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Prospect Theory Revisited

John Dean, White House Counsel during the Nixon administration, was the keynote speaker at the most recent meeting of the National Organization of Bar Counsel in Chicago. He spoke about Prospect Theory, as he had the last time I saw him speak in 2012. An article on these pages was inspired by that speech and his recent remarks refined the subject so a return to the theory seemed warranted. A refresher: Prospect Theory holds that an innate psychological bias causes decision makers to be risk averse when choosing between two possible outcomes that can result in a gain and risk preferring when deciding between two outcomes that can result in a loss. A person confronted with a choice of receiving \$100 or a one in two chance of receiving \$200 at the risk of receiving nothing, will generally take the money. When faced with a sure loss of \$100 or a one in two chance of losing nothing at the risk of a \$200 loss, most people will take the risk. The theory helps explain cover-ups -- the individual who has engaged in misconduct resorts to fabrications or evasions and thereby risks greater penalties in order to avoid the often smaller, but certain penalty that confession would engender. John Dean, at the center of the Watergate scandal, knows something about cover-ups.

Dean, in his recent speech, talked about individuals, especially lawyers, who find themselves in a "loss frame," or a choice between two possible negative results. In other words -- a losing situation. He posits that the loss frame creates a "cognitive bias toward concealment." Attorneys often face ethical dilemmas in their representation of clients and face loss frame situations when a risky ethical violation appears attractive, when things seem to be going poorly for the client, the lawyer, or both. Richard Painter, *Lawyers' Rules, Auditors' Rules and the Psychology of Concealment*, 84 Minn. L. Rev. 1399 (2000). The worse things get, the more likely a lawyer will compound her and her client's troubles with violations of ethics rules or laws. Painter, a proponent of the theory, has written that defense lawyers who learn that their client's case is proceeding worse than their client's expectation are more likely to behave unethically than are lawyers who believe that their client's case is proceeding better than expected. Painter, *Irrationality and Cognitive Bias at a Closing...* 69 Fordham L. Rev. 1111,1112 (2000). Dean's recent speech echoed Painter's advice: A lawyer who understands the cognitive bias towards concealment when within the loss frame should be able to recognize such a situation, step back and critically evaluate his own judgments. *Id.* at 1131.

Once a lawyer recognizes that she is in a loss frame situation (and this is often not an easy task, since optimism abounds), she must realize that her own decision-making could be flawed and collaboration with a disinterested party, i.e., an attorney not in the loss frame, is vital. For a lawyer, few loss frame situations are perceived to be worse than a legitimate complaint to Bar Counsel. Before the attorney deals with the merited complaint, she should recognize that there is a cognitive bias toward concealment and that the advice of a disinterested third party (a lawyer knowledgeable in ethics and disciplinary law) is more than appropriate, it is a demonstration of responsibility commensurate with professional behavior. We suggest that Prospect Theory has real value in assessing behavior because our experience in disciplinary cases, anecdotal though it might be, supports that opinion. In so many cases, we

find misrepresentations to courts, clients and bar counsel in an effort to conceal some mistake or ethical breach that if revealed would result in a loss often much less than the one faced by the lawyer who seeks to cover-up.

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