

“What is the price of experience?”: or, Think, don’t Blink!



By Patrick Dransfield

*“What is the price of Experience? Do men buy it for a song?
Or Wisdom for a dance in the street? No, it is bought with the price
Of all that a man hath, his house, his wife, his children
Wisdom is sold in the desolate market where none come to buy
And in the wither’d field where the farmer ploughs for bread in vain.”
William Blake (1757 – 1827)*

When asked which factor most influences their choice of external counsel, (Source: *Representing Corporate Asia & Middle East Survey, 2012*) an overwhelming 63 percent of our in-house recipients indicated that ‘Expertise in a specific area’ is the most important factor. This rises to over 75 percent of our in-house respondents in China. What clients are asking for is wise counsel. Wisdom is a deep understanding and realisation of people, things, events or situations, resulting in the ability to apply perceptions, judgments and actions in keeping with this understanding. According to Confucius, China’s most famous teacher, philosopher and political theorist (551 – 479 BC), wisdom can be learned using three methods: reflection (the noblest); imitation (the easiest) and experience (the most bitter).

So – given that a reflective and patient mind is requested by in-house counsel of their external counsel - why do numerous partners that I meet in China run around like the proverbial headless chicken? The situation proves little better outside of China. My experience of eight years of business development management at two international law firms, despite extensive attempts at training and diligent

preparation from my department, still provided me with numerous examples of important beauty parades being rehearsed in lifts on the way to the client’s office, about one minute before the anointed time, with deliberate prompting of “you say this and I will introduce that...” My recent canvassing of business development managers and senior associates of my acquaintance indicate that, despite the increased competition for work, this issue has not gotten any better in the intervening years.

In Daniel Kahneman’s new book, ‘Thinking, Fast and Slow’,¹ the Nobel Prize winning economist explores the way that our mind tackles problems, and the way in which it can be so very easily deluded. Kahneman defines fast thinking as “System 1”. When attempting to solve a problem, “the machinery of intuitive thought does the best it can. If the individual has relevant expertise she will recognise the situation, and the intuitive solution that comes to her mind is likely to be correct. However, the spontaneous search for an intuitive solution sometimes fails – neither an expert solution nor a heuristic answer comes to mind.”

If our intuition does not serve us, Kahneman has identified that we switch to

“slow thinking”, or “System 2” of his analysis. “In such cases we often find ourselves switching to a slower, more deliberate and effortful form of thinking.” Or not. Therein lies the danger. And Kahneman’s analysis is essential to understand the answer to Her Majesty, Queen Elizabeth II’s question regarding the Global Financial Crisis: “Why did nobody see it coming?” To quote Kahneman “the difficulties of statistical thinking contribute to a puzzling limitation of our mind: our excessive confidence in what we believe we know and our apparent inability to acknowledge the full extent of our ignorance and the uncertainty of the world we live in. We are prone to overestimate how much we understand about the world and to underestimate the role of chance in events. Overconfidence is fed by the illusory certainty of hindsight.”

The cautionary tale of the demise of Dewey LeBoeuf comes to mind when reading the above as it helps to explain how a group of clever and educated people could be so suicidally wrong-headed in their approach to business. The Dewey LeBoeuf debacle was not helped by the fragmented nature of international legal business. If one were to apply the Financial Times’ entrepreneurial guru

Luke Johnson's tenets of Company Evaluation to your average law firm, I challenge you to find more than two dominant criteria in the list below:

- 1) High forward visibility of revenue;
- 2) Defendable and attractive margins;
- 3) Strong franchise with high barriers to entry;
- 4) Proprietary technology or brands; and
- 5) Sizeable market share.

One can only assume that we are on the brink of a massive and painful consolidation of the legal industry. According to a recent *New York Times* editorial², American legal education itself is in crisis, with many recent graduates saddled with massive student loans and bleak job prospects. To reverse this crisis, legal education itself has to change. The identification of these problems is not new, but the continuing crisis has brought a sharper focus to the search for a solution. A report conducted in 2007 by the Carnegie Foundation for the Advancement of Teaching concluded that law schools in the US have contributed to the crisis by giving "only casual attention to teaching students how to use legal thinking in the complexity of actual practice".

The Case Method has been the foundation of legal education for over 140 years. Products of this method of learning are encouraged to have at front of mind a vast array of precedents – providing the grist for the intuitive thinking of System 1 of Kahneman's analysis. The Case Method does not encourage true reflection, or a deep understanding of ethics, nor the underlying philosophical principles relating to a society governed by the rule of law.

Going back to the client presentation; many lawyers of my acquaintance are confident in their ability "to wing it" on the day. Winging it is nothing more than the ability to appear competent without having to prepare.

Footnote

1. *Thinking, Fast and Slow*, by Daniel Kahneman, Penguin Books 2011
2. *New York Times*, editorial, Nov. 25, 2011

An insider's tips on successful pitches

I have the following advice, first hand, from an energy lawyer who has sat on both sides of the pitch table. For in-house counsel, they are best advised to truly drill down into the 'deal list' and quiz the assembled private practice lawyers about which deals they personally were directly involved in. Nine times out of ten, the fat pitch book will be pared down into a very much slimmer volume! Secondly, using 'System 1', use your intuition by observing the body language and interaction of the team in front of you. If it is a long assignment, you'll be looking for people who demonstrably 'get on' and are naturally supportive and good humoured, especially in tense situations. You can test your intuition by asking about the firm's compensation structure (see *ASIAN-MENA COUNSEL Vol 10 Issue 5 "Fortune Calls" – compensation and legal service delivery*) which in of itself can be most revealing.

For external counsel, if the pitch is important, then utilise 'the 6 Rs' – Research, Research, Research and Rehearse, Rehearse, Rehearse. And do your best, in pitch materials and presentation, to put yourselves firmly in the shoes of your potential client. It is pure hubris to think that the client will be impressed with how busy you appear, or your virtuosity on the BlackBerry key pad.

The problems for in-house legal counsel and external legal counsel are different sides of the same coin. For external counsel, and especially for more recent hires within large international law firms especially, there is the problem of over-specialisation. This results in not only joyless, monotonous work but also does not produce innovative well-rounded lawyers with true business acumen.

For in-house counsel there is the potential problem of over-stretch. However, with company directors now finding themselves facing potential jail terms for willful non-compliance, the board is now attuned and prepared to listen to the wise and considered opinion of their general counsel. Assuming that legal advice is coupled with truly pertinent business acumen, it seems that the opportunities for in-house counsel to prosper and grow in their roles have never been greater, at least in the short to medium term.

The goal for both in-house and external counsel is to train and reward the lawyer at the top of her game, where knowledge of the law and a profound grasp of professional ethics and integrity are embedded in her DNA. Wider reading, reflection and a broader education and natural curiosity will assist in transforming any lawyer to a truly wise counsel who can combine both intuitive thinking with a deeper reflective mind, attuned to and adverse to the natural bias of our cognitive processes – put another way, utilising the inner light of wisdom that is permanently free from all mistaken appearance. Wingers need not apply.

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