Think on Your Feet® - Legal Version Leaders Guide

Jacqueline Throop, of Breakthrough Learning Associates, Canada, developed the following Leaders notes. It’s made up of 5 elements:

- The Leaders Guide (first 80 pages)
- An abbreviated form – or Leaders Notes (25 pages)
- Pre-workshop questionnaire (1 page)
- Sample answers to the questionnaire (2 pages)
- Additional Practice Activities (11 pages)

The guide was developed for Jacqueline’s clients and her particular audience (in Canada). So we encourage you to take from this what is useful, and then customise for your group.

If you have any questions or contributions, please let us know. We would love your feedback.

(Note – if you want to recreate many of the visuals in the guide you will need to flipchart them. (Better get in early!). Some visuals are from the TOYF® slides, but many are customised.)
WELCOME TO

Think on Your Feet®
Think on Your Feet is about C, B, I

Clarity – Because ideas clearly presented are persuasive.

Brevity – Because getting to the point and presenting key arguments has impact – too much information usually hurts rather than helps.

Impact – You have impact when you create movement. When you’ve caused a shift in perspective and opinion. With movement comes persuasion.

Clarity, Brevity and Impact are essential for most professionals today, and especially for those within an adversarial system.

You already have tools to help you in these areas. Think on Your Feet is intended to augment your toolkit. Some of what we cover may feel familiar. That’s good. What we want to do is heighten your awareness so we can raise the skill level as well.

How do you get C, B, I?
We analyze our data, the content that’s in our head.

We organize our content into a clear, concise structure.

We present it using formats that move people.

These are core competencies for many professionals but especially for lawyers.
INTRODUCTIONS

- Who you are
- Your current file / work
- An interest or hobby
ASSESSMENT RESULTS

1. Presenting complex or technical information simply & clearly
2. Assessing your listener’s needs
3. Making clear logical arguments in emotional situations
4. Uncovering the real issues beneath client questions
5. Positioning arguments using benefits

To be customized for your client.
ASSESSMENT RESULTS

6. Highlighting key messages and essential points
7. Responding to "loaded" or "aggressive" comments
8. Structuring presentations
9. Handling Question & Answer sessions
10. Summarizing and recapping arguments

To be customized for your client.
OPENING ACTIVITY

• It's early in the morning. You've just arrived at the office. You get an urgent call for help.

• The Managing Partner needs you to replace another Associate in greeting a new group of clerks. This is the first day of their orientation.

• The purpose of the talk is to give the clerks a view of the firm from an Associate's perspective.
CLEAR SPEAKING IS CLEAR THINKING

- Analysis
  - get to the core
- Separation
  - keep ideas distinct
- Movement
  - make your argument flow

So,

Decide on the core points of your argument.
Separate them into 3-parts (as an average).
Package them in a way that moves people.
THINK ON YOUR FEET®

Broad Applications

- Persuade
- Sell your ideas
- Sell your services
- Negotiate
THINK ON YOUR FEET®

Legal Applications

- Court appearances
- Conference calls / negotiations
- Communications – clients & colleagues

Let’s look at typical applications for lawyers: How does this concept apply to these scenarios?

Think about the need for clear thinking, key messaging and the ability to move people in court, during conference calls, client meetings & negotiations as well as internally with clients and colleagues.
THINK ON YOUR FEET®

Court appearances

- Communicate with precision
- Display persuasive advocacy
- Speak authentically without “spin”
Influence your listeners – Persuasion is paramount.

Increase your credibility – Credibility is only established when you sound like you know what you talking about.

Which leads us to our next point that – People believe when they understand.

For example, with interest based negotiation it’s critical that you be understood; otherwise, common interests are never clear and negotiations break down.
Working at the senior level, the infamous “beauty contests” are an obvious example of the importance of Clarity, Brevity and Impact: if they believe you can do the job, you win. Where does that confidence come from? Being understood, Being persuasive. Being credible. All of this depends on communications.

At the junior level, remembering that your client is also the partner or senior associate. It’s a moment of truth for any junior lawyer or clerk standing in the doorway of a partner’s office giving an update on the status of a file or receiving instructions.
THINK ON YOUR FEET®

- One-to-one
- Meetings
- Presentations
Let’s do a quick activity to demonstrate the importance of this:

100000000

Ask: Quickly, what number is this?

Then add the commas (100,000,000)
What the difference with the before and after picture here?

100,000,000 is communication “at a glance”. 1000000000 is not.

The question is: How much do we want to make our listeners work? And, what are the risks, if they don’t bother to even try to make sense of our words?

Structure helps us sort and filter for our listeners (We do the work for them. We present our thinking in a way that is easy for someone to receive it.) and it helps us assert our message when there is competition or push back.
THINK ON YOUR FEET®

- Six plans to package persuasion
- Four sub-plans to flesh-out your ideas
- Practice-practice-practice
Review the Six Main Plans – Mention: icons as part of an accelerated learning technique.
We divide these plans into two categories: Basic and Assertive.

In the first instance, we use what we call Basic Plans (meaning structures): These are excellent for communicating key messages and to persuade subtlety or to diffuse a difficult situation.

In the second instance, we use Assertive Plans: These are excellent when you want to push back, assert another perspective or want to maintain control.
THREE BASIC PLANS

- Clock – via time
- Globe – via place
- Triangle – via aspects
DEMO

We work internationally as well as in Canada and you might be surprised to discover that there are even more consultants than lawyers “out there”. It’s key to distinguish ourselves. So, when clients ask “Why you?” We need a good answer. I often use the Clock Plan to focus on fundamentals. For example, I might say:

Why us? Our clients will testify that our approach gets results from start through to finish.

At the start of a project, we educate to transfer knowledge and empower our clients. We want our clients to know what we know.

At the peak of implementation, we listen and adjust to ensure we are on the best course. Accuracy and efficiency are key.

At the finish, we evaluate and measure success to prepare for the next intervention.

So from start to finish we ensure our clients keep learning and keep getting results.

This plan is also good to help you think through your competitive advantage.
Think on Your Feet®

CLOCK PLAN
- Works almost anywhere
- Calms listeners
- Creates action plan

Time can be used to structure almost any response or explanation as it is so much a part of how we think and organize.

It’s calming because it places a sense of control over a situation – George Bush

George Bush when he spoke after the September 11th disaster consistently used the Clock Plan as he had to calm a nation and show he was taking action. One example is after the Pennsylvania crash. He held a press conference and said the following:

- First, we will find out what happened.
- Then, we will find out who’s responsible.
- And finally, we will retaliate.

It has a forward dynamic because the Clock Plan is often a high level action plan – George Bush example also does this.
CLOCK PLAN

Opposing Counsel: “Look, last week your clients had no problem with this representation. My client considers the environmental reps and warranties to be deal breakers!”
Response: "We are prepared to give you an environmental representation and warranty."

- At first, my clients thought they could give the rep and warranty contained in the draft Agreement.
- Then, upon further review, they realized the rep and warranty covers a period in which they weren't in control of the land.
- Now, all they're asking is that the rep and warranty be limited to 'the best of their knowledge' for the period they weren't in control of the land.

So, we can't give you the rep and warranty as drafted but we can give you one that is 'to the best of our knowledge' for the period we didn't control the lands."
CLOCK PLAN

“Receiving the Letter of Intent will allow me to move to action.

- By lunch, I’ll send you a letter confirming our instructions and the terms of the retainer.
- By end of day, I’ll review the Letter of Intent and send you a proposed due diligence checklist for the Vendor.
- By first thing tomorrow morning, I’ll send you the first drafts of the Agreement of purchase & sale and closing agenda.

So, I can move to action over the next few days once I have the Letter of Intent.”
CLOCK PRACTICE

- Explain to an articling student how to prepare _____ (e.g., a closing agenda).
- Explain to your client how they should deal with _____ (e.g., dismissing an under-performing employee).
- Explain to your client the costs involved in _____ (e.g., litigating).
- Explain to your client why the bill is higher than expected.

Before court
During court
After court

Before the trial
During the trial
After the trial

Last Year
This Year
Next Year

Before negotiations
During negotiations
After negotiation
CLOCK FEEDBACK

CLARITY

- Did you hear three pegs?
- What were the pegs?
- Was the question answered?

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TF is founded on certain key principles that prevent us from falling into communication traps while supporting our essential communication needs. What’s the foundation of TF? Structure & Patterning.

3-part Structures & Patterns

- Found in traditional logic (for example, Hegel – thesis, antithesis, synthesis) as well as other logics-based disciplines, such as geometry (proving equilateral triangles and the hypotenuse).
- Rhythm – storytelling – What are some examples of threes in story-telling? This maintains interest, suspense and fun. What would the Three-Little Pigs have been like if there’d only been 1 Little Pig?

What are some famous threes?

Contract law

offer
acceptance
consideration
STANDARD FORMAT

Headline

Announce Three Parts
1. Key word ➔ Content
2. Key word ➔ Content
3. Key word ➔ Content

Recap Three Parts

Echo Theme/Repeat Headline

TF-29
GLOBE PLAN

Moves via Place
Think on Your Feet®

GLOBE PLAN

- Adds visual impact
- Calms tense situations
- Supports big topics

DEMO

Visual impact – plants a picture in the listener’s mind’s eye. Example: Take the statement: Lawyers must be persuasive advocates for clients. Now compare this to: Lawyers must be persuasive advocates for clients in court, at the negotiating table and media scrum.

Calms tense situations – When would lawyers want to calm things down?

Supporting big topics – helps people understand by getting them to visualize like in the above example of persuasive advocacy.
“For lawyers to be successful in court, at the negotiating table, and in media scrums, it’s important to remember certain fundamentals.”

- In court, lawyers must be well prepared, at all times respectful, and get to the point quickly.
- At the negotiating table, lawyers must understand the issues, support their position with reasoned explanations, and avoid bringing emotion into the scene.
- In media scrums, lawyers must remember not to offer more than what’s asked, smile and not look worried, and know that they decide when the interview is over.

If lawyers remember these fundamentals in court, at the negotiating table and in media scrums, they’re on their way to success.
GLOBE PRACTICE

- Select a “big” or broad topic you often have to explain to either clients or other listeners.
- Describe your firm to a client.
- Explain a challenge(s) your position faces.
GLOBE FEEDBACK

CLARITY
• Did you hear three pegs?
• What were the pegs?
• Was the Standard Format used?

BREVITY
• Too much information?
• Too little?
• Just right?
TRIANGLE PLAN

Moves via Aspects
DEMOS

Quickly give two examples.

Henry Mintzberg of McGill University uses the Triangle Plan to structure his speeches on Talent Management. He encourages all CEOs to ensure their managers have three key skills – interpersonal skills, informational skills and decision-making skills. And, he gets a few thousand dollars for saying this!

Journalists, might use the Triangle Plan to present a balanced report by showing three perspectives on an issue. So, in covering…
**TRIANGLE PLAN**

“It may be tempting to treat certain conditions of Closing lightly, but let’s reconsider this position by looking at the following aspects: your legal obligations, the significance of Closing Conditions and the Vendor’s possible remedies.

- Firstly, your legal obligations. You have a legal obligation to bargain in good faith. If you don’t, they can sue you.
- Secondly, the significance of Closing Conditions. If these are not met and aren’t waived, the deal will not close. You won’t get your money.
- Thirdly, the Vendor’s remedies. If the deal does Close, and it’s later determined that Closing Conditions weren’t met, the Purchaser could rescind the deal. You may have to return the money.

So, it’s important to treat all the conditions of Closing seriously.”
TRIANGLE PRACTICE

- Create an elevator speech: Describe your practice area in 30 seconds.
- Your client refuses to give a personal guarantee for ______. Respond to Opposing Counsel.
- Explain to the court why your client should not have to pay costs on ______.

Lawyers hate getting quick responses I’m told. Why is that? (Appears that the answer hasn’t been thought through.) How do clients and partners perceive lawyers who give quick answers? So here’s where the Triangle Plan can help us out.

PRACTICE

Let’s say, we’re asked by a partner, why should we take on this case?

If you give one reason, that’s often perceived to be only an opinion. But if we follow the rule of threes and apply it to the Triangle Plan, then three reasons gives us an argument. We appear objective and thoughtful.
TRIANGLE FEEDBACK

CLARITY
- Did you hear three pegs?
- What were the pegs?
- Was the Standard Format used?

BREVITY
- Too much information?
- Too little?
- Just right?

IMPACT
- Did the answer flow?
THREE BASIC PLANS
ADDITIONAL PRACTICE

1. Describe your practice area.

2. Explain _____ to an articling student.

3. You meet the Managing Partner in the elevator. Make your case on an issue of your choice.

4. Introduce yourself. E.g., You’re at a reception.

5. Explain to your client how to deal with _____ (e.g., dismissing an employee).
BENEFITS OF BRIDGING

- Show respect
- Answer "right" question
- Buy time
BRIDGING TECHNIQUES

ACKNOWLEDGE – facts, feelings

ASK – meaning, example

ADAPT – rephrase, refocus
BRIDGING

ACKNOWLEDGE
- That's an astute question.
- Thank you for raising that point.
- Your comments raise important issues.
- I can see you are frustrated by this situation.
BRIDGING

ASK
• If I understand your question, you are asking me if … is that correct?
• Could you give me a specific example?
• When you say “better”, what does that mean to you?
BRIDGING

ADAPT
• That is not my area of expertise; however, I can tell you …
• I agree that _____ is an important issue. Our goal is to focus on _____ to ensure …
• I would be happy to research that for you. Shall I call you tomorrow to further discuss?
THREE ASSERTIVE PLANS

- Zoom Lens
  - via perspectives

- Pendulum
  - via extremes

- Benefits
  - via advantages
Move our listeners from the small to medium to large view and vice-versa.

We call this Zooming Out and Zooming In.

Think of how a camera moves from a close-up shot to a medium shot to a long-shot.

We are going to do this verbally.
**WHY ZOOM OUT?**

- Expand to broader perspectives
- Handle sensitive or confidential information
- Justify a choice or decision

Now, let’s look at how it might work…

First of all, we signal to our listeners when we move from one idea to the next by using key words and often gestures. Listen for them in the following demonstrations. And think about how they function.

**DEMOS**

**Example 1: Expand to broader perspective**

In the early 80s, **SAS Airlines President, Jan Carlzon**, developed a concept called **The Moments of Truth** and he illustrated it by using the zoom out plan. He wanted employees to see the importance of paying attention to details, such as coffee ring stains on food trays. But let’s put it in the context of your profession…

There are many moments of truth for your clients.

**SPECIFICALLY:** If a client is surprised by their bill, that’s a moment of truth. A moment when the client makes a judgment.

**MORE BROADLY:** The client may conclude that…

**MOST BROADLY:** Such impressions left with clients can eat away at the success of our firm.
ZOOM OUT

- Specifically,…
- More broadly (generally),….
- Most broadly (generally),….
Question: “Why won’t your client give us the financial information requested?”

- “Specifically, I can’t give you the exact revenue figures for this quarter.
- However, you can rely on last year’s audited financials.
- Most broadly, any concerns your client may have are covered by the representations and warranties.”
Client Question: “So what? If X. Co. breaches the agreement, we’ll just sue him, right?”

- “Specifically, as your lawyer, I recommend that we ask for a guarantee from X Co. shareholders supporting X Co.’s obligations to you.

- More generally, I recommend it because I’m concerned X Co. may not have sufficient assets to pay the claim.

- Most generally, I believe this will give you comfort that you can recover damages if X Co. breaches the agreement.”
**Example 4: Focus on specifics.** We want to leave the listener thinking about a detail, a single item not the big picture.

CBC recently interviewed a director of an Energy Company regarding the natural gas facility they intend on building. When challenged about community safety and environmental dangers, the director said:

**Generally,** I can appreciate why the community is concerned about safety.

**However,** we have conducted multiple studies that carefully examine the safety issues as well as environmental risks.

**Specifically,** our audit team has carefully reviewed the recommendations and every recommendation has been implemented. There are no unresolved safety or environmental issues.
ZOOM IN

- Generally, ....
- However, ....
- Specifically, ....
ZOOM IN

Statement: “And, you’d advise your client to give an unlimited indemnity?!”

• “Generally, clients won’t accept unquantified liability.

• However, there are circumstances where an unlimited indemnity is entirely appropriate.

• Specifically, our use of your client’s intellectual property creates unlimited risk for my client, the purchaser. We’re entitled to a corresponding indemnity.”
PENDULUM PLAN

Moves via Extremes
PENDULUM PLAN

- Describes diverse viewpoints
- Moves to middle ground
- Creates a win-win outcome
PENDULUM PLAN

- On the one hand
- On the other hand
- As a middle ground
PENDULUM PLAN

Previous indemnity example “repackaged”:

Statement: “And, you’d advise your client to give an unlimited indemnity?!”

- On the one hand, I understand your client’s reluctance to give unlimited assurance.
- On the other hand, we could ask for a blanket indemnity for any breach of any of the agreements.
- As a middle ground, we’ll limit the indemnity to the area of our greatest concern, the intellectual property.

Quotes

1. “With a view to striking the right balance between innovation and protecting the values of Canadians, the government will widely consult the public.” – Allan Rock on patenting high life forms.

2. “Cabinet fight looms…” – Lawyer Weekly, June 27th, 2003?

Two parliamentary committees separately reviewing the status of foreign investment rules governing the communications sector in Canada have landed on the opposite ends of the policy spectrum, generating directly conflicting recommendations and thereby tossing a political hot potato squarely back in the lap of the Chretien cabinet. “Our Cultural Sovereignty: The Second Century of Canadian Broadcasting versus Opening Canadian Communications to the World.”
BENEFITS PLAN

Moves via Advantages to the Listener
BENEFITS PLAN

- Outline what a product, service, or idea does
- Focus on how the listener (or others) will benefit
- Do not suppress evidence or leave out the obvious
BENEFITS PLAN

Topic: Benefits of a Non-Disclosure Agreement
Listener: Client

Benefit #1: You profit by preventing your idea from being stolen.
Benefit #2: You gain credibility by demonstrating to potential investors that you're a sophisticated businessperson.
Benefit #3: You protect a great idea with only a small investment.

Notes

Large Group – Benefits of Incorporation

Tables – Convince a client that mediation is better than going to court.
BENEFITS PLAN

Topic: Conference
Listener: Colleague / Managing Partner / PD Coordinator
Headline:

Benefit #1:
Benefit #2:
Benefit #3:

Recap
BENEFITS PLAN

Topic: Client Development
Listener: Partner
Headline:

Benefit #1:
Benefit #2:
Benefit #3:

Recap
BENEFITS PRACTICE

- Sell an idea or a piece of advice to a client.
  (Consider a current client.)

- Sell an idea or a recommendation to a partner.
  (Consider a current situation.)

- Answer: “Why should a potential client retain you?”
  (Consider a current opportunity.)
REVERSE BENEFITS PLAN

Moves via Disadvantages
It may be tempting to treat certain conditions of Closing lightly, but let’s reconsider this position by looking at the following aspects: your legal obligations, the significance of Closing Conditions and the Vendor’s possible remedies.

- Firstly, your legal obligations. You have a legal obligation to bargain in good faith. If you don’t, they can sue you.
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- Thirdly, the Vendor’s remedies. If the deal does Close, and it’s later determined that Closing Conditions weren’t met, the Purchaser could rescind the deal. You may have to return the money.

So, it’s important to treat all the conditions of Closing seriously.”
REVERSE BENEFITS PRACTICE

- Your client wants to launch an Appeal immediately after losing at trial. Make your recommendation.

- Your client now has an Injunction issued against it. There are substantial monetary damages being claimed. The plaintiff has offered to settle. Make your recommendation.

- Your client wants to buy a 99-year old house without obtaining a home inspection.

- A client wants to take his / her business to another office. Create a response.
POSITION YOUR IDEAS TO SUIT YOUR LISTENERS

• Think about topic from listeners’ viewpoint
• List issues vital to your listeners
• Focus on background knowledge, hopes and fears
<table>
<thead>
<tr>
<th>BRAIN-SCAN GRID</th>
</tr>
</thead>
<tbody>
<tr>
<td>Listeners</td>
</tr>
<tr>
<td>Background Knowledge</td>
</tr>
<tr>
<td>Hopes/ Advantages</td>
</tr>
<tr>
<td>Fears/ Disadvantages</td>
</tr>
</tbody>
</table>

The following Flipcharts can be used for your group as needed.
SUB-PLANS

- Picture
- Opposites
- Domino
- W5
PICTURE SUB-PLAN
PICTURE SUB-PLAN

- Put pictures in your listeners’ minds
- Illustrate with examples
- Use for technical topics
OPPOSITES SUB-PLAN
DOMINO SUB-PLAN
DOMINO – THREE TYPES

3 Causes, 1 Effect

Chain Reaction

1 Cause, 3 Effects
W5

- Who
- What
- Where
- Why
- When
INTRODUCTIONS

• Who you are
• Your current file / work
• An interest or hobby

30 seconds to interview your partner
10 seconds to present to the group

ASSESSMENT RESULTS

ASSESSMENT RESULTS

ASSESSMENT RESULTS

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OPENING ACTIVITY

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• The purpose of the talk is to give the clerks a view of the firm from an Associate’s perspective.

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THINK ON YOUR FEET®

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- Communicate with precision
- Display persuasive advocacy
- Speak authentically without “spin”

THINK ON YOUR FEET®

Conference calls / negotiations

- Speak so others understand
- Increase your credibility
- Influence your listeners

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THINK ON YOUR FEET®
Communications – clients & colleagues
- “Beauty Contests”
- Partner updates
- Seminars / networking functions
- Client meetings

THINK ON YOUR FEET®
- One-to-one
- Meetings
- Presentations

THINK ON YOUR FEET®
100000000
THINK ON YOUR FEET®

100,000,000

THINK ON YOUR FEET®

- Six plans to package persuasion
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THREE BASIC PLANS

- Clock – via time
- Globe – via place
- Triangle – via aspects

CLOCK PLAN

Moves via Time

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**LOGICAL INTUITIVE**

**LEFT SIDE** | **RIGHT SIDE**

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**TF-25**

**CLOCK PRACTICE**

- Explain to an articling student how to prepare ______ (e.g., a closing agenda).
- Explain to your client how they should deal with ______ (e.g., dismissing an under-performing employee).
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**TF-26**

**CLOCK FEEDBACK**

**CLARITY**

- Did you hear three pegs?
- What were the pegs?
- Was the question answered?
WHY THREE PARTS?

- Persuasive
- Rhythmical
- Memorable

STANDARD FORMAT

Headline
Announce Three Parts
1. Key word ➔ Content
2. Key word ➔ Content
3. Key word ➔ Content
Recap Three Parts
Echo Theme/Repeat Headline

GLOBE PLAN

Moves via Place
GLOBE PLAN

- Adds visual impact
- Calms tense situations
- Supports big topics

TF-31

“For lawyers to be successful in court, at the negotiating table, and in media scrums, it’s important to remember certain fundamentals.”

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TF-32

GLOBE PRACTICE

- Select a “big” or broad topic you often have to explain to either clients or other listeners.
- Describe your firm to a client.
- Explain a challenge(s) your position faces.

TF-33
GLOBE FEEDBACK

CLARITY
- Did you hear three pegs?
- What were the pegs?
- Was the Standard Format used?

BREVITY
- Too much information?
- Too little?
- Just right?

TRIANGLE PLAN

Moves via Aspects

- Suggests objectivity
- Shows thoughtfulness
- Displays points of view
TRIANGLE PLAN

"It may be tempting to treat certain conditions of Closing lightly, but let's reconsider this position by looking at the following aspects: your legal obligations, the significance of Closing Conditions and the Vendor's possible remedies.

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BREVITY
- Too much information?
- Too little?
- Just right?

IMPACT
- Did the answer flow?
THREE BASIC PLANS

ADDITIONAL PRACTICE

1. Describe your practice area.
2. Explain _____ to an articling student.
3. You meet the Managing Partner in the elevator. Make your case on an issue of your choice.
4. Introduce yourself. E.g., You’re at a reception.
5. Explain to your client how to deal with _____ (e.g., dismissing an employee).

BENEFITS OF BRIDGING

- Show respect
- Answer “right” question
- Buy time
BRIDGING TECHNIQUES

ACKNOWLEDGE – facts, feelings
ASK – meaning, example
ADAPT – rephrase, refocus

BRIDGING

ACKNOWLEDGE
- That’s an astute question.
- Thank you for raising that point.
- Your comments raise important issues.
- I can see you are frustrated by this situation.

ASK
- If I understand your question, you are asking me if … is that correct?
- Could you give me a specific example?
- When you say “better”, what does that mean to you?
THREE BASIC PLANS

THINK ON YOUR FEET®
THREE ASSERTIVE PLANS

- **Zoom Lens**
  - *via perspectives*

- **Pendulum**
  - *via extremes*

- **Benefits**
  - *via advantages*

---

ZOOM LENS PLAN

Moves via Changing Perspectives

---

WHY ZOOM OUT?

- Expand to broader perspectives
- Handle sensitive or confidential information
- Justify a choice or decision
Think on Your Feet®

ZOOM OUT

• Specifically,…

• More broadly (generally),….

• Most broadly (generally),….

Question: “Why won’t your client give us the financial information requested?”

• “Specifically, I can’t give you the exact revenue figures for this quarter.

• However, you can rely on last year’s audited financials.

• Most broadly, any concerns your client may have are covered by the representations and warranties.”

Client Question: “So what? If X. Co. breaches the agreement, we’ll just sue him, right?”

• “Specifically, as your lawyer, I recommend that we ask for a guarantee from X Co. shareholders supporting X Co.’s obligations to you.

• More generally, I recommend it because I’m concerned X Co. may not have sufficient assets to pay the claim.

• Most generally, I believe this will give you comfort that you can recover damages if X Co. breaches the agreement.”
WHY ZOOM IN?

- Focus on specifics
- Counter sweeping statements

ZOOM IN

- Generally,…
- However,…
- Specifically,…

Statement: “And, you’d advise your client to give an unlimited indemnity?!”

- “Generally, clients won’t accept unquantified liability.
- However, there are circumstances where an unlimited indemnity is entirely appropriate.
- Specifically, our use of your client’s intellectual property creates unlimited risk for my client, the purchaser. We’re entitled to a corresponding indemnity.”

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PENDULUM PLAN

• Describes diverse viewpoints
• Moves to middle ground
• Creates a win-win outcome

PENDULUM PLAN

• On the one hand
• On the other hand
• As a middle ground

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PENDULUM PLAN

Previous indemnity example "repackaged":

Statement: "And, you’d advise your client to give an unlimited indemnity?!"

- On the one hand, I understand your client’s reluctance to give unlimited assurance.
- On the other hand, we could ask for a blanket indemnity for any breach of any of the agreements.
- As a middle ground, we’ll limit the indemnity to the area of our greatest concern, the intellectual property.

BENEFITS PLAN

Moves via Advantages to the Listener

- Outline what a product, service, or idea does
- Focus on how the listener (or others) will benefit
- Do not suppress evidence or leave out the obvious
<table>
<thead>
<tr>
<th>BENEFITS PLAN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Topic: Benefits of a Non-Disclosure Agreement</td>
</tr>
<tr>
<td>Listener: Client</td>
</tr>
<tr>
<td>Benefit #1: You profit by preventing your idea from being stolen.</td>
</tr>
<tr>
<td>Benefit #2: You gain credibility by demonstrating to potential investors that you’re a sophisticated businessperson.</td>
</tr>
<tr>
<td>Benefit #3: You protect a great idea with only a small investment.</td>
</tr>
</tbody>
</table>

| TF-64 |

<table>
<thead>
<tr>
<th>BENEFITS PLAN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Topic: Conference</td>
</tr>
<tr>
<td>Listener: Colleague / Managing Partner / PD Coordinator</td>
</tr>
<tr>
<td>Headline:</td>
</tr>
<tr>
<td>Headline:</td>
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<tr>
<td>Benefit #1:</td>
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<tr>
<td>Benefit #2:</td>
</tr>
<tr>
<td>Benefit #3:</td>
</tr>
<tr>
<td>Recap</td>
</tr>
</tbody>
</table>

| TF-65 |

<table>
<thead>
<tr>
<th>BENEFITS PLAN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Topic: Client Development</td>
</tr>
<tr>
<td>Listener: Partner</td>
</tr>
<tr>
<td>Headline:</td>
</tr>
<tr>
<td>Benefit #1:</td>
</tr>
<tr>
<td>Benefit #2:</td>
</tr>
<tr>
<td>Benefit #3:</td>
</tr>
<tr>
<td>Recap</td>
</tr>
</tbody>
</table>

| TF-66 |
BENEFITS PRACTICE

• Sell an idea or a piece of advice to a client.
  (Consider a current client.)

• Sell an idea or a recommendation to a partner.
  (Consider a current situation.)

• Answer: “Why should a potential client retain you?”
  (Consider a current opportunity.)

REVERSE BENEFITS PLAN

Moves via Disadvantages

"It may be tempting to treat certain conditions of Closing lightly, but let's reconsider this position by looking at the following aspects: your legal obligations, the significance of Closing Conditions and the Vendor's possible remedies.

• Firstly, your legal obligations. You have a legal obligation to bargain in good faith. If you don’t, they can sue you.

• Secondly, the significance of Closing Conditions. If these are not met and aren't waived, the deal will not close. You won’t get your money.

• Thirdly, the Vendor’s remedies. If the deal does Close, and it’s later determined that Closing Conditions weren't met, the Purchaser could rescind the deal. You may have to return the money.

So, it’s important to treat all the conditions of Closing seriously.”
Think on Your Feet®

REVERSE BENEFITS PRACTICE

- Your client wants to launch an Appeal immediately after losing at trial. Make your recommendation.

- Your client now has an Injunction issued against it. There are substantial monetary damages being claimed. The plaintiff has offered to settle. Make your recommendation.

- Your client wants to buy a 99-year old house without obtaining a home inspection.

- A client wants to take his / her business to another office. Create a response.

THINK ON YOUR FEET®

POSITION YOUR IDEAS TO SUIT YOUR LISTENERS

- Think about topic from listeners’ viewpoint

- List issues vital to your listeners

- Focus on background knowledge, hopes and fears

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<table>
<thead>
<tr>
<th>BRAIN-SCAN GRID</th>
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<tbody>
<tr>
<td>Listeners</td>
<td></td>
</tr>
<tr>
<td>Background Knowledge</td>
<td></td>
</tr>
<tr>
<td>Hopes/ Advantages</td>
<td></td>
</tr>
<tr>
<td>Fears/ Disadvantages</td>
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</table>

TF-73
Dear Associate,

I look forward to meeting you in October during our Think on Your Feet® workshop. In the meantime, I would appreciate your help in tailoring the program to meet your needs.

Below is a short questionnaire. It will take you approximately 5 to 10 minutes to complete.

Thank you,
Jacqueline Throop

1. Please select the 5 items that best represent your interests. Also, rank them 1 to 5. 1 representing your top priority and 5 representing your lowest.

   ____ Highlighting key messages and essential points when speaking
   ____ Summarizing and recapping arguments or positions (yours and/or your listener’s)
   ____ Presenting complex or technical information simply and clearly
   ____ Making clear logical arguments in emotional or highly-charged situations
   ____ Assessing your listener’s needs
   ____ Structuring presentations for small to large audiences
   ____ Handling Question & Answer sessions
   ____ Positioning arguments using benefits to your listener
   ____ Responding to “loaded” or “aggressive” comments or questions
   ____ Uncovering the real issues beneath client’s questions or statements

2. List two work-related questions you are asked but don’t like to answer (e.g., awkward, sensitive, or negative questions).

   •
   •

3. List two frequently asked questions you would like to answer more skillfully (e.g., “How will your firm ensure it meets my needs?”).

   •
   •

4. List two topics that often cause debate either within the firm or within the legal community (e.g., flexible-work options).

   •
   •
1. RESULTS according to their frequency and their importance.

6. Highlighting key messages and essential points when speaking

10. Summarizing and recapping arguments or positions (yours and/or your listener’s)

1. Presenting complex or technical information simply and clearly

3. Making clear logical arguments in emotional or highly-charged situations

2. Assessing your listener’s needs

8. Structuring presentations for small to large audiences

9. Handling Question & Answer sessions

5. Positioning arguments using benefits to your listener

7. Responding to “loaded” or “aggressive” comments or questions

4. Uncovering the real issues beneath client’s questions or statements

2. List two work-related questions you are asked but don’t like to answer (e.g., awkward, sensitive, or negative questions).

- When can you have the answer / work to me?
- That’s kind of long, isn’t it?
- How come you are not a partner?
- Can you meet on Saturday morning at 09:00 a.m.?
- How much will our services cost? (How much will this work cost?) (Noted 5 times)
- How long will it take? (Noted twice)
- What is your salary / bonus?
- Why did you spend X hours on this?
- Answering specific questions about the law before having the chance to research and think about the issue.
- How come we didn’t know it would cost this much? (Letter is on file stating the costs.)
- What is your hourly rate?
- When will the work be done?
- Tell a client you have to refer them to another firm because of a conflict.
- Are you busy?
- Why are you so expensive?
3. List two frequently asked questions you would like to answer more skillfully (e.g., “How will your firm ensure it meets my needs?”).

- What are the risks?
- How much will it cost? *(Noted twice)*
- Why are your fees so high?
- What do you think?
- Can you reduce my account?
- What is your specialty / expertise?
- What is your area of practice? What are your areas of practice?
- Can you get this work done by tomorrow morning (i.e., extremely short deadline)?
- Why is MC better than another firm?
- Do you like it at MC?
- What are my chances of winning?
- Why are lawyers so expensive?

4. List two topics that often cause debate either within the firm or within the legal community (e.g., flexible-work options).

- Compensation Criteria / Structure *(Noted five times)*
- Work / Life Balance *(Noted twice)*
- Transparency of firm operations
- Role and value of the Legal Researchers
- Criteria for assessing salaries (Should associates in all offices be paid the same, despite different job markets and costs of living?)
- The billable hour
- Distribution of work among associates
- Gay marriages
- Client development requirements
- Is private practice worth it?
- Parental Leave *(Noted twice)*
- Why do so many women leave the profession?
- Can we get rid of billable hours?
- Flexible Work Options
(Sample from Actual Client Workshop)

McInnes Cooper

Additional Practice Activities

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Assertive Plan Practice Questions

Bridging
1. Can you meet on Saturday morning at 09:00 a.m.?
2. How come we didn’t know it would cost this much? (Letter is on file stating the costs.)
3. Why are you (lawyers) so expensive?
4. How long will it take to have the work (answer) to me?
5. Can you get this work done by tomorrow morning?
6. What do you think about ________ (e.g., firm)?
7. What are my chances of winning?
8. Can you reduce my account?
9. Have you ever done something like this before?
10. What do you think I should do about _____?

Zoom Out
1. What is your salary / bonus?
2. Why did you spend X hours on this?
3. Why can’t you give me an answer now?
4. What is your hourly rate?
5. What is your specialty (expertise)?
6. What are your area(s) of practice?
7. How come you are not a partner?
8. Is private practice worth it?
9. How much will this cost me?
10. Why is your firm better than another firm?

Zoom In
1. That’s kind of long, isn’t it?
2. Why can’t you handle this? (Tell a client you have to refer them to another firm because of a conflict.)
3. Are you busy?
4. What are the risks?
5. Do you like it at this firm?
6. Why do so many women leave the profession?
7. Lawyers’ fees are too high!
8. Why do I need a lawyer?
9. You’re a lawyer; you must be making a pile of money.
10. What’s the fastest way to get this resolved?

Pendulum Topics
1. Compensation
2. Performance Management
3. Work / Life Balance
4. Communications
5. Internal Relations
6. Equal Opportunity
7. Workload Allocation
8. Client Development
9. Parental Leave
10. Flexible Work Options

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**Listening to Bridge & Select a Plan**

**General Issues**
1. What do you think about the municipal election & plebiscite results?
2. What do you think about our minority government situation?
3. Can you summarize the two sides of the same-sex marriage debate?
4. What are your thoughts on same-sex marriage?
5. How does E-mail affect your work?
6. Should business ethics be taught in all Canadian workplaces?
7. What do you think about the UN’s role today?
8. What are your thoughts on “The War on Terrorism?”
9. What do you think about the American election?
10. What’s your view of the influence of the media today?

**Legal Issues**
11. CCRA appropriately included lawyers as tax advisors in its civil penalties legislation.
12. Why is the USA more litigious than Canada?
13. How should lawyers prepare for CCRA’s auditors?
14. How would you define psychological harassment?
15. What steps are being taken to reform copyright law?
16. What are the pitfalls and problems of valuing intellectual property?
17. The biotech industry is right to demand of the federal government the right to table a new law to make higher life forms patentable.
18. In such a language-driven profession, how do we open doors for deaf lawyers?
19. How do you decide whether a judge is biased or not?
20. How or when do you decide to have the judge recuse him/herself from a matter?
21. How do you decide to make an application to withdraw as counsel?
22. Under what circumstances would you bring a matter to appearance day?
23. What is the value of mediation over litigation?
24. How relevant are ethics for a lawyer? Explain your answer.
25. What are the most important elements of trial preparation?

**Internal Questions**
26. Why did “Joe/Jane” leave the firm?
27. What’s the proportion of women to men at the partner level at your firm?
28. What do you think about the firm’s marketing strategy?
29. Why are there more female associates than female partners?
30. What’s the role of mentorship at your firm?
31. What do you think about the professional development opportunities at your firm?
32. Is work fairly allocated?
33. How effective is the Policy Board?
34. How would you rate our communications?
35. Tell me about your job satisfaction.
“Lightning Round”

When it’s your turn, choose a category, your team chooses a question from the category. Answer the question using a Bridge and a Plan. Try to keep your answer between 30 seconds and a minute. Time each other for fun!

A  FIRM QUESTIONS

1  Why do we need to change the performance appraisal system?
2  What can I do to increase my chances of getting better remuneration?
3  How could communication-skills training help all staff and improve the firm’s image?
4  How could flex time benefit the firm?
5  What can we do to encourage creativity in the workplace?
6  The partner isn’t always right so why should I let them get away with rude behaviour?
7  How would you convince a group of senior partners that their top-down management style has to change?
8  I know that some staff is “surfing” the Internet during work time. What can we do about this problem?
9  Where’s the firm going?
10  Why do we need an e-mail policy?
11  What do you think about alternate work arrangements?
12  How can the firm improve retention?
13  What’s appropriate compensation?
14  How can the firm communicate better with associates?
15  What does it take to become partner?
16  How effective are our client service initiatives?

B  SOCIAL QUESTIONS

17  Should we provide greater government subsidy of prescriptions for seniors?
18  How can we educate children about AIDS without frightening them?
19  Does giving money to the homeless encourage them to stay on the street?
20  If we force people on welfare to take a literacy test are we infringing on their basic human rights or improving their quality of life?
21  Marijuana is not as addictive as tobacco and should be legalized. Yes or no?
22  If the government provides a needle exchange for drug addicts isn’t this saying illegal drug use is OK?
23  If we make condoms available in the high schools won’t we be promoting sex?
24  Anyone without a criminal record should be allowed to have a gun to protect his or her home and family. Yes or no?
25  The tax system should be a flat rate with no increase in marginal rates on amounts for wealthy individuals. Yes or no?
26  Commuters should be forced to carpool or use public transportation to help the environment. Yes or no?
C  JUST FOR FUN

27 Do you believe in love at first sight or is it just something that happens in the movies?
28 You have been hired by a major airline to come up with a plan to give their airplane food a boost. What recommendations would you make?
29 What was your best ever holiday and why?
30 Is rap music a bad influence on today’s teens or is it just a form of expressing themselves that teenagers will outgrow?
31 If you could meet any one person in the world, who would you choose and why?
32 Are shopping malls a convenience or a consumer cash grab that is leading to the deterioration of the ‘downtown’ in many communities?
33 In what ways could having a pet be good for you?
34 Who is your favourite talk show host? What makes them outstanding in your mind?
35 What would your ultimate dream house or holiday home look like?
36 What type of program would you recommend to a friend who is trying to get in shape and lose weight?

D  LAW

37 “Why doesn’t your client just put the money in escrow so we can close this deal and go home?”
38 “Why don’t we just sue them?”
39 “Why is your bill double the estimate you gave us?”
40 Your client calls and complains that you are holding up Closing by refusing to give the Opinion requested by the other side.
41 The Partner in charge of the file wants you to account for the large amount of your time.
42 A Judge says, “If I accept your client’s position, won’t that open the floodgates of litigation?”
43 Counsel requests a Chamber Application and you want to oppose it.
44 Your client is resisting giving a personal guarantee on a business loan. What are her alternatives?
45 Your client wants to lay off 200 non-unionized workers ASAP. (It is the week before Christmas.)
46 Your client tells you she has not been filing her Insider Trading Reports.
47 Is the level of proof required for convicting corporate criminals too tough?
48 How can a jury in a complex case realistically consider the evidence and reach an appropriate verdict?
49 Do you think the buyer of a business is at a disadvantage? Explain your answer.
50 The adversarial process in the courts means that the better performer is the more likely winner, which makes a mockery of the idea of justice?
51 Don’t you agree our court system is a legal system, not a system of justice?
52 Should more and longer jail terms be imposed on those convicted of criminal corporate activity?
53 What do you think of the idea of eliminating juries to speed up court proceedings and make the courts more efficient?
54 If a client complains to you about your performance, how do you respond to the client?
55 A partner tells you a complaint has been made about your performance. What’s your response?
56 You are invited to join the partnership at your firm.
57 On discovery, how do you respond when opposing counsel instructs his/her client not to answer a question?
58 Respond to this comment: Litigators (“Type As”) have more fun than corporate lawyers.
59 What factors influence whether a case settles before trial?
Think on Your Feet® Legal Groups - Exercise with Articles

1. Find three or four one-page legal articles that are applicable for the client and participants.

2. At lunch on Day Two, ask get everyone to read one of the articles (Everyone at a one table has to read the same article. Try to have at least two tables to read the same article for comparison purposes).

3. After lunch participants have 10-minutes to create a three-point summary of the article with a Headline. They can use any plan that's already been covered for the summary.

This exercise works very, very well because lawyers have to summarize complex arguments all the time.

Sample articles are attached.
What if snake oil really isn’t?

Canadians can go on the Internet and read to their hearts’ content about new research showing how diet affects health. Worried about prostate cancer, genes? Download some info on tomatoes and lycopene. Are clogged arteries your concern? Google up on how the omega-3 fatty acids in fish or flax seed oil might help.

What Canadians can’t do is go into a supermarket and find this information posted next to the tomato display or the fish counter. They can’t go into a health food store and find the information on the shelf beside the lycopene capsules or printed on the bottle of the omega-3 oil supplements — at least, not if the store is complying with the law.

That’s because ss. 3(1) and 3(2) of the Food and Drugs Act make it illegal to advertise any food to the general public as a “treatment, preventative or cure” for the diseases listed in the act, including prostate disease and atherosclerosis.

As a result, those with enough time, initiative, sophistication and money to seek out the latest health discoveries can be better-informed and healthier than their brothers who lack the time or skill or access to a computer.

Virtually everyone involved in the natural health products industry — including the federal government’s Office of Natural Health Products (ONHP) — agrees that this state of affairs must end. In a report to the Minister of Health dated March 2000, the ONHP recommended the repeal of ss. 3(1) and 3(2) of the Food and Drugs Act. Four years later, the law remains.

A private member’s bill to repeal those subsections, Bill C-420, was introduced by MP James Lunney last year, but probably won’t make it through Parliament before the election is called.

Anyone who patronizes health food stores knows that this law is frequently sidestepped. While product labels may be meticulously devoid of health claims, there are often booklets or leaflets available nearby asserting the health benefits of particular supplements, and the clerk behind the counter often volunteers forbidden information.

Prosecutions are rare, but not unheard of. Kamloops, B.C. lawyer Shawn P. Buckley has handled the defence of the Strauss Herb Company and its principals a few times. He believes ss. 3(1) and 3(2) would probably be found unconstitutional as a violation of the charter guarantee of freedom of expression, if the case ever got that far. However, after he gave notice of a constitutional challenge during one prosecution, the Crown agreed to stay the charges.

The debate over what can or can’t be publicly stated about nutritional supplements is certainly not unique to Canada. In 1994, Dirk Pearson and Sagdy Shaw, authors of the best-selling book Life Extension, filed a lawsuit against the U.S. Food and Drug Administration (FDA) seeking to be allowed to state on their products that “consumption of omega-3 fatty acids may reduce the risk of coronary heart disease.” Ever since 1959, the FDA’s position had been that “any claim, direct or implied, in the labeling of fats and oils … that they will prevent, mitigate or cure diseases of the heart or arteries is false or misleading and constitutes misbranding [a criminal offence] …”

After seven years of litigation, the FDA finally conceded that Pearson and Shaw could make the requested health claim on their product label. However, the FDA also forced them to add: “Although there is scientific evidence supporting the claim, the evidence is not conclusive.”

In May 2003, the U.S. government made an about-face. The White House is now encouraging Americans to increase their consumption of omega-3 fatty acids and says “The government should make this life-saving information as widely available as possible.”

The obvious question is: how many Americans died of heart attacks during the years between 1959 and 2001 because a U.S. government agency wouldn’t allow anyone to tell people what they could take to prevent them? Canadians should be asking this question of our government, too.

No doubt laws like these were originally passed for a benevolent purpose — to protect the public from quackery. Unfortunately, the harm they cause may well outweigh the good, when it turns out that the stuff some bureaucrats labelled “snake oil” actually possesses valuable medicinal properties.

Laws like this can easily be perverted to different, malevolent purposes. For instance, where law enforcement is the norm, as it is in the health food industry today, selective prosecution (triggered perhaps by an anonymous complaint) can become a tool for targeting individuals who just happen to have annoyed the authorities for completely unrelated reasons.

Laws like this also give an unfair advantage to those who sell competing patented drugs for the same ailments. The manufacturers of expensive cholesterol-lowering drugs probably don’t want the public to know that equal or better results may be obtained from taking less expensive fish-oil supplements or simply eating sardines regularly.

The government should be red-faced with embarrassment over its record in the medicine-approving field. Not only has it withheld its endorsement from healthful products, it has all too often granted approval to things that later proved harmful. Hormone replacement therapy for menopausal women was okay, they said — until we learned it may increase cancer risk. A new class of heart and blood pressure medications was approved, but recent news stories say they kill more people than they save, and old-fashioned diuretics are more effective.

With this history, why are Canadians so complacent about entrusting their health to the state?
In Support of E-Commerce
(part 1)

By George S. Takach

I am often asked, "is it legally safe yet to do business over the Internet?" There are several variations to this question, including: are electronic messages, such as e-mail, as good as paper, from a legal perspective? For example, "We want to implement the truly paperless office by scanning all customer correspondence and throwing away the paper. Can we do that, legally speaking?"

Canadian legislators have made great strides over the past few years to construct a legal environment that accommodates, and facilitates, all these forms of e-commerce. For instance, legislation has now been implemented in all jurisdictions that requires a "writing" or a "signature", "here is how you comply with such a requirement in an electronic messaging environment." Evidence law statutes have also been amended.

"We want to implement the truly paperless office by scanning all customer correspondence and throwing away the paper. Can we do that, legally speaking?"

Digitally Sensitive Judges

Courts are active as well. Consider the recent decision in Canadian Real Estate Association v. Sutton (Quebec) Real Estate Services Inc. In this case the defendant, Sutton, was downloading real estate listing information about homes from the plaintiff CREA's website, and making commercial use of it on the Sutton website.

In the usual cadence for such disputes, CREA wrote to Sutton demanding that they cease downloading and using material from CREA's website. Sutton did not oblige. CREA then instituted technical measures to block Sutton's access to the CREA website, but as often happens in these web-based disputes, this prompted a game of technological cat and mouse. Sutton, who used a web hosting company based in Phoenix, Arizona, changed its URL headers, and implemented other stealthy responses, including using various IP addresses, to thwart CREA's blocking efforts. This technical thrust and counter thrust process makes one want to update the Newtonian physics adage as follows: for every digital action, there is an equal, and equally successful, digital reaction.

CREA, however, could not countenance this state of affairs. The Montreal real estate board told CREA that it would stop sending CREA Montreal-based house listings if CREA could not stop Sutton's unauthorized downloading behavior. This would have had a devastating impact on CREA's web presence, given the importance of Montreal in the national real estate market.

Website Terms and Conditions

Having failed to stem Sutton's downloading through technical means, CREA brought a legal claim against Sutton, coupled with an injunction application. One of CREA's core arguments was that Sutton was in breach of the CREA website terms of use. These terms stipulated, among other things, that "any commercial use of the listings or data in whole or in part, directly or indirectly, is specifically forbidden except with the prior written authority of the owner of the copyright," which Sutton did not have.

While Sutton's behavior seemed to be a clear contravention
of the CREA website terms of use, Sutton argued the fundamental point that these terms of use were not binding on Sutton as Sutton never expressly agreed to them. Sutton argued it never clicked on an "I Agree" icon, or some similar button that would have expressly manifested consent to the terms of use.

There is indeed jurisprudence in Canada which holds that where an online set of terms and conditions include an "I Agree" button at the end of the terms, and the site is designed so that the user must click on this button before proceeding to use the site, such terms will be binding upon users (Rudder v. Microsoft Corporation). This is so even if, for example, not all the terms can be read at once, but rather require some scrolling (just as a multi-page paper-based contract requires the turning of different pages to read the entire agreement).

**Digital Fine Print**

What was not yet clear in Canada was the effectiveness of the terms of use that were on a separate part of the website, and connected to the home page merely by a small link, usually found at the bottom of the home page.

In one American decision, *Ticketmaster Corp. v. Tickets.com Inc.*, the judge concluded that such an attempt to notify the user of the terms was insufficient, as most users would proceed into the body of the website without stopping to click on the tiny link. The court equated this to the "small print" of a paper-based contract and concluded that something more prominent was required in order to bind the website's users.

On the other hand, another US court has decided that assent to website terms and conditions may be manifested by conduct, such as using the site for its intended purpose (*Register.com v. Verio, Inc.*). In this case, the relevant terms of use provided that the website user, by using the site's service, was agreeing to the terms of use.

The court in *CREA* concluded that ultimately this threshold question of the enforceability of the CREA site terms of use would have to be decided by the trial judge, presumably as facts would have to be assessed and weighed, including determining how prominent the link to the terms of use was at the bottom of the CREA home page. Nevertheless, for purposes of the injunction application, the court concluded that: (i) the CREA home page did include a link to the terms of use; (ii) the terms of use clearly prohibited Sutton's behaviour; and (iii) the terms of use stipulated that they applied to anyone who made use of the website, and therefore Sutton was bound by the terms of use.

**The Goose and Gender Principle**

In coming to this conclusion, the court noted that Sutton's own website contained a set of terms and conditions quite similar to those on the CREA site. Thus came into play what I call the "sauce for the goose, sauce for the gander principle." That is, it would be difficult for Sutton to argue that it did not know generally how website terms and conditions operate, when its own site used essentially the same vehicle (which was reproduced at length by the court in *CREA*). In short, on the threshold requirement for an injunction that there be a "serious question" or a "fair question" to be tried, the court in the *CREA* case could answer in the affirmative.

The court went on to discuss the other requirements for an injunction, namely the balance of convenience and irreparable harm. On the facts before it, the court granted the injunction and ordered Sutton to cease its downloading and use of material from the CREA website.

The *CREA* decision illustrates well the extent to which courts will go to support e-commerce activity. Nevertheless, prudent website operators should go beyond merely having a link to their terms of use at the bottom of their home page. For example, Ticketmaster now places a prominent notice at the top of its home page, indicating that use of its website is subject to the terms of use. And in some cases even stronger forms of "implied click consent arrangements" will be warranted.

Next month I will look at another recent case that is consistent with the trend of judges supporting e-commerce from a legal perspective.

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Marketing the Intangible

By Donna C. Wannop

Marketing as a business discipline has been around for a long time. However, its roots are far removed from the practice of law. Formal marketing theory and practice were first developed with respect to consumer packaged goods. The application of marketing to professional services generally, and to legal services in particular, are developments that have taken place slowly and more recently.

This article focuses on tangibility, which is a fundamental difference between products and legal services. Unlike products, legal services are essentially intangible, meaning they are not perceptible or discernible through use of the five senses. They cannot be seen, heard, touched, smelled or tasted. Therefore, they are difficult to understand and to evaluate, which has an impact on how lawyers and law firms should approach marketing. Many traditional marketing models and approaches that have been successfully applied to tangible products might not be applicable to the marketing of legal services, or may at the very least require serious reworking in order to be effective.

A concrete example will better illustrate the point. Consider something familiar—toothpaste. This product is aggressively marketed. Toothpaste is tangible and therefore toothpaste marketers typically focus on tangible core product attributes that are demonstrable and relate to a key function or purpose of the product. For example, toothpaste advertising often focuses on things such as cavity prevention, tooth whitening, breath freshening properties and taste. These things are perceptible, and can be measured and evaluated.

Now contrast toothpaste with legal services and you will begin to understand how different they are.

From a client's point of view, the legal services provided by competing firms look pretty much the same. And contrary to what most lawyers like to think, that goes for clients of all types, even sophisticated ones. Clients are hard pressed to appreciate the differences between a well-drafted contract and a not-so-well drafted one, or between a creative legal argument and a non-creative one. It might be true that the substantive quality of your work surpasses that of the lawyer you are competing with, but the reality is that clients usually cannot tell or do not care. Therefore, if you insist on using the toothpaste approach, and focus on the purely technical or substantive aspects of your services for the purposes of marketing, your margins for differentiating yourself from your competition are small.

If you are practising at an established firm with a solid reputation, clients assume that the quality of the service you provide meets a high standard. Clearly your first priority is to ensure that you meet that quality threshold. We all appreciate that getting there and staying there is no small accomplishment, but it is not enough—at least not anymore. You must give your clients something else—something that they understand and value that will provide them with tangible clues to, or evidence of, the quality of your service.

In order to facilitate better client understanding and evaluation of what you do and how you do it, enhance your service by adding value that takes discernable and concrete forms—things that clients can observe and understand. There are many ways to do this, but some straightforward examples will help to make the point. Be a good listener, be interested, and make your clients feel welcome, appreciated and valued. Show your clients that you are thoughtful, empathetic and responsive. Give them your undivided attention. Return their calls. Provide them with regular updates. Save them money. Provide them with good ideas. Introduce them to new business prospects. Be a strategic advisor, not just a legal technician. Make sure that your chairs are comfortable, and that your coffee is good. You get the idea.

In other words, since legal services provide very little that is tangible enough to focus on for the purposes of marketing, you should enhance the basic service you provide with other things with a view to making the inherently intangible more tangible.

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Why judges don’t deserve a raise

O
h, those clever judges. They’ve done it again. According to Statistics Canada’s 2001 census, they’ve beaten every other occupation to the top of the income heap — except for specialist physicians, who check out a mere $438 more per year. Judges lead lawyers, dentists and non-specialist physicians in their dust, as they did in the 1996 census.

So what are we to think when we read that federally appointed judges, already earning $216,600 and upwards, are seeking salary increases from the Judicial Compensation and Benefits Commission that will put them in the range of $253,000 to $300,000 over the next four years? Are they simply determined to one-up those hoity-toity medical specialists? Or do they really deserve a raise?

The judges first trot out the old cliché about financial security ensuring judicial independence. What’s the connection? Are we supposed to worry that judges will be tempted to accept bribes if they earn only a paltry $216,600 per year? Don’t forget, judges can spend every last nickel of their incomes, because barring some egregious misconduct, they’re guaranteed that amount every year until retirement, when their generous pensions kick in. In a country where the average household of two or more people gets by on earnings of only $64,000, how much more secure can you get?

Next, judges say a raise is necessary to attract the best candidates to the job. They compare their earnings to those of the country’s top lawyers in private practice. However, this comparison is inappropriate for several reasons.

First, the highest-earning lawyers in any particular year are not necessarily the top earners every year. Lawyers’ incomes fluctuate. By taking a snapshot of the highest incomes in a given year, judges would be looking at the short-lived peak, rather than at the more representative average.

Second, the qualities that propel lawyers to the top of the heap in private practice may not be the qualities that make the best judges. Top litigators often have an outstanding sense of showmanship, strategy and media savvy, all of which are unnecessary in judges. Sometimes top lawyers get to where they are because of political, social or familial connections, or because of extraordinarily aggressive personalities — all factors that might well make for worse, not better, judges.

The qualities that would seem most desirable in judges include a comprehensive knowledge of the law and an analytical (as opposed to an adversarial) disposition. These qualities are probably more prevalent in academics than in practitioners. The salary for a senior professor with 25 years’ experience at the University of Victoria Law School is $115,000. At Dalhousie Law School, full professors earn between $88,000 and $117,000. Admittedly, professors can moonlight and judges can’t, but it’s unlikely that academics are making more than $100,000 extra in their spare time. So conceivably, we might entice some highly suitable candidates out of academia without any raise at all.

Consider, however, if a raise really is necessary to attract the best, what does that say about the judges who have received their appointments over the past few years? Have we been appointing a bunch of mediocrities? If so, why should they get the same higher salaries that the better candidates are going to receive? Maybe we should make existing judges reapply and face the stiffer competition we expect to attract before we give them a raise.

A repeated theme in the submissions of both the judges’ association and the federal government is that the salaries of judges should be roughly equivalent to the salaries of senior deputy ministers in the federal civil service. This is like comparing leprechauns to sasquatch. Neither of them has any connection whatsoever to the real world. There is no objective basis by which to evaluate what a civil servant should be paid. There are no market signals. Taxpayers are compelled to pay their salaries whether their existence is helpful or harmful to the country. Are they doing a good job or a bad job? Who can tell?

Similarly, there is no mechanism for determining whether judges do their jobs well or poorly. So what is the point of comparing them to people who are supposed to have similar “outstanding character and ability”? Maybe neither group does.

The final straw, however, is the judges’ contention that their job has become increasingly demanding and onerous in recent years due to the complexity and volume of charter litigation and the intensified public scrutiny of judicial decisions. Judges, we are told, “are repeatedly called upon” to adjudicate on “many controversial issues” such as same-sex marriage, which Parliament and the provincial legislatures “leave” for them to determine.

Have they been living on the same planet as the rest of us? For starters, the charter has been around for 22 years now — longer than a substantial percentage of judges have been on the beach — so they do now have to know what they applied for when they applied for the job that charter litigation would be among their duties.

More importantly, though, can they possibly be unaware that the public criticism they’ve been receiving stems from the perception among many laymen and legislators that the judges are intruding unbidden on legislative turf? If they are really so oblivious to the nature of the bullhorn that has swirled around them for years now, who can really believe that these twits deserve more money?
LITIGATION DEMOS

TRIANGLE
Opposing Counsel objects to the qualification of your witness as an expert.

Your Response:

• Education (incl. teaching experience & papers presented)

• Work Experience (# of years in profession, types of projects)

• Witness Experience (# of times as defence/plaintiff witness, # of times accepted by the court)

BENEFITS
Situation: Your client reneges on an agreement because their Board did not pass the deal but the terms of settlement were already agreed to and sent to the Opposing Counsel whose client has agreed. You need to convince your client/Board to proceed.

Benefit #1: You’ll have the matter resolved and no further time will be spent on it.
Benefit #2: You’ll spend no further money on fees.
Benefit #3: Your business reputation will be preserved within the community.