

On Litigation Skills - Thinking Fast and Slow

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Thinking Fast and Slow by Daniel Kahneman is must reading for lawyers who want to improve their own judgments and their understanding of the decision-making process of judges, juries, clients, opposing counsel and colleagues. Kahneman is a psychologist who won a Nobel Prize in economics for showing that people's economic decisions are often very different than what is expected of the "rational man" posited by classical economics.

The book explains that human brains have two systems for making decisions: Systems 1 and 2, which produce fast and slow thinking, respectively. System 1 is intuitive and relies on "rules of thumb" or "heuristics." It operates automatically and quickly with little or no conscious effort. System 2 is slower and requires conscious effort and attention. It is ultimately in charge and can resist the conclusions of System 1, slow the decision process and impose logical analysis. Kahneman explains that "most of what you think and do originates in your System 1 but System 2 takes over when things get difficult and normally has the last word."

System 1 is a machine for jumping to conclusions and is generally very good at what it does. Jumping to conclusions is efficient if the conclusions are likely to be correct and the costs of making an occasional mistake are low. But System 1 has biases and is prone to make systematic errors that make it unreliable in certain circumstances. By contrast, System 2 is lazy and reluctant to invest more effort than seems necessary in a decision, so it often follows the path of least resistance and accepts the conclusions of System 1 without much scrutiny. As a result, System 1 sometimes makes mistakes that System 2 fails to correct.

System 1's decisions are based largely on the coherence of the story that it creates from the available data — often without sufficient attention to the amount or quality of that data. System 1 also does not keep track of alternatives that it rejects and sometimes does not even notice that there are alternatives. It is blind to its own blindness.

Even professional decision-makers frequently make flawed decisions by deferring to System 1 over System 2. For example, a study of parole judges in Israel, who spent entire days reviewing applications for parole, with three food breaks, showed that the likelihood of being granted parole depended heavily on the time of day when the decision was being made. Overall, only 35% of all applicants were granted parole. But right after a meal break, 65% of applications were granted. The percentage declined steadily until the next meal break. In other words, tired and hungry judges tended to fall back on the more common and less risky decision of denying parole. The lesson is to avoid difficult judgments when tired or hungry and therefore overly reliant on System 1. As one of my partners says, never make an important decision after 4 p.m.

Kahneman's explanations of decision-making will ring true with most trial lawyers. We know that, when people intuitively believe a conclusion is true, they tend to believe arguments that appear to support it. When System 1 is dominant, the conclusion comes first and the reasoned justifications follow. As a result, the key to convincing juries (and even judges) is often presenting a coherent and plausible story and a confident and pleasant persona. Once your audience wants to believe your arguments, you are more than halfway home because you have persuaded System 1.

Most people — even experts — put too much faith in their intuitive judgments. Studies have shown that skilled intuitions are reliable only when an environment is sufficiently regular to be predictable and the expert has learned these regularities as a result of prolonged practice. Just like everyone else, experts have a tendency to jump to conclusions based on too limited practice or experience.

According to Kahneman, the "way to block errors that originate in System 1 is simple in principle: recognize the signs that you are in a cognitive minefield, slow down, and ask for reinforcement from System 2." But questioning your intuitions is unpleasantly hard work when you are stressed by a big decision, so it is usually wise to consult with others. As Kahneman puts it, "it is much easier to identify a minefield when you observe others wandering into it than when you are about to do so. Observers are less cognitively busy and more open to information than actors." In addition, organizations "are better than individuals when it comes to avoiding errors, because they naturally think more slowly and have the power to impose orderly procedures."

This column is too short to do more than scratch the surface of Kahneman's insights and recommendations, so everyone who cares about good decision-making should buy or borrow a copy of this book. Regardless of the pitfalls, lawyers will have to continue to think both fast and slow, so we should keep trying to do both as well as we can.