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Creating a Fast-Track Strategy Towards Your **PREFERRED FUTURE**

Gerry Riskin

Urgent and Important: your firm's future is not waiting for you! It is marching on, and you need to choose a sensible strategy to guide it. But you can't wait until it is convenient or comfortable – or worse, until the conditions are perfect – or it will simply never happen. In this context, procrastination can be lethal.

Strategy is all about focus and direction. Often, it's about what your firm does not want to do as much as what it would love to do. Without a strategy, even good law firm leaders find themselves steering around the icebergs without a clear destination, while more strategic competitors are striking out into the deep.

So if a strategy can create competitive advantage, why do so many firms wander around directionless? I believe that, as lawyers, it's precisely our intelligence and practice experience that get squarely in our way. Here are six examples of the lawyer-specific propensities that work against us when selecting our strategy. I'll wager that more than one of these will resonate with you.

"Without a strategy, even good law firm leaders find themselves steering around the icebergs without a clear destination"

- 1. We don't want to exclude anything.** *"What if a global circus owner asks us to do a huge elephant acquisition? We'd better list 'circus law' among our practice areas."*
- 2. We are constrained by precedent.** *"Which other law firms have done it this way before? How did it work for them? The ABC firm? We would never emulate them. Has XYZ done it? We revere XYZ!"*
- 3. We are perfectionists.** We must explore every option thoroughly until we have vetted every combination and permutation. *"Maybe we'd better defer our strategy pending a global study on how general counsel in high-tech companies prefer their eggs in the morning."*

- 4. We require consensus.** *"Partner X won't go along with this. Yes, we know he's unreasonable and ill-equipped to assess a decision of this nature. But he can be difficult and rude when he doesn't get his way. It just isn't worth doing without his support, and especially over his objections."*
- 5. We despise being wrong.** We hate risk, and we won't move until we have a bullet-proof action plan that is certain to succeed. *"How do we know this will work for sure? We don't want to be embarrassed by making a big mistake."*
- 6. We're resting on our laurels.** Our past success has made us complacent. *"We're making a nice living now and working very hard. We don't want to spend more time even on high-quality non-billable initiatives. Leave us alone."*

One traditional answer to these problems is to throw excessive amounts of money at an elaborate process that involves surveys and research and meetings and assessments and heaven knows what else. *"No one can criticize the leadership*

team if we spend a million dollars to have McKinsey study us and tell us what to do." But although these elaborate processes can hypothetically work, they are slow and can easily polarize factions within the firm.

Sounds discouraging, doesn't it? But forming a strategy for your firm isn't impossible, and it doesn't have to be the strategic equivalent of brain surgery. In fact, there's much to be said for a stripped-down, get-it-done-now, fast-track strategy that gets your firm off and running in the right direction. There is no substitute for actually doing something!

(This may be an appropriate point to insert a disclaimer. If yours is a global firm, with more than a thousand lawyers in more than a dozen offices in more than three

countries, and you have not articulated a strategy that has been reduced to writing in over five years, then you need a more robust approach than I am describing here. But if you are revisiting a strategy or creating a new one for a firm of a few hundred lawyers or less, then breathe easy. There is an elegant strategic process that will take you only a day and a half and get you off to a great start.)

The strategy of adjustment

We want to avoid the error of overbuilding the strategy. By way of analogy, if you commute from your home to your office in your own car, following the same route each day, why not just program your car for every turn and traffic light so that you can sit back and relax or read while your car drives for you? It's because of the three-year-old who might chase a ball into the street right in front of you, or the unfastened cargo from the truck in front of you falling into your path. In a word, "uncertainty" – there are just too many variables.

Many firms make the huge mistake of looking at strategy as *The Grand Plan* that will withstand all foreseeable changes in the relevant variables. Your firm's strategy must be flexible enough to assimilate information as changes occur and then adapt. If this world promises anything, it is change – much of it unforeseeable.

Hopeless? No more than driving to work. When a bridge is washed out, you change your route. You might even adjust your timing based on whether school is in or out and how many parents and school buses are clogging the lanes. The point is that you do not defer your plan to drive to work until you have achieved perfection. You get underway and trust that you can make the course corrections necessary as circumstances dictate. This is precisely how you should treat your firm strategy.

The making of a strategy

So let's get down to choosing an overall destination for your firm, with sub-destinations for your sub-groups. To achieve this, we need your leaders to gather together for a day and a half. To start the process, we would benefit from the collective knowledge of your partners by asking them a few survey questions, possibly along these lines:

1. Describe the prospects for the future of your practice.
2. Identify your firm's highest priority over the next few years.
3. Evaluate (or add to) a list of threats and opportunities the firm faces.
4. Describe your firm's greatest strengths.

5. Identify your firm's endangered practice areas and industries.
6. Identify, from a list, your firm's top goals.
7. Get input on work/life balance priorities.
8. Establish the perception of prominence of your firm's brand.
9. Identify your top competitors and their greatest strengths.
10. Identify areas in which your firm can dominate (i.e. rank among the top three).

The data gathered from a simple survey can be organized and presented to the leadership team and discussed for a couple of hours. This is extremely helpful, because it is credible and allows leaders to be responsive to the partners the strategy will affect.

The art of exclusion

The next segment is a tightly facilitated discussion about where the firm's few best opportunities lie. The tight facilitation is to avoid digressions and overly critical and analytical discussion; the group must stay on track!

The toughest part of the process is to exclude areas from the strategy. There are two kinds of exclusion. One is for the areas you decide to exclude from your practice, while the other is identifying an area that will receive what might be called standard support.

Imagine a business-oriented firm that also does matrimonial work. Imagine further that the nature of the business clientele suggests that the firm must be able to serve a much larger geographic area – perhaps by expanding, merging, joining a global association, selecting "best friends," or some combination thereof. Further, the firm may see the importance of beefing up its intellectual property capabilities. In all events, the matrimonial area is not perceived to be part of the firm's growth engine.

If the firm decides that the matrimonial practice is inconsistent and counterproductive to the strategy, the firm may decide to jettison the practice area altogether. In such a situation, the firm might assist the departing partners and feed them referrals. Equally, the firm might decide that it is perfectly fine to keep the matrimonial group inside the firm and support it with the firm's overall infrastructure, but not to invest in the group to the same degree as the identified strategic areas (geographic expansion and IP capabilities).

This part is tough, because many leaders are reluctant to communicate to a group that, while it's an important part of the firm, it is not in the strategic "sweet spot" that will receive extra attention. It's like explaining to one child why the other child, a gifted musician, gets to travel to perform in a concert. Not fair, perhaps, but realistic, and a necessary sacrifice where resources are limited.

This process, which I have described in a skeletal way, sees the leadership team making decisions within one to one-and-a-half days. The result must be a specific action plan and a process whereby that plan remains illuminated and measured. It is critical that the plan not fade into oblivion – that would be worse than not having conceived the plan at all.

The never-ending story

In summary, we gather input, simply and quickly. Then we decide on a focus. Then we accept that areas outside the strategic focus still need support, but not the special attention of the strategic areas.

From that point on, the plan requires continued scrutiny and adaptation. Suppose, for example, that while IP is part of the strategy, an M&A practice team becomes available from a respected competitor or in a desirable growth jurisdiction. The leadership team might decide to exploit that opportunity, so long as it complements and is

not inconsistent with the plan, and so long as it will not so tax the firm's resources as to delay unduly the execution of the primary strategy.

In other words, when the day-long session ends, your process is not over. Senior firm leaders should ensure that subgroups follow similar processes for their groups. That's what practice group meetings are for.

For those partners who are never satisfied with the quality or the quantity of the information available, there are two answers. The first is that corporations make billion-dollar decisions every day with much less information than we are accustomed to as lawyers. The second is that, in the most vital areas, the acquisition of information can proceed continuously and be evaluated frequently without holding up the journey at the start.

The best firms don't always have the best strategic plans. The best firms know how to plan, and then frequently adapt those plans to their rapidly changing world. §

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Law Firm Media Relations: Getting the Most Out of **YOUR PR FIRM RELATIONSHIP**

Michelle King

This article is a "blog" post from the Jaffe PR Blog (jaffepr.com/blog). It is reprinted here with the permission of the author, Michelle King, and Jaffe PR.

I have been a public relations and marketing consultant for the majority of my career, and I have learned that every client is different – which is one of the many things I like about being a consultant. However, one of the main differences often lies in the extent to which my clients take advantage of and make the most of my services and expertise.

While I can do some things that will benefit my clients with minimal involvement from them, for the most part,

how much my clients gain from our relationship depends heavily on how much they put into the relationship. I must have their input, ideas and involvement to achieve the best results. This is especially true in law firm media relations – I am tasked with "selling" attorneys' expertise to the media and other audiences. Regular, consistent access to that expertise is critical to achieving the best results.

Here are a few ways lawyers can work with PR agencies to get the most from their relationships:

Communicate regularly with your publicist:

The more your publicist understands your practice, the

better the results you will achieve. Take the time to explain your practice and industry. Provide regular updates on your work, including major cases and new clients.

Be aware: Monitor the media in your industry and be knowledgeable about current issues, trends, major cases, new legislation, regulatory changes, and anything else that may impact your clients. Then let your publicist know about them. While your publicist should also be monitoring your industry and sending ideas your way, you will always be much more knowledgeable about your practice area than your publicist will be. Plus, being aware of industry issues is just good business.

Understand the different types of media: Your publicist can help you with this one. Of particular interest to attorneys is the trade press, which are specialized publications aimed at people in particular industries or business sectors. Often, a major story will break in an outlet like *The Wall Street Journal*, *The New York Times*, or other national media. Then, the trade media will follow up on that story and cover it in more depth with stories tailored to their niche audience. This deeper coverage provides attorneys an opportunity to reach a narrow, defined audience with in-depth analysis on a major news event.

Be proactive: Timeliness is crucial to obtaining coverage on hot topics. There are many other law firms and attorneys jockeying for “ink,” and often journalists will simply interview the first few sources that approach them. Let your publicist know when there is something on the horizon that you think your clients will be talking about. If it’s relevant, but you’re not sure how you can contribute to the topic, your publicist will help you figure that out.

Think seasonally: Are there certain issues your clients are typically concerned with at particular times of the year? The media loves seasonal stories – you’ll notice back-to-school stories, summer fun stories and of course Christmas stories in the consumer media. But you also see this in the business and trade press. For example, tax attorneys are ideal for this kind of tactic. Let your publicist know well in advance about these seasonal events and it might result in a nice story for you.

Be opinionated: Journalists are looking for sources that can provide useful background information and analysis, but they truly love sources who have opinions. While that’s not always possible (for any number of reasons), if you can, take a stand on a topic. The more

controversial or different your ideas and opinions are, the better chance you have of standing out from the crowd and getting covered.

Multitask: If you create a helpful how-to communication for your clients (such as a client alert, newsletter article, speech, or just an email), let your publicist know. He or she may be able to turn that piece into a media opportunity.

Treat journalists as if they are your clients or referral sources: Publicists depend heavily on their own credibility and relationships with the media. If you don’t show up to an interview, are late in responding to a request or are not a helpful source, that journalist may refuse ever to use you again as a source, and might even take it out on the publicist. If the topic isn’t right for you, say so. But perhaps there is another attorney in your firm or someone in your professional network who can talk to the reporter. Pass along any helpful information you can, and the reporter is much more likely to call you again.

Be willing to write: The media is changing dramatically, and many media outlets now depend on contributed articles from industry experts. Business and trade publications are especially on the lookout for qualified guest writers on issues of importance to their readers. Your publicist should guide you on the publication’s requirements and style and then edit the article from a journalist’s viewpoint, pointing out any legalese, jargon or stilted language. §

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New Judicial Guidance on Life Insurance Policies and **CAPITAL DIVIDEND ACCOUNTS**

Guy A. Desmarais
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Life Insurance policies are often assigned to creditors to provide for the discharge of a loan on the death of a shareholder or key employee of a private company. Upon the death of the individual, the life insurance proceeds are used to pay off the loan, with the proceeds in excess of the adjusted cost base added to the corporation's capital dividend account. The balance of the capital dividend account is then available for a tax-free distribution to the shareholders.

Historically, it has been the Canada Revenue Agency's (CRA) policy to deny the addition of the life insurance proceeds to the capital dividend account. The basis for that position was outlined in paragraph 6 of IT-430R3 and Income Tax Technical News No. 10, which denied the addition to the capital dividend account when the proceeds of the life insurance policy are paid directly to the creditor as a beneficiary, or where the creditor is an absolute assignee for security. Despite the fact the debtor paid the premiums on the policy, the CRA viewed the addition of the capital dividend account as remaining with the creditor rather than the debtor.

The CRA traditionally held that the corporation did not receive the proceeds as a beneficiary as required by the definition of "capital dividend account" under subsection 89(1)(d)(ii) of the *Income Tax Act*, which definition includes:

all amounts each of which is the proceeds of a life insurance policy... received by the corporation... in consequence of the death of any person....

However, the recent decision of the Federal Court of Appeal in *Innovative Installation Inc. v. R.* (2010 FCA 285) provides a different interpretation of the definition.

In the case, *Innovative Installation Inc.* (Innovative) had a business loan with the Royal Bank of Canada (RBC) and was enrolled in a group creditor life insurance policy set up by RBC with Sun Life. The policy provided for the discharge of the loan upon the death of the principal of Innovative. Innovative paid the premiums to RBC as part of its loan repayments, and RBC remitted them to Sun Life. Upon the death of Innovative's principal, Sun Life paid the proceeds of the policy to RBC as the policyholder and RBC was contractually obligated to discharge

the loan with those proceeds. In these circumstances, the Minister denied the addition of the life insurance proceeds to Innovative's capital dividend account. The Tax Court of Canada upheld that decision.

The Federal Court of Appeal disagreed, however, holding that Innovative "received" the proceeds of the policy – for purposes of the definition of "capital dividend account" – when RBC applied the proceeds to discharge the loan, as required by the contract. The definition did not require the corporation to receive the proceeds directly from the insurer or that it be named as a beneficiary of the policy. As such, the life insurance proceeds were properly added to the capital dividend account, in contrast to the CRA's historical position.

The *Innovative* case would suggest, then, that it is irrelevant who the owner and beneficiary of the policy is or who physically receives the proceeds from the life insurance. The effect for tax practitioners could be a reduction in the administrative burden in structuring insurance policies as security for debt. It has yet to be seen whether the CRA will update its administrative position and Interpretation Bulletin IT-430R3 to reflect the outcome of this case. §

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The Art of Trust: **TONE FROM THE TOP**

Tyna Jallet
Randy Greenstone

This is an excerpt from a longer piece that is the second in a series of fraud-related articles focusing on the balance of trust. The series may be viewed at <http://www.collinsbarrow.com/news.asp?typeID=27>

What is tone from the top?

The term *tone from the top* refers to how an organization's leadership creates an ethical, or unethical, atmosphere in the workplace, which trickles down through the organization to each employee. Employees, like children, notice the behaviours and actions of their superiors, and tend to follow their leads. If the tone is "do as I say, not as I do," employees will tend to be more likely to commit fraud, as they will feel that ethical conduct is not a focus or a priority.

Why Tone from the Top?

How management acts and the message it sends to employees will affect how employees behave and perceive their working environment. Management structures that focus only on reaching a certain level of profit tend to encourage employees to turn to unethical behaviour in order to align themselves with that perceived goal. On the other hand, where management promotes an ethical environment in which employees feel confident in their roles and responsibilities, and feel less pressure to attain a certain goal, ethical behaviour tends to prevail.

White collar crimes like those seen in the WorldCom and Enron fiascos stemmed from management's pre-occupation with constantly achieving goals set internally and by the market, and rewarding management players with unrealistic compensation plans and incentives. As the employees watched their employers manipulate financial records, they followed suit in an effort to make the companies appear to be meeting projections. The employees apparently did not regard what they were doing as wrong.

How do we send the right message?

The solution is not simply to have policies in place forbidding improper conduct. The answer lies in communicating clearly what is expected from employees, leading by example, providing a system that will allow and

encourage employees to report violations, and – most importantly – rewarding integrity.

In such an environment, employees will be less afraid to provide management with data and reports that do not meet expectations, or to set goals that could in turn affect their own financial compensation.

Following are some steps that management can implement to demonstrate that it takes these issues seriously:

- Implement a code of ethics
- Take prompt action when misconduct is suspected or discovered
- Implement a "whistleblower" program
- Define a clear mission and goal of the company and share it with employees
- Emphasize the importance of a strong set of internal controls

Bringing it all together

Management's expression of the importance of employees stepping forward and reporting unethical behaviour, and the controls that have been put in place to protect them and maintain confidentiality, will determine how effective these steps will be. Employees will not come forward unless they believe they will be protected. It is also critical that they feel confident that, when they report suspected wrongdoing or unethical behaviour, management will take action. It is the employee's perception of the fairness of the overall process that will determine its success. That is *tone from the top*.

Employees will follow the path set by management. Care must be exercised when conveying any message, either expressly or impliedly, from management to employee. A strong ethical *tone from the top* will foster a positive atmosphere, encouraging ethical behaviour. Morale and loyalty will improve as the likelihood of fraud diminishes. §

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Tech Central: **A REASONABLE EXPECTATION OF PRIVACY ON A WORK COMPUTER?**

A recent ground-breaking decision from the Ontario Court of Appeal comes hot off the presses just in time for this issue of *Tech Central*.

The Court released its decision in *R. v. Cole* (2011 CarswellOnt 1766) on March 22, and already it has raised many eyebrows in the legal community, as lawyers, prosecutors and police contemplate the effect it will have on computer search and seizure practices in the province and across Canada.

At issue was whether a high-school teacher had a reasonable expectation of privacy in the content of his school-issued laptop computer, and whether such expectation extended to protect him from unreasonable police search and seizure of images of child pornography stored on that computer. It is an issue on which there has so far been little legal authority or guidance in Canada.

The Court grappled with the unique facts of the case, including the facts that the school board had issued laptops to many teachers at the school and expressly permitted them to use the laptops for personal use, allowing them to be taken home on evenings, weekends and even over the summer break. Other teachers provided testimony as to the importance of maintaining a sense of privacy in the personal information they stored on their school-issued laptops.

The Court of Appeal appears to have been influenced by this position, noting “The contents of the hard drive of a laptop may contain extremely personal information such as medical and financial reports, personal journals, emails and appointments.” It was important to the Court to maintain a sense of privacy in that information. Though the school board owned the computer and had the right to search and seize its contents for its own internal administrative and disciplinary purposes, it did not have the right to give police access to that material for criminal search and seizure purposes.

Many factors will play a role in whether an employee has a reasonable expectation of privacy in a work-issued computer. The Court contemplated these factors:

- Whether the computer in question is a laptop or a desktop model
- Whether the computer and/or specific files are password-protected
- Whether the employer’s IT department has unfettered access to the computer
- Whether employee computer usage is routinely monitored by the employer
- Whether there is a well-known usage policy in place
- Whether the employee has the employer’s express permission to use the computer for personal use
- Whether the employee is permitted to take the computer/laptop home

In this technological age, it has come to be understood generally that files and content created or kept on a work computer are owned by the employer and not by the employee. That may still be so in the civil context, but *R. v. Cole* has added a new dimension to that general understanding. Depending on the circumstances, the employee may retain a reasonable expectation of privacy extending beyond the employment relationship to protect from police search and seizure.

We will continue to monitor this issue and provide updates here at *Tech Central* as new developments arise. §

Lawyers Alert is designed to highlight and summarize areas of interest to the legal profession in Canada. The contents herein are for the general interest of the reader. They are not intended, and should not be relied upon, as legal or professional advice.

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