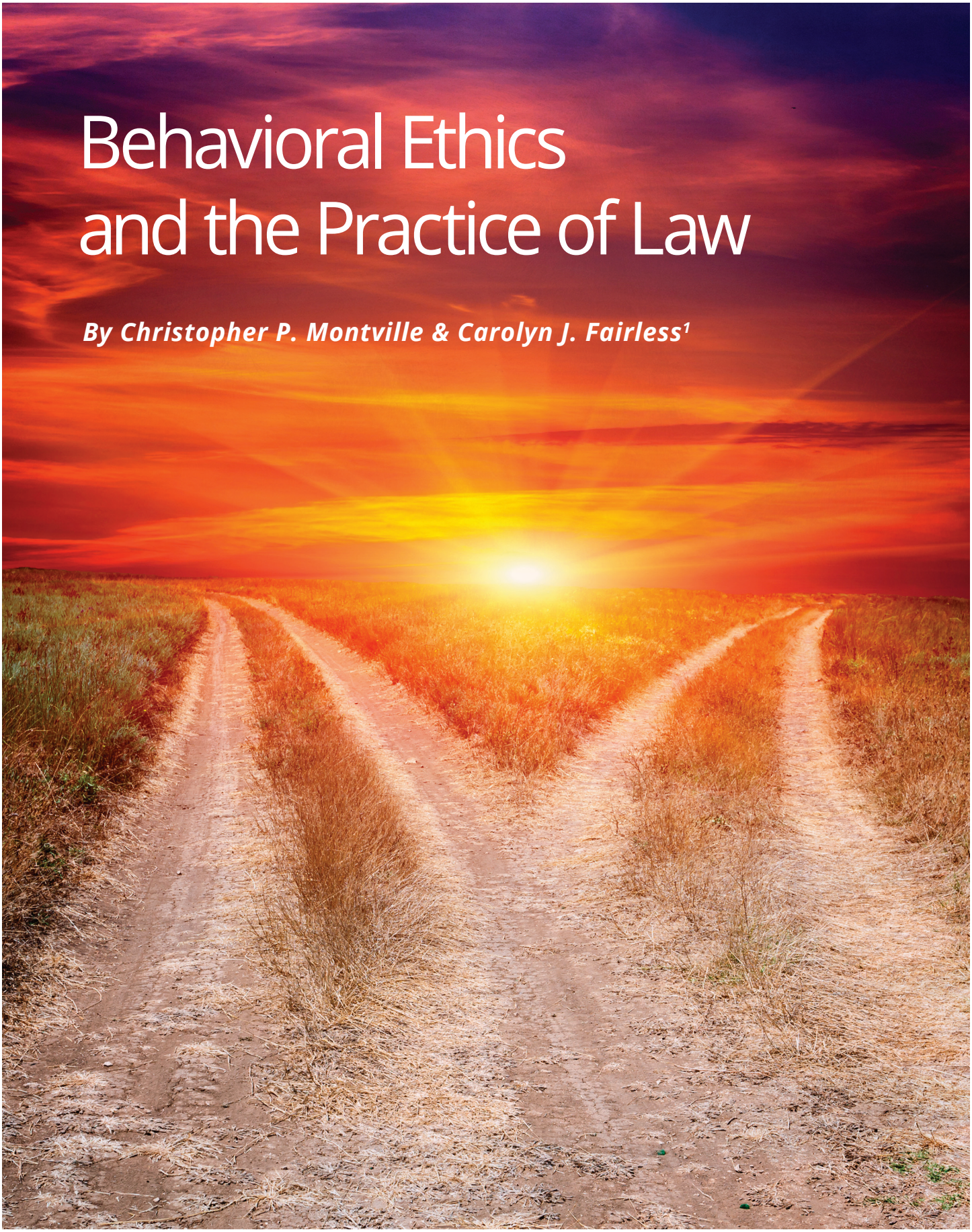
Behavioral Ethics and the Practice of Law

By Christopher P. Montville & Carolyn J. Fairless[1]



I. INTRODUCTION

Are you more ethical than the average lawyer? If you're like most lawyers, you probably answered "yes." But as in Lake Wobegon, where "all the women are strong, all the men are good-looking, and all the children are above average," it can't possibly be true that most lawyers are more ethical than the average lawyer.[2] And this misplaced belief is dangerous, because it blinds well-intentioned lawyers to the traps that trigger unethical conduct. One doesn't have to look hard to find reports of lawyers engaging in egregious misconduct. Legal publications, not to mention the legal tabloid blogs, seem to have a new tale of woe every day. Lawyers make national news for physically attacking clients, judges, and adversaries.[3] They destroy evidence.[4] They forge signatures of clients[5] and judges alike.[6] And worse, with startling frequency, lawyers misappropriate client funds through excessive billing, fabricated expense reports, and outright fraud.[7] In 2017, 2,742 U.S. lawyers were publically disciplined, 1,418 suspended, and 684 disbarred.[8] Although

[1] Christopher Montville is a partner at Wheeler Trigg O'Donnell LLP, where he represents clients in professional liability and complex commercial matters. Chris has served on several successful trial teams defending lawyers and law firms against malpractice and negligence claims, and he has also won at trial for business owners in commercial disputes. Carolyn Fairless is the Co-Managing Partner of Wheeler Trigg. She represents sophisticated clients in complex commercial litigation and professional liability defense. Carolyn is ranked in Chambers USA and is a Fellow of the American College of Trial Lawyers.

[2] Science Friday, *Are ALL Minnesotans Above Average?*, NYC Studios (Nov. 16, 2016) (77.4% of audience members reported that they were above-average drivers).

[3] *See*, *e.g.*, Rummara Hussain, *Source*: *High-profile Attorney Allegedly Punched Inmate*, Chi. Sun-Times, Oct. 1, 2015.

[4] *See Premium Pet Health v. All American Pet Proteins*, No. 2014CV3136 (Dist. Ct., City and County of Denver, Colo. June 11, 2015).

[5] *See*, *e.g., Matter of Sydnor*, 830 S.E.2d 732 (Ga. 2019).

[6] *See*, *e.g., United States v. Ohanian*, No. 2:19-cr-00284-JAK (C.D. Cal., Apr. 17, 2019) (attorney charged with stealing $4,000,000 from clients and forging judicial signatures); David Ovalle, *He forged signatures of judges over 100 times. Now this lawyer is going to jail*, Miami Herald, Aug. 3, 2017; *Att'y Grievance Comm'n of Md. v. Lefkowitz*, 205 A.3d 17 (Md. App. 2019) (disbarment for drafting fraudulent subpoena representing that it had been witnessed by a judge).

[7] *See*, *e.g., Storied Plaintiffs Lawyer Chesley Disbarred in Kentucky Over Excessive Fees*, Nat'l L. J., Mar. 21, 2013; *see also Matter of Kahn*, 829 S.E.2d 344 (Ga. 2019) (lawyer disbarred for fraudulently inducing client to invest $300,000 in his business); *In the Matter of Earl Nelson Feldman*, No. 14-O-05758-LMA (Cal. Bar Ct. Feb. 8, 2017) (lawyer disbarred for stealing nearly $2 million from charitable trust).

[8] Standing Committee on Professional Regulation, American Bar Association Center for Professional Responsibility, *2017 Survey on Lawyer Discipline Systems Chart III – Part B* (July 2019).

typically (and thankfully) less dramatic, legal malpractice claims frequently implicate lawyers who allegedly favor their own interests over those of their clients. Regular readers of ALAS's "Real Claims—Hard Lessons" and "Schadenfreude Diaries," will recognize these familiar fact patterns.

It is convenient to try to pigeonhole these lawyers as a few bad apples. No doubt, some have spent their lives in an ethical netherworld, congenitally unable to conform to rules of professional conduct before finally getting caught. But many, if not most, enjoyed respectable careers before becoming the target of serious accusations of misconduct.

The question, then, is "why"? As it turns out, researchers have spent recent decades studying the science of human decision-making—and, in particular, why good people make bad ethical choices. This still-emerging academic field, now known as "behavioral ethics," applies the findings of these psychologists and economists to explain the causes of unethical behavior.

The lessons of behavioral ethics have made inroads into business schools and MBA programs. Law schools, meanwhile, still focus exclusively on the governing ethical rules, rarely examining why lawyers violate them. This article will focus on how understanding the ways external factors and unconscious biases influence ethical decision-making can not only help lawyers in their day-to-day practice, but also can temper the decisions that lead to expensive and avoidable malpractice claims.

II. BACKGROUND

Make no mistake: it is critical that lawyers understand the rules of professional conduct. And the reality is that most do. Before obtaining a law license, lawyers in every jurisdiction, save Wisconsin, must pass the Multistate Professional Responsibility Exam.[9] And all but a handful require lawyers to participate in continuing education courses focused on attorney ethics, which invariably discuss the applicable rules of professional conduct.[10]

The prevailing pedagogy, however, focuses on the rules themselves, and how they apply to specific practice areas and specific situations. In other words, they prepare lawyers to find objective solutions to thorny ethical problems. As a result, practicing ethically can seem like just another exercise in mechanical issue spotting.

[9] *See* Judith A. Gunderson and Claire J. Guback, National Conference of Bar Examiners, American Bar Association Section of Legal Education, and Admissions to the Bar, *Comprehensive Guide to Bar Admission Requirements* (2019).

[10] *See* Mandatory CLE, *https://www.americanbar.org/events-cle/mcle/.*

It isn't. Nine times out of 10, when lawyers take on a conflicting relationship, accept a high-risk client, engage in irresponsible corner cutting, or enter into questionable business transactions with clients, it isn't because they don't know the rules. Instead, good lawyers make bad decisions because, in the real world, ethical decisions leave plenty of room for wishful thinking, self-serving judgments, and rationalization. Doing the "right thing" can cost a lawyer money, mean sacrificing professional stability, and impact personal and professional relationships.

As the Preamble to the Model Rules of Professional Conduct recognizes,

> 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.[11]

The fundamental challenge is that the rules of professional conduct are "rules of reason."[12] They "provide a framework for the ethical practice of law,"[13] but do not, and could not, provide formulas that tell a lawyer exactly what to do in a given situation. That's where human decision-making comes in.

By way of example, consider Model Rule of Professional Conduct 1.7, concerning conflicts of interest and current clients. Model Rule 1.7 defines a concurrent conflict as one presenting "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...."[14] But it's often hard for a lawyer to know whether the "risk" in their own situation is "significant," or whether the limitation on the representation is "material." And the situation becomes no easier when deciding whether a conflict is waivable, which delves into the lawyer's "reasonable" belief.

In each instance, the lawyer's decision is subjective, and reasoning malleable. This is where behavioral ethics comes into play. Traditionally, ethicists have applied a normative approach to ethics, trying to explain why a decision is "right" or "wrong." Behavioral ethics takes a different approach, one that "start[s] from the assumption that even good people do bad things"—and then seeks to explains why.[15] In particular, academic studies show a uniformly massive gap between ethical goals—that is, how ethical individuals

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[11] Model Rules of Prof'l Conduct, Preamble ¶ 9.

[12] *Id.*, ¶ 14.

[13] *Id.*, ¶ 16

[14] *Id.*; R. 1.7(a)(2).

[15] Max H. Bazerman and Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty,* Ann. Rev. L. & Soc. Sci. (Dec. 2012).

aspire to be—and ethical judgment—that is, what individuals actually do. To understand why, it is important to begin by looking at how people actually make decisions.

III. THE SCIENCE OF (ETHICAL) DECISION-MAKING

We draw the lessons in this article from two books that attempt to cast research on human decision-making into mainstream terms. First, in 2011, Princeton University psychologist Daniel Kahneman published *Thinking, Fast and Slow*, a colorful compendium of research into what academics call "behavioral decision theory." Kahneman's life's work, along with that of his colleague Amos Tversky, proved so groundbreaking that it won him the Nobel Prize in Economics—despite the fact that Kahneman is not even an economist.[16]

Second, Max Bazerman and Anne Tenbrunsel, both business school professors, authored *Blind Spots: Why We Fail to Do What's Right, and What to do About It*. Their book, which draws on the research of Kahneman and Tversky, aims to persuade the reader that everyone makes ethical judgments with two sets of standards—"one rule for ourselves, and a different one for others...."[17] Perhaps this might seem trite—but the empirical evidence they present to support the point is in equal parts compelling and disheartening.[18]

A. System 1 and System 2 Thinking

Kahneman lays out the evidence that, when making decisions, people rely on two distinct modes of reasoning. He describes these as "System 1" and "System 2." Simply put, System 1 is what some might refer to as "intuition," and System 2 is reasoned analysis.

Taking them in reverse order, System 2 makes the logical decisions. It detaches and attempts to consider all of the evidence. When faced with a thorny ethical decision, System 2 starts with no preconceptions about the "right result." It understands that a lawyer's self-interest should not influence his professional decision-making. It reads

[16] Tversky did not share in the honor because he died in 1996, and the Nobel Foundation does not grant posthumous awards. *See* Karen Freeman, *Amos Tversky, Expert on Decision Making, Is Dead at 59*, N.Y. Times, June 5, 1996.

[17] *Id*. at 8.

[18] Both books are well worth reading in their entirety. This article seeks to highlight some of the findings applicable to the day-to-day practice of law, but can barely scratch the surface of what they teach us about human decision-making. For those without the time to work through Kahneman's 450-page magnum opus, Michael Lewis's 2017 book, *The Undoing Project*, provides a breezy narrative of Tversky's and Kahneman's research and tumultuous friendship.

the rules of professional conduct (comments included), and it spends hours researching ethics opinions and decisions from disciplinary boards. System 2 is the logical machine lawyers imagine themselves to be.

Kahneman and Tversky devoted their careers to demonstrating that, when it comes to making decisions, System 2 plays only a supporting role. It is System 1 that decides first—and frequently decides last. System 1 determines whether an unexpected noise signals danger. It arrives at instantaneous judgments about people's intentions based on their facial expressions. System 1 decides quickly, effortlessly, and—in most cases—correctly. Without it, humanity could not survive.

The problem is that System 1 is subject to a wide range of biases, flaws, and external influences. Fortunately, the logical analysis of System 2 can sometimes overrule System 1's snap judgments. Kahneman provides a simple problem to illustrate the point.[19] Consider, without thinking, your initial reaction to the following math problem:

1. Together, a bat and a ball cost $1.10.
2. The bat costs $1.00 more than the ball.
3. How much does the ball cost?

The vast majority of people who give an intuitive answer will say that the ball cost $0.10. In this simple example, though, System 2 will quickly lead to the right answer: the ball cost $0.05.

So what does this have to do with ethical decision-making? As it turns out, quite a lot. In every ethics situation, System 1 will provide a lawyer with the lawyer's "hunch," "intuition," or "reaction" about what the right answer might be. But research shows that System 1 decisions are profoundly influenced by factors as diverse as fatigue, priming, and systemic errors in risk analysis.

System 2, meanwhile, won't necessarily come to the rescue. Proving oneself wrong—and then accepting the result—is hard. Not only that, but System 2 thinking is a limited resource. More often than not, System 2 serves to justify System 1 decisions by selecting the most favorable evidence, and then discounting the rest.

B. Bounded Ethicality

In other words, people—lawyers included—make decisions based on a selective view of evidence and unacknowledged influences. In *Blind Spots*, Bazerman and Tenbrunsel call this problem "bounded ethicality." In essence, bounded ethicality examines why people

[19] Daniel Kahneman, *Thinking, Fast and Slow*, 44–45 (1st ed. 2011). Fifty percent of Harvard students and 80% of students at less selective colleges reached the wrong answer. *Id*.

fail to realize that their ethical decisions are driven by something other than cold, hard logic. Because of bounded ethicality, people apply two different ethical standards: one that they apply to others, and one that they apply to themselves.

IV. THE THREE-STEP PROCESS OF ETHICAL DECISION-MAKING

To see why, behavioral ethicists explain that people typically make decisions in three phases: "Prediction," "Decision-Time," and "Recollection."

A. Phase One: Prediction

The prediction phase comes first. Everyone carries with them a set of ethical values. For lawyers, these personal values come with the additional requirement that they comport with their jurisdiction's rules of professional conduct. Regardless of their personal values, individuals will predict that, in the future, their decisions will comport with those values. But research shows that this isn't true. As it turns out, humans are bad at prediction, and inclined to forecasting errors.[20]

A 2001 study illustrates the problem.[21] There, researchers split a group of female college students into two random groups. The first was asked to predict how they'd behave in response to three inappropriate interview questions: (1) *"Do you have a boyfriend?";* (2) *"Do people find you desirable?"*; and (3) *"Do you think it is appropriate for women to wear bras to work?"*

Sixty-two percent of the participants said they would press the interviewer about why the questions were being asked. Sixty-eight percent said they would refuse to answer outright.

B. Phase Two: Decision-Making

The researchers then put participants into job interviews which, unbeknownst to them, were staged. There, the interviewers asked these same three questions. None of the participants refused to answer. And only a minority inquired about why the questions were being asked—and did so politely and at the end of the interview.

Traditional ethicists might discuss whether the second group acted ethically or not. But that wasn't the researcher's focus. Instead, they wanted to know why the students'

[20] Max H. Bazerman and Ann E. Tenbrunsel, *Blind Spots: Why We Fail to Do What's Right and What to Do about It,* 61–66 (1st ed. 2011).

[21] Julie A. Woodzicka and Marianne LaFrance, *Real Versus Imagined Gender Harassment*, J. Soc Issues 57 (2001).

predictions differed from their real-life decisions. They ultimately concluded that the participants were unable to accurately predict that factors, other than their personal moral standards, would influence their decisions. These factors included social pressure, a fear of confrontation, or the importance of obtaining a job offer.

C. Phase Three: Recollection and Ethical Fading

Equally important is how people view their ethical decisions in retrospect, after taking an action that is inconsistent with their self-reported values. Invariably, they remember their decision as ethical.

In the prior example, the participants might conclude that they were placed in a fundamentally unfair situation. After all, they could be rejected from the position for refusing to answer questions or confronting the interviewer. Acting consistently with their prediction would punish them twice—once by subjecting them to inappropriate questions, and then by costing them the job. This reasoning might be right, but it still fails to comport with what the participants thought they'd do.

A study from the University of Texas at Austin demonstrates how System 2 can be used not to drive ethical decisions, but to rationalize them in hindsight.[22] In the study, researchers showed participants pictures of two chickens, ready to be cooked. One chicken looked plump and delicious. The other chicken was scrawny and unappetizing.

The researchers then split the participants into two groups. They told the first group that the plump chicken was organic, and the scrawny chicken factory farmed. They told the second group exactly the opposite: that the scrawny chicken was the organic one. They then asked the participants which chicken they'd rather eat.

It is no surprise that both groups said they'd prefer to eat the plump chicken. But when the researchers asked the participants why they made the decision, the two groups gave radically different answers. The group that believed the plump chicken was organic explained that they valued health over taste. But the group told that the scrawny chicken was organic said exactly the opposite: they valued taste over health.

In other words, both groups made a System 1 decision based on their initial reaction to the pictures of the chickens. When provided with additional information, System 2 stepped in to rationalize that choice. And when making ethical decisions, lawyers are not immune from this post hoc rationalization. Lawyers, it turns out, do the same thing.

[22] *See* McCombs Today, *Do You Make Buying Decisions Based on Logic or Emotion? A Tale of Two Chickens* (May 8, 2018).

V. ETHICAL TRAPS

Based on research into decision-making, researchers have identified a series of common ethical traps—or, as Bazerman and Tenbrunsel call them—"blind spots." At least six are particularly relevant to the practice of law.

A. Priming

Research shows that human decision-making can be "primed"—that is, influenced by factors that seem to have no relation to the problem at hand. For example, in a 2008 study of Arizona voting patterns, researchers compared voting outcomes on a school budget measure. Those who voted in school gymnasiums were more likely to support the measure than those who voted elsewhere, such as churches, municipal buildings, and the like.[23]

Many studies have applied this principle to the priming effect of money. Simply showing subjects a pile of money can cause them to make decisions inconsistent with their ethical standards.

Participants primed with money also show increased self-reliance—and are more selfish and more isolated.[24] These are all factors that contribute to poor ethical decision-making.

But the effects of priming go far beyond money. One group of researchers read business students a list of words.[25] Some sets were negative, such as "aggressively," "rude," "intrudes," and "annoying." Other participants heard positive words like "respect," "sensitively," "considerate," and "appreciate." Students were then asked to evaluate a wide range of ethical scenarios, ranging in severity from questionable product placement to outright bribery. In the majority of scenarios, those primed with negative words were less sensitive to ethical situations.

Negative language, emotions, and conflict are, unfortunately, a routine aspect of legal practice.

Lawyers considering ethical quandaries should be wary of these priming effects. Negative language, emotions, and conflict are, unfortunately, a routine aspect of legal

[23] Jonah Berger, Marc Meredith, and S. Christian Wheeler, *Contextual Priming: Where People Vote Affects How They Vote*, PNAS 105 (2008).

[24] Kathleen D. Vohs, *The Psychological Consequences of Money,* Sci. Mag. 314 (2006).

[25] John Tsalikis and Ana V. Peralta, *Priming Effects on Business Ethical Decision Making*, Int'l J. Strategic Innovative Marketing Vol. 01 (2014).

practice. Yet a lawyer who receives an angry and offensive letter from opposing counsel, then later the same day considers an unrelated ethical quandary, is unlikely to see the connection between the two events. But System 1 apparently does, and is more likely to disregard ethical nuances after negative priming.

An unwary lawyer can then easily find himself using System 2 logic to support the System 1 decision, based on nothing more than priming. For example, a lawyer might begin her day with an unexpected phone call from a difficult client, who angrily insists on withdrawing a settlement offer that the opposing party just accepted. In the midst of dealing with this situation, the lawyer's associate comes by with a highly damaging email that he just identified while reviewing client documents. He asks: "So, do we have to produce it?" A lawyer exhausted by her challenging morning will have a harder time saying "yes," and is more likely to make the easy decision: withhold the document and develop a questionable rationale to support the decision.

B. Exaggerated Optimism and Egocentricity

"Exaggerated optimism" describes the tendency to predict that one will do better than the "average" outcome—even with no objective evidence to support this belief. The phenomenon has been studied extensively in the business world. In one study, entrepreneurs were asked to predict their personal odds of succeeding.[26] Eighty-one percent put their ultimate chance of success at seven out of 10 or higher. One-third actually said their chance of failing was zero! Yet in reality, only 35% of new businesses survive for five years or more.

Another study analyzed 11,600 corporate forecasts by publicly traded companies. It found that the chief financial officers of these companies were grossly overconfident about how accurate these forecasts would prove to be. And, importantly from an ethics perspective, the overconfident CFOs took far more business risks than those who expressed less confidence.[27]

Lawyers face the same challenges. In a 2010 study, researchers surveyed nearly 500 lawyers across the country, asking for predictions about the outcome of cases set for trial.[28] The researchers then compared the actual case outcomes to the lawyers' predictions. In just 32% of cases, the outcome matched the prediction. As for the rest, the lawyers who overestimated their chances of success outnumbered those who

[26] Arnold C. Cooper, Carolyn Y. Woo, and William C. Dunkelberg, *Entrepreneur's Perceived Chances for Success*, J. Bus. Venturing 3 (1988).

[27] Ulrike Malmendier and Geoffrey Tate, *Superstar CEOs*, Q. J. Econ. 24 (2009).

[28] Jane Goodman-Delahunty, Par Anders Granhag, Maria Hartwig, and Elizabeth F. Loftus, *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*., 16 Psychol. Pub. Pol'y & L. 133 (2010).

underestimated by a factor of two-to-one. Women did slightly better than men, but more experienced lawyers were no better than their junior counterparts at predicting outcomes.

The related concept of egocentricity also influences how people make decisions. As used in the field of decision analysis, egocentricity is defined not as pure self-importance, but as the "tendency to be influenced by the outcome more favorable to an individual's 'side.'" In other words, regardless of the objective evidence, individuals are more likely to predict that they will win than lose.

This concept is particularly relevant to lawyers. A 1992 study looked at the behavior of students in a negotiation class.[29] Researchers provided the students with identical information about the facts underlying a civil lawsuit. The researchers then told the students which "side" they'd be negotiating for. Next, they asked the students to objectively predict how a judge would rule on the dispute. Even though all the students had the same information, the "plaintiff" negotiators gave predictions twice as optimistic as the students arbitrarily assigned to the defense side.

Egocentricity doesn't just influence decisions, but even impacts the information that individuals consider. In another study, researchers broke participants into two groups and provided them with the facts of a fictional labor dispute.[30] Participants then were randomly assigned a "side": plaintiff or defendant. The researchers then quizzed the students about the facts underlying the dispute. When asked to recall key facts, the participants routinely remembered more facts favorable to their side.

The implications for lawyers are numerous. Imagine, for example, a lawyer evaluating

[29] Linda Babcock, George Loewenstein, Samuel Issacharoff, and Colin Camerer, *Biased Judgments of Fairness in Bargaining*, Am. Econ. Rev. 85 (1995).

[30] Leigh Thompson and George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, Organizational Behavior and Hum. Decision Proc. 51 (1992).

a concurrent conflict of interest under Model Rule 1.7. In considering whether a conflict presents "a significant risk that the representation … will be materially limited," exaggerated optimism will lead the lawyer to believe that her unique talents will allow her to advocate effectively for both clients without regard to her self-interest. As the thinking goes, "perhaps other lawyers might be influenced by the dual representation, but not me!" Or egocentricity may cause her to focus only on those facts that would militate against the existence of a conflict, ignoring those facts that go the other way. In so doing, lawyers are tempted to substitute their own judgment for the "reasonably prudent and competent lawyer" standard set forth in the rules of professional conduct.

The same goes for lawyers evaluating malpractice risk. Most practitioners know that accepting a representation of a client who fired multiple previous lawyers is a dicey proposition. But optimism and egocentricity can lead the lawyer to conclude that, by virtue of his own skill, and the strength of the client's position, the lawyer will succeed where others have failed. In reality, the lawyer often succeeds only in drawing a claim.

These attributes come into play with another frequent malpractice fact pattern: the lawyer who provides an overly optimistic assessment of the client's chances of success. Or the lawyer who advises a client to reject a reasonable settlement, based on the lawyer's belief of significant success at trial. Like the students in the negotiation experiments, all lawyers face the risk of discounting or even forgetting unfavorable facts, and reaching unsupported conclusions merely because they favor a client's position.

C. Cognitive Strain

Research also shows that the logical System 2 is a limited resource. And when System 2 is strained by a difficult task, individuals will make ill-considered System 1 decisions, without the protection of measured logic. For the reasons explained below, and many others, the practice of law takes place in the context of cognitive strain far too frequently.

Many examples of cognitive strain have been demonstrated. For example, in one study, researchers forced subjects to eat healthy foods.[31] In another, subjects were forced into situations involving human conflict.[32] In a third, researchers simply asked participants to avoid thinking about white bears.[33] In each study, the researchers placed subjects into situations requiring restraint and logical thought. The result, in each instance,

[31] Mark Muraven and Elisaveta Slessareva, *Mechanisms of Self-Control Failure: Motivation and Limited Resources*, Personality Soc. Psychol. Bull. 29 (2003).

[32] Mark Muraven, Dianne M. Tice, and Roy F. Baumeister, *Self-Control as a Limited Resource: Regulatory Depletion Patterns*, J. Personality and Soc. Psychol. 74 (1988).

[33] *Id.*

was a depletion of System 2 thinking. And the impact on participants was always the same: they struggled with logical decision-making and reacted more aggressively to provocation.

Nothing illustrates the risks of cognitive strain for lawyers better than one of the most distressing studies we encountered: an analysis of judicial decision-making. In this 2011 study, researchers followed Israeli administrative law judges presiding over parole cases.[34] In Israel, such cases are presented in a random order—and caseloads permitted the judges to spend an average of only six minutes deciding each.

Overall, the judges granted parole 35% of the time. Researchers, however, dug deeper, recording the time of day that each decision was rendered, as well as the timing of the judge's food breaks. The researchers found that immediately after each meal, the judges granted 65% of parole requests. The approval rate then dropped steadily throughout the day. And the judges almost never granted parole right before lunch.

Few lawyers would believe that trying to stick to a healthy diet causes ethical lapses. But the practice of law is inherently taxing and time consuming. Lawyers who are busy, tired, faced with conflict, or rushed can find themselves subject to cognitive strain, often unwittingly. When faced with difficult decisions, the lawyer is more likely to make the "easy" decision, without appreciating why.

Yet the correct decision is often the difficult one. For example, litigators are often faced with the decision of whether or not to file a motion, and must evaluate whether doing so is in the clients' interest. A cognitively strained lawyer is more likely to conclude that the motion is unnecessary. And the problem becomes even more acute with tough ethical calls. Doing the right thing can involve walking away from significant potential fees or confronting a difficult client with bad news.

D. Motivated Blindness

It doesn't take much research to understand that people's ethical decisions are heavily influenced by their own self-interest. People (lawyers included) are more likely to reach conclusions that benefit them and then rationalize the decision after the fact. More insidious, though, is the tendency to avoid recognizing the misconduct of others. This happens in situations where doing so could lead to unwelcome conflict or collateral consequences, and can arise simply because a person considers herself arbitrarily aligned with the wrongdoer.

A classic example of this phenomenon was the Enron scandal, where accounting firm Arthur Andersen turned a willful blind eye to its client's misconduct. The accountants

[34] Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, Proceedings Nat'l Acad. Sci. V.S. 108 (2011).

did so even though the benefit to themselves, in terms of fees, was relatively modest. It paled in comparison to the windfall that their clients, Enron management, realized through financial fraud. And yet, they willingly colluded.

What does it really take for motivated blindness to come into play? One study suggests the answer is "not much." There, researchers created a hypothetical situation regarding the sale of a fictional company. They broke participants into four groups: (1) potential buyers of the fictional company, (2) "auditors" of the buyers, (3) potential sellers of the fictional company, and (4) the sellers' "auditors." They then provided each group with the exact same information regarding the companies and asked each group to provide an objective valuation of the company.

The sellers, of course, valued the company higher than the buyers. But, somewhat more surprisingly, the auditors did the same thing: the group of auditors who were told they represented the buyer provided lower "objective" valuations than those representing the sellers. In other words, the participants were unknowingly influenced by nothing more than a fictional association with one side or the other.

Every lawyer knows that they can't knowingly assist a client with a crime or fraud. Yet, between 2011 and 2018, ALAS reported close to $1 billion in reserves associated with "client misconduct" claims.[35] Not infrequently, the "warning signs" were present. But in some cases, motivated blindness undermines these instincts, playing a key role in lawyers' failure to recognize and protect themselves against clients gone bad.

E. Outcome Bias

When considering whether conduct is ethical, people are naturally inclined to view the conduct through the lens of its ultimate outcome. In other words, "no harm, no foul." But no harm, no foul is not how the rules of professional conduct work. Rather, they require the lawyer to make a decision based, at most, on a prediction regarding the future likelihood of detriment to the client. An unethical decision does not become ethical simply because the potential risk to the client never came to pass.

A hypothetical involving a clinical drug trial illustrates the point.[36] Consider two pharmaceutical researchers, both supervising clinical trials of drugs with tremendous promise, but also potential risks.

[35] "Claims Trends: A Review of 2011–2018 Case Reserves," ALAS *Loss Prevention Journal* (Summer 2019).

[36] *Blind Spots* at 94–95.

▶ *The first researcher faces budgetary and time constraints beyond his or her control. Preliminary results are promising, but not statistically significant. To avoid scuttling the drug, the researcher decides to include four study patients that were rejected based on technicalities to make the results statistically significant. Upon release, the drug kills six people, and injures hundreds.*

▶ *The second researcher faces budgetary and time constraints beyond his or her control. Preliminary results are promising, but not statistically significant. To avoid scuttling the drug, the researcher invents four fictional study patients to make the results statistically significant. The drug saves thousands of lives.*

Both researchers engaged in dubious conduct, but the second researcher's actions were more egregious than those of the first. Yet, most people have a very hard time judging the second researcher more harshly than the first. Indeed, one can imagine a biopic in which the second researcher becomes the hero who bucked the system and cured thousands of people as a result. The first researcher, by contrast, could well find herself under criminal indictment.

Outcome bias is a dangerous trap for lawyers. Even when conflicts of interest do not cause an objectively adverse outcome for a client, juries often will unhesitatingly substitute their moral judgment for a careful causation analysis. And the problem is not just one of risk management. As the Model Rules of Professional Conduct explain, "[t]he legal profession's relative autonomy carries with it special responsibilities of self-government … Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves."[37] In other words, being ethical means more than just protecting the financial well-being of the client. This is why disciplinary authorities are likely to unsparingly admonish lawyers who use trust accounts for personal gain or borrow money from clients, even when those funds are promptly repaid.

F. Prospect Theory

Perhaps the most fascinating System 2 influence on ethical decision-making comes from a seminal 1979 paper by Kahneman and Tversky, *Prospect Theory: An Analysis of Decision Under Risk.*[38] It was prospect theory that won Kahneman the Nobel Prize in Economics, and it explains a great many of the decisions that lead to serious malpractice claims.

[37] Model Rules of Prof'l Conduct, Preamble ¶ 12.

[38] Daniel Kahneman and Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk,* Econometrica Vol. 47, No. 2. (1979).

Before Kahneman, economists evaluated decisions implicating risk under "utility theory." Utility theory assumes that individuals will make decisions, including evaluating risk, based on what is likely to benefit them in the long run.[39] Simply put, economists assumed that people are fundamentally rational.

Kahneman and Tversky discovered that, in reality, an individual's appetite for risk varies with whether the riskier choice will lead to potential losses or instead to potential gains. They illustrate the point with two economically equivalent scenarios, one involving a potential gain, and the other one involving avoiding a loss.[40]

- ***In the "gain" scenario, the participant faces the choice of either (1) receiving $900; or (2) accepting a 90% chance of receiving $1000, and a 10% chance of receiving nothing. Most people will choose the first option, the sure thing, because they are risk adverse when faced with a gain.***

- ***In the "loss" scenario, the participant most chose between either (1) losing $900, or (2) accepting a 90% chance of losing $1000, and a 10% chance of losing nothing. Most people will chose the second option, because they are more willing to take risks to avoid significant losses.***

Why? Because (as any experienced trial lawyer will tell you), losing hurts more than winning feels good. And prospect theory has profound consequences for decision-making, which lawyers who defend malpractice claims see playing out all the time.

Consider two different scenarios where an ethical decision can lead to the loss of client fees. One scenario involves a potential new client, and the other involves a current client.

- ***In the new client scenario, two potential clients, co-owners of a business, approach the lawyer seeking joint representation. The matter brings with it the potential for a significant long-term stream of work. But the lawyer sees the distinct possibility of an unwaivable conflict developing between the potential clients. Judging the engagement as not worth the trouble, the lawyer declines the representation.***

- ***In the existing client scenario, the lawyer has represented the same two clients for 10 years, and they've proven a significant source of revenue. The clients go into business together, and the same risks as in the prior scenario emerge. In this situation, though, prospect theory teaches that the lawyer is far more likely to downplay the risks and interpret Model Rule 1.7 in a way that allows continued representation—without even realizing it.***

[39] *Thinking, Fast and Slow* at 270–71.

[40] *Id*. at 279–80.

Prospect theory can play out in many other scenarios. For example, a law firm in a tenuous financial position will accept riskier representation than a healthy firm intent on becoming even more successful. An associate who is far short of meeting a mandatory hours requirement is more likely to inflate his hours than a well-performing lawyer hoping to meet a higher bonus tier. In each instance, lawyers leave themselves vulnerable to outsized risks because of the vanishing hope that they can avoid a loss.

G. The Hidden Downside of Informed Consent

A number of Model Rules of Professional Conduct allow lawyers to accept representation only if, among other things, the lawyer obtains informed consent from the client.[41] These rules are necessary and sound—but lawyers must recognize that informed consent is not a free pass. This is because, once a lawyer discloses a conflict and obtains informed consent, that lawyer is less likely to self-police his conduct than a lawyer operating without such disclosure.

A 2005 study illustrates the problem.[42] There, investigators split the participants into two groups: "estimators" and "advisors." The researchers paired each estimator with an advisor. They then asked all of the participants to guess the number of coins in a jar. The estimators were positioned with an obscured view of the jar. The advisors were allowed to take a closer look, and were directed to help their estimator make an accurate guess.

The hitch came with compensation. The estimators were paid based on the accuracy of their guesses. The advisors, meanwhile, were paid based on how high their estimates were. Half of the advisors were told to make a "full disclosure" of this compensation scheme. The other half were told to keep it a secret.

As it turned out, the advisors who made a full disclosure had significantly higher estimates than those who did not. The disclosure allowed them to rationalize the higher estimate; after all, the estimators knew that the advisors couldn't possibly be objective. Whereas the advisors who hadn't disclosed their secret incentives apparently felt a moral imperative to be fair to the estimator. The lesson for lawyers is that informed consent

[41] *See, e.g.*, Model Rules of Prof'l Conduct 1.2(c) (requiring informed consent to limit representation); 1.6(a) (requiring informed consent to reveal confidential information); 1.7(b)(4) (requiring written informed consent to waive conflicts); 1.8(a)(3) (requiring informed consent for business transactions with clients); 1.9(a), (b)(2) (requiring informed consent in certain conflict situations involving former clients); 1.11(a)(2) (same for former government officers and employees); 1.12(a) (same for former judges); 1.18(d)(1) (informed consent required if a lawyer receives disqualifying information from a prospective client).

[42] Daylian M. Cain, George Lowenstein, and Don A. Moore, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interes*t, J. Legal Stud. 34 (2005).

is not a license to cheat. Both disciplinary authorities and juries expect lawyers to treat clients fairly, even when advised of a conflict.

H. The Influence of Firm Culture

In the wake of the 2001 Enron collapse and the 2007–2008 financial crisis, businesses responded with a widespread adoption of written ethics codes. As well intentioned as these documents might be, research suggests that they are near useless. Ironically, a study of ethics codes at S&P 500 companies showed that the codes themselves were often plagiarized.[43] The average company had 37 sentences repeated word for word in the ethical codes of other businesses. For some, the overlap was 222 sentences. And others had complete duplication. The takeaway is that ethics codes are easy to write (or at least copy), but have little to do with firm culture.

What actually matters is informal culture. In a striking study of Carnegie Mellon University students, researchers provided students with a difficult timed test.[44] The students checked their own answers against a key. They then received cash for each correct response, based on their self-reporting. The researchers, however, carefully designed the test to make it impossible for anyone to answer all of the questions in the time allotted.

The researchers ran the study twice. In both variants, before the students self-reported their results, an actor in the group stood up and falsely claimed to have solved every problem. The first time around, the actor pretended to be a Carnegie Mellon student. After his announcement, 25% of the study participants then joined their "classmate" in claiming complete success on the test. In the second run, the actor wore a University of Pittsburgh t-shirt. Upon realizing that a rival had surely cheated, only one of the Carnegie Mellon participants lied about having solved every problem.

The lesson for law firms is that actions speak louder than words. Firm leadership should be skeptical of over investment in internal policymaking and messaging. What matters most are publicized, real-life examples of ethical decision-making and evidence that the organization means what it says when it comes to professional conduct.

[43] Margaret Forster, Tim Loughran, and Bill McDonald, *Commonality in Codes of Ethics,* J. Bus. Ethics, Vol. 90, Supp. 2 (1990).

[44] Dan Ariely, *The (Honest) Truth About Dishonesty: How We Lie to Everyone—Especially Ourselves* (2012).

LOSS PREVENTION SUGGESTIONS

Some risk-management suggestions are easy to implement—or, at least, the path forward is uncontroversial. With behavioral ethics, the answers are not so clear. As Bazerman and a colleague put it, "only by reflecting on their ethical failures and the inconsistencies between their desire to be moral and their actual behavior, can [professionals] rise to the actions (and ethical standards) that their more reflective selves would recommend."[45] A laudable goal—but not one that firms can implement just by altering a conflict-check procedure or a records retention policy.

The proponents of behavioral ethics hope that their findings will fundamentally alter the way that professional schools teach ethics. The same should hold true for law firms, which (for better or worse) bear the weighty task of developing fledgling associates into responsible members of the legal community. Applying the findings of Kahneman, Tversky, Bazerman, Tenbrunsel, and their colleagues, firms should emphasize the following with their lawyers:

- **ACCEPT ETHICAL FALLIBILITY:** If behavioral ethicists could persuade lawyers of one thing, it would be to abandon their self-conception as objectively rational actors, immune from unconscious influences. No one is safe from System 1 influences. To make the right decision, lawyers should scrutinize their "gut reaction" rather than spend valuable System 2 resources to justify it. Instead, a lawyer should use System 2 to question whether any of the external factors discussed above might have influenced his intuitive conclusion.

- **PREPARE IN ADVANCE:** It is critical that lawyers think through in advance how they'd react to potential ethical quandaries. For example, if a partner reports to you that a colleague has falsified time, how would you want to react? What game-time influences might cause you to deviate from your prediction? Project yourself into future situations making the right decision.

- **WAIT UNTIL SYSTEM 2 IS AVAILABLE:** In rare circumstances, such as in the midst of a trial or on the eve of a transactional deadline, a lawyer must make a game-time call and live with the consequences. Most decisions can wait. Lawyers who are harried, pressured, or distracted will make the easy

[45] *Behavioral Ethics* at 28.

decision, which is often the wrong one. Instead, go to sleep, eat a good meal, and reconsider whether the initial System 1 reaction comports with the rules of professional conduct, sound risk management, and personal ethics.

- **STANDARDIZE GATHERING OF CONFLICT INFORMATION:** As illustrated, individuals have a tendency to forget information that favors their desired outcome. When it comes to considering potential conflicts, decide ahead of time what to ask—and ask the same questions every time.

- **THINK ABSTRACTLY ABOUT THE PROBLEM:** Bazerman and Tenbrunsel suggest thinking about how your ethical choices would come across as part of your eulogy, or whether you'd be comfortable sharing your decision with your mother.[46] Lawyers faced with a difficult decision can leverage this observation by asking themselves what, when presented with the same situation, they would advise a colleague to do. Or they can imagine themselves faced with a claim; if the circumstance were to turn into a lawsuit, what would the lawyer say in a deposition? And what would others say about the lawyer if they knew about the lawyer's decision?

- **CONSULT WITH A LOSS PREVENTION PARTNER:** As lawyers become more senior and more respected, they can become less likely to turn to others for guidance. But these ethical decisions are not things that should be handled alone. Instead, lawyers of all levels of experience should seek help from their firm's general counsel or loss prevention partners. Input from a disinterested colleague can provide insight into whether System 1 influences have infected the lawyer's ethical decision.

- **FOSTER A STRONG ETHICAL CULTURE:** Firms should empower and encourage the proper handling of ethical challenges, including ensuring that young lawyers and staff members feel empowered to come forward with ethical concerns. The firm should share examples of ethical issues that the firm has faced as learning examples for other attorneys in the firm. Firms should also ensure that their lawyers receive regular training on these issues, which ALAS is happy to provide.

[46] *Blind Spots* at 157–158.