IMPROVING LAWYER JUDGMENT BY REDUCING THE IMPACT OF "CLIENT-THINK"

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The very nature of the lawyer-client relationship serves to increase the unconscious biases that impede the client/lawyer team's ability to see all the information before them and to evaluate its impact. "Client-think" is a real phenomenon and is reflected in the statistics that establish a very high rate of lawyer error in valuing cases for mediation and settlement. But the means to improve judgment is available; but first lawyers and clients have to accept the need to do so and establish methods and habits that reduce the impact of client-think.

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LAWYERING requires making judgments about the possible choices clients face. Indeed, Rule 2.1 of the American Bar Association (ABA) Model Rules of Professional Conduct (which have been adopted in 51 jurisdictions) mandates the exercise of judgment:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

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However, law schools, law firms, and the profession in general have paid scant attention to the elements of judgment and how to systematically improve legal decision making. Lawyers may be fascinated by the new insights of neuroscience, but we have largely ignored more than 30 years of work by Nobel-winning psychologists who, even before pictures of the living brain could be seen in Functional Magnetic Resonance Imaging (FMRI), debunked the notion of a hypothetical "economic man," who could simply elect to make rational choices. These scientists described a multitude of unconscious biases that impair rational evaluation. Daniel Kahneman[1] and Amos Tversky established that instinctive unconscious reactions often trump rational decision making and deceive us into believing we have made a rational decision. Richard Thaler and Cass Sunstein applied many of these insights to public policy decisions.[2] Popular culture is receptive to these ideas. We lawyers need to examine them, learn from them, and incorporate protective processes into our approach to making decisions in order to improve outcomes. Without a method for guarding against the forces of the unconscious mind, and of group decision making, and then of calibrating the accuracy of our decisions, we have no hope of improving our own judgment.

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Does Lawyer Judgment Need Improvement?

Perhaps we ignore the available information on decision making because we believe that close analysis of facts and law exempts us from the effect of unconscious bias. But concrete evidence establishes that we have no such exemption. In fact, it appears from the information now available that the very nature of client representation and loyalty exacerbates and concentrates known cognitive impediments to create what I call "client-think" (a take-off on "groupthink"[3]). Client-think impairs our ability to see critical facts, and even if we see them, to weigh them appropriately. The resulting selective perception is reinforced by the adversarial relationship with the opposition. Client-think makes us literally blind to visible and knowable risk. The result is mis-assessments of cases and their risk adjusted value.

In a series of works that analyze lawyer judgments about the value of cases that is at the core of negotiation, mediation, and settlement, Randall Kiser and his colleagues have clearly established that despite high settlement rates, lawyers are routinely turning down settlements only to obtain a less satisfactory result at trial. They are not assessing the BATNA correctly.[4] It is often when the two sides of the dispute have very different valuations of the likely outcome that mediation reaches an impasse, or settlement discussions fail. In 2008, Kiser along with Martin Asher and Blakely McShane published a study entitled "*Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*."[5] The authors analyzed over 2,000 California state court cases in which a rejected settlement offer could be compared to the damages actually recovered at trial. They found that more than 60% of plaintiffs received less at trial than was offered in settlement.[6]

Thus, in over 60% of the cases studied, the plaintiffs' counsel made a "decision error" (as defined by Kiser *et al.*), turning down a settlement and obtaining the same amount or less at trial. The rate of decision error for defendants' counsel (turning down a settlement only to pay the same amount or more at trial) was much lower—only 24%, which was a surprise. Thus, just under 25% of the defendants in the study sample faced a verdict higher than the rejected settlement offer. However, the impact (or magnitude) of decision error was very different. The "mean" cost of defendants' mistakes was $1.1 million (much higher than that of plaintiffs—only $43,000).

Although the first study focused on California cases, Kiser followed up with studies in New York that reached substantially similar findings with a similarly large body of data.[7] The magnitude of New York defendants' mean cost of error was approximately 19 times the magnitude of the plaintiffs' mistakes. And in larger cases the dollar amounts become startling. For all the cases studied, where the claim was $1-$50 million, the mean cost of decision error for plaintiffs was approximately $327,000, and the mean cost for defendants' decision error was $5.326 million.[8]

Kiser was so impressed by these findings that he decided to study the thought process of a small group of lawyers who routinely make good valuations. Kiser interviewed the members of this

group to learn their methods in order to teach others to improve their odds.[9]

Studies on failed decision making can teach us how to avoid some of the worst unconscious problems. But first, we have to accept the proposition that we badly need correction when it comes to case valuation; we need to establish and then follow a better methodology. However, most lawyers are not even aware of the problem; but even if they are, they are not convinced that we need to take action.

What Is Client-Think and How Does It Misguide Us?

Lawyers are invariably put into a situation that constitutes a perfect storm of unconscious influences calculated to impair their judgment. These influences (known as biases and cognitive barriers in the psychological literature) are well documented in general. Kahneman's current bestseller provides a valuable general introduction to cognitive biases and why they impair everyone's judgment. These biases coalesce in the lawyer-client relationship, magnifying the potential for mis-evaluation. The lawyer and the client immediately constitute a group of two people. In large cases, the lead (i.e., first chair) lawyer may have others working with him or her (partners, associates, investigators, paralegals, and experts). Their task is to find ways to support the client's case—and uncover weaknesses in the adversary's case. Unconsciously, they have taken a side from the outset. Once the parties file their pleadings, submit their motions, and engage in discovery, which usually leads to disputes, the table has been set for client-think.

Groupthink, the term invented by Irving Janis, describes the kind of impaired group decision making that led to the Bay of Pigs Invasion. Janis identified the following symptoms of groupthink:

1. The group feels it cannot fail.
2. The group rationalizes away disconfirming data and discounts warnings.
3. The people in the group believe they are inherently better than their rivals; the opposition is demonized or stereotyped.
4. Dissent is discouraged, overtly or covertly.
5. The group comes to the belief that it unanimously supports a particular proposal without necessarily asking what each individual believes (a process of polling that Kahneman thinks should be done in writing and before discussion).
6. Individuals self censor. Few or no alternatives are discussed and people do not surface risks or seek outside expertise that has no vested interest.[10]

Having worked with large teams of trial lawyers for many years, I see a parallel structure in the legal team.

In the case of the planning for the Bay of Pigs, the individuals in the White House Cabinet Room who knew most of the facts were at the bottom of the hierarchy. When someone asked what would happen if the invasion failed, the answer was that the 1,400 CIA-trained Cuban exiles who carried out the invasion would simply melt invisibly into the hills. No one checked to see where those hills were located. In fact, they were 40 miles or more away from the landing point for the invasion, known as the Bay of Pigs. After the fiasco, President John F. Kennedy asked former President Dwight Eisenhower if there was any strategy that could have made the effort successful. Eisenhower declined to discuss strategy, insisting that he wanted to focus on the decision-making process that got them to the point of invasion. Kennedy did learn from his mistakes and significantly reorganized his decision-making process to encourage dissent and critical evaluations among his team. He took the group out of the Cabinet room, asked for multiple proposals, and had the proponent of any proposal oppose it and develop support for approaches suggested by others.[11]

Other unconscious barriers to good decision making can exacerbate client-think. An example is the process known as anchoring. Kahneman (who worked closely with Tversky before the latter's death) identified two separate influences at work in anchoring. The first is that, from a known fact, we adjust to reach our conclusion, but our adjustment is not sufficient. At the same time, says Kahneman, the anchor has an "unconscious priming effect—a suggestion to the mind that becomes associated with the matter at issue." So the process begins with a possibly irrelevant fact that, in our mind, becomes associated with the thing we are evaluating. Then, that fact is adjusted. The problem is that our adjustments are always insufficient. So, for example, if I live in Chicago, I will estimate Milwaukee's population based on Chicago's, but I will overestimate because I am anchored in too high a number. If I live in Green Bay, my estimate will be too low because I am anchored in a low number.

A lawyer might fall into the trap of anchoring if he or she unconsciously anchors on the number the client, an expert, or a newspaper, suggests is fair, without specific reference to the case at hand. Even actual damages may serve as an inappropriate anchor because the value of a case is

never the same as the damages range and the plaintiff never has a 100% chance of winning. Also, that value must take into account the costs of trial, expert fees, time, and attorney fees.

Now, let's do a little experiment on the unconscious impact of an irrelevant number. First, write down the last three digits of your telephone number. Now, guess whether the date that Attila the Hun was defeated was before or after that number and write down that date. (This won't work if you know the date.) Now guess the actual date. In extensive experiments with this problem, on average, people with phone numbers lower than 300 selected a date between 500-800 years earlier than the date chosen by people with a phone number over 600. This is in a situation where it is absolutely clear to the conscious mind that the phone number has no bearing whatsoever on the answer to the question. And incidentally, to avoid a flood of "Googling," the date is 451 CE.

Kahneman says that negotiators can counter the impact of anchoring by consciously focusing on the anchor and searching for arguments against it ("thinking the opposite").[12] Lawyers should seek to avoid anchoring and they should involve their clients in this process. However, if the client insists on hearing only positive information, the lawyer will have a difficult time communicating unbiased valuations to the client.

Another unconscious barrier that contributes to client-think is lawyer overconfidence about the ability to accurately predict outcomes. Several studies have revealed that more than 80% of lawyers believe they are in the top 10% when it comes to judging outcomes.[13] Overconfidence makes accurate prediction less likely, and ensures that measures will not be used to improve the accuracy of case outcomes and calibrate estimates.

Then there is the client's "sunk-cost bias," which causes clients to feel the investment justifies going forward with the case, rather than settling. But these past costs are irrelevant: only future costs are relevant to deciding whether and how to proceed.

A powerful description of sunk-cost bias in another context is found in John Krakauer's book *Into Thin Air*, where, despite well-established rules about descending Everest before the weather could defeat them, the climbers and even some guides violated these rules because they had put three months and $65,000 in the effort. As a result, six climbers lost their lives.

Framing the issue is another component of client-think for both plaintiffs and defendants and their counsel. Kahneman and Tversky have clearly established that the perception of the issue changes our response to risk. We are willing to accept less if it is a sure thing when we are seeking a gain and we are gamblers when we face a potential loss.[14]

What happens when these and other unconscious influences coalesce in client-think? It is called "attention blindness." In looking to support our client's position, we literally fail to see damaging evidence or disconfirming information that would directly impact risk assessment. I know of no better way to convince you of this than to direct you to the YouTube presentation called the "Monkey Business Illusion." You should take a moment to Google it on your computer to experience it.

There are steps that lawyers can take to improve the quality of their judgments about liability risk and damages.

How Can We Improve Our Risk Assessments?

If you have been persuaded that our brains can get in the way of making reasonable judgments, that unconscious biases and heuristics (i.e., here unconscious strategies or short cuts for solving problems) have an impact on everyone's judgments, then there are some steps that lawyers can take to improve the quality of their judgments about liability risk and damages:

1. *The devil's advocate.* The first step is to organize your team and your collection of information for better absorption of the information, avoidance of attention blindness, and to ensure better risk assessment. For example, once a team of lawyers is assigned to work on a case, assign one member of the team to play the role of devil's advocate (i.e., assume the perspective of the adversary). This person will examine all the evidence (from the beginning) in that light, and bring damaging evidence directly to the lead lawyer and the client without gloss.

I once suggested a devil's advocate to a lawyer, who said, "Yes, and then we kill him." It was a great rejoinder and a real example of the problem itself. The use of a devil's advocate should not await the mock trial or jury study.

2. *Keep communications open.* To avoid attention blindness, it is vital for the team to keep talking to the other side, trying to learn how it views the

issues, the witnesses (its and yours), the arbitrators or judge, and the evidence.

3. *Involve the client.* One way is to probe the client for information about the adversary's views of the facts and other aspects of the case. It can be useful to ask the client how he or she can explain what the adversary experienced, what it wants, and how it might interpret key evidence.

4. *Do pre-mortems.* Kahneman suggests doing pre-mortems. It involves having the team imagine, well before the trial, that it lost the case. Then have the team discuss the reasons for the loss. This will bring up troubling evidence or issues of law. Having this information will enhance the reliability of the team's risk assessment.

5. *Record each team member's views on each issue.* Kahneman also suggests that before undertaking a group risk analysis, each member of the team should write down his or her views on each issue. This can also avoid the trap of groupthink.

This suggestion is especially useful in firms where teams are hierarchical because it encourages lawyers who are lower down in the hierarchy to speak up, and thereby make a real contribution to the assessment process.

6. *Budget going forward.* Be sure to budget and account for costs and fees going forward in assessing the value of a case for settlement.

7. *Describe the case to others.* Another technique is to describe your case to others (without breaching confidentiality) who have no interest in the outcome, and do not know or care what side you are on. Don't even tell them. Then ask how they see the case, and what do they think are the risks?

8. *Use jury studies.* Undertake jury studies if the case warrants the expense or use online jury research.

9. *Going forward.* Keep records of your case valuations, liability assessments, and budgeting costs and fees in order to evaluate them at the end of the trial, or after a settlement, to calibrate them against actual results. By recording the settlement analysis for comparison to the eventual result at trial, arbitration, or mediation, you will be able to discern your errors or their patterns.

Law firms and corporate law departments could help their attorneys refine their judgment skills by requiring them to keep a file of their risk assessments and budget estimates at various stages, and to have other firm lawyers comment on them, and then actually compare them to the final award or settlement.

Conclusion

The unconscious mind is both an ally and foe, but we can help ourselves avoid attention blindness and improve our risk assessment skills if we admit they need improvement and commit to an evolving but methodical process. We need to keep better records to help us with these assessments. We should make a habit of keeping information on budgets and ultimate costs, settlement offers, and ultimate results. We should also ask for (and give) feedback on risk assessments and on settlement offers or demands before making them.

There are good reasons to take these steps. Biases will sabotage our efforts if we don't create and follow a method for decision making. Therefore, we should establish checklists and routine procedures to facilitate a more reliable risk assessment process that will help us all avoid error and improve our judgment. ■

ENDNOTES

[1] Author of the bestseller *Thinking Fast and Slow* (Farrar Straus 2011).

[2] Authors of *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale Univ. Press 2010).

[3] This term was invented by Irving Janis, *Victims of Groupthink* (2d ed. Houghton Mifflin 1982).

[4] BATNA (Best Alternative to a Negotiated Agreement) is a term invented by Roger Fisher and William Ury in *Getting To Yes* (Penguin 1981). In the context of this discussion, it means the present value of the likely outcome at trial less costs, for plaintiffs, and with the costs added for defendants.

[5] In 5 *J. Empirical Legal Stud.* 551 (2008).

[6] Their analysis did not typically include litigation costs and attorney fees because that information was not available. If it had been, the rate and cost of valuation errors would have increased.

[7] See Randal Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* (Springer 2010).

[8] Randall Kiser, "Judgments: How We Reach Them and How We Can Improve Them" speaking at the NJSBA Dispute Resolution Section, Jan. 24, 2012.

[9] His findings are in the book *How Leading Lawyers Think* (Springer 2010).

[10] See Janis, *supra* n. 3.

[11] Irving. L. Janis, "Groupthink," *Psychology Today* 5:6 (November 1971, 43-44, 46. 74-76; See also *Victims of Groupthink*, *supra* n. 3.

[12] Kahneman, *supra* n. 1, at 122-28.

[13] Jane Goodman-Delahunt *et al.*, "Insightful or Wishful: Lawyer Ability to Predict Case Outcomes," *Psychology, Public Policy and Law* (May 2010) (finding that litigators—particularly male litigators—are overly optimistic in the predictions of trial outcomes and the higher the level of confidence in their predictive capacities, the more likely they were to fall short of their goals.)

[14] Kahneman, *Thinking Fast and Slow*, *supra* n. 1, at 271-77.