

WHY GOOD LAWYERS DO BAD THINGS *(AND WHAT TO DO ABOUT IT)*

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Bad to the Bone

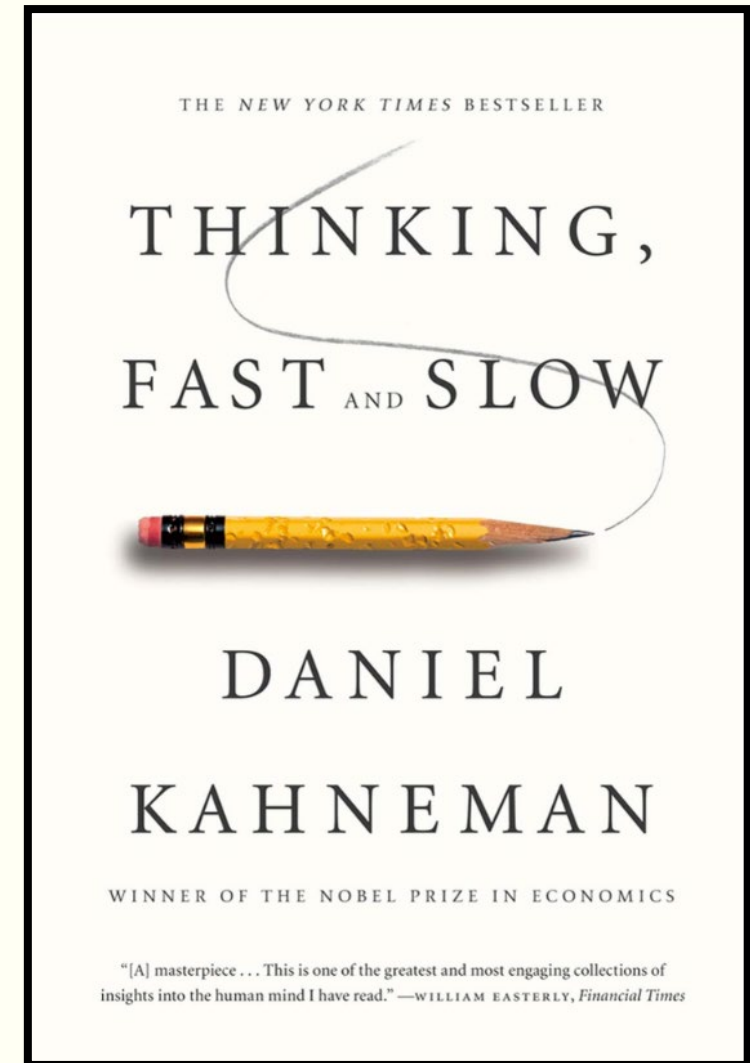
- “High-Profile Lawyer Charged With Punching Client In Court”
(ABA Journal, 10/30/15)
- “Storied Plaintiffs Lawyer Disbarred in Kentucky Over Excessive Fees”
(NLJ, 3/21/13)
- “Lawyer Charged With Forging Signatures Of 7 Judges On Over 100 Court Documents”
(Above the Law Blog, 2/24/2016)
- “Biglaw Partner and Associate Destroyed Evidence, Suborned Perjury”
(*Premium Pet Health v. All American Pet Proteins*, No. 2014CV3136 (D. Colo.))

“Everyday” Ethics Violations

- *People v. Romero*, 16PDJ039
 - Lawyer enters into flat-fee agreement with client in criminal matter
 - Accepts payment beyond the flat fee; advises client to plead guilty
 - Client hires new lawyer and is acquitted
 - One-year suspension
- Private Diversion, reported April 2017
 - Lawyer borrows \$1,000 from client on “fair and reasonable terms”
 - Fails to obtain written, informed consent
 - Repays the note before being reported
- *People v. Braham*, 15PDJ095
 - Lawyer files documents without client consent
 - Discloses confidential information
 - One-year suspension.

Today's Semi-Scientific Framework

- Neoclassical Economics: People are purely rational actors
- Behavioral Economics
 - Psychology drives decision-making
 - A real academic field
- Behavioral Ethics
 - People think they're more ethical than they are
 - Psychology drives ethical decision-making
 - Commonly used in management training



Are you *at least* as ethical as the average
civil defense lawyer?

The Lake Wobegon Effect

- “All the women are strong, all the men are good-looking, and all the children are above average”
- 1981 study: 80% of respondents rated themselves in the top 30% of all drivers
- 99% of high school students “get along with others” better than the average student
- 60% of students were in the top 10%!

The Rules of Professional Conduct and “Room for Interpretation”

C.R.C.P. 1.7 (Conflicts of interest; current clients)

“A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”

The Rules of Professional Conduct and “Room for Interpretation”

- “A concurrent conflict of interest exists if . . .
 - there is a significant risk that the representation of one or more clients
 - will be materially limited by the lawyer’s responsibilities to another client, a former client,
 - or by a personal interest of the lawyer”

The Rules of Professional Conduct and “Room for Interpretation”

- “Notwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if
 - the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.”
 - “Each affected client gives informed consent, confirmed in writing.”

Ethical Conduct Can Be Hard

- “Virtually all difficult ethical problems arise from conflict between
 - a lawyer’s responsibilities to clients
 - to the legal system
 - and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.”
- CRPC Preamble, ¶ 9

Ethical Conduct Can Be Hard

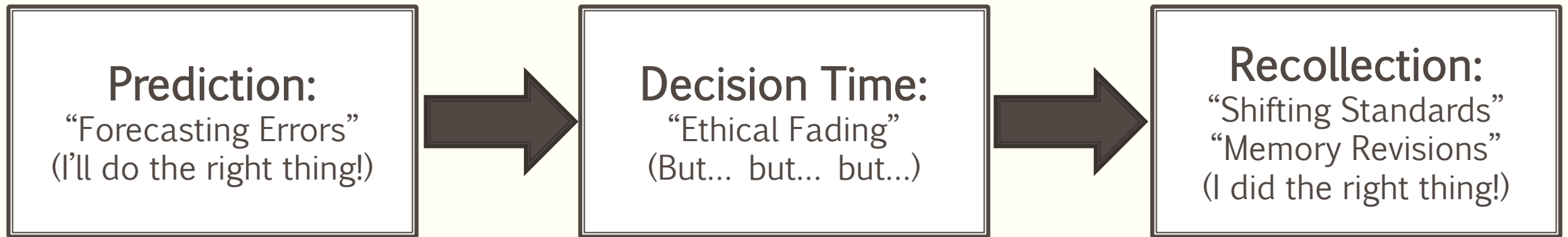
“The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.”

CRPC Preamble, ¶ 16

Ethical Conduct Can Be Hard

- Making the right call:
 - Can cause clients to lose motions—or cases
 - Can harm client relationships
 - Can harm relationships with colleagues
 - Can cost money—lots of it
 - Can endanger the health of your practice (at least in the short term)

Ethical Decision-Making



Ethical Forecasting Errors

- College women were asked to predict how they'd behave in response to specific inappropriate and sexist interview questions
- Their predictions:
 - **62%** would press the interviewer about why they were asking inappropriate questions
 - **68%** would refuse to answer

Ethical Forecasting Errors

- The reality: None refused to answer
- Why?
- Failure to anticipate other factors
 - Inequity of losing a job opportunity due to unfair questions?
 - Power dynamics during the interview?
 - Fear of reaction?

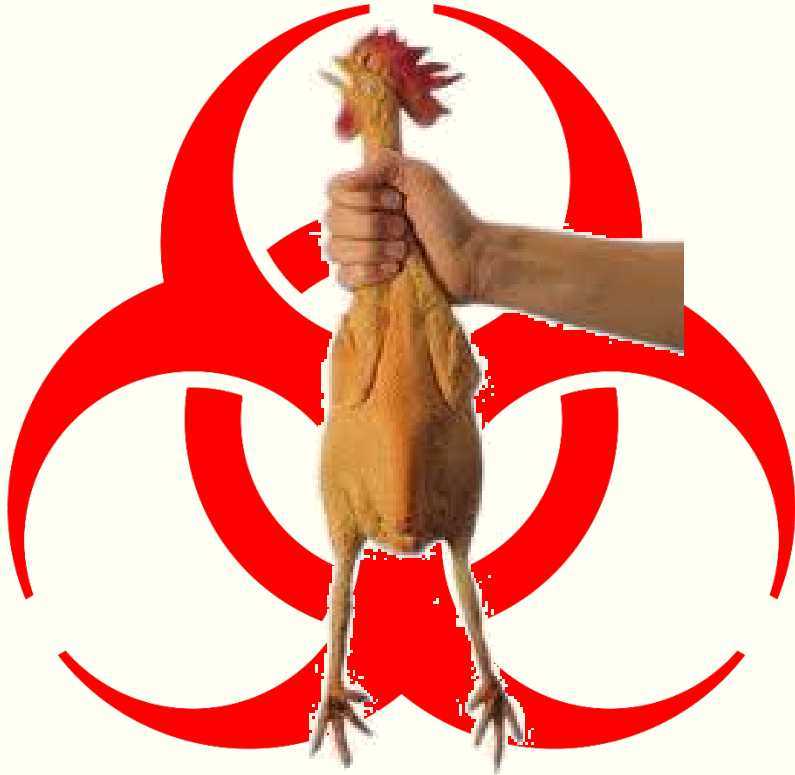
Recollection and Shifting Norms



Recollection and Shifting Norms



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Recollection and Shifting Norms



“I value health over taste.”



“I value taste over health.”

“System 1” vs. “System 2”

- Neoclassical view: People analyze problems like computers
- Lawyers as computers
 - Identify client's problem
 - Issue spot
 - Research
 - Find solution
 - Implement
- Behavioral economics view: People are subject to many other influences

Kahneman's “System 1”

- People couldn't get through the day analyzing every decision like a math problem
- System 1: “Lazy” thinking
- Highly efficient
- Seeks an answer that is “good enough”

System 1: How does he feel today?



System 1: How does he feel today?



System 1: How does he feel today?



System 2

- System 2 is the human computer
 - System 2 is methodical
 - System 2 is (more) accurate
- BUT:
 - System 2 is slow
 - System 2 is exhausting

THINK FAST!

- A bat and a ball together cost \$1.10
- The bat costs \$1.00 more than the ball

How much does the ball cost?

THINK FAST!

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How much does the ball cost?

Thinking Slow

- $Bat + Ball = 1.10$
- $Bat - 1.00 = Ball \rightarrow Bat = Ball + 1.00$

- $Ball + 1.00 + Ball = 1.10$
- $2 * Ball = 1.10 - 1.00$
- $2 * Ball = 0.10$
- $Ball = \frac{0.10}{2}$
- **$Bat = 0.05$**

Trap 1: Cognitive Strain

- Why do we usually use System 1?
- System 2 is a limited resource
- System 2 gets worn down
 - Causes difficulty with logical decision-making
 - People react more aggressively to provocation

Trap 1: Cognitive Strain

- Study of eight Israeli administrative law judges
- An average, they granted parole in 35% of cases
- Cases are presented in a random order
- Judges spend 6 minutes deciding each
- Researchers recorded time of decision and food breaks

Trap 1: Cognitive Strain

- After each meal, judges granted 65% of requests
- Approval rate drops steadily after than
- Judges almost never granted parole right before lunch
- Conclusion: Depletion of System 2 leads to the “easy” decision

Trap 1: Cognitive Strain

- Busy lawyers make bad ethical decisions
- Tired lawyers make bad ethical decisions
- Lawyers faced with endless conflict make bad decisions
- Lawyers who are rushed make bad decisions
- Keep an open mind; sleep on it

Trap 2: Prospect Theory (Gains v. Losses)

Which do you prefer?

Option 1: Receive \$900 as a sure thing

Option 2:

- 90% chance of getting \$1,000
- 10% chance of receiving nothing

Trap 2: Prospect Theory (Gains v. Losses)

Which do you prefer?

Option 1: Lose \$900 as a sure thing

Option 2:

- 90% chance of losing \$1000
- 10% chance of losing nothing

Trap 2: Prospect Theory (Gains v. Losses)

- Neoclassical economic theory: These are equivalent choices
- Kahnemen & Tversky: Most people take bigger risks to avoid losses than gains
- Implications for ethics?
 - Desperate situations make for bad decisions
 - “The cover-up is worse than the crime.”

New Client Scenario

- You're having a great year
- Two potential clients approach you with a significant potential long-term matter
- You identify a significant conflict of interest
- Is it waivable?

Existing Client Scenario

- You're having a terrible year
- You've represented two joint clients for a decade
- A significant potential conflict of interest develops between them
- Is it waivable?

Trap 3: Contextual Priming

- System 1 can be influenced, or “primed,” by circumstances
- A 2008 study looked at voting patterns in Arizona
- Finding: “[P]eople who were assigned to vote in schools were more likely to support a school funding initiative.”
- Effect was subtle but significantly significant

Trap 3: Contextual Priming

- Multiple studies have “primed” students with money
- Results
 - Primed students spent less time helping another student who pretended to be confused
 - Primed students were more likely to pick up dropped pencils
 - Primed students stayed further apart from other students (118 vs. 80 cm)
- Implication: Higher financial stakes leads to diminished ethical decision-making

Trap 4: Exaggerated Optimism

- 81% of new entrepreneurs put their personal odds of success at 7 out of 10
 - 33% said chances of failure were zero
 - But only 35% actually survive 5 years

Trap 4: Exaggerated Optimism

- Study of 11,600 S&P 500 forecasts
 - No correlation between prediction and outcome
 - CFOs grossly overconfident
 - CFOs most confident and optimistic about prospects of their firms went on to take more risk than others
 - “An unbiased appreciation of uncertainty is a cornerstone of rationality.”

Trap 5: Egocentricity

- Researchers created a simulated labor dispute
- Participants were told that they represented either plaintiffs or defendants
- The researchers provided everyone with an identical fact pattern
- When asked to recall as many of the facts as possible:
 - The “Defendants” recalled more defense-favorable facts
 - The “Plaintiffs” recalled more plaintiff-favorable facts

Trap 5: Egocentricity

- Researchers created a fictional civil suit
- Students in a negotiation class were told which side they were on
- They presented the facts to the students
- When asked to predict how the case would turn out, the “plaintiffs” predicted damages twice as large as the “defendants”

Exaggerated Optimism & Egocentricity

- 2010 study of lawyer's ability to predict outcomes
- Lawyers were asked to identify
 - Their goals in a particular case
 - The odds that they'd achieve that goal
 - Their confidence level
- Overall, lawyers were significantly overconfident

Exaggerated Optimism & Egocentricity

- Level of experience didn't matter
- Criminal or civil lawyers, plaintiff or defense lawyers, didn't matter
- Lawyers who were asked to provide reasons were no more accurate than those who just gave predictions
- “Female lawyers were slightly better calibrated than their male counterparts and showed evidence of less overconfidence.”

Risks of Exaggerated Optimism & Egocentricity

- Common legal malpractice fact patterns:
 - Difficult and litigious clients
 - Internal strife
 - 3rd or more successive counsel
- Don't assume that you'd be "better" than peers at controlling a difficult client
- Don't assume that you can be more objective and diligent in the face of a potential conflict
- Don't rationalize aggressive billing based on the fantastic work you've done

Trap 6: Motivated Blindness

- Experiment: Fictional sale of company
- Researchers broke subjects up into four groups
 - Buyers
 - Auditors for the “buyers”
 - Sellers
 - Auditors for the “sellers”

Trap 6: Motivated Blindness

- Each group was tasked with valuing the subject company based on objective facts
- Auditors on both sides were encouraged to be objective
- Sellers valued company higher than buyers – but so did their auditors!
- Risks of rationalizing client misconduct
 - “My client lied, but...”
 - “My client concealed information, but...”

Trap 7: Outcome Bias

Clinical drug trial #1:

- The researchers faced budgetary and time constraints imposed by pharmaceutical company
- Their study has 1000 participants
- The results are just four participants short of statistical significance
- They make up data for four additional participants
- The drug is approved
- It saves thousands of lives

Trap 7: Outcome Bias

Clinical drug trial #2:

- The researchers faced budgetary and time constraints imposed by pharmaceutical company
- Their study has 1000 participants
- The results are just four participants short of statistical significance
- They include four additional participants originally excluded due to technicalities
- The drug is approved
- It kills six people and injures thousands

Trap 7: Outcome Bias

- No harm, no foul?
- CRPC Preamble, 12:
 - “The legal profession’s relative autonomy carries with it special responsibilities of self-government.”
 - “A lawyer should also aid in securing their observance by other lawyers.”
 - “Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.”

Trap 8: Framing Errors

- Ethical decision or business decision?
- Impact of compliance systems
 - Participants play corporate CEOs who have promised to run emissions scrubbers
 - Group 1 was told that 5% would be audited
 - Group 2 was told that compliance was fully voluntary
- Group 1's compliance was lower than group 2
- They viewed the situation as a business decision—and it was cheaper to risk an audit

Trap 8: Framing Errors

- The Rules of Professional Conduct require disclosure or informed consent in certain situations:
 - Business transactions with clients
 - Waivable conflicts of interest
- Can disclosure and consent *encourage* unethical behavior?

Trap 8: Framing Errors

- Estimators and Advisors Study
- Some participants were “estimators”
 - They were seated far away from a jar filled with coins
 - They were asked to guess the number of coins
 - They were paid based on accuracy
- Others were “Advisors”
 - Advisors could take a closer look and help their assigned estimator
 - Advisors were paid based on how high (not accurate) their estimates are
 - Some advisors disclosed their payment structure to the estimates; others didn’t

Trap 8: Framing Errors

- Advisors who disclosed how they were paid had higher estimates
- Their estimates were also less accurate
- But disclosure and consent aren't a license to breach fiduciary duties!

Trap 9: Broken Culture



theranos



DEWEY & LEBOEUF



Trap 9: Broken Culture

- Formal ethics codes and rules tend to fail
- Study of ethics codes in the S&P 500:
- The average firm had 37 sentences repeated word for word in other codes
- For some, the overlap was 222 sentences
- Some cases of complete duplication

Trap 9: Broken Culture

Study of Carnegie Mellon Students:

- Participants were given a challenging test
- They were given cash for each correct answer
- They graded their own work and then answer sheets being shredded
- Finishing all problems was impossible

Trap 9: Broken Culture

Scenario 1:

- An actor pretends to be a fellow Carnegie Mellon student
- He claims to have solved every single problem
- 25% of the participants follow suit and lie about solving every problem

Trap 9: Broken Culture

Scenario 2:

- An actor in a University of Pittsburgh t-shirt claims to have solved every single problem
- Only one participant (3.6%) cheats!

Avoiding Traps

- Recognize your vulnerability to System 1 influences
- Think through how you'd react to potential ethical quandaries
 - Anticipate the “want” self
 - Project yourself into future situations

Avoiding Traps

- Plan ahead for the loss of substantial clients
- Standardize information gathering to avoid willful blindness
- Think abstractly
 - What would you advise a friend to do?
 - What would you say in a deposition?
 - What would others say about you?

Avoiding Traps

- Consult with trusted advisor not subject to same influences
- Focus on unfavorable outcomes
- Stop and think
 - And cool down
 - It almost certainly isn't an emergency

Avoiding Traps

- Foster informal ethical culture
 - Internally publicize good ethical calls
 - Respond positively to ethical behavior
 - Foster us (ethical) vs. them (dirtbags) culture

Further Reading

- Thinking, Fast and Slow, Daniel Kahneman, 2011
- The Undoing Project, Michael Lewis, 2017
- Blind Spots, Max H. Bazerman & Ann E. Tenbrunsel, 2013
- The Ethical Executive, Robert Hoyk & Paul Hersey, 2008