



FROM THE IUSTORIA BLOG

The Psychology of the Parties: How a Judge Decides, What Each Side Wants, Doesn't Know It Wants, and Says It Wants

The court is not a justice machine, the client doesn't really know their own interests, and the other side is lying most to themselves. A dense popular-science look at what current research says about the psychology of everyone in a legal dispute — from Danziger through Burton and Argyris to Stone, Patton & Heen.

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A client came in with a fixed conviction: "I want the court to punish him." After an hour of conversation, something else emerged: he wanted the other side to admit they had been wrong. Another hour in, the truth was different again — the whole thing was about how the matter had humiliated him in front of his own family the week before, and no judgment, on its own, would heal that wound. Three layers of the same dispute. Three completely different strategies. And the client had walked into my office convinced he wanted only the first.

This is not an edge case. It is *the rule*. Most of the disputes we have run in our practice did not stand on what the client had in mind when they came for advice. They stood on what was actually there — and which we had to discover together. And on the other side of the table sits a counterparty in exactly the same situation. And presiding over it all sits a judge — who, too, is not a machine.

In my earlier piece on [psychology and tactics in legal disputes](#) I looked at how behavioural economics and negotiation theory change the way you should think about a case. This article is about something slightly different: about *who, exactly* makes the decisions in a legal dispute, and what is going on in their minds. The judge. The client. The other side. And — perhaps surprisingly — counsel themselves. When we stop treating any of them as a rational actor and start asking *what mental processes* lead them to a conclusion, our chances of influencing the outcome rise dramatically.

Part One: The Myth of the Judge as a Machine

Law schools never teach it directly, but the subtext is everywhere: the judge is an *application machine*. Throw facts in, a ruling comes out the other end on the basis of statute. Reality is different, and the literature backing this up is surprisingly robust.

In 2001 Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich published *Inside the Judicial Mind* (*Cornell Law Review*, 86, 777). They presented 167 federal judges with the same kinds of tasks Kahneman and Tversky use to demonstrate cognitive biases. The result was depressingly consistent: judges were susceptible to **anchoring**, **hindsight bias**, **the representativeness heuristic**, and **egocentric bias** to a degree comparable to laypeople. Not worse. But not better either. In a follow-up, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?* (*Texas Law Review*, 93, 855, 2015), Wistrich, Rachlinski, and Guthrie showed that even when judges are told a piece of evidence is inadmissible and instructed to ignore it, they *do not* — its influence persists. The research is now well enough established to have its own sub-field: **judicial behavior research**.

Perhaps the single best-known study in this area comes from Israel. Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso, in *Extraneous Factors in Judicial Decisions* (*PNAS*, 108(17), 6889–6892, 2011), analysed 1,112 decisions by Israeli judges hearing parole applications. The probability of a favourable ruling was close to 65% just after a meal and dropped towards zero as the judge approached the next break. After the break it leapt back up. So it was not the strength of a prisoner's argument but *the time elapsed since the judge's last refreshment* that was one of the strongest predictors of the outcome. The methodology can be (and was) legitimately critiqued — Weinshall-Margel and Shapard later proposed an alternative explanation via case ordering in *PNAS* 2011 — but

the underlying phenomenon of **decision fatigue** is well documented in psychology (Baumeister, Bratslavsky, Muraven & Tice, *Ego Depletion: Is the Active Self a Limited Resource?*, *Journal of Personality and Social Psychology*, 74(5), 1252, 1998).

Probability of a favourable ruling over the course of a hearing day (schematic, after Danziger et al., 2011)

Phase of day	Probability of favourable ruling
Start of day	≈ 65 %
Just before first break	≈ 0 %
Just after first break	≈ 65 %
Just before lunch	≈ 0 %
Just after lunch	≈ 65 %
Late afternoon	close to 0 %

What does this mean in practice? Entirely pragmatic things. It matters when your case is on the docket. It matters how long that day is. It matters how complex the case heard immediately before you was (whether the judge has the headspace to go into detail or is just running on inertia). And of course it matters *which form of argument* lands hardest — because a judge in a state of fatigue relies more on **System 1** (Kahneman, *Thinking, Fast and Slow*, 2011) than on slow analytical reasoning. Short, visually strong, narratively coherent submissions have a disproportionate edge over a wall of argument in such moments.

And here is the most important point: **judges don't only have biases — they have their own interests too**. There is variation among judges in their aversion to being overturned on appeal (the literature calls it **reversal aversion**; see Choi, Gulati & Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, *Journal of Law, Economics, and Organization*, 26(2), 290–336, 2010). Some judges decide so as to keep a "clean docket" and a settled list — meaning they value solutions that don't drag the calendar out. Others look for precedential value. Still others are sensitive to questions of public interest, others not. All of this is information that determines what kind of submission makes sense for whom.

Anyone who thinks "the court will decide according to the law" is right — but only in the sense that the law defines the playing field. The decision on that field is generated by a specific human brain in specific conditions. And those conditions can be legitimately responded to.

Part Two: What the Client Wants — Position, Interest, Need

In the manifesto piece I touched on the basic distinction between **position** and **interest** from the Harvard Negotiation Project (Fisher, Ury & Patton, *Getting to Yes*, 1981/2011). Here I want to go deeper, because the position/interest model on its own still keeps the client on the surface.

A far more refined frame was developed by **Douglas Stone, Bruce Patton, and Sheila Heen** in *Difficult Conversations: How to Discuss What Matters Most* (Penguin, 1999, second edition 2010). It grew directly out of the Harvard Negotiation Project and argues that every difficult conversation — and every dispute — is in fact running simultaneously on **three layers**:

1. **The "what happened" conversation** — what really took place, who is right, who is to blame. This is the layer the client articulates when they walk into the office. "I want them to pay the invoice." "I want an apology." "I want them to admit they breached the contract."
2. **The feelings conversation** — what each side is feeling about it. Anger. Fear. Shame. The sense of betrayal. This layer is systemically ignored in Czech legal practice because emotions "don't belong in the courtroom." They do. Not as a legal argument — but as a variable that changes *everything*: willingness to settle, time preferences, willingness to give evidence, willingness to genuinely accept an economic compromise.
3. **The identity conversation** — what the dispute says about who I am. "If I back down, I'm weak." "If I don't fight, people will think everything that was thrown at me is true." "If I lose this, I'll have failed the father who handed me the company." This is the layer where things are *truly* decided. Economic logic drops to second place.

The same problem from a slightly different angle was described by **John Burton** in his **Human Needs Theory** (Burton, *Conflict: Resolution and Prevention*, St. Martin's Press, 1990). His thesis: behind many seemingly intractable disputes lies not a clash of interests but a threat to **basic human needs** — recognition, identity, security, meaning. These needs cannot be traded. Interests can (money for a concession, time for instalments, confidentiality for a reduced claim). Identity cannot. If a dispute is framed as an attack on identity, no material offer will douse it until something moves at the identity level.

And going still deeper, **Friedrich Glasl** in his model of conflict escalation (*Konfliktmanagement: Ein Handbuch für Führungskräfte, Beraterinnen und Berater*, Verlag Freies Geistesleben, 1980, repeatedly republished). Glasl described **nine stages of escalation**, grouped into three phases:

Glasl's stages of conflict escalation (simplified)

1. **Stages 1–3 (win-win zone)**: hardening positions, polarisation, action replacing words. Agreement is still possible.
2. **Stages 4–6 (win-lose zone)**: seeking sympathy from third parties, loss of face, threats. One side can win, the other lose.
3. **Stages 7–9 (lose-lose zone)**: limited destructive blows, total devastation, joint plunge into the abyss. Winning is no longer on the menu.

Why Glasl matters for a lawyer: **the tasks at each stage are different**. A dispute at stage 2 is solved by reframing. A dispute at stage 5 is solved by mediation. A dispute at stage 8 is solved only by separating the parties and damage control. Whoever brings stage-2 tools to a stage-7 situation will not succeed — no matter how legally sound the matter is.

Part Three: What the Client Doesn't Know — Espoused Theory vs. Theory-in-Use

Where things get really interesting is the third axis — what the client *doesn't know about themselves*. In the management literature Chris Argyris and Donald Schön, in their seminal *Theory in Practice: Increasing Professional Effectiveness* (Jossey-Bass, 1974), call this the difference between **espoused theory** (what people say they do, when you ask them) and **theory-in-use** (what they actually do, when no one is watching and they don't have time to rationalise).

In a legal dispute that gap shows up constantly. The client swears they "want a settlement." In reality they reject every settlement that denies them moral satisfaction. The client claims it's "about the money." When an offer that handles the money but offers no public vindication arrives, they refuse it. The client says they "want peace and they've had enough." When given a deal that means peace without victory, they recoil again.

Argyris's thesis: people carry two parallel models of their own behaviour. Espoused theory is **the publicly acceptable version of self**. Theory-in-use is **the operating system they're actually running**. The latter is usually shaped by early experience, identity, values inherited from parents, trauma, or a long-standing role in the family or firm. And it is *typically unconscious*.

Argyris and Schön went on to develop a methodology for this called **double-loop learning** — the ability to reflect not just on actions but on the assumptions behind them (Argyris, *Teaching Smart People How to Learn*, *Harvard Business Review*, 69(3), 99–109, 1991). For legal practice this means one thing: my job as counsel is not just to take the client's instruction and execute it. My job is to work with the client until we both understand *what they actually want*. That isn't therapy. That's **strategic diagnostics**. And if I skip it, I risk winning a dispute that doesn't save the client — because I was playing for a goal their theory-in-use never really set.

A similar insight from another angle came from **Joseph Goldstein, Anna Freud, and Albert Solnit** in their psychoanalytically inflected, but empirically rich *Beyond the Best Interests of the Child* (Free Press, 1973). Their classic observation: divorcing parents typically argue for "the best interest of the child" — but underneath, the fight is often about coping with their own deep loss, their guilt, or their rage at the ex-partner. Espoused theory: "I want the child to lack for nothing." Theory-in-use: "I want the other side to feel what I'm feeling." If that gap stays unarticulated, no "child-focused settlement" will hold.

A client who is unaware of the gap between what they say they want and what they actually want will press you into building strategies for the first goal, then criticise you for failing to deliver the second. Diagnosing that gap **up front** is the cheapest investment of the whole dispute.

Part Four: What the Client *Says* They Want — Narrative and Self-Distortion

Between what the client really wants and what they say they want lies one more layer: **the narrative** they tell themselves about their own story. And narrative is not a neutral description. It is a *construction*.

The psychologist **Daniel L. Schacter**, in *The Seven Sins of Memory: How the Mind Forgets and Remembers* (Houghton Mifflin, 2001), systematically catalogued how memory distorts past events — *bias* (rewriting memory under the pressure of current attitudes), *misattribution* (wrong source-tagging), *suggestibility* (importing someone else's version into your own memory). After two years of dispute, the client remembers the meeting differently from how it happened. Not because they're lying. Because **memory is reconstruction, not playback**. Elizabeth Loftus brilliantly demonstrated this in a series of experiments collected in *Eyewitness Testimony* (Harvard University Press, 1979) and her later work on the **misinformation effect** (Loftus, *The Reality of Repressed Memories*, *American Psychologist*, 48(5), 518–537, 1993).

The second layer — **the fundamental attribution error** (Lee Ross, *The Intuitive Psychologist and His Shortcomings*, in: Berkowitz ed., *Advances in Experimental Social Psychology*, vol. 10, Academic Press, 1977). When I do something wrong, I see it as a product of circumstances ("I had to, I had no choice"). When the other side does it, I see it as a product of their character ("they're a manipulator / a cheat / a wimp"). This asymmetry kicks in automatically in every dispute. The client typically applies it to the other side. The other side does the same in reverse. Then both wonder why their accounts of what happened diverge so radically — not because of malice, but because of how the human mind manufactures causal explanation.

The third layer — **self-serving bias** (Miller & Ross, *Self-Serving Biases in the Attribution of Causality: Fact or Fiction?*, *Psychological Bulletin*, 82(2), 213–225, 1975). I claim credit for success and externalise failure. This dynamic is especially dangerous in legal disputes because it *distorts one's own outlook*. A client doing well generalises success and grows a sense that the case "will obviously be won." A client doing badly blames a third party — judge, lawyer, the economic context — and refuses to revise their own strategy.

And the fourth, perhaps the most insidious — **confirmation bias** (Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, *Quarterly Journal of Experimental Psychology*, 12(3), 129–140, 1960). People look for confirmation of their hypothesis, not refutation. Throughout a dispute, the client interprets every new piece of information so that it fits the "I'm right" narrative. If counsel doesn't actively check that bias, a strategic blind spot emerges — the kind in which otherwise winnable cases are lost.

Treat the client's first description of the case as a working hypothesis, not as data. The actual data is in the documents, the timeline, the e-mails, and what the client *did not* say.

Deliberately seek the counterfactual — the other side's version. If you can't formulate it in a way that sounds at least somewhat defensible, your model of the situation is incomplete.

Periodically ask the client what would make them revise their position. If they can't answer, you're not in a dispute — you're in an identity contest. The strategy needs to be different.

Part Five: What the Other Side Wants — and Why We Tend to Assume the Worst

Symmetrically, everything above applies to the counterparty too. With one extra layer added: the so-called **demonisation effect**, described in the social psychology of conflict by Jeffrey Rubin, Dean Pruitt, and Sung Hee Kim in *Social Conflict: Escalation, Stalemate, and Settlement* (McGraw-Hill, 1986/1994). Once a conflict deep-

ens, **the cognitive representation of the other side simplifies** — a complex actor with their own motivations becomes a caricature whose only motive is to harm. This reduction is psychologically economical (it allows quick orientation) and strategically catastrophic (it makes agreement impossible).

Closely related is **naïve realism**, described by Ross and Ward (*Naive Realism in Everyday Life*, in: Brown, Reed & Turiel eds., *Values and Knowledge*, Lawrence Erlbaum, 1996). People assume their own perception of reality is accurate, while the other side's perception is distorted by ideology, self-interest, or ill will. The dispute then plays out in parallel realities, in each of which one side is convinced the other "must surely see the same thing." Usually they don't.

Constructive work with this problem starts from two simple questions, formulated by Robert Mnookin in *Beyond Winning* (2000) (which I cited in the manifesto in another context):

- **Why might the other side think they are right?** Not sarcastically. In earnest. If you can't answer this, you have a blind spot.
- **What does the same fact mean to them, vs. to us?** An identical fact can carry radically different significance for two parties — strategic, reputational, identity-related. Same evidence, different interpretation.

From experience I'd add a third: **What hurts them more than we realise?** Many destructive postures by the other side originate from a wound we don't register in our optic — because the wound was inflicted outside the legal frame. Once you spot it, a space opens that the classical legal apparatus can't reach at all.

Part Six: What the Lawyer Wants — and Why the Client Mustn't Overlook It

This part feels most exposing to me, because it touches on my own role. If I'm describing the biases of judge, client, and counterparty, intellectual honesty requires me to describe my own too.

One of the best-documented is the **availability heuristic** (Tversky & Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *Cognitive Psychology*, 5(2), 207–232, 1973). Lawyers overestimate the probability of scenarios they've personally experienced. If I've spent three years winning cases on a certain argument, I subconsciously underestimate the risk that next time the court will rule differently. If, conversely, a recent loss is fresh in mind, my risk estimate even on a *winnable* case shifts upwards — not because of facts, but because of what comes "to mind" most easily.

The second — **overconfidence**. From the classic meta-analysis *Calibration of Probabilities: The State of the Art to 1980* (Lichtenstein, Fischhoff & Phillips, in: Kahneman, Slovic & Tversky eds., *Judgment under Uncertainty*, Cambridge University Press, 1982) through Philip Tetlock's *Expert Political Judgment* (Princeton University Press, 2005), the finding is consistent: experts trust their predictions more than they should. Specifically for lawyers, this is documented in **Goodman-Delahunty, Granhag, Hartwig & Loftus's** *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes* (*Psychology, Public Policy, and Law*, 16(2), 133–157, 2010). Their finding: lawyers' predictions of case outcomes were significantly more optimistic than the outcomes they realised.

The third — **fee-structure biases**. An hourly-rate lawyer has different incentives from a fixed-fee or contingency lawyer. This isn't a critique of fee economics — without them, litigation practice wouldn't exist. It is an honest acknowledgement that **the fee structure influences which strategies get offered**. A client who isn't aware of this dynamic is in a blind spot. A client who is aware can ask their lawyer about it — and learn a great deal from the answer.

And the fourth — **identification with the case**. After several months of intense litigation, counsel loses critical distance. The dispute becomes personal, the other side an enemy, victory a matter of honour. Edgar Schein wrote about this phenomenon in the helping context as **emotional contamination** (*Helping: How to Offer, Give, and Receive Help*, Berrett-Koehler, 2009). Professional discipline consists in being able to recognise this state and return to a cold appraisal.

Actor	Key bias	Implication for the dispute
Judge	Decision fatigue, anchoring, hindsight bias	Timing, format, and structure of submissions matter on a par with content.
Client (espoused)	Self-distorted narrative, confirmation bias	What the client says they want is not a reliable compass for strategy.
Client (theory-in-use)	Identity-driven motives, unarticulated emotion	Without diagnosing this layer, you risk winning the case and losing the goal.
Counterparty	Demonisation, naïve realism	Our picture of the other side's motives is systematically simplified.
Lawyer	Availability, overconfidence, identification	Even an expert mis-predicts; reflecting on one's own role is a strategic duty.

Part Seven: What to Do About It in Practice — Diagnosis Before Action

If I had to compress all of the above into a few practical points, it would look like this.

1. The initial intake is not an interrogation. At the first meeting, don't ask "what happened and what do you want." That gets you the espoused version. Ask: "what would have to happen for you to *abandon* this case?" — and you'll learn the threshold. "What would you be willing to do to *resolve it today*?" — and you'll learn the price of identity. "Who have you talked to about this and what did they say?" — and you'll learn what narrative the client is cultivating around themselves and who is reinforcing it.

2. Map the three layers per Stone, Patton, Heen. What happened (facts). What's being felt about it (emotion). What it says about who the client is (identity). If any layer is missing from the file, you don't have a map; you have a fragment.

3. Practise active devil's advocacy. On the client and on yourself. What would the other side say? What would they see in the evidence that we don't? What is *their* narrative — not the one they have, but the one they think they have?

4. Periodically revisit the goal. In long disputes (over twelve months) the client's goal migrates. What started as "I want justice" can become "I want this behind me" after a year, and "I want to win, even if I lose more by it" after two. If you don't keep checking the map against the territory, you'll get lost.

5. Address the judge as a human, not a machine. Structure submissions to function even in a state of fatigue. Key points on the first two pages. A visually led narrative line. No "information dump" after which System 1 wins and the matter is decided outside the argument.

6. Don't make yourself the exception. Reflect on your own biases as hard as you do on those of others. Ideally with a colleague who has licence to push back.

Closing: A Dispute as a Collision of Five Psychologies

To return to the opening scene — to the client who came in with "I want to punish him" and left with the realisation that the issue was a public wound in front of his family — you can see what's at stake. A dispute is not a clash of facts. It isn't even just a clash of interests. It is **the simultaneous interplay of five separate psychologies** — the judge's, the-client-as-we-see-them, the-client-as-they-actually-are, the counterparty's, and counsel's own. None of them is accessible to cold calculation until we understand it as a human process with its own laws. And no number of statutes will save a strategy that ignores any one of these five psychologies.

This isn't an argument against law. It is an argument *for* mature law — law that knows where the playing field is, and where the conditions are under which any party can play meaningfully on it.

Related reading: on [why purely rational-economic logic fails completely in some disputes](#), see the companion piece on the irrational adversary. On [why law isn't the only — or often the right — tool](#), see the article on the lawyer as a strategist of non-legal problems. On [why most disputes are lost by playing the wrong game](#) — chess, poker, Monopoly or Snakes and Ladders in law — see the text on the four operational frames of a dispute. The scientific background of negotiation as such is in [Statutes Are Just the Foundation: Psychology and Tactics in a Legal Dispute](#). For a practical application I recommend [What Litigation and Business Negotiation Have in Common](#).

Are you facing a dispute where you can frame the request, but sense there's something more complicated underneath? In [our practice](#) we open every significant dispute with diagnosis — not with drafting. [Get in touch](#) before you've talked yourself into a strategy you wouldn't pick six months from now.

Further Reading

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This article is popularisation, not academic scholarship. Citations are accurate to the original works; the application to legal practice is my own interpretation and should not be confused with the views of the cited authors. Where the cited research rests on a specific jurisdiction (typically the US, Israel, or Germany), its generalisation to the Czech context should be applied with the usual caution.

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