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Walking, fast and slow

Applying Nobel Prize-winning decision-making theories to trial practice



Cooper

BY MILES B. COOPER

The two lawyers walked across the darkened city, a full moon rising over the downtown skyscrapers. “You should write about Kahneman in your next column,” said one. That would be Daniel Kahneman, the Nobel-Prize winning psychologist and economist, who with Amos Tversky developed concepts on judgment and decision-making psychology. As the two lawyers chose needlessly steep uphill streets to stimulate muscles and mind, they spit-balled applying Kahneman and Tversky’s efforts to trial work.

Dual Process Theory

Kahneman’s 2011 *Thinking, Fast and Slow* explores the relationship between intuitive, or fast thinking, and reasoned, or slow, thinking. Together they form Dual Process Theory. In case value, consider them an inside value and an outside value. The inside or intuitive response is the knee-jerk answer. Intuitive thinking has value, particularly with experienced players. After many years, we develop intuitive case valuation. We’ve put in our Malcolm Gladwell 10,000 hours, if you forgive the psychology mash-up. We can spit out a case value after listening to a colleague’s summary. Intuitive analysis, instinctual and in the ballpark.

Next comes reasoned analysis. A typical valuation discussion naturally transitions into information-gathering. From “What’s the venue?” to, “Any prior injuries?” to, “What historical numbers are reported for settlements and verdicts with these injuries?” and so forth. We’ve unwittingly begun performing Bayesian statistics, lawyer style. New term? Me too. A consequence of walking with a University of Chicago math-student-turned-lawyer. In Bayesian statistics, one updates the probable outcome as more information develops. Imagine flipping a coin three times, resulting in heads twice, tails once. One could wrongly intuit future coin flipping will produce heads 66% of the time. Flip it 100 times, update the system, and better outcome prediction results. Now, if I try three cases and win twice...

Reasoned failings

Reasoned decision-making produces better outcomes if one reduces the impacts of biases. While we cannot eliminate biases, we can become bias conscious. Imagine a tough call – settlement versus trial – with a client requesting a recommendation. Who participates in the debate? The best people? Folks who like you but do not care about your feelings. Encourage this construct. Put an empty box outside the door, tell everyone coming in to stop, drop their egos in it, and to commit to communicating with brutal honesty (but not brutality). Have everyone write down their answer before the discussion begins. Otherwise, the first speaker has too much influence under primacy bias. Recognize that people who rise in organizations tend to be risk-takers and optimists. Think back to those three coin flips: Is the big-swinging trial lawyer recommending trial as an optimist with two recent wins?

Conclusion and availability biases

That optimist may further be unwittingly arguing a position based on conclusion bias. Conclusion bias is where we think we believe in something because we have good supporting arguments. But the opposite tends to be true. We believe the conclusion and subconsciously work backward, creating the arguments. The optimistic trial lawyer loves trial and presents strong pro-trial arguments. Combat these two ways. First, listen closely while trusting your instincts. Typically, you know this person. It might even be who you see in the mirror! Is the trial lawyer (or are you) using subtle techniques to tilt the room toward desired outcome? Second, confront directly. “We committed to brutal honesty. Is there a chance your reasoning might be directed by your passion for trying this case? Argue the other side now – all the reasons why we should settle.”

Availability bias is an easy arrow to grab from conclusion bias’s quiver. Verdict reports, the media, and our emails trumpet great trial results. Their easy availability implies that everyone who dares, wins, which, while a great commando motto, is not always an accurate outcome predictor. The results are notable, get attention, and are therefore available. Settlements and verdicts tend to be self-reported. Do State Farm or Farmers’ in-house teams typically waste time publishing defense and low verdicts or settlements? They don’t need publicity to attract clients. But the plaintiff’s lawyer with the outlier outcome wants people to know.

Weak prospects

We’ve focused on the optimist trial lawyer in our bias review. We cannot overlook pessimists and prospect theory, however. People hate losing, and fear short-term loss over the benefit of long-term prospects. These are immediate, emotional reactions. The emotional impact results in greater loss weighting. Does that settlement offer look good because it is the right decision or because one fears loss?

We reach our best conclusions by conducting both intuitive *and* reasoned decision-making. When performing reasoned decision-making, we can get ensnared by biases bypassed by intuition’s fast thinking. We must confront and control for these biases.

Outro

Back to our walking lawyers. Huffing and mentally taxed from debating Kahneman and Tversky, they summit the steep hill, yielding the jewel box city glittering below. After a brief pause, they intuitively head down a hidden stairway without reasoned analysis. It feels like the right path, and the decision’s consequences are low.

Miles B. Cooper is a partner at Coopers LLP, where they help the seriously injured, people grieving the loss of loved ones, preventable disaster victims, and all bicyclists. Miles also consults on trial matters and associates in as trial counsel. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is an American Board of Trial Advocates member.