



Resolving Your Expert Witness's Cognitive Biases

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As a litigator, you need to reduce your expert witness's [decision biases](#) by asking him or her the right questions, or by hiring a consultant. Otherwise, these biases will be exposed in depositions and cross-examinations. For this reason, reducing biases will increase the odds of winning cases.

Cognitive researchers have identified two modes of thinking: intuitive and reflective. The first is referred to as System One, while the second is referred to as System Two. System One is a mode of thinking that gives us a stable representation of the world around us, which allows us to perform certain actions without much thought. An example of this would be walking and contemplating something else at the same time. System Two, on the other hand, is a mode of thinking that is reflective and analytical. Professors Thaler and Sunstein popularized this distinction in their book "Nudge".

Cognitive biases arise due to System One thinking. This essay deals with reducing biases by encouraging witnesses to look at their decision processes through a Systems Two lens. We need System Two thinking to complement our intuitive thinking, as we are unable to fix errors that we do not recognize. The essay does not deal with errors in strategic and marketing analyses.

Value estimation and damage estimation are susceptible to cognitive biases. However, such biases should not appear in an expert witness's strategic analyses or financial modeling because, as an expert, he or she would presumably have the necessary education, training, and peer-reviewed publications. Otherwise, his or her expertise would be in question.

You can reduce decision biases in one of two ways. The first way involves asking the expert witness the right questions (some of which are outlined below), while the second involves retaining a consultant to help your expert

witness recognize his or her biases by encouraging the expert to incorporate Systems Two thinking. Applying System Two thinking also makes it easier for your expert witness to find biases in the opposing party's analyses.

You and/or your consultant must play the delicate role of not being seen as a quality control boss. You do not want to appear to question a witness's expertise or integrity. Instead, this complementary role you and/or your consultant will undertake is intended to stimulate discussion and debate.

Below are some questions that you or your consultant need to ask the expert:

1. Did the expert consider alternative scenarios? What are the justifications for deciding on the presented scenario?
2. Are the presented analogies, if any, relevant to your case?
3. Are the distinctions between facts and assumptions clearly stated?
4. Is the presented scenario overly optimistic? ■