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Advising the Trust or Estate Litigant: When to Raise or Fold

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Lawyers should be aware of how psychological factors may distort the judgment of participants in fiduciary litigation, both clients and lawyers, and of how those distortions may be moderated.

When we advise a trust or estate litigant, we are likely to play many roles in addition to our customary role as advocate. As lawyers, we explain the law and counsel strategy and tactics in light of the constraints the law imposes. For this we need legal skills and experience. But we act also as an investment advisor of sorts, bringing our experience to bear on the client's decisions whether to invest more time, money, and emotion in the venture. For this we need to analyze risk and return. The client may come to us in pain, to ask if he or she can recover anything out of the estate from which the client has been excluded. In responding, our situation may resemble that of a physician, advising a patient on the likelihood of his or her recovery.

Finally, most litigated estates involve emotional and psychological complexities that demand of us the skills and insight of a psychotherapist. Psychotherapists would remind us that we need to be aware not only of the client's emotions, but also of our own emotional involvements as well. All of these skills—legal, analytic, emotional, and psychological—may be called into play as we counsel a client considering whether to commence a will contest or an action to remove a fiduciary.

Once the complaint has been filed, the same issues continue to confront us: Should we encourage the client to press on, or urge settlement? As we make those recommendations we need to be aware of how our own interests, personal and financial, may shape our judgment and advice. We need to be aware also of the myriad factors that may distort or bias a client's decisions. Clients rarely resemble the ideal rational economic person, efficiently functioning to maximize his or her utility. Abundant studies in recent decades in the areas known as behavioral law and economics, or experimental law and economics, have demonstrated these biases and distortions.

Some of those studies have obvious relevance to probate and trust litigation. They may not offer solutions. Indeed, the insights they offer may make our task as lawyers more complex both

practically and ethically. Nonetheless an awareness of their implications may help us better serve our clients, and the legal profession.

This article explores some of the factors that may shape the decisions of both the litigant and his or her counsel in the emotionally charged circumstances we frequently encounter in trust and estate litigation. These circumstances—the disinherited child, the biased trustee, the second marriage—present psychological and practical challenges to both client and attorney. The ultimate question in many instances is whether to press forward in litigation or to urge settlement. Although litigation is not poker, some of the same strategies apply. An individual may raise or call to get another card or more information (about the other players). Discovery in litigation, however, should result in all the cards being known. Thus, it is not litigation strategy *per se,* or how to assess the strength of a case, that this article considers. Rather, it points out some of the other issues that may be confronted in advising the beneficiary litigant.

A medical analogy

Years ago, Dr. Mark Siegler, a physician at the University of Chicago, wrote a paper entitled "Pascal's Wager and the Hanging of Crepe." [1] Dr. Siegler explains that physicians have been known to give a critically ill patient and family the bleakest view of the patient's condition (the term is "hanging crepe"). If the patient dies, it was expected and there are no challenges; if the patient survives, the physician is a miracle worker. Although ostensibly a no-lose strategy, Dr. Siegler questioned the ethics of this strategy.

The strategy of a physician hanging crepe is pessimistic. Although the strategy is ostensibly benign, helping to draw the family together and prepare them for the worst, Dr. Siegler pointed out the risks this pessimism raises of less aggressive care and unnecessary emotional costs.

We may face an analogous temptation in advising trust and estate beneficiaries. Our temptation, like the physician's, may be to make ourselves look great and at the same time protect ourselves. The decisions of estate and trust litigants are often driven by emotion. The attorney has to decide when and how to encourage the beneficiary to pursue litigation, and when to discourage litigation. The attorney's advice, however, may in part be colored by his or her own economic interest in securing the client's engagement for this possible litigation.

The lawyer's temptation, if he or she has the economic interest in mind, may favor being overly optimistic. This too has inappropriate risks and costs, both financial and emotional. Like the medical profession, we need to be alert to those risks and costs.

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Dr. Siegler proposed to substitute for the overly pessimistic and flawed approach of hanging crepe, a system of prognostication based on application of the best statistical data available to the facts and condition of the particular patient. This has, indeed, become common practice. Different cancers and their stages, for example, are now differentiated, and the survival rates for each determined and correlated with different treatment protocols.

Hypothetical scenario. How does all this apply to us, as attorneys advising potential trust and estate litigants? Consider this situation: The decedent, Dorothy, an elderly widow with no children, recognizing that she was growing old and frail, contacted her scattered nieces and nephews whom she saw rarely, if at all, to ask if any of them would be willing to accept appointment as her guardian, if she were to become incapacitated. Only one, Walter, accepted. Some years later, Walter was appointed as her guardian. The guardianship continued for several years.

Dorothy died recently. Walter presented for probate a will, dated five months before Dorothy's death, in which Walter is named as executor. The will provides for bequests of $50,000 to each of the other four nieces and nephews; the remainder of the $5 million estate is left to Walter.

Several of the other nieces and nephews, who believe they have been cheated out of the share of the estate they had expected to receive, approach an attorney. How should the attorney analyze the situation, and what advice should the attorney provide?

This is not an easy or obvious case. On the one hand, Walter was indeed the only one to step forward, and he bore the responsibility for Dorothy's care for several years. On the other hand, her will was written after years of incapacity and only shortly before her death. To the extent it was procured by Walter, the presumptions of undue influence may run against him, and as her guardian, he will have been subject to manifest fiduciary duties. Depending on the jurisdiction, a guardian may be able to modify a ward's estate plan by will or trust amendment, but only pursuant to court order. [2]

How should the attorney respond to these potential litigants? Should the attorney encourage them or discourage them? An attorney's initial response is probably exploratory—to review the documents (i.e., the will that was filed and any prior wills). The attorney also needs to know more about Dorothy's physical and mental condition. Are there physician's reports? Then, what should the attorney's response be after reviewing these materials?

Rules of professional conduct. The Model Rules of Professional Conduct, adopted in 42 states, say:

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RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The relevant provisions are (a)(2) and (b): a lawyer shall "consult with the client about the means by which the client's objectives are to be accomplished," and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The comments to (b) state: "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so." What this does not tell us, however, is what will be "sufficient information." That judgment is left, necessarily, to the lawyer.

Relevant factors. Critical parts of the information that may be necessary for the potential client's "intelligent participation in decisions concerning ... the representation" are:

(1) The likelihood of success.
(2) The value of the likely recovery, if successful.
(3) The likely cost of pursuing the matter.

It is precisely here, in conveying this information, that the attorney's situation becomes complex and conflicted. At first glance it would seem that attorneys have the same incentives as physicians

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to “hang crepe.” If the attorney describes this as a difficult case with a slim chance of recovery, the client will not be surprised by an unsuccessful outcome; and if there is in fact a recovery, the attorney will seem a hero.

Another factor, however, is also at play. An estate of $5 million may be sufficient to sustain protracted litigation. If the attorney predicts a strong likelihood of substantial recovery, the client is likely to engage his or her services. The fees to the attorney will be substantial. On the other hand, if the attorney offers a negative analysis that dwells on the risks and costs, the attorney is likely to discourage the client from pursuing the matter—and the attorney will receive no fees. With this factor in the mix, the lawyer's situation seems the obverse of the physician's: The lawyer has an incentive to present an optimistic rather than a pessimistic view, an incentive to hang bunting rather than crepe.

This is the essential paradox of employment as a professional. A professional is uniquely possessed of the information regarding the services needed by the client, the likely costs, and the probable outcomes—i.e., information needed by the client for making an informed decision regarding employment of the professional. Only a surgeon can tell me what is needed to repair my shoulder, how long the recovery will be, and the likelihood of my regaining full mobility. Likewise, only an experienced trusts and estates litigator can provide the analysis on which the client can base his or her decision whether to engage the attorney.

The Rules of Professional Conduct allude only glancingly to this intrinsic conflict. In the Preamble they state:

> [9] In the nature of law practice, however, conflicting responsibilities are encountered. 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.* The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The Rules recognize the conflict, but its resolution is left to “the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.” Thanks!

The situations of physicians and attorneys are not the same. Physicians' financial incentive usually run parallel to a pessimistic analysis, and the hanging of crepe: the worse the patient's condition, the more likely it is that elaborate and costly medical interventions will be called for. Of course,

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the prospect of great cost may exert a counter pressure to limit treatment, but insurance may abate that pressure.

Attorneys, by contrast, have a personal financial incentive to be optimistic, and foresee a favorable outcome. Hanging crepe would risk losing the engagement. Insurance, it goes without saying, will not be a factor. Individuals are likely to find their attorney's fees the highest fees they incur from a professional service provider that are not covered by insurance.

Paths out of the conflict?

The problem for an attorney is that the attorney's financial interest in undertaking the representation may conflict with the client's interest in an objective and accurate analysis of the prospects and costs of the litigation. The situation arises, in part, from the fact that the attorney, billing for his or her time, will earn the fee regardless of the outcome of the litigation. Can the interests of client and attorney be brought into better alignment? The underlying problem with strictly hourly billing in this situation is that the attorney's compensation is independent of his or her success.

Contingent fee structure. One seeming solution would be adoption of a contingent fee. The virtue of the contingent fee is that it should tend to align the interests of attorney and client. The attorney is encouraged to make an accurate assessment of the likelihood of recovery, since his or her compensation depends on it. The client can more easily rely on the attorney's judgment, without feeling compelled to make an independent determination.

Even with this solution, however, the alignment of the interests of attorney and client is not perfect.

Example. A contingent fee agreement awards to the attorney 30% of any recovery. Assume further that $50,000 of additional attorney time is likely to increase the recovery by $100,000. This would be an unambiguously positive outcome for the client, who will receive an additional $70,000. For the attorney, however, the outcome is negative. The $50,000 of additional time nets the attorney only $30,000.

The attorney, therefore, lacks an economic incentive to pursue this further effort, even though it will benefit the client. The interests of the attorney and the client are inconsistent. The attorney may, therefore, have an incentive to settle, while the client may have an interest in further aggressive action.

Numerous ethics rulings make clear that an attorney may not structure a contingent fee agreement that would limit the client's control over settlement decisions. The agreement may not, for

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example, provide for payment of the greater of the contingent fee, or the attorney's customary hourly fee, if the client settles without the lawyer's permission, [3] or if the client refuses a reasonable settlement. [4]

Are hourly fees better? Assume that $50,000 of attorney time has a 50% chance of increasing the recovery by $100,000. For a rational client, the value of going forward is only $50,000. For the client, therefore, this is really a neutral proposition—the client will pay $50,000 for a 50% chance to win $100,000. If, however, the attorney's compensation is not dependent on success, the attorney will be willing to go forward in any event. Furthermore, the estimates of both probability of success and cost are made by the attorney. The attorney, therefore, has an incentive to underestimate cost, and overestimate probability of success.

Mixed fee structure. While at the inception of the engagement a contingency fee aligns the interests of attorney and client in an accurate assessment of the prospects for a successful outcome, at a later stage their interests may diverge, as we have seen. One response may, therefore, be a mixed fee structure, combining a success premium with a base hourly fee calculated to cover the attorney's basic operating expenses, which would include not only direct out-of-pocket costs and an allocation for overhead, but also a basic income for the attorney (essentially, his or her own overhead). Because the attorney will receive the base fee in all events, his or her success premium should be a smaller percentage than the customary contingency fee.

The challenge would be to calculate a percentage that will always align with the client's interests. This fee structure resembles a cost-plus contract and has the comparable risk of encouraging an inflated calculation of costs. It is unlikely, in any event, that the larger law firms will be willing to take on contingency fee engagements. Despite extensive recurring discussion about the death of the hourly fee, it remains widely entrenched.

Prognostication: the value of a case

The path proposed for physicians away from the temptation to hang crepe was to use instead statistically based prognostication, as a way of giving the patient and family a more accurate understanding of the likelihood of recovery or survival. There is a fairly well-known paradigm in the law for estimating the value of a case. The principles are well known, but bear repeating. The value of the case depends on:

(1) High and low estimates of the expected recovery.
(2) The probabilities of those recoveries.
(3) The costs of obtaining those recoveries.

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The calculation, in simple form, would be some combination of:

(1) The anticipated low recovery multiplied by the probability of that recovery, less the cost.

(2) The anticipated high recovery multiplied by the probability of that recovery, less the cost.

The combination would, presumably, involve the use of a weighted mean of some sort.

For example, assume that if the four disappointed nieces and nephews of Dorothy went to trial and the five-month-old will were thrown out, the $5 million estate would be divided five ways (i.e., among the four plaintiffs and Walter). The maximum recovery for each niece and nephew would be $1 million. Trial, however, would require multiple depositions, expert witnesses, and much lawyer time. The cost might well be $250,000, which might be split among all five nieces and nephews. Assume further that this outcome has no more than a 30% probability. A 30% chance of gaining $1 million is worth $300,000, reduced by the $50,000 cost, for a net value of $250,000.

On the other hand, the matter may not be pursued to trial, but may instead be settled. If the plaintiffs (i.e., the disappointed nieces and nephews) think there is a 70% chance that Walter would settle for a total of $600,000 to be divided among them, but it would cost the four plaintiffs $100,000 to get to that point, the net value to each plaintiff niece and nephew would be $600,000 / 4 × 70% - $100,000 / 4 = $80,000.

The value of the case is the sum of these two values: $250,000 plus $80,000, or $330,000. If the estimate of the likelihood of success at trial were lower (say 20%) the net value of litigation would be only $150,000, and the value of the case might be as little as $245,000.

The obvious weakness in this method of valuing a case is the uncertainty of its essential elements. An estimate of the probability of success depends not only on the strength of the client's case, and how sympathetic the client may be to jury or judge. It will also depend on the offsetting strength or weakness of the opposing case. This may be only imperfectly known at first, and thus projections of success will vary continuously as discovery goes forward. Costs are similarly uncertain. An attorney may try to limit the costs incurred, but many costs will be incurred in responding to actions by the other side. Costs, therefore, are only partly in an attorney's control. For an attorney advising a potential litigant, useful statistics on likely outcomes are hard to come by. Experience is often the only alternative.

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Although this algorithm may be the theoretically proper way to estimate the value of a case, it may be difficult to get the client to rely on it, or even to understand it. It may help if an analysis of this sort is presented by a third party, such as a mediator.

Lessons from behavioral economics

The conventional mode of valuing a case described above presumes an economically rational actor. The value derived by that algorithm is what a rational person should anticipate. But behavioral economists have for a while now been demonstrating that, in many cases, people do not act like the "rational person" of classical economics. They engage in behaviors that fail to maximize their utility. Various factors discussed in the economics literature are relevant to the situation of estate and trust litigants.

Endowment effect. The value people assign to an item is often exaggerated by what is known as the "endowment effect." Individuals tend to overvalue what they already possess. Assume, for example, that half of a class of law students is given a coffee mug bearing the university's logo. It costs $8 at the university bookstore, and the sticker bearing the price is still on the bottom. Assume also that we know from prior study that the average price people would pay for this coffee mug is $5. Repeated studies have demonstrated that those students who receive this coffee mug will demand more than $5 to part with it, even though they would probably have been willing to pay no more than that to acquire it. [5]

Although an individual might be willing to pay no more than $100 for a ticket to a Chicago Bears game, the same individual will demand more than that to sell the ticket he or she already possesses. Indeed, Duke University students who were fortunate to win a ticket to a Duke basketball game after camping out for a week demanded at average of $2,400 to sell it. Other students, who had also camped out, but had not won a ticket, would pay only $170 to acquire one. [6] Ownership itself clearly enhances the perceived value of possessions. Indeed, even anticipated ownership may increase their value. The longer an auction participant is the high bidder, the greater he or she is likely to value the object. [7]

Passions. Passions also distort judgment. Dan Ariely, for example, describes studies demonstrating, not surprisingly, the distorting impact of sexual arousal on the judgment of young males. [8] That is an unlikely factor in trust and estate litigation, but we should expect similar distortions as a result of grief, sibling rivalry, and the other passions with which we are familiar in decedent's estates.

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Undervalue costs. A third significant factor distorting the judgment of litigants is a tendency to overly discount the likely future cost of litigation. Quite independent of the distortions of passion, anger, and possession, people tend to underestimate and undervalue future costs. [9]

Self-serving bias. A fourth factor is known as "self-serving bias." Its effects are probably familiar to all of us: "[W]hen married couples estimate the fraction of various household tasks they are responsible for, their estimates typically add to more than 100 percent." [10] Well over half of us think we are better than average as drivers, better than average as managers, in better than average health, more ethical than the average. Empirical studies also demonstrate that "people tend to arrive at judgments of what is fair or right that are biased in the direction of their own self-interests." [11] The result, in litigation, is likely to be that "[e]ven when parties have the same information, they will come to different conclusions about what a fair settlement would be and base their predictions of judicial behavior on their own views of what is fair." [12]

All of these distortions are likely to come into play in the common situations of estate and trust litigation. The distorting effects of passion in such circumstances should come as no surprise to us. Dorothy's neglected nieces and nephews are jealous and suspicious. The disfavored or disinherited child comes to us consumed by pain and anger, and jealous of his or her favored siblings. The children are jealous of the second wife who has been left the house. The second wife who has been left only a life estate is hurt and angry.

The endowment effect is likely to be equally at work. Walter, the nephew who cared for Dorothy, served as her guardian, and to whom the bulk of the estate is left feels that it *is* his. He may be disproportionately disposed to defend his right to it. This may induce him to expend more in defending his status quo than might appear to the attorney, his "investment advisor," economically reasonable. The endowment effect may also shape the responses of the disgruntled nieces and nephews who may have been anticipating their expectancy. Studies indicate that the endowment effect is less likely to manifest itself when the property at issue is an exchange good (i.e., money). In contrast, as any of us knows who has watched litigation over family heirlooms spin out of control, the endowment effect is strongest when tangible goods are at issue. [13]

Clients are likely to believe their claim is the only obviously fair one, and assume that any judge would concur. Attorneys who have invested significant time in a client's case also are likely to lose sight of the contrary view. This susceptibility to self-serving bias is likely to lead to unrealistic expectations, and is, therefore, likely to make settlement more difficult.

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Practice tips

How then should attorney respond to these irrationalities? Estate and trust litigation is so often carried out in the context of grief, mourning, guilt, jealousy, and anger, that it may be that irrationality is its dominant characteristic. Attorneys advising in such circumstances have an opportunity to temper those distortions. Attorneys might, to begin with, seek to make clients aware of the psychological factors that may distort their judgment. Attorneys could encourage their clients to consider the pros and cons of their decisions and impulses. In giving advice, attorneys might go further, and give clients opinions regarding what they ought to do in the circumstances, and explain why. Attorneys might even offer their "professional judgment" in a more authoritative manner.

Each of these approaches has in fact been found to influence clients' decisions. "[A]t least in some circumstances, lawyers taking an active role in their client's litigation decision making processes *probably* can affect the extent to which psychological factors, as opposed to the comparison of the expected financial values of alternative litigation options, motivate litigants' ultimate decisions." [14]

An especially suggestive study indicates that in confronting self-serving bias, it is not sufficient to merely make litigants *aware* of the existence of such biases. They are likely to assume that the other side may be subject to such biases, but not them. What has been shown to be effective, however, is asking the litigant actually to list the weaknesses in his or her own case. [15] We lawyers should be aware of such weaknesses—asking our clients to make such a list would be an easy way of enhancing their awareness and perhaps reducing their self-serving bias. Of course, we lawyers, if we are to make effective use of techniques such as this, need to be aware of our own self-serving biases and sensitive to the countervailing temptations we may ourselves face to fan the flames of litigation.

The conventional method of valuing a case outlined above notably ignores the noneconomic values that may drive litigation in the area of trusts and estates. We may try to remind the disinherited child that "this is only about money," but that is manifestly not true. The disappointed spouse who wails, "but my Henry wouldn't have done that to me," is seeking more than money. So is the child who growls: "Mom always favored Lewis. I hate Lewis." Disproportionate dollars have been spent fighting over family heirlooms of primarily sentimental value. In advising litigants we need to be sensitive to these values too.

In considering the economically irrational factors that may drive litigation, the economists have another concept that may be useful. In assessing investment strategies, economists distinguish between compensated and uncompensated risk. An investor choosing between stock in a blue-chip

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company and a start-up company should find a greater expected return associated with the riskier start up. That greater potential return is the compensation for accepting the greater risk.

When observing clients, attorneys may be able to distinguish actions and decisions which, although perhaps not economically sound, nonetheless provide emotional compensation, and other decisions which will provide no such compensation, emotional or economic. Decisions driven, for example, by the endowment effect or by the distortions of self-serving bias would be uncompensated in this sense.

Other noneconomic costs also should be kept in mind. Damage to family relationships may be foremost among them, although with litigation already on the table, it may well be too late to worry about the potential damage to family relationships.

If we are aware of the irrationalities likely to be distorting the judgment of our clients, the limitations on our conventional ways of valuing a case, the potential asymmetries associated with whatever fee structure we have proposed, and the temptations we as economic actors may be subject to, we may be able to somewhat better counsel our litigation clients. We will inform the advice and counsel we provide, not only with our knowledge of the law, our understanding of the facts, and our experience, but also our sensitivity to the ways in which sentiment and emotion may distort the judgment of our clients.

Fiduciary as client

The discussion thus far primarily focused on advising beneficiaries. The situation may be quite different when a fiduciary is the litigant, particularly if the fiduciary is a corporation.

A corporate fiduciary should usually be immune from the distortions of judgment discussed above. First, the decisions of a large corporate fiduciary are likely to be produced by a group consisting of in-house trust counsel, trust account executives, group managers, and others. Group decision making is likely to provide multiple viewpoints, thus “debiasing” and tempering passions. A corporate fiduciary is also likely to have previously experienced most common litigation situations. That experience is likely to modulate distortions and enable the corporate fiduciary to assess litigation risk better. On the other hand, a corporate fiduciary may believe it will be subject to greater than usual litigation risk due to jury bias against corporations.

For corporate fiduciaries, litigation poses a unique risk to the institution's reputation. Reputation is so critical a concern for financial institutions that protection of their reputation is a major concern of the Federal Reserve. The Federal Reserve's *Bank Holding Company Manual* describes the reputational risk to which the private-banking function (which includes private trusts) is exposed

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as “the potential that negative publicity regarding an institution's business practices and clients, whether true or not, could cause a decline in the customer base, costly litigation, or revenue reductions.” [16] Given the institution's need to protect its reputation, and the scrutiny paid by the Federal Reserve to this issue, a corporate fiduciary will seek to keep its name out of the case caption. It will, therefore, prefer to avoid appearing as either lead plaintiff or lead defendant, lest the matter draw the unfavorable attention of local media.

Even if the name of the fiduciary is buried deep in the case caption, litigation may pose reputational risks the fiduciary will seek to avoid. If discovery might turn up internal bank correspondence that refers in an embarrassing manner to a bank client, the bank may feel strongly compelled to settle, especially if the client has celebrity status that would draw media attention.

The fiduciary is an unlikely plaintiff. The most common circumstances in which a fiduciary appears as plaintiff is suits seeking approval of accountings, instructions, or interpretation of a governing document. In an action for instructions or construction, the fiduciary will present the question, and the beneficiaries will be responsible for arguing their different positions. As plaintiff, the fiduciary must maintain a neutral position among feuding beneficiaries. A fiduciary's failure to do so will be a breach of fiduciary duty that may result in denial of fees to the fiduciary. [17]

In construction actions, it should not make much difference whether the fiduciary is a corporation or an individual. Nonetheless, an individual family member fiduciary may believe he or she “knows what Dad intended” and has a duty to carry out that intent, regardless of the risks or costs. That fiduciary should be reminded he or she also owes a duty, perhaps a competing duty, to the beneficiaries.

The fiduciary most commonly appears as a defendant in actions challenging investment decisions and breaches of fiduciary duty. The decisions of a corporate fiduciary in such a situation should be less subject to emotional distortion than those of an individual. On the other hand, the corporate fiduciary will be concerned about the possible effects of litigation and its attendant publicity. Although the beneficiary plaintiff in such cases should stay alert to the corporate fiduciary's sensitivity in this area, that sensitivity may not always work in the plaintiff beneficiary's favor. Although the bank fiduciary may prefer early settlement so as to avoid the publicity of a suit, once a suit is filed the corporate fiduciary may feel compelled to litigate to conclusion, in order to vindicate its reputation.

Of the factors discussed above as likely to distort judgment, a corporate fiduciary should manage to escape passion. But if the fiduciary is defending against an attempt to remove, the endowment

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effect may indeed come into play. Despite group decision making and extensive experience, corporate litigants may be as vulnerable as individuals to self-serving bias.

When the defendant fiduciary is an individual, all of the issues considered above remain germane. When one sibling is named as executor or trustee to the exclusion of the others, litigation becomes more likely. Litigation may be even more likely if the fiduciary sibling is also a beneficiary. The attorney's task in that situation is doubly difficult. The individual fiduciary should be advised to take reasonable defensive measures, such as consulting regularly with professional advisors, and providing regular and detailed accountings.

Recovering fees

When may a litigant recover fees? This is yet one more factor that influences the litigant's willingness or ability to go forward. In trust and estate litigation, the fiduciary is usually entitled to recover fees expended in litigation. In certain circumstances all parties may be entitled to recover their fees. Generally, parties will be entitled to recover their fees when their actions have been to the benefit of the estate or trust. Thus, the need for a will construction suit is understood as caused by the ambiguity of the decedent's document, and all parties engaged in clarification of that ambiguity may usually recover their fees. Note, however, that the fiduciary in such a circumstance is still required to remain neutral.

The possibility of recovering fees alters how attorneys value their client's case. It also shapes how attorneys frame the complaint. If it is framed as a will or trust construction, the attorneys may manage, if they succeed, in imposing part of the cost on the other side.

A litigation situation

The issues touched on thus far are generally applicable. It may be useful, however, to consider briefly how they may apply in a particular situation.

Returning to the situation of Dorothy, with whom we began, suppose one or more of her disappointed nieces or nephews is the client. This client should be urged to consider the following factors:

- The costs of preliminary investigation regarding Dorothy's mental condition and Walter's treatment of her.
- The burden the client will labor under, because the disappointed individuals failed to respond to Dorothy's request for assistance.
- Walter's corresponding advantage.

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- The offsetting burden Walter may be under to show that he has not taken advantage of his fiduciary situation.
- The possibility that Walter, having cared for Dorothy single handed, may feel he is properly entitled to her estate (the endowment effect), and may, therefore, be unwilling to settle.
- The possibility of recovering nothing.

Before any of this is pointed out to the client, however, the client could be asked to make a list of the weaknesses in his or her case and the strongest arguments of the other side. This may help reduce the client's self-serving bias.

If Walter is the client, he could be urged also to consider all those factors and to list the weaknesses in his position. He may also be urged to consider the possibility that he is motivated in part by the endowment effect, and he may be told that a quick settlement may be more economical than protracted litigation.

Conclusion

Trust and estate litigation is not poker. It is, if anything, more complex and more challenging. To be sure, attorneys need to be able to estimate intelligently and dispassionately the strength of the cards their client holds. Attorneys can, therefore, explain to clients how to estimate rationally the value of their case. Yet, as their clients' advocates, attorneys also are one of the cards in the hand. Attorneys employ their strengths and skills on the client's behalf. If attorneys are to serve their clients well, however, they must be alert to the financial and ego-gratifying temptations to overstate and overvalue their own skills and strengths.

Litigation is not poker, but like many card players clients are likely to behave irrationally—to behave in ways that may lead to sub-optimal performance. Recent studies in behavioral law and economics suggest some of the ways in which that irrationality may manifest itself. By remaining alert, attorneys may recognize those irrationalities and perhaps blunt their effects. The law and economics literature even suggests some remedies, which attorneys should be prepared to try.

In the intensely emotional contexts of trust and estate litigation, when grief, anger, and jealousy invariably play roles, clients need more than an attorney's “legal” counsel. They need their attorney's analysis of the law and courtroom skills. But to best serve the client's interests, both financial and emotional, an attorney needs not only to help the client understand the strengths and weaknesses of the case. The attorney needs also to be able to recognize the distortions to which both the client's and attorney's judgment may be subject, so that the attorney may perhaps help the client control those irrationalities. In pursuit of the knowledge and skills for that task, attorneys

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should be prepared to draw on the learning of other professions and scholarship in parallel areas of the law.

[1] Siegler, "Pascal's Wager and the Hanging of Crepe," 293 New England J. Medicine, 853-857 (10/23/1975).
[2] *Cf.* Uniform Probate Code (1990), §5-411.
[3] N.Y. County Ethics Op. 736 (2006).
[4] Or. Ethics Op. 2005-54 (2005).
[5] See Thaler, *The Winner's Curse* (Princeton University Press, 1992), Chapter 6; Kahneman, Knetsch, and Thaler, "Experimental Tests of the Endowment Effect and the Coase Theorem," 98 J. Political Economy 1325 (1990).
[6] See Ariely, *Predictably Irrational* (HarperCollins, 2008) Chapter 7.
[7] Ariely, Heyman, and Orhun, "Auction Fever: The Effect of Opponents and Quasi-Endowment on Product Valuations," 18 J. Interactive Marketing 7 (Autumn 2004).
[8] See *supra* note 6, at Chapter 5.
[9] See Thaler, *supra* note 5, at Chapter 5.
[10] Babcock and Loewenstein, "Explaining Bargaining Impasses: The Role of Self-Serving Biaes," in Sunstein, *Behavioral Law & Economics* (Cambridge University Press, 2000), at page 356.
[11] *Id*. at page 357.
[12] Babcock, Loewenstein, Issacharoff, and Camerer, "Biased Judgments of Fairness in Bargaining," 85 American Economic Review 1337 (December 1995); Arlen and Talley, *Experimental Law and Economics*, (Edward Elgar Publishing, 2008), page 287.
[13] Arlen, Spitzer, and Talley, "Endowment Effects Within Corporate Agency Relation," 31 J. Legal Studies 1 (2002); Arlen and Talley, *supra* note 12, at page 113.
[14] Korobkin and Guthrie, "Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer," 76 Texas L. Rev. 77 (1997); Arlen and Talley, *supra* note 12, at page 277.
[15] Babcock, Lowwenstein, and Issacharoff, "Creating Convergence: Debiasing Biased Litigants," 22 Law & Social Inquiry 913 (1997); Arlen and Talley, *supra* note 12, at page 316.
[16] Federal Reserve – Division of Banking Supervision and Regulation, *Bank Holding Company Supervision Manual*, Section 2010.11.2.1 (July 2009).
[17] See Restatement 3rd, Trusts, §88, Illustrations 2, 3, and 6; Northern Trust Co. v. Heuer, 560 NE2d 961 (Ill. App. Ct. 1st Dist., 1990); Mears v. Addonizio, 765 A2d 260 (2001).

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