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## What Are the Chances You're Underestimating the Risks of Litigation?

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Trial lawyers' clients always ask: What are my chances of winning or losing? How much do I stand to gain or pay? Lawyers working on a contingency-fee arrangement ask themselves the same things. The answers are crucial when an opportunity arises to resolve a dispute, whether that is at mediation, during the final preparations for an arbitration hearing, or on the courthouse steps.

The bestselling book *Thinking, Fast and Slow*, by Nobel-Prize winning psychologist and economist Daniel Kahneman, contains a gold mine of insights about calculating litigation risk. Apart from settlement discussions, lawyers assess risk with varying degrees of rigor at other critical junctures—the decision to file suit; the selection of trial counsel; establishing litigation budgets and reserves; or the decision to appeal an adverse judgment. Despite the importance of realistically assessing risk to facilitate good decisions, the process of evaluating litigation risk is often predicated on surprisingly unreliable factors and other distorting influences.

Where are your psychological blind spots in this regard? Some can be identified as categories of “heuristics,” which represent the ways in which our minds propose the answer to a difficult question by substituting a different, simpler question. One example is the “affect heuristic,” in which we allow our desired conclusion to dominate our assessment of arguments. When the initial impression of a piece of evidence is that it is helpful, the natural inclination is to adopt and rely on that conclusion. Further critical assessment is instinctively suppressed. Another is the “availability heuristic,” in the frequency of any event is judged by the ease with which instances come to mind. If some high-dollar verdicts quickly come to mind for a particular type of case, the mind likely will translate that information into an assumption that such verdicts frequently occur. Awareness of the results of a bellwether trial or the first few appeals under a new statute can lead to overestimating the true likelihood of similar results in subsequent



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cases, resulting in distorted expectations during a mediation.

Another idea, which should come as no surprise, is that our ability to assess risk can be plagued by overconfidence. Regardless of whatever flaws we initially see in a case, over time we tend to fall in love with our cases. We become overly enamored with our own arguments. There's the further challenge of having access to limited information. A discovery battle of attrition has its strategic advantages and disadvantages, particularly with respect to improving risk assessment and trial preparation, but in the process litigants might charge past their best opportunity to resolve their dispute. Further, the limits of factual knowledge will vary

over time within a litigation team. It takes time for information learned in discovery to filter from lawyers on the front line reviewing documents and taking depositions, to the lead lawyer or the person with the best client relationship, to the responsible in-house lawyers and client decisionmakers. These varying levels of knowledge can lead to varying understandings within the team about good and bad developments that may influence the outcome, different appreciations of risk, and a spectrum of expectations about what would constitute a good result.

Perhaps the most ego-busting observation in *Thinking, Fast and Slow* is that subject-matter experts are no more immune than the general public from making these kinds of analytical errors. Experienced trial lawyers might reliably predict short-term trends in their practice areas, but over the longer term, their forecasts become less reliable. Like professional stock pickers who consistently fail to beat market performance over long periods, experts tend toward overconfidence in their own predictive abilities, never lacking for excuses when proven wrong. It is all too easy for lawyers, hired by their clients precisely because of their knowledge and experience, to fall into the same trap.

How can these snares be avoided, and can litigation risk be objectively evaluated? Being aware of the ways in which we delude ourselves into overconfidence can be helpful. For example, the “availability heuristic”

can be combatted by identifying numerous similar results—more than a couple—to confirm anecdote-based assumptions about how a court might rule or a jury’s likely verdict. One or two eye-popping examples might be useful for influencing mediation negotiations, but the exercise of trying to list a dozen examples may counsel against allowing outlier results to unduly influence the client’s sober expectations. Unfortunately, studies have shown that being conscious of these dynamics still won’t stop our brains from working the way they naturally do.

Acknowledging the distortions introduced by our intuitions reinforces the need to employ disciplined, formal methods of risk analysis. A comprehensive decision tree that incorporates all of the critical uncertainties about going forward in litigation, leading to a meaningful range of possible outcomes, will help to discipline the analysis. The key factors will be different for each case and can include dispositive motions, key evidentiary rulings, witness performance, and damages determinations. This method improves the logical consistency of risk analysis by requiring the probabilities relating to each factor to add up to 100%. In addition to mapping the material unknowns that will influence the ultimate outcome, it is necessary to assess confidence in the evaluation of each factor. Achieving a meaningful degree of certainty in risk analysis entails quantifying risks in

ranges, such as by solving separate decision trees representing best- and worst-case scenarios. Generating one decision tree to be used by both sides in the course of a negotiation also can help a mediator to focus the parties on the critical risk factors and to identify any overlap in the parties’ ranges of expected outcomes.

The behavioral-economics research recounted in *Thinking, Fast and Slow* teaches lawyers to develop a healthy skepticism about trusting our intuitions. A realistic assessment of settlement opportunities at mediation requires lawyers and clients to challenge their predispositions, impose strict discipline on risk assessments, and accept the inherent challenges of forecasting results. Taking these lessons to heart will result in expecting meaningful assessments of litigation risk to reflect a significant range of expected outcomes.

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