the world for as long as their product is in customers' hands. And if something happens, they want to be protected. Giving legal advice in that situation is challenging and sometimes gut-wrenching.

Predicting future legal problems involves risk assessment and is a necessary ingredient to successfully practicing preventive law. It involves an identification of potential legal and possibly non-legal problems that could occur and then a quantification of both the probability of occurrence and consequences (*e.g.* severity) if they do occur.

You can’t just assume a “worst case scenario,” meaning you always assume a high probability of the worst outcome. If you did, your client would have to do many things that probably aren’t necessary if they followed your advice. And they would never hire you again. You have to be practical, but be sure the client understands the risks of doing or not doing certain things.

So, what do you do? Where do you draw the line? Where can your clients draw the line? How do you estimate probability? This is the hard part of preventive lawyering. We need to know the common law generally but since we don't know where the legal problems may arise, it is not that useful to consider the law in specific jurisdictions. And the common law is an amorphous and sometimes ever-changing concept.

We also need to know the applicable regulatory law, but that is only the start to giving advice in this area. Such law is usually pretty vague, subject to interpretation, and it is unclear how and when the applicable government agency will interpret it and enforce it. Enforcement comes and goes, usually with a change in political parties, and it is difficult to know how much weight to give to that in assessing risk. Violating the law can be a problem even if the law is not being enforced.

Providing proactive legal advice includes predicting the future and necessarily involves making educated guesses. Despite that, we play a crucial role in helping our clients identify risk and then giving them legal advice on what could happen if it isn't avoided and what procedures can be taken to avoid it. And, in fact, we should also not be shy about putting on our business hat and telling the client whether what they are going to do is a good or bad idea, even if it complies with "the law."

When a client asks me whether they need to add a safety device to make the product "reasonably safe" or whether their warning labels are legally adequate, my advice is based on the law, but mostly based on over 30 years of experience doing counseling and defending litigation and a gut feeling as to what is reasonable, compliant and defensible.

Our role in this area is more of a legal risk manager. And also as someone who helps to make sure that the client has identified all of the information necessary for them to make a reasoned business decision. Risk will never go away. But I want my clients to fully understand the risks, so they can make a business decision and accept a level of risk that they are willing to live with. The goal is that if something happens, the client is not surprised by its occurrence or severity.

Hopefully, the problem doesn't occur. But if it does, by obtaining preventive legal advice, the client should have a better case, whether they are a plaintiff or a defendant. In that way, the preventive lawyer is providing the best possible services given the speculative nature of predicting the future.

More and more lawyers include some preventive law terminology in their practice descriptions. This is a good development. However, to provide the best services possible, they have to remove their litigator's hat and try not to be too

conservative in their advice, as this will stifle some business activities that should be undertaken and possibly result in the taking of unnecessary actions.

Figuring out how to be a helpful, practical, and realistic preventive lawyer is tricky. You don't want to mislead the client by underestimating or overestimating the risk. And it is impossible to identify all possible risks. But you must learn the law generally, learn about your clients and their appetite for risk, and learn about the various ways in which risk can be minimized. Putting it all together is helpful for the client, and hopefully society, and can be immensely gratifying to you as a lawyer.

Kenneth Ross
Bowman and Brooke LLP
Minneapolis, Minnesota
kenrossesq@comcast.net

Published by DRI

*Kenneth Ross is a former partner and now Of Counsel to Bowman and Brooke LLP in Minneapolis, Minnesota. He is active in DRI and currently co-chairs the Product Liability Committee's Manufacturer's Risk Prevention Specialized Litigation Group. He also writes a regular column on product liability prevention for that committee's newsletter, *Strictly Speaking*. For more information on preventive law in many areas of practice, see http://www.preventivelawyer.org/main/default.asp. For more information of preventive law in product liability, see www.productliabilityprevention.com.