

Thinking Outside of the Box; Best Practices for a Successful Mediation

LITIGATION AND MEDIATION STRATEGY: A PRIMER FOR CREATIVE THINKING OR “THINKING OUTSIDE OF THE BOX”

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Overview and Objective

In this article we consider the concept of “thinking outside the box” (hereinafter T.O.T.B.) and whether it might be useful in the practice of law in general and specifically in litigation practice. We conclude that T.O.T.B. is a powerful addition to the lawyer’s armamentarium. How then to teach T.O.T.B. to others? Is expertise in T.O.T.B. transferable by competent T.O.T.B. practitioners to those just beginning their careers? In the article we look at a hallmark heuristic for teaching the components of trial advocacy (the N.I.T.A. methodology) and we conclude that some of these N.I.T.A. teaching concepts are transferable into the pedagogy of T.O.T.B.

Ultimately, we conclude that teaching T.O.T.B. requires its own bespoke pedagogy and we elucidate what the successful pedagogy might look like. We canvass some of the literature supporting the benefits of teaching T.O.T.B. to young lawyers and advocate for its implementation into litigation strategy. The article then postulates a formula which increases the chances of harnessing T.O.T.B. methodology to advance clients’ interests. We suggest that sacrificing positional bargaining and focusing more on holistic

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interests, vindicates the contention that T.O.T.B. exemplifies what may be available to disputants who are prepared to sacrifice positional “gains” on the altar of non-positional “interests”.

A. Introduction

In the world of pedagogy, it is well accepted that to effectively teach skills, it is incumbent upon the teacher to be specific in critique and to be adept at demonstrating the correct way to perform the skill. For example, when teaching trial advocacy, it is axiomatic that general comments such as “that was a terrible cross-examination” are unhelpful, as the student will fail to improve based on such a deficient critique.¹

Osgoode Hall Law School, University of Toronto Law School and other law faculties offer courses which teach trial advocacy to upper year law students. The courses are constructed on a skills-based teaching methodology developed and refined over the past 50 years by the National Institute for Trial Advocacy (N.I.T.A.) in Louisville, Colorado.

The paradigm is that the faculty demonstrate a different component of a trial each week and the following week the students perform the skill that was demonstrated by the faculty the week before. The faculty and students employ elaborate fact patterns to hone the skills of the aspiring trial lawyer. Over a twelve-week period, the students learn how to do an opening statement and a closing argument to a jury. They are taught how to do direct examination, cross-examination and re-examination of lay and expert witnesses. They are taught how to introduce exhibits, as well as how to impeach a witness. The students perform and the faculty critique. The students then get to re-attempt the trial skill (opening, closing, direct examination, cross-examination, re-examination, the use of experts, introducing exhibits) after the faculty critique. So, the faculty demonstrate a skill; the next week the students perform the skill, and they are critiqued by the faculty before they re-attempt the post-critique skill. This teaching model exponentially improves student performance. At the end of the law school term, the students handle a mock trial before an actual judge. The performances are almost always significantly better than they were when the students began the course.

The improvement in performance confirms a highly salient feature of this particular teaching methodology. Advocacy skills

1. Trial Advocacy Teachers’ Manual, Fall 2021 edition, pp. 4-64 (based on 2018 Law School edition) Osgoode Hall Law School, York University.

are teachable and learnable but only by implementing a rigorous, highly disciplined approach. Much like the scientific method, the methodology must be repeatable and consistent in order for the teaching to be effective.² As previously stated, it is beyond unhelpful to critique a student by stating "your cross-examination was terrible". Such a critique is doomed to fail to improve the student's ability to cross-examine. In fact, it will probably intimidate the rookie cross-examiner and her future cross-examinations will be no better.

An unfocused, verbose, non-specific, meandering critique dooms skills teaching from the beginning. The critique that focuses on anything other than student performance has no value. To address the proposition that the best skills learning is by repeated consistent skill performance and repeated critique directed to the performances and not to the performers, a highly structured model for critique was created in 1971 – by N.I.T.A. The standardized way to critique and thereby improve student performance must follow a prescribed format. The components of the effective and academically sound trial advocacy critique are:

- (i) Headline
- (ii) Playback
- (iii) Prescription [Fix, or Remedy]
- (iv) Rationale³

Where a student counsel is performing, she must be critiqued in a formalized way. The following example illustrates how a N.I.T.A critique should proceed:

(i) Headline

I want to talk to you about the use of open-ended questions in cross-examination.

(ii) Playback

You asked the following open-ended questions:

1. How far away were you when the fight started?
2. What was the weather like?
3. Do you wear glasses?
4. Did you make accurate notes in your police notebook?

2. Erik Gregersen, eds, *Encyclopedia Britannica*, sub verbo "Scientific Method".

3. *Trial Advocacy Teachers' Manual*, *supra*, footnote 1 at p. 13.

(iii) Prescription

The teacher suggests the following to the student performer.

Put propositions, helpful to your own case or damaging to the other party's case, to the witness. She is there to answer "yes" or "no". In cross-examination the witness is a marionette; the lawyer is the marionettist.

1. You were 10 feet away when the fight started.
2. It was raining.
3. You were not wearing your glasses nor were you wearing contact lenses.
4. Your notes are accurate and complete.

Though the critique is responsive to the specific cross-examination by the performing student, a sound critique will address common problems confronting other students in the class.

(iv) Rationale

Cross-examination is not the time to seek to acquire information, nor is it the time to afford the opposing witness the opportunity to elaborate on her in-chief testimony in order to further damage your case.

The N.I.T.A methodology is highly effective because it allows the student to do a trial advocacy task, to articulate her thoughts about her performance, and to receive feedback focused on her performance. The feedback may include discussion of previously unidentified assumptions. The point is to have the student incorporate the critique and in doing so perform more effectively on the next attempt. We propose in this paper to consider the N.I.T.A. methodology and whether it is transferable in the context of teaching how to think outside the box.

B. Is it Possible to Teach T.O.T.B?

As set out above, the best skills teaching requires the development of a model in order to generate useful technique. Without a cogent technique for teaching a skill, as per N.I.T.A, the teaching and learning will always be deficient. Further to the concept that teaching a skill relies upon a well-structured, effectively communicated teaching technique, skills teaching also mandates a realization that people carry with them patterns of problem-solving, developed over the course of their lifetimes. These patterns affect the way that each person will approach problem-solving. Known in the academic

literature as “heuristics,” these problem-solving patterns are instantly available, but not always as effective as other approaches, for example teaching students how to T.O.T.B.⁴

Recognizing the components of a helpful critique is absolutely essential to the effective teaching of trial advocacy skills. The methodology requires explication before applying it to other skills-based endeavours such as T.O.T.B. training.

With appropriate adaptation, T.O.T.B. is an example of this tautology. The idea of being able to think creatively, perhaps even to create a novel method of problem-solving, is an idea that has become increasingly popular in the dispute resolution literature. Divergent methodologies of teaching negotiators how to be better at negotiation is an example of a new approach to an old problem. For example, rather than teaching negotiators the old “win-lose” or “zero-sum game” approaches to a negotiation, contemporary negotiators in training are encouraged to create a larger scope of remedy to any given set of facts by expanding the pie.⁵ This is confirmation that T.O.T.B. is a good idea. What remains unclear is how to adapt the N.I.T.A. approach alone or in combination with other techniques to most effectively teach T.O.T.B.

Gladwell's thesis that it takes 10,000 hours to master a cognitively complex activity may apply to hockey players, chess grandmasters, and composers, but where can a student of T.O.T.B. pick-up 10,000 hours of T.O.T.B.? How does one get T.O.T.B. if one does not already have it, or how can one get better at it?

We can attempt to teach and learn T.O.T.B. in an academic way. The other option is for us to teach and learn by examples, namely how those proficient at T.O.T.B. do it. Since we have been unable to locate or construct an academic model to teach T.O.T.B., we submit that watching others successfully do it and thereafter implementing what one sees from expert “out of the box” thinkers, increases the chances that the reader can be trained to T.O.T.B.

The idea that watching others and repeating after them can produce salutary results in T.O.T.B. is supported by the academic literature dealing with how best to teach law to law students at law schools. There is a robust library of academic literature dealing with the deficiency of the case law and Socratic methods of teaching at law schools. Kris Franklin, a law professor at New York Law School,

4. Douglas N. Frenkel & James H. Stark, “Improving Lawyers' Judgment: Is Mediation Training De-Biasing” (2015) 21:1 *Harv Negot L Rev* 1 at pp. 8-10.
5. Kay Elkins Elliott, “Neuroscience and Negotiation” (2015) 25:1 *Alternative Resol* 16 at 17.

asserts that clinical legal education provides the corollary and necessary opportunities for law students to learn to “think like lawyers” where the doctrinal, Socratic method of teaching law students falls short in teaching necessary lawyering skills.⁶

In turn, we propose that there must be a portion of a law student’s education that works to develop the seemingly elusive goal of T.O.T.B. Franklin considers clinical education, where one can have “hands on” lawyering experience as a law student, not only useful for grasping the realities of practicing law (i.e. communication with clients and other professionals, drafting legal documents, practicing oral advocacy, and attending courts or tribunals) but as a necessary component of the foundation required to obtain skills necessary to think like a lawyer. Franklin wishes to reframe the clinical law education experience as something to be coveted by the keen law student seeking to elevate her legal education (doctrinal law) to professional competency. By reference to Bloom’s taxonomy, Franklin identifies many of the necessary components that must be integrated into a melange of doctrinal law and skills development.

We submit that the competency edifice is constructed on two equally important support pillars; mastery of black letter law, conjoined with mastery of skills. In order to train competent lawyers it is axiomatic that the mastery of case law and statute law (cognitive apprenticeship) and mastery of skills (skills apprenticeship) are essential. This can be depicted by the following equation:

$$\text{Effective lawyering} = \text{Knowledge of case law, statute law and application of the Socratic method (doctrinal knowledge)} + \text{Skills-based legal training}$$

Franklin goes on to consider how the goal of teaching has historically been to advance a student from a basic level of competency to mastery.

As alluded to earlier, Benjamin Bloom an influential educational theorist, proposed (more than five decades ago) in his seminal *Taxonomy of Educational Objectives* that cognitive operations could be organized into six levels, moving through the simplest through increasingly complex operations to the highest order of conceptual thinking. Bloom’s early work has been revised and re-examined over the years, but the essence of his categorizations of thinking, commonly known as Bloom’s Taxonomy, remains well-respected and commonly used.

6. Kris Franklin, “Sim City: Teaching Thinking Like a Lawyer in Simulation-Based Clinical Courses” (2008) 53:4 NY L Sch L Rev 861 at 864.

Contemporary education theorists, following Bloom's Taxonomy, have articulated six distinct levels in the cognitive domain (the "Taxonomy"):

- (i) remembering;
- (ii) understanding;
- (iii) applying;
- (iv) analyzing;
- (v) evaluating; and
- (vi) creating.

While more expansive and layered versions of the Taxonomy have sometimes been represented as a wheel, the cognitive levels listed above are most often organized within an upside-down pyramid or in other ways portrayed wholly hierarchically. Thus, in accordance with Lustbader's theories, the Taxonomy presumes that there exist both lower and higher forms of thinking.⁷

Consistent with Bloom's Taxonomy, we assert that T.O.T.B. is best practiced when the T.O.T.B. learner achieves mastery of the skills required to do it. Teaching T.O.T.B. can therefore parallel Franklin's notion of teaching how to think like a lawyer through what she aptly calls a "cognitive apprenticeship," or the repeated practice of problem resolution that leads to the reinforcement and eventual intuitive calling upon the skills that thinking like a lawyer requires.

This paper does not for a moment suggest that one can only think like a lawyer if one is a law school graduate. In fact, quite the opposite: anyone, by watching those proficient at T.O.T.B., can do it. But the skills required to T.O.T.B. take time to learn and require practice. These skills are therefore evolutionary and subject to frequent re-examination. Examples of T.O.T.B. can in fact be the best way to communicate why T.O.T.B. is and will continue to be so important in the practice of law and, arguably, in the practice of life. The following examples will serve to illustrate this point.

(i) Calculation of Costs Payable upon Settlement of Personal Injury Cases in Ontario

All personal injury and insurance claims professionals have since time immemorial been taught a formula for calculating costs in a personal injury/insurance/tort case. This formula to calculate the costs was orthodoxy. Departure from the formula bordered on heresy. It was as close to being a rule as it could be, without being

7. Franklin, *ibid* at 867-868.

incorporated into the *Courts of Justice Act* or the *Ontario Rules of Civil Procedure*. The formula was 15% on the first \$100,000.00 of damages paid and 10% on the rest.

The formula worked as follows:

(i) Damages settlement - \$828,542.00

15% x \$100,000.00	=	\$15,000.00
\$828,542.00 - \$100,000.00 = \$728,542.00	=	\$72,854.20
10% x \$728,542.00		
TOTAL		\$87,854.20

(ii) Damages settlement - \$1,948,220.00

\$15% x \$100,000.00	=	\$15,000.00
\$1,948,220.00 - \$100,000.00 = \$1,848,220.00	=	\$184,822.00
10% x \$1,848,220.00		
TOTAL		\$199,822.00

This formula produces the correct result. Because it produces the correct result, practitioners have slavishly implemented it for decades. It works and it is relatively easy to apply. Why bother looking for another, perhaps more efficient way of doing it?

A famous idiom summarizes this rote approach: "If it ain't broke, don't fix it". However, if lawyers and a mediator are at a mediation at 11:00 p.m., and are exhausted, implementing the formula by the participants might lead to it being "broke." So, you might take 15% of the first \$100,000.00 and write down \$15,000.00. Using example 1 above, one might forget to subtract \$100,000.00 before continuing with the formula.

This is a \$10,000.00 error. It is very easy to commit this error when fatigue overwhelms precision. The other mistake which could occur is the incorrect addition of the component figures. In example (ii), if one makes an error in adding \$15,000.00 to \$184,822.00, then any number other than \$199,822.00 is incorrect. There are never enough checks in the system.

This ingrained way of problem-solving is well known to neuroscientists. It is not as well known to be intrinsic to legal analysis and in the teaching of law at law schools and in clinical settings. This is a lost opportunity to meaningfully integrate the social sciences into the practice of law. As Weinstein and Morton put it,

One of the functions of the brain is to process information in such a way as to form patterns. Without this self-organizing patterning system, the stimuli entering the brain would be impossible to manage. For example, when we see something with four legs and fur, and that thing is barking, we will see it as a dog. On a different level, the law and legal training use pattern identification in relying upon analogy, precedent and the concept of causes of action to select, organize and think about information when solving a problem. When someone has been injured, we think of legal solutions using patterns from torts and criminal law.

Thus, the information we perceive is, at least in part, determined by what our brains are trained to notice through our experiences. Once that information is received, its processing will generally follow established pathways. As an example of this, consider cars. If you are on the road you may see many types of cars, but not necessarily notice any particular car. However, if you have just bought a car, you will tend to notice cars like yours more frequently. This may also explain why we can often predict the way someone we know is going to behave, and how that person can predict how we are going to react to their behaviour. We have a tendency to react in similar ways to particular stimuli. This is an important quality, for it allows us to anticipate the consequences of our behaviour and to make thoughtful choices. However, repeated reinforcement of the same thinking strategy also creates thinking "ruts." Over time, the more frequently used pathways become the processes that are most relied upon when a person is presented with new challenges. The more we do something, the stronger or more dominant we make the pathways; the more ingrained the thinking pattern, the "deeper" the "ruts" in our minds become. Thus, our judgments become biased towards the status quo; essentially we can become "stuck in a rut".⁸

We should recognize this reality as mostly helpful in solving legal problems. However, slavish devotion to patterned thinking clearly definitionally obviates creativity and means that we are oblivious to more satisfactory solutions. Weinstein and Morton then address how to climb out of this morass.

Cognition, the actual thinking process, is generative even in the absence of conflicting ideas. When we perceive new information, we form "new concepts, or modify or extend old ones".⁹ New thoughts arise from combinations of thoughts that already exist in the brain. These new thoughts in turn add to brain functioning and will influence future perception. This added functioning is the

8. Janet Weinstein & Linda Morton, "Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education" (2003) 9:2 *Clinical L Rev* 835 at 844, 845.

9. *Ibid.* at 845.

foundation of the creative thinking process. In other words, we begin with what we have, and expand upon it.

An example of heuristics derailing creativity and innovation is the calculation of costs in an insurance case.

Recently, it was postulated by the authors that instead of the formulaic 15% on the first

\$100,000.00 and 10% on the balance, a simpler approach is to take 10% of the total number paid for claims and add \$5,000.00.

This new formula to calculate costs demonstrates the robust adverse effects of blind and mostly subconscious adherence to custom. When this concept was first presented to scores of lawyers, they were shocked by the fact that the ingrained heuristic blocked access to this alternative, much simpler method. This re-stated formula ought to have been taught to everyone decades ago. The fact that it was not, highlights the perils of mindless adherence to custom heuristics. The self-recognition of the potential perils of patterned thinking is part of the foundation for T.O.T.B.

An example of the new formula for calculating costs is:

<u>Claims</u>	<u>Costs using the new formula</u> (10% of the whole claim number and then add \$5,000.00)
i) \$928,314.00	(\$92,831.40 + \$5,000.00) = \$97,831.40
ii) \$634,528.00	(\$63,452.80 + \$5,000.00) = \$68,452.80
iii) \$423,423.00	(\$42,342.30 + \$5,000.00) = \$47,342.30

It is apparent that the new way is far superior. What is important to recognize is that the new way of looking at things took 50 years to emerge, because the heuristic advocating the 15% - 10% methodology was so embedded in our collective thinking.

(ii) Ice and The Mailbox

The following anecdote helps to shed light on how a litigator or mediator can be creative in thinking beyond the apparent boundaries of the case being mediated.

Jack was walking to a mailbox to mail a letter on a cold March day. As Jack started walking towards the mailbox, he saw a few ice balls in the immediate vicinity of the mailbox. Jack trained his vision on those ice balls to the exclusion of scanning his intended path to the mailbox. As Jack soon discovered, the very hard way, there was a large patch of black ice that he probably would have seen and avoided, had he been less focused on the danger that he knew about.

Jack ought to have been looking for other potential dangers that he might have discovered, had he been more attuned to the environment and open to the real possibility that there were other dangers lurking.

Our non-empirical impression after running this by many people is that focusing on the danger that Jack knew about is typical of what most of us would do. It almost always works to protect us from known dangers. However, the known danger is not necessarily the most threatening danger. The most threatening danger is the one that will be missed by fixedly focusing on the ice that you already know about. Paradoxically, a less threatening danger (the known ice) morphs into a much more threatening overall danger by virtue of the perceptual primacy of the now less threatening danger (known ice). By obscuring consideration of the more threatening danger (the unknown black ice) this patterned thinking may lead to catastrophic results. Jack's attention to the danger which he knew about caused him five broken ribs and an eight day stay in hospital. This illustrates the application of a heuristic. The mental trick, or shortcut that Jack employed was one Jack had employed several times in his life: look for a danger and slowly maneuver around it. Jack was decidedly not T.O.T.B.

Scholars note that though heuristics are almost always helpful (or by definition they would not be heuristics), they have the potential to create biases that inflict negative outcomes.¹⁰ Biases, normally studied in the context of cultural competency, are no less relevant in this seemingly more mundane circumstance devoid of any social interaction. Jack's bias towards favouring the visible obstacle before him created a negative outcome; Jack ignored something else that ended up severely injuring him. If creative thinking is defined as exploring options other than ones to which we are accustomed,¹¹ then the lack of consideration of another danger in Jack's encounter with the visible ice exposed him to the black ice.

There is an interesting parallel to this which emerges when considering how biases affect lawyers' professional judgments. As Frenkel and Stark point out, referencing the prior work of Amos Tversky and Daniel Kahneman,

Cognitive biases refer to the many tendencies and limitations human beings face in processing complex information, especially under conditions of uncertainty. For example, even when they know that the best decisions will be produced by open-mindedly considering all sides of a question or argument, people tend to engage in single-minded

10. *Supra* footnote 4 at 9.

11. *Supra* footnote 8 at 838.

thinking. They tend to focus on one or two plausible “arguments or hypotheses, that are good enough” due to limitations in their ability to process more complex data or to a kind of mental “fixedness” of inertia that sets in. People use mental shortcuts or heuristics to guide their decision making. Sometimes, as when speed is required, these heuristics are adaptive. Often, however, they lead to systematic and predictable error.¹²

There are therefore real-life implications and applications to T.O.T.B. Most of the time we do not re-assess what we are doing until some seismic event prods us into thinking of alternatives to something that worked but is no longer working.

As the psychiatrist R.D. Laing stated it:

The range of what we think and do is limited by what we fail to notice. And because we fail to notice that we fail to notice, there is little we can do to change until we notice how failing to notice shapes our thoughts and deeds.¹³

The moral of this story transcends snow and ice. Be alert to the possible presence of dangers you obviously do not know about and be alert to the possibility that the more ominous threat may not be the danger under consideration. Look for alternatives. If you are not looking for other ice, you are paradoxically unaware that you may be failing to see other ice. The idiom “keep an open mind” perfectly captures this paradigm.

Another key element to creative thinking is to find ways to step off the normal pathways limiting such creative thinking.

An important aspect of “pathway” thinking is that it is often implemented in stressful situations. Stress has been shown to increase peoples’ preferences for strategies fostering a sense of control, even when that sense is illusory, and the strategies are likely to produce suboptimal results.¹⁴ Again, paradoxically, when one is most stressed, falling back on tried-and-true strategies to solve problems may provide comfort but not a solution. We postulate that T.O.T.B. is most required and least likely to occur in high stress situations. The following citation illustrates this point:

12. *Supra* footnote 4 at 8, 9.

13. Kenneth Cloke, *The Limits of Mediation* (September 2021), online: Mediate.com <<https://www.mediate.com/articles/cloke-limits-mediation.cfm>>.

14. Nehemia Friedland et al., “Controlling the uncontrollable: Effects of stress on illusory perceptions of controllability” (1992) 63:6 *Journal of Personality and Social Psychology*, 923.

One 1920s pioneer of the ADR movement, Mary Parker Follett had an insight while sitting in the Harvard library. She wanted the window closed to prevent the draft on her papers, but another student wanted it open for fresh air. The solution that emerged from their different desires was to open a window in the next room. From this deceptively simple insight, she realized that there were three ways to respond to conflict: domination, compromise, and integration. Opening the window half-way would not have given the other reader enough air and still would have created a draft.¹⁵

There are many traps which ensnare us all when we apply formulaic thinking to problems that can usually be solved by such formulaic thinking. The obvious problem is when that formulaic thinking fails. Because it usually works, we persist with it, even when it fails. As Paul Gibson asserted:

Most (90-95%) of human behaviour is unconscious and neural pathways are developed at a very early age, and are reinforced and strengthened with time and use. The implication is that changing behaviour is difficult because once the brain has an idea it is very difficult to change (or lose) the idea as a result of the ingrained neural pathways.¹⁶

C. Practical Applications of T.O.T.B.

In tort mediations, there are a number of matters that are handled in a routine, almost mechanistic way. It is suggested that adopting a more thoughtful, disciplined approach would better serve the clients' interests.

(i) Positional Bargaining

Most mediators have seen the following unfold almost every day. The plaintiff's lawyer's initial demand is \$3.5 million for a case that she thinks is actually worth \$1 million. This almost always generates a "low ball" defence offer of \$80,000.00 for a case the insurance adjuster thinks is worth \$800,000.00. The plaintiff's lawyer has invited the insurer to a "silly party" by asking for three and-a-half times what she thinks the case is worth. The insurer now accepts the invitation and offers 10% of what it thinks the case is worth. We suggest that it would be far preferable for the plaintiff to start at \$1.5 million. Plaintiffs' counsel are loathe to do so because they correctly say that there is no guarantee that the insurer will not lowball the

15. *Supra* footnote 5 at 16.

16. Paul R. Gibson, "The Impact of Brain Science on Conflict and Its Resolution" (2019) 31:Special Issue SAclJ 547 at 568.

plaintiff with the insurer's first offer. This realization leads the plaintiff's lawyer to the precipice. She really doesn't know what to do. If she asks for \$3.5 million, she will probably receive a lowball offer. If she asks for \$1.5 million, she may receive a lowball offer anyway. Plaintiffs' lawyers usually resolve this dilemma by asking for \$3.5 million. The defence then offers \$80,000.00 and the tsunami begins. The Plaintiff then "drops" to \$3.1 million. The defence goes up to \$175,000.00. We suggest that this approach is unnecessary, and the animosity generated may lead to someone leaving the mediation prematurely; before the parties know whether the case can be settled.

The outrageous numbers approach bespeaks a significant flaw in the plaintiff's lawyer's negotiation strategy. If the plaintiff begins with an offer of \$1.5 million instead of \$3.5 million, and the defendant offers only \$80,000.00, the plaintiff's counsel is still in control of the negotiation.

The plaintiff should drop her second offer to \$1.4 million. Should the defendant persist in a second lowball offer of say \$100,000.00, the plaintiff's third offer will be \$1.35 million. A third lowball offer is met with a fourth plaintiff's offer of \$1.33 million. After the third or fourth lowball offer, the plaintiff should go home. The case isn't "settleable."

The defendant can behave in an equally responsible way regardless of how realistic the plaintiff's lawyer has been. If the plaintiff's lawyer proposes a settlement of \$3.5 million on round one, and the defence using our previous example thinks the case is worth \$800,000.00, then the insurer should reject the plaintiff's invitation to attend the "silly party". The defence can offer \$600,000.00 and in doing so invite the plaintiff to a "reality party". Should the plaintiffs minimally move down to \$3.2 million on round two, the insurer's second offer should be \$650,000.00. If the Plaintiff's craziness continues, the insurer's third offer should be \$675,000.00. The fourth defence offer should be \$690,000.00. If the Plaintiff is still "in the clouds", then the insurer should decamp from the mediation. The case will not settle, because the plaintiff's side is "misbehaving."

By definition, because this realistic assessment approach to negotiations is rarely adopted by either side, to actually implement the approach, constitutes T.O.T.B. We suggest that it is an unfortunate commentary on contemporary negotiation strategy to reject common sense in favour of implementing an inherently flawed negotiation methodology. Proposing absurdly high or low offers is not a sign of intelligence. It is a symptom of flawed logic. As the old adage states (attributed to Voltaire), "common sense is not so common."

(ii) Resisting the Urge to Win Every Battle

It is common for a personal injury dispute to be negotiated at mediation by reference to components or categories. The following is a list of some of these categories:

- Non-pecuniary general damages for pain and suffering;
- Past wage loss;
- Future wage loss;
- Past medical and rehabilitation expenses;
- Future medical and rehabilitation expenses;
- Past attendant care;
- Future attendant care;
- Family Law Act claim for a spouse;
- Family Law Act claims for children;
- OHIP past subrogated claim;
- OHIP future subrogated claim;
- Plaintiff's past housekeeping and home maintenance expenses;
- Plaintiff's future housekeeping and home maintenance expenses;
- Prejudgment interest
- Costs, H.S.T.; and
- Disbursements.

What most negotiators do is they descend into positional bargaining by trading numbers for each category. So, for negotiation purposes, each category generates its own "mini negotiation".

By the time round five of the mediation arrives, this category approach has usually been abandoned in favour of either blended damages, plus prejudgment interest, costs, HST and disbursements or an "all-inclusive" offer which includes damages, prejudgment interest, costs, H.S.T. and disbursements. However, much blood has been needlessly spilled and consequently there may not be a round six.

Let us assume that the "growth" areas for the plaintiff are future wage loss and future care. The defence thinks the plaintiff's demand for future wage loss is overstated by \$1 million and the future care demand is overstated by \$2 million. The plaintiff has demanded \$200,000.00 for non-pecuniary general damages for pain and suffering. The defendant thinks the general damages are to be assessed in the \$150,000.00 - \$175,000.00 range. Why not simply meet the plaintiff's demand for \$200,000.00 and send the mediator

back to the plaintiff's room with the message that "where you are reasonable, the defence will meet you more than half way?" By tentatively agreeing on general damages, the plaintiff is more likely to be reasonable with respect to the larger claims, such as future wage loss and future care. The defendant's acceptance of the plaintiff's general damages assessment is recognized as sensible by the mediator and by the plaintiff and her lawyer. By perhaps "overpaying" on the general damages, the plaintiff will probably reduce her demand on other categories by say \$1 million. It is obvious that one should not be intransigent on small dollars when such intransigence will probably backfire.

As the negotiations eventually almost always lead to "all-inclusive" numbers, it borders on the absurd to negotiate in a way which exacerbates partisan reaction and is ultimately "penny-wise and pound foolish".¹⁷

We suggest that being "pound wise" is a departure from the norm. If we are correct, then negotiating as we have suggested is yet another manifestation of T.O.T.B.

D. Conclusion

It is beyond the scope of this paper to do a deep dive into neuroplasticity as it applies to the practice of law in general, and specifically to negotiation pedagogy. We suggest that, based on our research, there is ample academic support for our hypothesis that T.O.T.B. can be taught and learned. Though T.O.T.B. was postulated by Douglas N. Frenkel and James H. Stark in the context of lawyers developing non-partisan stances while simultaneously developing zealous advocacy in support of their clients' positions, the concept permeates problem solving. Frenkel and Stark explain that, for effective lawyering, lawyers must be forced to challenge their own thoughts and cognitive patterns to best counsel their clients. Moreover, this challenging of neural pathways must be done repeatedly in order for it to become more instinctual.¹⁸ T.O.T.B. is similar in that it must involve the active challenging of pre-conceived conclusions, and it must be practiced.

As we begin to notice how failing to notice shapes our thoughts and deeds, we, by noticing more, enlarge our capacity to think in new ways. If we are correct that successfully T.O.T.B. generates more T.O.T.B., then this skill is teachable, though not in the same way as

17. Robert Burton, *The Anatomy of Melancholy* (1621), (Project Gutenberg, 2004).

18. *Supra*, footnote 4 at 33.

using the formulaic N.I.T.A approach to teaching trial advocacy skills.

We believe that the most effective method of teaching T.O.T.B. is to implement a module with two specific components. The first component involves reading case studies of successful T.O.T.B. strategies. One should then ask the following questions: why were these problem solvers successful? How did they succeed where others had failed? The second component is to propose examples of problems not yet solved, or where a solution was developed that was deficient. Following this step, it is necessary to brainstorm in a group setting to identify the potential solutions. Group brainstorming is particularly important because it forces each member of the group to be exposed to thinking patterns outside of her own life experience.

Jennifer Brown articulates this concept in her article on creativity and problem solving. In particular, she illustrates what happens when heuristics create a feedback loop that is unresponsive to the problem. She further proposes that brainstorming has the potential to undo the damage done by formulaic thinking. She asks the following:

Why is brainstorming so popular, both in practice and in negotiation training? Perhaps the answer lies not so much in what it activates, but what it disables. What I mean is that it may be easier to teach people what not to do - rather than what to do affirmatively - in order to enhance their creative thinking. We may not know much about how to unleash new sources of creativity for negotiators, but we are pretty sure about some things that impede creative thinking. Theory and practice suggest that creative thinking is difficult when people jump to conclusions, close off discussions, or seize upon an answer prematurely. Indeed, the very heuristics that make decision-making possible - those pathways that permit people to make positive and sometimes normative judgments - can also lead people astray. One of the ways in which they may be led astray is that the heuristic prompts them to decide too quickly what something is or should be. Once judgment has occurred, it is tough to justify the expenditure of additional energy that creative thinking would require. Creativity could be considered the "anti-heuristic", it keeps multiple pathways of perception and decision-making open, even when people are tempted to choose a single, one-way route to a solution. If we do nothing else, we can attempt to delay this kind of judgment until negotiators have considered multiple options. Brainstorming provides the structure for this kind of delay.¹⁹

19. Jennifer Gerarda Brown, "Creativity and Problem-Solving" (2003-2004) 87 *Marq L Rev* 697 at 698-699.

The problems illustrated in the earlier portion of this paper could easily be used as departure points for the brainstorming sessions. Brainstorming in a group requires everyone to come up with potential solutions without premature evaluation by any members of the group. The evaluation process only begins when all the possibilities have been identified. The participants at that point will rank the options in whatever order is agreed upon amongst them. The group's best option would then be implemented. If that attempt fails, then the group would apply the second option.

We suggest that there are certain common characteristics to T.O.T.B. One characteristic is that it is inherently creative.

Being open to new possibilities is foundational for creative thinkers. This element is closely tied to the thinking styles discussed below; the more flexible and less conservative the style, the more the person is to be open. Individuality is a quality valued by Abraham Maslow in his description of the creative person. According to Maslow, people who are very concerned with how others think of them, with doing things the "proper way," with being critical of themselves and others, and who are rigid and careful, have a difficult time being creative. They may not be in touch with their individuality, or may not allow themselves the freedom to express it.

Perseverance is important to creative thinking, because hard work and determination may be necessary to go through the obstacles to creative thinking. The mental blocks we encounter in the frustrating endeavour of continuing down mental pathways that do not work, as well as the discomfort engaging in the creative thinking process, requires perseverance.

Optimism is complementary to perseverance; if we do not believe that a successful outcome is possible, we have no reason to persevere. Optimism may also be related to happiness, which has a positive effect on the activity in the prefrontal cortex, where our problem solving occurs.²⁰

The child just learning how to ride a bicycle gets better at it the more she practices. The ability to do Sudoku, solve Rubik's cube, or do crossword puzzles improves with practice. By repeatedly implementing what heretofore would have been T.O.T.B. strategies, the brain evolves to create new pathways to solve old problems. It is hoped that our examples of T.O.T.B. in this article will nudge the reader to do just that. Now that the reader is becoming aware of what she was not previously aware of, her chances of

20. *Supra*, footnote 8 at 864.

success at T.O.T.B. are enhanced. This virtuous cycle or positive feedback loop is available to all of us. All that is required is patience, curiosity, and the time to read about and think up new ways to do old things.

We suggest that the more one T.O.T.B., the more natural it will become to T.O.T.B. There is a synergy to T.O.T.B. Do it more and you will find yourself doing it more. If you do it, you will succeed in doing it more.