

C-SWOT and PLA-Squared: Techniques for Avoiding and Breaking Bad News

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In 1847, the American Medical Association's first code of medical ethics stated, "The life of a sick person can be shortened not only by the acts, but also by the words or the manner of a physician".⁴ Lawyers too have an ethical responsibility to be mindful of their words and manner. This is particularly important when breaking bad news. In every lawyer's life there comes a time to deliver bad news. Sometimes you may have to deliver a difficult message to a corporate client, a family, a colleague or a senior partner in the firm. Regardless of who the recipient of the bad news is, the way you deliver the information and manage the process will either make things worse or better. Developing the skills to effectively deliver bad news is simply learning to deal with the inevitable.

There are many ways you can break bad news. You may ask yourself, "Is there a correct or best method? Should you be direct or assertive? Can you be compassionate without sounding disingenuous? Is it best to just get to the point? You need to utilize your judgment along with your knowledge of the client and/or corporate culture to determine how you will proceed, but there are some fundamentals that can be helpful. This article discusses (1) the nature of bad news, (2) what makes news bad and (3) the authors' Case-Strengths, Weaknesses, Opportunities and Threat (**C-SWOT**) model which is an effective tool for analyzing a case and then developing congruent expectations between you and your client. We also present the **P²L²A² Model (PLA-Squared)** which describes a process you can use to minimize the difficulties associated with breaking bad news. Both the **C-SWOT** and the **PLA-Squared Model** have been field tested in a variety of settings including law firms, healthcare organizations, insurance companies and small businesses.

Three Universal Principles

When we consider delivering bad news, certain universal principles apply. First, the skills required to deliver bad news are teachable and therefore are learnable. Second, delivering bad news is seldom easy and is always uncomfortable. Third and finally, learning to deliver bad news thoughtfully, enhances trust in client-attorney relationships, is ethically appropriate and makes good business sense. While it is an absolute truth that everyone encounters situations that include breaking bad news, few of us have had any formal training on the subject. Intuitively, we also all know that Sophocles was correct when he said "*None love the messenger who brings bad news*" (Sophocles 496-406 BCE), therefore knowing how to break bad news is an important skill to develop.

Bad Is In the Eye of the Beholder

Bad news, like beauty, as the saying goes, is in the eyes of the beholder. As a practical matter, news can be characterized as "bad" when it reflects the gap between expectations and outcomes. The gap between expectations and outcomes is likely, at a minimum to provoke disappointment and may result in anger, hostility and blame. Take for example, losing a motion for summary judgment when the case law seemed clearly favorable. Your expectations were created based on your analysis of the facts and the case law. They were also demonstrated in the brief you prepared in support of your motion for summary judgment to the court. When your motion was denied, a gap was created between your expectations and the outcome. How did you feel? What did you think about having to break the news to your client? Will the client have faith in you and the plan you must recommend as a next step in the litigation?

Imagine another scenario: you have a settlement offer on the table that your client perceives as being too little or too much. Either way, you as the bearer of bad tidings and as the client's lawyer, must recognize your client's negative reaction and help them manage the gap between their view of an appropriate settlement and the various alternatives that are available. Conducting a C-SWOT analysis can help resolve this situation.

There also are times when the information you must manage would be seen as bad news by any reasonable person. Examples include discussing the death of a client's loved one, the failure of a business endeavor resulting in loss of money and the ensuing litigation; or having to implement staff reductions and lowering compensation at your firm. The consistent thread in each of these examples is the presence of loss and the potential for harm to the future of those affected. The PLA Squared Model can be especially useful for these types of situations.

It is easy to see that bad news can take a toll on both the recipient of the news and the messenger. It is not an accident that messengers are often blamed for the messages they deliver. Fear of being blamed makes delivering bad news especially difficult. However, being unprepared due to little or no training in basic communication skills and not having a model or tools to use increases the risk of making things worse due to the manner in which the bad news is delivered. Additionally, without tools and training it is likely that you will feel heightened anxiety when you are the messenger.

From the moment an inquiry is made about representation through to the disposition of a case, there is the potential for having to deliver bad news. For example, a woman calls inquiring about representation because her brother died in an automobile accident in which the front tire of his car failed causing him to lose control and strike a bridge abutment.

You decide to meet with her in person to assess the case. You and your paralegal review the matter carefully and then determine that the facts and the potential costs of pursuing the litigation do not support initiating representation. When you tell the prospective client during a second meeting "No, I am sorry, we cannot accept your case.", she becomes tearful, but quickly regains her composure and angrily says "My brother is dead and you are only thinking about the money. The tire, the tire, it was less than a month old and it failed, it exploded. I think the tire manufacturer...maybe even the tire store who sold it...are responsible for Charley's death and I want to sue them!" There is nothing surprising about the surviving sister's response. The **C-SWOT** could help you manage this situation if you use it to explain your analysis of the case to the deceased man's sister. **PLA-Squared** can provide guidance and structure regarding how you deliver the message that you cannot accept the case.

Another difficult conversation can occur during discovery. During a deposition your adversary is aggressively questioning your client. You and your client expected the deposition to be two hours long however it has taken the entire morning and appears that it will take another two hours after lunch. Your client is rattled and annoyed. During the lunch break he seeks direct guidance regarding a question posed by your adversary. You decline to provide the guidance, explaining that he remains under oath and that you cannot coach him regarding the content of his answers. He looks at you and says, "I thought you were my lawyer and that I could count on you to help me. I guess I was wrong." He clearly feels let down and perhaps abandoned by you, his lawyer. In this situation the client does not understand the rules, roles and limitations you ethically must abide by, therefore he has erroneous expectations. There is a gap between expectations and outcomes that results in you having to tell the client you cannot help them in the manner they wish to be helped. Using the **PLA-Squared** Model with the client prior to the deposition to realistically frame rules, roles, responsibilities and expectations can be a pre-emptive strategy for mitigating potential bad news.

A Few Words on Communication Skills

What you intend to communicate must be congruent with the style you use to deliver the message. To inform or get a task accomplished, your communication style needs to be direct, clear and convey what you expect to have done. If your intention is to establish trust, you must be honest and understanding; excellent listening skills are essential to establishing trust. When you want to learn more about a particular fact, opinion or perception, your communication style should be inquisitive. That is, do not deliver a declarative message when you really want to ask a question.

Sitting down and repeating what you heard to demonstrate understanding are powerful ways to enhance communication. Lowering the tone of your voice and confirming that your client was heard and understood helps establish mutual understanding. Nodding affirmatively to encourage further disclosure is also a powerful non-verbal way to establish and maintain congruence between intentions, communication and actions. Congruence between your words, emotions and actions is especially important when breaking bad news lest your behavior be perceived as untrustworthy or ineffective.

The C-SWOT: Case Strengths, Weaknesses, Opportunities and Threat Analysis

The **C-SWOT** is an effective way to examine each case by reviewing the strengths and weaknesses and comparing these to opportunities and threats. The Strength-Weakness assessment should focus on internal case issues, whereas the assessment of Opportunities-Threats addresses external issues. Identifying and writing these observations in one place enables you and your client to

see the bigger picture at a glance, thereby identifying the known major factors affecting expectations and the case itself. The C-SWOT analysis also can serve as a strategic planning and decision-making aid within the trial team.

How to Conduct a C-SWOT Analysis

First, focus on the strengths of the case. Identify the facts, the supporting statutes, case law, expert witnesses and your client's strengths. Using the four-quadrant model, fill in as many strengths as you can in the top left box. Spell them out clearly and honestly – and don't be modest. Typical questions you might ask are:

- What do statutes say or require? How do they strengthen the case?
- What case law applies and how does it add strength to the case?
- Identify your witnesses' (expert and lay) substantive and communication strengths.
- Discuss and identify the skills/knowledge each member of the trial team brings to the table.
- What strengths does the client bring in terms of credibility, likeability and communication skills?



Then move to the top right quadrant, filling in as many weaknesses or areas that represent internal factors that may threaten achieving the goals of the litigation. Ask these types of questions:

- What do statutes say or require? How do they weaken the case?
- What case law applies and how does it weaken the case?
- Do the experts and client communicate clearly, understandably and credibly?
- Does the client have reasonable expectations regarding the case?
- Does the client have the mettle to pursue the case through to a trial if necessary?
- Do I have adequate time, money and talent to take on this case?

Now it is time to look outside of yourself and your trial team. This inquiry is essentially focused on environmental issues that may have an effect on the case. In the bottom left quadrant, identify areas such as:

- What opportunities exist to maximize resources you intend to use?
- Who can add value to the trial team from within the firm?
- Are there opportunities for a trial consultant to assist in the case? If so how?
- What technologies are available to help present the case?
- Does the case offer any practice development opportunities?
- Does the case offer an opportunity to maximize the synergy between you and your client?

Next in the bottom right quadrant, list those factors that may threaten the success of the litigation. These might include:

- Lack of time and resources
- Stress, travel and being away from home for extended period of time
- Client is not likeable and is inconsistent relative to the facts
- Difficulty finding appropriate experts
- Pre-trial publicity
- Conflict among members of the trial team

C-SWOT Analysis Results

The **C-SWOT** will provide you with a profile of the case and enable you to weigh the pros and cons. More importantly however, the **C-SWOT** provides a basis to identify and develop consensus around each element of the case between you, members of the legal team and the client. Additionally, a **C-SWOT** enables you to minimize the gap between client expectations and outcomes over the course of the litigation, thereby reducing the likelihood of having to deliver bad news. The **C-SWOT** also provides a method to strategically plan litigation resources and manage identified risks.

The PLA-Squared Model ($P^2L^2A^2$)

PLA-Squared Model is an acronym based upon the following words: plan/prepare, listen/learn, and alternatives/actions. The model suggests specific behaviors and ideas for your consideration when you are confronted with having to deliver or break bad news to a client or colleague. The model is a generic framework for structuring difficult conversations. The model was originally developed for use in a business setting and bears many similarities to models used by healthcare professionals. The model includes specific guidance regarding preparation, learning, posing alternatives, as well as supporting and empathizing with clients. The fundamental premise of the model is that preparation, excellent communication and shared understandings will make the task of delivering bad news more effective and less stressful for all parties.

Plan and Prepare: P^2

When you run into a situation that requires you to break bad news, assuming you have done a **C-SWOT** as part of your case preparation, you will have already identified potential weaknesses and threats. The **C-SWOT** thus reduces some of the destructive impact that comes from surprising your client with bad news about their case. In fact, in our experience we have seldom seen a situation in which bad news was delivered that did not relate to a known weakness in the case or an anticipated threat from an adversary. The exception to this occurs when unanticipated changes in the law framing the litigation or the transaction change the fundamental nature of the goals, structure, plans and outcomes.

Being prepared therefore, means anticipating the foreseeable problems that may arise during litigation and having mapped out a plan to manage them. Being prepared also means having tools and methodologies to manage unforeseen changes in the law. In either case, however, the most effective plans for delivering bad news will address timing (when); the setting you choose to use to break the bad news (where); knowing what the facts, issues and findings related to the bad news are (what); and having identified the key stakeholders (who). Being honest and realistically empathizing with the client's dismay over the bad news provides guidance regarding your behavior and the tone of your speech.

An additional element in planning and preparing is rehearsing. Just as you would plan, prepare and rehearse an opening or closing argument before a trial, you will want to rehearse delivering bad news. This does not mean developing a presentation and memorizing it. It does mean knowing what you want to communicate and having practiced your delivery to the point that you are comfortable with what you intend to say and how you intend to say it. In every instance, there must be congruence between your delivery, your concerns and the impact of the bad news on your client.

Listen and Learn: L²

No matter what the circumstance are when you are breaking bad news, it is essential that you listen to your client and members of the trial team. Effectively listening will enable you to learn what their expectations are. You no doubt recall we operationally defined "bad news" as the gap between expectations and outcomes, therefore knowing a client's or colleague's expectations positions you to manage the bad news or gap between their expectations and the emerging status of the case.

Listening to your client and learning about prior experiences and knowledge provides an opportunity to identify and reframe pre-existing events, ideas and emotions that may be creating erroneous expectations. Like jurors, clients have biases that have been influenced by prior events and ideas. Unlike your interactions with jurors, you have the opportunity learn as much as possible about your client's prior experiences, beliefs, ideas and the way they impact expectations regarding the litigation. Inquiring about a client's history, experience and knowledge followed by thoughtful listening positions you to work with their biases to better represent them.

Employing a learning style that includes attentive, active listening will result in getting more and better information; combining listening and learning (L²) is congruent with your interest in the client's wellbeing and will enhance trust between attorney and client.

Alternatives and Actions:A²

A previously completed C-SWOT analysis will have identified strengths and opportunities that often can be used to generate alternatives and action steps in response to bad news regarding the case. After discussing the bad news among members of the legal team, we recommend that you generate a list of potential alternatives and actions that address the issues that are creating the gap between expectations and outcomes. Each alternative that you identify as a possible response should have a suggested action step attached to it. The list of alternatives and action steps can then be presented to the client for explanation and further discussion.

In certain instances the choices that are available may be limited due to court rules, judicial findings or changes in law or regulations. These situations need to be carefully and thoroughly analyzed and explained along with any alternatives that may be available. When alternatives and actions appear to be limited, it is important not to rush the client to a decision if that can be avoided. Remember, in many instances the client has little or no experience with legal matters and certainly has less than you, so they are likely to need more time to process the information and manage their disappointment, anger or outrage. Additionally, you also must not lose sight of the fact when you are breaking bad news that the client may be hearing something for the first time whereas you have had more time to consider the issues. In situations that are particularly complex or emotional it may be a good idea to bifurcate breaking the bad news from exploring alternatives and actions by several hours or days, as time allows.

Conclusion

Using the **C-SWOT Analysis** process and the **PLA-Squared Model** adds structure, reduces ambiguity and consequently reduces anxiety when you encounter a situation in which you have to break bad news. Lawyers and trial consultants who use it can reduce fear and enhance effectiveness for themselves and their clients. By helping your client and your colleagues manage the gap between expectations and outcomes you help them reduce ambiguity, reframe erroneous expectations and become more effective members of the litigation team. The benefits for you are significant too. If you are not preoccupied about how to deliver bad news, you can devote your energies to what needs to be said and the best way to say it while representing your client's best interests.

End Notes for Further Reading

1. Buckman R. How to break bad news: a guide for health care professionals. Baltimore: Johns Hopkins University Press, 1992.
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3. Ptacek JT, Eberhardt TL. Breaking bad news. A review of the literature. JAMA 1996;276:496-502.
4. The Code of Medical Ethics of the American Medical Association, 1847, AMA Ethics Archive <http://www.ama-assn.org/ama/upload/mm/369/1847code.pdf>

C-SWOT Analysis Checklist	My Case	Adversary's Case
Strengths	<input type="checkbox"/>	<input type="checkbox"/>
Weaknesses	<input type="checkbox"/>	<input type="checkbox"/>
Opportunities	<input type="checkbox"/>	<input type="checkbox"/>
Threats	<input type="checkbox"/>	<input type="checkbox"/>

Use the C-SWOT as an assessment tool and to establish realistic expectations between legal team and clients.

Breaking Bad News The PLA-Squared Model Summary

Plan-Prepare-P²

When-timing
Where-setting
What-content
Who-messenger & recipient
How-method
Practice-script & rehearse
Identify-expectations

Listen-Learn -L²

Listen Actively
Learn what your client knows/ doesn't know
Listen to establish shared goals
Learn to establish trust
Listen for emotional content
Learn to establish congruence
Listen for gaps between expectations & outcomes

Alternatives & Actions-A²

Explain Limits
Identify Alternatives
Respect Disappointment
Pace Reasonably
Review Intentions
Propose Actions
Evaluate Outcome

Using the PLA-Squared approach to break bad news reduces ambiguity and provide a basis for attorneys and trial consultants to enhance relationships with clients and members of the legal team.

A Note From the Editor

Race, gender, tears, rage, damages, communication, economy and emotion!

You cannot run the gamut of topics anymore than that! And that's what we have for you in the May 2011 issue of The Jury Expert! As trial consultants, we see the good, the bad, and the ugly. We are privy to the secrets, the dysfunction, the illicit wishes and wants of the parties and the anger and frustration of both litigants and lawyers. And that results in work that is sometimes exhausting but always invigorating and interesting.

You may have expected a piece in this issue about the way our heroes fall and how jurors [and the general public] respond. We think that topic is way too predictable for The Jury Expert. So instead, what you will see is emerging work on how the race and gender of the trial lawyer is related to the ultimate verdict for criminal defendants. (It isn't pretty.) And then you'll find lots more including some original research on damages and entitlement, product liability, juror emotions, and finally, narrative persuasion.

We are, naturally, attuned to the economy and your desires to save some money. So we have two pieces on how to save money on pre-trial research and on witness preparation. Why? Why, because we care about you and want to help.

You could help us too! Our authors work hard on their articles for The Jury Expert! You like reading them. So read. Enjoy. Gather nuggets. AND then become real—by writing a comment on our website or on your own blog so our authors know you are out there appreciating their hard work.

Next time you see us it will be in the dog days of summer. So enjoy this breath of spring and know that, before too long at all, "we'll be back".

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A M E R I C A N S O C I E T Y O F T R I A L C O N S U L T A N T S



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