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Symposium: Creative Problem Solving Conference – Conference Transcript Excerpt – Session 3: Mobilizing Creative Problem Solvers

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SESSION 3: MOBILIZING CREATIVE PROBLEM SOLVERS

I. PANEL DISCUSSION

MS. BOWERMASTER: Good morning. I'm Janet Bowermaster. I'm the academic director for the McGill Center for Creative Problem Solving, and professor of torts, family law and domestic violence at Cal Western.

We are now embarking upon the third and final preliminary session in our conference on the lawyer as a creative problem solver. Our first session focused on envisioning the new lawyer. Session two looked at training the creative problem solver. And in this session, we're going to address the challenge of mobilizing creative problem solvers.

Now, remember that throughout our presentations and discussions, we've focused on a broad scope of creative problem solving. Although alternative dispute resolutions and skills may be the first notion that comes to mind, it is not co-extensive with creative problem solving. We've also been talking about preventive law, parallel thinking, therapeutic jurisprudence, collaborative lawyering, community lawyering, and more.

During the last few days, we've suggested a wide range of competencies that are needed by the creative problem-solving lawyers. Included among these are the ability to understand legal problems in their full context, and the ability to generate occasional non-traditional options for addressing those problems.

We've talked about the familiarity and the need for familiarity with social services to whom clients can be referred. We've talked about the need for the ability to work collaboratively with other lawyers and other professionals, the need for ADR skills, such as listening, problem identification, negotiation, mediation, and so on.

We've talked about the need for interdisciplinary competencies, the need for traditional litigation and transactional skills, the need for person-centered concern for our clients, and more.

It may be that different competencies are needed depending on whether the creative problem-solving lawyer is involved in judging, in individual representation of clients, in legislative work, in community involvement, in policy work, or in other areas.

As we explored our vision of the creative problem solver and the creative lawyer, many obstacles to achieving that vision have been identified over the last few days as well. And some of these include questions such as,

will this new kind of lawyering be accepted by clients who may have traditional expectations of what their lawyers can do for them as clients? Will creative lawyering pay the bills practicing lawyers? For law schools, will it attract students who are concerned with building resumes that reflect traditional forms of achievement and excellence and who are concerned with passing the bar exam? Will creative problem solving be accepted by law school faculties who may find that they themselves need to retrain to develop new skills to broaden their perspective? Will it be rejected by academics as touchy-feely? And more. The concerns are numerous.

So, our panel this morning is going to begin our discussion of where do we go from here, what should our curriculum look like, what are the obstacles and what can we do to mobilize from here. They're going to begin by giving individual presentations from varied but related points of view.

So, it's my pleasure to introduce our distinguished members of the panel, and we'll begin with a presentation by Steven Keeva. Steven is the Assistant Managing Editor of the *ABA Journal*, which is the official publication of the American Bar Association and the most widely read legal publication in the world. The winner of numerous awards for feature writing, he has written on a range of topics for magazines in the United States, Australia, Great Britain and Japan. His articles for the *ABA Journal* have been used as instructional materials by bar associations and law schools nationwide. He is also the author of a new book called *Transforming Practices, Finding Joy and Satisfaction in the Legal Life*. Steven?

MR. KEEVA: Thank you. Yesterday, I was sitting and thinking about what really stands out in my mind from what I've heard here so far, and the answer came to me very quickly. It was something I heard within five minutes after I walked in the first day. Jeanine was talking about the *Palsgraf* case and she mentioned Mrs. Palsgraf's daughters, and that to me is sort of like this beating heart beneath a lot of what we've been talking about. The unusual focus on the Palsgraf daughters was an example of finding sort of new focus of meaning in something that we'd always looked at in a different way, and it seems to me really important that we have at least another couple of stories to leave here with.

So, I wanted to tell a couple of stories that I think have a lot to do with creative problem solving. The first one concerns a lawyer in western Michigan, who at one time in his practice went off to Lake Michigan and got a cottage and spent a weekend doing some deep soul searching, to decide whether or not he wanted to continue the practice of law. He came away being absolutely certain that there was one thing about practicing, one experience he'd had without which he didn't really want to live his life. It was something he needed to do. And that was help people in pain, often physically injured people, but also emotionally injured people, to heal and to feel better again in whatever way he could, and bring all that he had in him as a person and a lawyer to bear on helping people.

He stayed in the practice, and some years later, in fact, quite recently,

this story transpired. A couple came to him who had two twin daughters, both of whom were born with a really terrible degenerative muscular disease. The prognosis wasn't very good for them living a very long life, and in fact, one had recently died. The other daughter was in a bad way and was living in a nursing home. They'd both been living in that nursing home for many, many years. And the night before this couple came to see this lawyer, their daughter in the nursing home had been sexually molested in her bed by a janitor there. They appeared absolutely grief-stricken, angry, everything you might imagine. And the father wanted to sue the nursing home. He just felt someone had to pay for what happened to his daughter. His wife did not want to sue because her feeling was that, for all the years the girls had been in the home, they'd been treated quite well. The family generally was treated well. The service was good. And when this incident happened the previous night, no one made any attempt to hide anything from them. They told them exactly what happened. The man who did it had been arrested and was in jail.

This lawyer listened to them for about an hour, probed, asked everything he could think of to try to understand them and their situation as well as he could. And at the end of the hour, he said to them, "You have a wonderful case. My experience tells me this is a very strong case. I would be really surprised if you recovered less than a million dollars in this case. But, given that, I would suggest that you not file this claim." And they were shocked. They had pretty much the same impression of lawyers as most people do and thought, well, the guy's talking about turning down a third of a million dollars, if he's right, and they asked him why he thought this. And his answer was that there were three reasons.

One reason is that these people are still relatively young. Their daughter was not going to be around much longer. And if they got embroiled in serious litigation, the few years they had remaining to spend any time with their daughter would quite likely not be very pleasant for them.

The second reason was that the daughter would have to be moved. You can't sue the nursing home and keep her there. And the closest place with reasonably comparable care was in Detroit. They would have to drive three hours to go see their daughter, who they saw every day at this point.

The third reason, though, is the one he considered most important. By observing these folks, he concluded – and this is what he told them – that the reason they'd survived this long, as healthy and happy as they still were, is because they had each other, and his experience told him that because of what litigation can do to people, there would be a relatively good chance their marriage would be destroyed if they disagreed on how to proceed on this. So, he said that he would be willing to do whatever they decided they wanted to do. He asked only that they spend the weekend thinking about it. They were quite religious so he asked them to pray on it, talk to their priest or preacher or pastor, and come back and see him on Monday. They did that. They came back Monday and they said, "We think you're right. We're not

going to do this.”

Switch to another story that I think has a similar moral, but is in a different context, the context being a big Chicago law firm and a business transaction. This is a story that I have in my book that David Link, who until very recently was dean of Notre Dame Law School, told me. It’s about him. He worked in Bobby Kennedy’s justice department, and when he came out, he was a real hot shot lawyer in the justice department. He looked for a job and found one with Winston and Strong in Chicago and was hired as a partner doing tax litigation work. And one of the first things he was asked to do by the partner in charge of the particular case was to design the tax plan for the sales of a trucking company, and he did a lot of work on this thing. He wanted to just present the most exciting tax plan anyone had ever seen.

The day came when the partner in charge brought him and a lawyer that Dean Link refers to as Charlie together with the client to present what they had done for the client. The other guy was supposed to draw up the documents for the transfer of the business. And he called on Link first and Link brought out his charts and just wowed everybody in this dazzling array of legal brilliance in the tax area, showed him how much money he would save. And then the guy said to Charlie, “What do you got here? What are you going to do?” And Charlie said, “I don’t have anything.” And the partner in charge was not real happy and he asked him why not. And he said, “Because I can’t do this in the abstract. I’ve got to ask the client some questions.” And the partner in charge said, “Well, he’s sitting across the table from you. I think you ought to do that.”

So, Charlie said to the client, “Do you really want to sell your company? Do you really want to do that?” And the guy said, “Of course I want to do that. That’s why I came here. And I want to sell it because it was valued at ten million dollars. Someone has offered me twelve million dollars. I do want to sell it.” And Charlie said to the guy, “What are you going to do with yourself if you sell it? I mean, you’re in the trucking business. What are you going to do? Are you going to travel around the world and have a good time? You know, you can do that anyway. You’re a wealthy man. What do you want to do?”

This went on for a little while. Eventually, David Link looks over at the client and the guy’s got tears running down his face. It turns out the guy goes ahead and tells the story of the trucking company, which was born in a dilapidated garage on the south side of Chicago. His dad started it. It had been built up into something really significant. And in fact, he didn’t want to sell the company. He really did not want to and he chose not to.

I think it’s clear there were probably some people at Winston and Strong who were not thrilled with that result. But, as Dean Link said, this guy, the client, was well-connected with lots of people in the business community and went to the country club, and there was no doubt that the next time someone said, you know, “Who do you use as your lawyer?” he was going to say, “You go to Winston and Strong. They’ve got lawyers like

Charlie. You've got to go there."

It completely changed the way David Link looked at clients from that time on. He said he never made any assumptions. He had to ask questions and find out who the people were behind the cases.

To switch gears a little bit here, in terms of what might be appealing about creative problem solving to lawyers, Bruce Winick spoke for a minute at the microphone the other day and talked about how we have to not look only at what this does for clients, but what it does for the lawyers themselves and their sense of well-being and enjoyment and happiness as practitioners.

I wrote the book I wrote partly because it was clear to me that there was a real crisis of meaning in the legal profession. Lawyers weren't finding a whole lot of meaning in what they did. It was a lot of noise and movement and the meaning was eluding a lot of them. I'm constantly reminded of this yearning and hunger for meaning. Partly the response to my book, which has been very strong, seems to be this collective sigh of relief that somebody's talking about the need for meaning in the law practice.

And since the book came out, I published a few articles. One is on the healing law firm, which happens to be the firm of this Michigan lawyer, where their goal is really, really healing people. I wrote another piece on listening. And a third on the role of apology in law practice. These are all, you know, kind of touchy-feely soft kind of things, you might say. But, the responses to all three were really, really strong. E-mails and letters and all kinds of things, people asking me my advice on when they should apologize in a case, and all kinds of other things.

But, this just kind of leads me to think this is part of that hunger for meaning in work. A guy called me from Washington at one point, having just read my book. He said the problem with most lawyers is that their work has no tangible benefit to the soul unless you go through the process of connecting everything up. They don't have time to connect everything up, was his point.

I think creative problem solving, as I understand it, is a way of connecting all these things up, the client and yourself, and your need for meaning. And certainly, you're going to be involved in sort of facilitating finding meaning for clients, which in itself, I think, is probably a terribly meaningful thing to do and a satisfying thing to do.

I've been reading a book on creativity recently, and a point in the book is how much meaning creativity brings to one's life. One of the reasons is that most of what we really value and find really interesting in life is the fruit of the creative process. Additionally, this book is based on hundreds of interviews of very creative people in the arts and sciences, who overwhelmingly report that they feel most alive when they're creative, when they are creating. It's a really enlivening thing to do. I think that's an important piece of the puzzle here on creative problem solving.

Being creative is fun, it's exciting. People who do it, at least in the arts and the sciences, report just having a blast when they're being creative. I

don't know if that translates exactly into the legal realm. But, I think the sense of being more alive when you're being creative is probably really there.

The only other thing I want to say gets a little more touchy-feely. But, although I live and work in the Chicago area, I'm a Californian. So, I get to do this. Lawyers tend to be so caught up in things all the time. Doing, striving, working, winning, controlling and covering your ass a lot of the time, too, I think. That's a big part of it. And it's hard when you're practicing law to stop and take a breath sometimes and realize you really are here where you're sitting. Your mind is ahead where you need to be and behind you involved in all kinds of problems and issues. I suspect that the work of creative problem solving, working with clients in a deep multi-faceted way, is an experience that brings you more into the present moment than most of what law practice is, and I think that's an inherently satisfying thing to do. Thanks.

MS. BOWERMASTER: Thank you, Steven. Our next speaker is Diane Yu. She is associate general counsel of the Monsanto Company, which is an eight-billion-dollar company with agricultural, pharmaceuticals and nutrition businesses. She formerly served as general counsel for the State Bar of California, in which capacity she successfully argued 33 Supreme Court cases in California and one U.S. Supreme Court case. She is a former White House fellow and special assistant to the U.S. Trade Representative. As the current chair elect of the ABA section on legal education and admissions to the bar, Diane is the first Asian-American to chair any ABA section or division. She is also a board member of the American Corporate Counsel Association, a member of the ABA House of Delegates, a former member of the ABA Commission on Women in the Profession and a former member of the Commission on Opportunities for Minorities in the Profession. Last year, 1999, Diane was named as one of the 25 most influential women in business in St. Louis. Diane?

MS. YU: It's a great pleasure to be here. My topic is helping to mobilize creative problem solvers in the law, and I'm trying to give you a little bit of perspective from the client's view, because Monsanto is a pretty big client to a lot of law firms around the country, and there are some things that I've been learning in the corporate experience, which is extremely exciting and a little dizzying sometimes. This might be of value if you're sort of contemplating how to do these things, how to help create and mobilize problem solvers in the legal and academic communities in which you serve.

As I was looking at this topic, I was reminded of something that Mahatma Gandhi once said when he was asked what he thought of western civilization. His reply, "I think it would be a good idea." So, as I look at the legal profession, past, present and future, I see some changes that we have experienced or have seen, some that we may not know are coming. But, at least if I look at the business world, which I think is a few months, if not years, ahead of the legal profession in many ways in terms of adapting to

change, it might be of some help if I point some of them out.

First, the traditional model of lawyering. A lot of people have made great successful careers based on a fairly conventional model of serving as a counselor or advocate, attorney at law for individuals and corporations, and things worked very sensibly. People understood if you either did lots of hard work or you were a star with the jury or you brought in lots of business, you'd be a success.

I think in the present model, there's been some changes, some seismic changes. All you have to do is read the paper and see these \$125,000 entering salaries that law firms are offering brand new graduates. I mean, it is horrifying, if you think about it, because what they know is considerable, but they really don't know anything for the most part, other than those who had some summer experience, what it really is like to compete and to be in the law firm experience and exposure. It is a little bit frightening when you think about the fact that some of these associates in their first year are making more money than the Chief Justice of the United States Supreme Court. It's a little mind-boggling what the disconnect is there.

But, that kind of change, both in economics and in the way law is practiced, has been upsetting, I think. In the last five to ten years, people have seen partners fired, people moving back and forth, no loyalty, no dedication, no continuity of service. Law firms are getting fired because they lost an attorney to someone else. It's a little bit like the sports free agency market. And it's just bewildering to some people that these sorts of dislocations and these kinds of changes are occurring.

And that may define a present reality that some people are not terribly comfortable with. At the same time, you have these internal battles. You also have multi-disciplinary practice, and multi-jurisdictional practice, the sort of efforts that some lawyers see as encroachments in the traditional practice of law and who does it.

I see a future that's going to be different from the past and the present, where lawyers will be viewed as partners. They're going to be viewed as strategic planners, as thinkers, as people who are going to bring together their wealth of skills and talents to help the client get the job done. Perhaps they'll help divert clients into doing things, or prevent them doing things that would not be in their best interest, but would help them achieve a greater goal, their ultimate goal. This is exactly the same kind of lawyer that Steve mentioned earlier who helped the client see what it was he really wanted to do, as opposed to what he thought he ought to do.

I can tell you, at least from the corporate setting in which I've been involved, some things that our business does to try to develop, nurture, reward and continue a creative spirit. And some of these may apply to the legal academy and to law firms and legal employers, and I hope you may find some of them interesting.

I have eight ideas, or proposals. The first one is top leadership commitment. We have a CEO at Monsanto, Bob Shapiro, who has been noted

worldwide for his extraordinary visionary skills, for his creativity, for his out-of-the-box thinking, for his encouraging a climate in our workplace that is very ambiguous, very uncertain, constantly changing, where there are no assumptions that cannot be pushed and tugged and shoved and changed and messed up. I mean, it is an amazingly creative, dynamic, sometimes frustrating and unstable, but extraordinarily productive way to work. It is very similar to the kind of climate that's being developed in the Silicon Valley. It is extraordinarily constant in terms of its change.

Secondly, continuous learning. Bob Shapiro would be someone Bob MacCrate would really love, because the MacCrate Commission's notion of a continuum of education, training and development is really part of our company's way of doing things, too. We support that through tuition, so people who want to get an MBA, they want to get a JD, they want to do this and pay for their tuition, we encourage them. We have nonstop training and education, both electronically and through live training programs, and we're encouraged constantly to keep learning new things. You have to. In business, there is no constancy. It would be inconceivable that someone could do the same thing year after year, because you have to change and adapt to the changing climate in business month after month, sometimes week after week. If you were so whetted to doing things in a conventional way, you would easily be bypassed. You'd become the little store along the interstate that no one visits anymore because they've got the Walmart next door. I'm not saying that's always good. I'm just saying that's the way business is.

The third thing, we use outsiders. We do not depend just on the internal talent, strength and intelligence of our people, which is considerable. We also like other people, outsiders, whether they're consultants or advisory boards or scientists or others, because we have a very heavily science-based culture, to come in and pick at our ideas, try to figure out how they can make us more effective, more efficient, get our message across, do better with our customers, with the public, what have you. It's even sometimes very upsetting to be challenged by these outsiders who come in, say what they want and leave, and they don't have to live with their results. But, it is also very creative. It forces you to not believe that your way is the only way of doing things.

Fourth, we reward people according to how well they are creative, how well they express their energies and their innovative qualities, and we do this through our bonus system, because 75 percent of most people's bonuses will be on their business performance, which you'd probably expect. But, 25 percent is based on what we call their developmental goals, which include things like how creative they are, how much risk-taking, courage, team work, leadership, communication, how they do in other areas besides just delivering their numbers. It's a rather different system than most companies, but we think it really does help put a focus on innovation. And one of the results we have is that in the last three years, we've filed over 500 patents in the patent office, which is an extraordinary record for a medium sized com-

pany.

Fifth, we believe in cross-fertilization. We do not think that you can keep getting better if you keep doing the same thing. We encourage people to take overseas assignments and people from overseas come to the States and work here. We encourage IP lawyers to get into the business and work with the research people, not just as lawyers, but as business advisors. We encourage patent scientists and agents to go to law school. They come back and become lawyers and they have the benefit of both their business and science background and the law background. We send lawyers to the business to learn it, and vice versa. We do lots of different things, mix it up a little bit. It can be unsettling sometimes. But, it's also extremely exhilarating and I think people do learn and stretch.

Sixth, we do tons of things in teams. There's almost no team we haven't formed. And we find that that is a very effective, sometimes messy, way of doing things. It's sort of like that democracy quote about, "It's the worst way of governing a country, except every other way." Well, teams we've found do things in a very different way than if you just have very smart people thinking of their own little isolated way of doing things. We encourage cross-disciplinary teams. I'm on one right now where I'm the only non-scientist, non-technical person. I'm sort of offering the layperson's common sense approach and they're finding it kind of helpful, because they're so into their science. They know that stuff, but they don't know how to communicate it as well. So, I can be of some benefit. And I'm learning a lot from them.

The seventh is technology. If you don't prepare students for the extraordinarily heavily-reliant, technology-based society, then you're doing them a disservice. It's my hope that every law school will have that capability of getting every one of their students phenomenal skills in the technology area, because it's what they're going to need to survive and thrive.

And finally, we have a sort of flat organization. It's not the classic organization chart. We have bubble charts. We have overlapping charts. We have ways of showing that different people interrelate with different people. But, it is not an environment that is heavily structured or relies on sort of military—approaches. We have senior executives, including our CEO, who has an office without walls. It's basically a Dilbert-style cubicle. He thinks that this helps foster interaction. People will stop by and visit. They won't see closed doors. They'll see openness. They'll see innovation. They'll see opportunities to talk to people constantly. And we find that that's helpful. And we have a casual dress code.

So, these are some of the eight tips that corporate entities are using to foster creativity. I think, in the law school arena, I have ten quick ideas that you might want to think about, that we could talk about in the discussion part that might be of some use.

First, when you're teaching people how the law has developed through the case study or any other way, I would urge you to consider not just what

the law is, but how and why it developed the way it did. That helps people think in a creative way, when they understand what went into it, the context for it.

Second, the continuum of learning example that you set is going to be very powerful. I mean, students look up to those of you teaching, or if you're an adjunct professor as a practitioner, they'll look up to you. And if you, through your own experience, demonstrate that commitment to continuous learning, that will mean a lot and they will carry that with them and you've done them a great service.

Third, technology, I've already pointed out. I think it's very, very essential that you give them those kinds of skills, so that they have those capabilities. I've been to law schools where they have one courtroom that's outfitted for technology. It's simply not adequate for this day and age.

Fourth, use those outsiders. Get relationships going with your economics departments, philosophy departments, business schools, medical schools, science-based departments. Have those kinds of folks come in and talk to your students from time to time. Have them interact. Have them understand how law fits into the greater mix in the greater society, because it will give them, I think, a breadth of understanding of how law works much better than if they're just sticking to their case books.

Next, mentors. Make sure that you are available and others within the law community are available for mentoring. There is an expression an educator once used that finding great mentors is like finding great oranges, to squeeze and get as much juice as you can out of them because you will learn invaluable lessons from all of these sorts of people. And mentors come in all shapes, sizes, ages, experiences, and I think if you help alert students to how important it is for them to find mentors throughout their careers, that they may actually take some proactive efforts to find them.

Next, I would say, change and ambiguity. Prepare them for a life where everything's going to be changing all the time and very fast. Flexibility and adaptability are going to be very critical as they move ahead and practice law in any setting.

Next, I would say, consider that the way you teach can be changed. It doesn't have to be the same thing where you're up there talking. You can have students teach. You can break into small groups. Some of you like the break-out groups here. You could do some of those things in your teaching environments, and not just be wedded to the way it's always been done. It doesn't always have to follow that kind of routine. I think you'll find it more stimulating and I think students will learn a lot from each other, if you give them a little guidance and direction. But, also, trust them to understand that they can control their own education to some extent, too.

Next, you could consider ways in which you discourage them from linear thinking. I think lawyers tend to think one step after another, and this is where you end up in court. There are other ways to do things. I think, again, Steve's examples of how lawyers can think in a more holistic way, in a

roundabout way, in a zig-zag way, as opposed to strictly linear can be of a great benefit. We see this in the corporate setting all the time when you're testing a new marketing idea. You don't just come in with one idea. You usually have about twenty ideas and try to get them whittled down. You want people to think broadly and then narrow, as opposed to start narrow and then if you're lucky stretch it out.

Finally, interconnectedness. I think it is a mistake if people think that the U.S. experience is it. Most companies, many businesses are international. We have a globally connected economy, and if you don't prepare them for a world where there are tremendous amounts of diversity out there, lots of different ways of doing things, many different approaches, again, you are not giving them a competitive advantage that will be useful to them, and I think that's important for law schools, as academically inclined as they are, to be aware of.

In the end, I think it's an exciting frontier of activity that we've got facing us. I think it was Nina Totenberg who once said: There will always be a need for law; whether every lawyer that we have trained the way we have them trained is needed is another thing. I think in order for us to get above the curve, ahead of it, and help students in every way we can, I think it's helpful if we accept the change and the challenge that's imposed upon us.

I certainly wish all of us a lot of luck. I'm looking forward to being chair of the section coming this summer. It will be an exciting way to work together, from the practice and the academy, to make these things happen. And as Jack McConnell, who is the co-inventor of Tylenol, once said, the future remains ahead of us. Thanks a lot.

MS. BOWERMASTER: Doesn't she make practicing law sound like a lot of fun? Our next speaker is Gregory Williams. Dr. Williams earned his bachelor's degree from Ball State University in social science and Spanish in 1966, his JD in 1971 from George Washington University, and a Ph.D. in political science from George Washington University in 1982. He has served as associate dean and professor at the University of Iowa College of Law; visiting professor, faculty of law at Durham University in Durham, England; visiting scholar at Selwyn College, Cambridge University; and associate vice president for academic affairs at the University of Iowa. He is presently dean at Carter C. Kissel (ph), professor of law and professor of political science at Ohio State University. During 1999, he served as the president of the AALS, and in July 1999, he became the first recipient of the National Bar Association's A. Leon Higgenbothom, Jr. (ph) Award for Outstanding Contributions to the Preservation and Promotion of Human and Civil Rights. In October 1999, he was selected dean of the year by the National Association of Public Interest. His nationally acclaimed book, *Life on the Color Line: The True Story of a White Boy Who Discovered he was Black*, was featured on several national television and radio programs. In 1995, that book was selected as book of the year by the Los Angeles Times. Depass (ph) Entertainment recently announced plans for the movie version of his book, and any nomina-

tions for actors to play his part can be made directly to Williams.

MR. WILLIAMS: Thank you very much for that kind introduction. I should say, actually, I have my son Zak here with me, and he is going to try out for the part of Greg Williams. It's very unusual that a child wants to emulate a parent. But, we may have that at least in some circumstances. It's really a pleasure to be here and to be part of this conference on creative problem solving. I think California Western School of Law deserves great credit, the faculty, the staff, the students, for putting this together, because it is critically important for us to talk about these issues.

I know that I've learned a lot about the important role of teaching problem solving as we train our law students during the time that I've been here. Of course, that's not an easy task. A large number of our students come to law school wanting to be litigators, and think they're going to be litigators. Actually, most of them don't end up being litigators, but the problem is that that is often the mindset that they have when they begin law school. And of course, we reinforce that to a certain extent in terms of our initial focus, as we talked about earlier, in focusing on the adversarial model. That reinforces this mindset that's awful difficult for us to get beyond.

You know, actually, there's the old saw about the parents identifying their most argumentative children very early on as going to law school. Actually, I think what we need more in law school is we need more listeners. Lawyers are notoriously poor listeners, and unfortunately, that often gets in the way in terms of legal education. I mean listening in the true sense of probing the thoughts and the comments of our clients and carefully thinking about what the clients want and what in fact they need, and I think some of the examples that Steve and Diane are talking about show the importance of that, and fortunately, we have some people that are doing that.

Now, I think we do a good job in providing technical training, but we just don't do a good job in teaching listening skills. This shortcoming really has a very special meaning for me when I think about the special challenges that our future lawyers are going to face in dealing with their clients in an increasingly diverse and multi-cultural world. It's one thing for us to have the substantive skills. It's another thing to be able to deliver those skills to the communities our lawyers in the future are in fact going to have to be delivering those skills to.

The facts and figures to me are pretty clear. We have a legal profession that's over 90 percent white. Persons of color in the next 30 to 50 years are going to zoom up to close to 40 percent of our population. For me, there's two inescapable conclusions to that. One, we need to do everything we can to increase the number of persons of color in the profession so that we will truly begin to represent the society that we serve. But, we also need to train the non-minority students and non-minority graduates to be able to deal with that diverse population that they are going to be facing out there in the future.

And in my view, our focusing on training problem solvers provides the

opportunity to reach these communities, because it shows the importance of really learning and knowing a lot more about your clients and the special needs that they have. If you're really, in my view, doing creative problem solving, it's going to require students to have a knowledge and awareness of the special and unique backgrounds that the clients have when they come in the door, when they're there trying to present their issues.

Well, if they don't have that knowledge, at least the ability – our students are going to need the ability to find out that information. Creative problem solving is going to require different skills than we have taught or trained folks in the past, if we're going to bridge this racial and cultural gap. We're going to need students who are more open, who are willing to be challenged, and have the ability to change their perspective. That causes us to do something different than what we've done in the past.

The issue for me as the dean of a law school has been, how can we infuse these training things and these characteristics into our curriculum, how can we make this happen? And actually, I believe that creative problem solving really is the answer here.

I've heeded the admonition that has been said several times, that ADR is not congruent with creative problem solving. But, I think ADR is creative problem solving, part of it, at least, and ADR for us at Ohio State had opened the way to allow us to do more in creative problem solving. And in fact, we spent a lot of time infusing ADR into the core of our curriculum, and I think that has enabled us to do many other things in terms of dealing with these kinds of issues. And actually, I do believe that if we want to try to infuse creative problem solving into the curriculum, what we might do is think about someone's suggestions on ways that we have infused ADR into the curriculum.

Lynn Riskin (ph) of the University of Missouri in one of his articles described characteristics that are in fact needed to infuse ADR into the curriculum, and I think the same things apply to creative problem solving. First, you need a lead faculty member. You need someone that can really provide leadership. You also need to develop a knowledgeable core of faculty members that understand and are interested and willing to promote this.

Obviously, you're going to need strong support. When I came to Ohio State, actually, I was the third dean that was supportive of ADR activity. So, we had a history of deans who were supportive of this kind of approach, and infusing these types of things in the curriculum. That's very important. Obviously, you're going to need to try to ultimately develop law school consensus on this. You know, sometimes, when I think about law school consensus in my perspective of seven years as dean, I think of this book that was written about higher education in Wisconsin. The title of it was, *Moving a Battleship With Your Bare Hands*. It takes on some of that flavor from time to time, but I think actually you can build consensus. It's hard but it's not impossible.

What was helpful for us, for instance, in the ADR program at Ohio State

was also outside support from our alums and from our graduates. Particularly in Ohio, we were fortunate to have a chief justice who was very supportive of the development of ADR. In fact, the chief justice took a million dollars out of his budget and allocated it to training judges in alternative dispute resolution. Of course, that's a big boost for us to try to do things in law school.

Well, obviously, there's a lot of inertia on curricular reform. I believe that our focus on ADR has allowed us to move beyond that into creative problem solving areas. But, what changes have we made and how has this really worked in our law school? Now, we really haven't labeled everything that we've done as creative problem solving. But, I think, after listening to the discussion here for the last couple of days, that it really fits within the type of things that we're talking about. Of course, we have twelve different courses in the ADR program. In ADR, we have a number of simulations in the courses. But, we have ten live client clinics in the law school. It's an opportunity for every student in our law school to have a live client, and I'll talk a little bit more about that in a minute.

We also developed a number of different programs that to a certain extent take students out of their comfort zones. We work with inner city schools and elementary and middle school and high school programs, and street law, peer mediation and programs like that. It gives our students an opportunity to work with students in different cultural and ethnic backgrounds than they are, and that's had a dual effect. On the one hand, it provides an opportunity for our students in terms of their learning. It also provides a service to the community.

In fact, recently, I talked with the principal of one elementary school and we had worked with a fifth grade class, actually, for about six weeks. And the principal was telling me at the end of that time, she said, "You know, Dean, on this peer mediation thing we were working on, I don't have any problems with the fifth grade class any longer. The problems I have are with the fourth grade class and the sixth grade class. The fifth graders have really learned it. They have taken it to heart." So, I think that's been important.

Of course, actually, they took it a little differently than my twelve-year-old son. He was a peer mediator at the school he was attending. I actually came home one day and I said, "Well, Tony, what do you do?" And he said, "Well, Dad, I have a clipboard, and I go out on the playground during recess and if kids are having problems, I write it down and I talk to them and I help them resolve their problems." I said, "That's really great, Tony." And then a couple of days later, he came home, kind of dog-faced, hanging down and glum. I said, "Tony, what happened?" He said, "Well, Dad, I was out on the playground today and I was talking with this kid, trying to help him resolve his problem and he wouldn't listen to me, and I hit him with the clipboard." So, Tony was out of the peer mediation program.

Actually, we've also encouraged creative problem solving by our stu-

dents in focusing on our pro bono work. For instance, at Ohio State, what we've done is we developed a public service designation that is placed on a student's diploma if they have fifty hours of public service. And so, actually, I was really shocked at graduation last year. We had a couple of students that had over a thousand hours of public service, which would include our street law program, externships and other things like that, and I thought that really shows a substantial commitment on their parts.

Another feature of our creative problem solving program, if you will, is we have developed a center for law policy and social science to try to focus both faculty and students on the importance of interdisciplinary work. In fact, we've drawn in faculty from political science, history, sociology, criminal justice, economics, business and medicine as part of our center for law policy and social science. And I think that's been important to show the interdisciplinary value of a legal education in terms of the understanding of the things that our graduates are going to face when they're out there practicing law.

Our creative problem solving program has also had an important impact in other ways as well. It has had an impact on faculty hiring, for instance, and right now, over a quarter of our faculty has degrees in areas in addition to law, either a masters degree or Ph.D. or some type of additional study. For instance, I have a Ph.D. in political science, and I remember thinking about this twenty years ago when I got that degree that many people asked me, "Well, why did you get it?" And about ten years ago, people in the law school world thought that was a novelty. But, when we look at hiring today and we see this Ph.D., we think this is a real plus. And so, I think that certainly has had great evolution and been very important for legal education.

But, again, I do think one of our most important creative problem solving training programs really has been our clinics. As I said, we have ten different clinics, an opportunity for every student who wants to have a clinical experience can in fact have that experience, have that live client attention, or live client focus which allows you to focus attention on a specific problem, a live client, a real issue, right in front of you.

Now, I understand—and we've talked about this a little bit—there's some dilemma or some question and discussion about the status of clinicians. Actually, I teach in the clinic. I think I'm probably only one of maybe two or three law school deans in the United States that in fact teaches in a clinic. Well, I do it for a couple of reasons. One, I really do like it. And two, I do think it sends a message. If the dean is willing to teach in a clinic, then that shows the value of that type of activity, and so I certainly have tried to send that message, because I do think it's a significant training program for our students as an opportunity to bring everyone together, to bring everyone at the table. It allows us to do, I guess, what Dr. Debono said, focus on designing a way forward.

Actually, my co-teacher and I, we try to think of this a little differently at Ohio State. For instance, we do the criminal defense clinic mostly repre-

senting indigents in misdemeanor cases when the police have them—and we think the most important thing that we teach our students is begging. Can you imagine teaching law students begging? It really puts them in a different place than they often are. So, I think it's been very important and it's been very critical to see the development in these students in terms of the perspective that they have after they've been in the clinical program and dealing with live clients has really been intriguing for me.

There's two final points that actually I want to make. I think we've seen a lot of change in the law school world in terms of what we're doing and the curriculum. I think Eric Schneider yesterday raised an important question, though, as kind of what happens after we finish. For instance, this question really was related to the bar examination. Recently, when I had an opportunity to talk with our board of trustees about some of the things we're doing in this area, she said, "Well, that's great, but too bad it's not on the bar exam." I said, "Well, you know, why can't it be on the bar exam?" And in fact, I'm trying to think about that now. Mid-April, I go to speak to the National Conference on Bar Examiners, so if any of you have any suggestions about how I can tell them to put this on the bar exam, please send those to me.

Finally, I think actually, while creative problem solving is not subsumed by ADR, we need to follow the way the ADR has moved from acceptance to critical importance in legal education. I think it's important. What I've seen in terms of my time as dean leads me to be very optimistic about the future for creative problem solving. I think it's ultimately what society needs from us, and in fact, if we don't deliver it, our students are going to start to demand it from us. So, I'm optimistic about the future. Thank you very much.

MS. BOWERMASTER: Our next speaker is Edward Dauer. Edward is the co-founder and president of the National Center for Preventive Law, and in that position, Dean Emeritus Dauer has spent more than two decades combining work in preventive law and alternative dispute resolution. He's been in law teaching for 31 years, including three years at Toledo, two at Southern Cal, and eleven years at Yale before moving to Denver in 1985. California Western is proud to announce that Dean Emeritus and Professor Dauer has been named Director of the Professional Risk Management Section of the Lewis M. Brown Program in Preventive Law, a new center of excellence at California Western School of Law. Dean Dauer.

MR. DAUER: Thank you. Just for a little audience empathy, I want you to think about 31 years of monthly faculty meetings, what that says about my wisdom. Legal education is the only thing I know and so it's the thing that I want to talk about under the heading of how we go forward from here. What I'd like to do is to respond to some comments that Dean Brest made yesterday when he addressed the group. You may remember that Paul expressed some skepticism about the enterprise of creative problem solving, which I will take for this purpose to include the related areas of preventive law and therapeutic jurisprudence, and some others that I think are fairly close cog-

nates.

Paul Brest had skepticism that this enterprise of creative problem solving could ever find a full measure of support within the legal education system as it exists today, because of the place that such novel ways of teaching must occupy within what he called the political economy of the academic world.

I'm much more optimistic than Paul Brest is about that, and I'd like to describe the differences that I have with Paul on that subject, not because I want to engage in the pleasure of debate, which I would not be able to have at any rate because he's not here this morning anyway. Although I should tell you that when I tried some of these ideas out on him as he was leaving yesterday, he disagreed thoroughly with everything I'm about to tell you. So, that's by way of fairness. But, I do think by contrasting my views with some of his views, what I want to do is to take his notions as a challenge, because I think he describes some of the problems in the landscape of legal education that we may need to overcome if my optimistic future is going to be more likely to come about than his skeptical future.

My bottom line is that there's an important aspect to the creative problem solving – and again, I mean that very broadly. It's an adventure that may not yet have been fully catalogued, and that is, namely, a scholarly and research agenda. I'm not suggesting that this is the only answer to some of these problems and challenges that Paul talked about, but I do think it may be a part of one answer.

Paul's argument, you remember, went in three steps. The first thing he said was that in legal education today, seats in the first-class cabin—that's my phrase, not his—go to those substantive legal topics that have both an important public policy substrate and also have a rigorously analytical texture. Again, those aren't his words, but in professor-speak, that's exactly what I think he was saying. His second point was that, given the university setting of legal education, any lawyering competence that is skill-oriented by contrast has to take its seat back in the second cabin, not the first. I believe he referred to the analogy between theoretical physics on the one hand and engineering on the other as a way of expressing something about substantive law on the one hand and skills—lawyering skills on the other.

Even worse—and this was this third point—that once we've identified that some kinds of subjects require the skills training approach, then that requires a different form of teaching and that form of teaching, namely clinical, whether it's live or whether it's simulated, is one that's different from and more expensive than, and therefore vulnerable to competition from the more traditional didactic substantively oriented and conventional kinds. So, that's his three-point argument. I think Paul is probably right on the first of those three points.

But, I think he is not necessarily right on the other two, because in my own view, creative problem solving also has significant public policy substrates, and it also has analytical regimes and scholarly attributes that are

easily the match of anything that's taught in my experience in any field, within the legal academy. And to illustrate that, I'd like to offer, first, a couple of rhetorical thoughts, and then finally to make maybe a more serious suggestion.

First rhetorical idea. Imagine somebody who writes an elegant brief on a constitutional issue as an amicus that's posed before the Supreme Court, and imagine that that brief then becomes the thing that carries the day on that important constitutional question. I think it would be widely agreed that that's up there. If it's not at the pinnacle, it's awfully close to the pinnacle of what we would regard as really respectable first-cabin academic legal scholarship. But, if we step back and think about what went into that, it's interesting to note the blend, on the one hand, of the intellectual substance, and on the other hand, some of the lawyering skills that goes into even that, maybe the most sterling, the gold standard of what we do as academicians.

The fact is that the ideas in that brief may have been pure intellect or scholarship or whatever it is you want to call it, but the crafting of the argument and the writing of the brief without any question whatever matters of lawyering skill, I think, and yet nobody has ever pointed to those elements of skill as being any diminishment of the scholarly enterprise in that sort of setting.

And creative problem solving has, I think, just the same sort of blend of scholarly mentation and practical art. You have to not only think about it, but you have to deliver it, and that's done in precisely the same way as this constitutional Supreme Court brief. That is to say, we're not dealing here with greater problem solving preventive law therapeutic jurisprudence with something that is just skill, as if that were somehow a criticism of it. But, somehow, I think we've let the rest of the world allow themselves to characterize it in that way.

The second rhetorical observation goes to Paul's point about the forms of teaching, and if you remember what he said was we have to teach it in certain kinds of ways that themselves are not always, with the exception of places like Ohio State and a few others, the first cabin within the curriculum. I had a thought about that. There are courses that we believe have to be taught through clinical, whether it's simulation or live client, clinical kinds of strategies. If we ask why is that the case, why do we need that sort of thing, I think the answer is because what we're trying to do in those areas is to teach judgment. And we can't teach judgment without delivering experience. I think experience is the only way to teach judgment. And we can't teach experience without having some kind of hands-on connection, and that leads us to this simulated or real clinical style of teaching.

Well, I think again that creative problem solving and its cognates are not really different from anything else. While it's true that we need to teach judgment in client counseling which lies at the heart of the creative problem solving endeavor, I'd like you to consider the following kinds of things we also do in law schools.

In constitutional law, we want our students to begin to understand what strict scrutiny means and to be able to use it. In contracts, which I do know a little about, we contracts teachers want our students to learn something about how to use the concept of substantial performance, and torts teachers are wrestling with trying to impart into their students some competence in dealing with concepts such as due care. And I'd like to suggest that being adept at handling any of those kinds of things, which are really at the core of the conventional teaching subjects, require nothing other than the acquisition of judgment just as well. That is to say, the mix of judgment that goes into those substantive things is very much the same as the judgment that's required in those things which have client counseling at their core.

So, once again, I don't see any difference that would drive us to suggest that more vulnerable, or more expensive or different kinds of teaching strategies are necessary for the sorts of things we care about here this weekend, than what law schools have cared about for the other thirty years I've been associated with them. Let me get finally to my more serious point. Maybe this can lead to a productive kind of suggestion.

I think that in addition to all of the obvious attributes and characteristics of creative problem solving, there's a part of it that is both integral to it and necessary to it, and decidedly a first-class cabin in any rarified academic environment. It just hasn't been fully catalogued yet. And so, here are some ideas of my own about scholarship in this field. And again, I don't think this is a full description of what scholarship looks like. This is just one or two examples taken from something that I think is probably potentially really vast.

I'd like to ask you to consider the areas of jurisprudence. If you think about jurisprudence, at the heart of that lies the idea that by articulating laws, courts somehow are affecting society, and that the subject of jurisprudence is a study of that relationship. Well, let's examine exactly how that occurs.

How is it that courts, by giving voice to laws, somehow affect society? Well, what happens, I think, is that laws, at least by conventional understanding, create incentives and disincentives, and that causes people to behave in certain ways that result in certain kinds of social configurations that the courts may have had in mind when they were articulating these laws. That's a description of jurisprudence. That's all you need to know about it. But, you know, it's really missing something, isn't it, if you stop to think about that.

How exactly is it that the articulation of law by law gives like courts really affects the way in which people behave, and therefore the order in which society is ordered? I'd like to suggest that that occurs through the activities of lawyers who are counseling their clients, advising those clients and shaping their behavior in a way that achieves the client's individual goals within the confines that have been set up, the incentives, the disincentives, the limitations, the encouragements that have been set up by the legal system that the courts have created, and there is absolutely nothing mechani-

cal about that.

My point is that what it is that lawyers do in counseling clients is an essential part of the study of jurisprudence as any other aspect of it is. And so, it seems to me, once again, that there's no distinction, no reason for the skepticism that Paul was suggesting, because to omit from the study of jurisprudence the study of how lawyers counsel clients and translate law into advice is to omit the mechanism by which the entire process so often actually occurs, and that is an analytically rigorous and policy suffused kind of investigation.

More generally, courts make legal decisions, and so we have scholars running around the country studying what are the forces that cause courts to make decisions one way or another way? What are the environmental factors that shape the decision making of courts. I'd like to point out that lawyers and clients make legal decisions, too, and they probably make those decisions more frequently than courts do, all the courts in the land combined. And so, analyzing the forces that shape those kinds of legal decisions, it strikes me as no less analytically rigorous than analyzing what it is that courts do.

So, in the conventional substantive lower realm, we explore the link between juridical decisions and social welfare. In the creative problem solving realm, we can explore the link between lawyers' decisions and individual welfare. And it strikes me that they are entirely parallel. Legal psychology is no less a discipline than legal sociology. Creative problem solving is therefore no less scholarly enterprise than any of the substantive fields that seem to occupy the first class seats.

It's the same mix of mentation and skills, the same mix of thinking and delivering that we see in so many of these other fields that we sometimes take for granted. And so, what kind of a positive idea does this suggest? Well, my suggestion is that one of the things we should do, and it's only one, is to begin cataloguing a research agenda, a research and scholarship agenda for creative problem solving, and a research agenda that has maybe several different kinds of attributes. I think it needs to be a good one that allows young scholars entering the academy to be able to do work in a safe environment where they don't need to explain or apologize for what their interests are.

It ought to be an empirical agenda, at least in part, to build a solid base of data about the shape and the consequences of lawyering. We don't really know very much about that. And it seems to me that sociological jurisprudence and creative problem solving in this regard are strictly analogous. The research agenda also ought to be an heuristic one, creating paradigms around which the literature can begin to grow, and I think it also ought to be a policy-based agenda, or policy-based dialectic to help frame the conversations about what the goals of this enterprise really ought to be.

So, after hearing Paul talk yesterday and having given some thought about this for a little while, I decided, you know, damn it, I think we ought to

just walk up to the first class cabin and sit down, because we deserve those seats.

MS. BOWERMASTER: Whoa. Did I promise you some thought-provoking and titillating talks? Well, if I didn't, I should have. Our charge in the time remaining in this session is to focus on mobilizing creative problem solving lawyers. So, I'm going to begin that by asking our panel members to address a question and then we'll throw it open to participation from the audience, because I know from our small group session this morning that there were lots of good ideas. So, we'll start here. We'll start with the notion that this conference itself is a big step forward in developing and promoting creative problem solving.

In our discussions yesterday in preparation for this panel, we discussed the fact that this conference probably couldn't have taken place five years ago, maybe not even three years ago, and that now we've been able to draw a broad range of people, and some of you have been doing this work on your own and now here's a place for us to connect.

So, here's the question I throw out, and that is, what do you see as the most effective next step in developing and promoting creative problem solving? And it can be the law schools, in the practice, the judiciary, educating the public. Where would you start, if we had to take one step forward?

MR. DAUER: Well, I meant to actually be addressing that in suggesting that one step is to define the research agenda. But, there's another one as well, which came up in the small group that I was in this morning, and that is creating connections among people who are working in this field under various definitions all across the country. One of the things about creative problem solving that I think really deserves to be applauded is that it's become kind of a galvanizing name for a lot of thoughts, a lot of different ways of thinking about lawyering and teaching lawyering and studying the legal process. And what may be necessary is to have a switchboard someplace, a central place where people who are working in various pieces of it can come together. What form that takes, I'm not sure it can be specified now. One can think obviously of journals. Websites, I suppose, if you're in that generation, rather than journals. Places, times, connections.

MS. YU: There's usually a four-step approach that works at least in some settings, as you're trying to create something new. One is that you first recognize you have either an issue or a problem or a desire, and I think that's beginning to build. Secondly, you communicate with others about it, because the benefit of having a number of committed individuals becomes exponentially greater if you've got more people. Third, you work with those folks to develop a common understanding of how you're going to build or foster this discipline or area. And then fourth, you act on it. So, I think the research agenda and the idea of trying to have a communication device is very important, and clearly, I think there are going to need to be some leaders getting together to try to strategize this.

MR. KEEVA: I think it's just very, very important to start to get the sto-

ries out there into the world, both to lawyers, law students and potential clients, stories that show what it looks like to practice creative problem solving. It would be nice if Dick Wolf, the guy that produces the television show Law and Order might put together a show that demonstrates that. But, I think as clients come to realize there's such a thing, the whole thing would become driven at least in part by their need to avail themselves to those kinds of services.

MR. WILLIAMS: Well, I don't think there's any one thing to do. I think there's a number of avenues which we have followed that need to be continued, for instance, development of interdisciplinary work, kind of broad ranging type of things. Actually, you know, an interesting thing, a few years ago, we were subject to the sabbatical inspection. We had one person that came in and looked at our clinical folks and said, well, you know, you should be writing in clinical journals. And my response was they should be writing in any journals they want to and we should be talking about these types of things in a broad array of journals. So, I don't think—I would not characterize it or categorize this to be in one place or in one discussion group.

(End of panel discussion.)