

Overcoming
Nonconscious
Characteristics
and Tendencies

By William L. Schuette

The fields of neuropsychology, behavioral economics, and related sciences have begun to discover and describe the unconscious mental processes that control the thoughts and feelings that are relevant to juror decision making.

Persuasion—Some Neuropsychological Considerations

We have been told that jurors decide whether they like and trust an attorney within the first 10 seconds of voir dire. Although this is probably an exaggeration, studies have shown that that jurors make the decision very rapidly and

without conscious analysis. Moreover, this subconscious decision process is not limited to jurors but includes judges, opposing counsel, mediators, clients, and everyone else whom we interact with.

Trust is a necessary antecedent to persuasion. A judge or a juror will probably not be persuaded of the merits of your case unless he or she trusts your representations of the facts and the law and trusts in the logic of your arguments. (Although this article will generally refer to a juror as the target of our attempt to persuade, the concepts are equally relevant for judges, mediators, clients, opponents, and all other people.) Obviously, a juror who likes and trusts an attorney will be more easily persuaded to the merits of his or her case, whereas the attorney who does not receive that benefit will have an uphill battle.

So how is such a consequential decision made so rapidly, with little or no information and with no conscious analysis? Fortunately, over the past 30 years, the fields

of neuropsychology, behavioral economics, and related sciences have begun to discover and describe the unconscious mental processes that control our thoughts and feelings.

The “90 Percent” Fallacy

We have all heard the meme that people only use about 10 percent of their brain capacity, suggesting that we have a tremendous reserve left with which we can consciously and logically figure out quantum mechanics, general relativity, string theory, and whom to trust and believe. To understand how the brain really functions, however, you have to give up this fallacy and accept that our brains are severely overtaxed and that more than 99 percent of its activity occurs on an unconscious level.

Even when we are completely idle, a tremendous amount of our brainpower is devoted to running our organs, organ systems, and biochemical processes. When we choose to move, our brains have to



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organize a ballet of contracting and relaxing muscles. Even our perception of the environment requires immense processing power. Take vision for example. Although it seems that our eyes function as cameras and we experience sight as a direct input of light focused on our retinas, nothing could be further from the truth. Anatomically, the eye makes a very poor lens with only a two-degree circle of relatively sharp vision within an otherwise very blurry visual field. The neural signals from our retinas also suffer from other major limitations such as being two dimensional and having limited access to color data.

So how do we have the rich visual experience that is typical of people? The brain devotes substantial resources to constructing what we see. It continually moves the little circle of sharp vision around to collect new input; it processes the information multiple times, combining it with prior information, beliefs, and memories to construct its best model of our environment; and it does this without our being aware of it. In addition, all the other senses function similarly, although they take less brain resources than vision.

It is not the purpose of this article to explain the nature of perception, although sensory limitations are important topics for evaluating eyewitness testimony. Rather, the article intends to help you appreciate that your brain is severely overtaxed, most of what it does is opaque to us, and this has certain cognitive consequences.

Heuristics and Biases

Beginning in the 1960s, researchers discovered that the effects of the brain's unconscious processing were not limited to mechanical operation of organ systems and sensory perception. Rather, unconscious processing has a significant effect on our conscious thoughts, emotions, and judgments without our awareness of this effect. This research has resulted in a description of our brain as including two distinct systems.

System 1 is often referred to as the unconscious, the adaptive unconscious, or the nonconscious. It controls all the automatic processes of life and uses our sensory input to create our perception of the environment. System 2 is who we perceive ourselves to be. It is our consciousness, our personal-

ity, and our abilities to reason and plan. It operates voluntarily, slowly, with effort, and consumes large amounts of energy. It generally requires attention to operate and is often turned off or not engaged. From evolutionary pressure, however, System 2 also developed certain abilities to make quick and automatic decisions regarding threats and opportunities. When engaged, System 2 can overrule the conclusions of System 1.

Although we associate ourselves with System 2, it is allotted only a minute fraction of our mental resources. System 1 is allotted several orders of magnitude more resources. It seems counterintuitive that everything that we think that we are comprises less than 0.01 percent of our mental activity, yet consider that System 1 regulates all our bodily functions, processes all sensory information, generates a continuous simulation of our environment and constantly monitors the environment for threats and opportunities. Because System 2 is allocated such a minute fraction of our mental resources, it is limited and can be easily overtaxed and distracted.

In the 1970s, two psychologists, Daniel Kahneman and Amos Tversky, made the groundbreaking discovery that mental processes operating without conscious awareness within System 1 had significant effects on the supposedly logical, conscious, and informed decisions made by System 2. This is particularly true with regard to conclusions regarding the truthfulness and reliability of certain information and persons. Kahneman and Tversky identified and described a number of these nonconscious mental decision-making processes, which they named "heuristics," by identifying consistent logical discrepancies made by populations of people under certain circumstances (biases). Since this discovery, the existence of heuristics and the technique of identifying them through their associated biases have been validated in innumerable experiments. (It would not be possible to attempt to cite even a cross section of all of the studies in psychology, neuropsychology, behavioral economics, and related fields. For those interested in the field, Daniel Kahneman's recent book *Thinking Fast and Slow* contains a thorough discussion of his research and the research of others.) Kahneman was awarded the Nobel Prize in Economics for the discov-

ery of heuristics and greatly expanding our knowledge of human judgment and decision making in 2002. (Tversky was not recognized due to the Nobel Committee's rule against granting an award to someone who was deceased.)

Heuristics act as a hidden set of hard-wired rules within System 1 that help us make decisions when we have insufficient

Due to the cultural stigma associated with bigotry, people are often unwilling or unable to acknowledge that any part of their decision-making process is affected by such irrelevant differences as skin color, culture, or religion.

time, information, or energy to perform a complete, logical analysis. They make "good enough" or "fast and dirty" decisions. As components of System 1, heuristics operate quickly and effortlessly, using available information. System 1, however, is gullible; it "believes" all information that it receives and has no capacity to reject information as untrue. Heuristics operate in the background and their operation is not directly perceivable. Finally, they operate all the time and cannot be disabled, even when we have the desire, time, and information to analyze information fully and logically.

Heuristics probably developed from our lack of mental capacity to attend to every decision that confronted us and the fact that the vast majority of day-to-day decisions could be relegated to automatic decision-making processes without adverse consequence. As we have seen, however, under certain circumstances, heuristics will ignore relevant information and produce an erroneous conclusion or judgment (a bias).

Heuristics and Persuasion

Since Kahneman and Tversky's initial work, many heuristics have been identified that affect our judgments and decisions in a wide variety of subjects. Our focus, however, will be on those that affect our judgments of truthfulness and reliability since those characteristics are most relevant to our ability to persuade.

Representativeness

The "representativeness" heuristic arises from our nonconscious reliance on prior patterns and stereotypes. It has two main effects relevant to persuasion. First, the more similar someone is to us, the more likely we are to trust, like, and accept him or her. Second, we are prone to overestimating the likelihood, reliability, or truthfulness of something that fits a representative pattern or stereotype.

All else being equal, our trust in someone is directly related to how similar he or she is to us. This heuristic likely arises from the human tribal history in which common culture, language, and appearance suggested membership in the same tribe and served as indicia of trustworthiness. Conversely, upon meeting a stranger with unusual appearance, customs, and language, it was safer to be wary of an unexpected attack. This suggests that as attorneys we should strive to be as similar to those we are trying to persuade as possible, as long as we are doing so honestly. Remember that almost none of us are Oscar-winning actors who can convincingly portray that we are something that we are not. Similarly, our clients and witnesses should appear to be as similar to the jurors as possible. Flamboyant clothing and idiosyncratic behavior may make memorable characters, but they are likely to create obstacles to trust.

While we can try to make ourselves more similar to the jurors who we are attempting to persuade, the most difficult aspect of the representativeness heuristic to deal with is that people of all cultures, ethnicities, and communities are less likely to trust those who they perceive to be from a different culture. This nonconscious tendency underlies all forms of racial, cultural, ethnic, and religious biases, and an attorney must be extremely tactful in addressing it to avoid creating any impression that he or she is implying that a juror is a bigot. Moreover, due to the cultural stigma associated with big-

otry, people are often unwilling or unable to acknowledge that any part of their decision-making process is affected by such irrelevant differences as skin color, culture, or religion. This heuristic is also particularly subject to post hoc rationalizations. Studies have shown that test subjects presented with situations in which the only distinction between who to believe was skin color consistently agreed with persons of their own skin color but attributed the decision to non-existent factors. The only way to deal with this tendency is, as early as possible, to acknowledge your client's differences, to admit that all of us are more suspicious of people who are different than us, and to ask jurors to do their best to avoid letting any such differences affect their decisions consciously or subconsciously by actively questioning their decision-making process. Still, it is unlikely that the even most conscientious person will be able to eliminate this tendency entirely.

The second aspect of the representativeness heuristic is that people are prone to overestimating the likelihood of events that match common patterns and stereotypes. For example, test subjects are far more likely to overestimate the probability that John from California is a drug user than John from Indiana. This increases the importance of understanding the social and cultural backgrounds of jurors and identifying any prevalent patterns, stereotypes, and beliefs. The more our arguments are consistent with these internal patterns, the more persuasive they will be.

Availability

The "availability" heuristic was the first heuristic identified by Kahneman and Tversky and causes the overestimation of the frequency, relevance, and importance of information that is more easily retrieved from memory and therefore is more "available" to the conscious mind. Availability is affected by a number of factors, including how recently the memory was formed or refreshed, how dramatic or emotional it is, whether the information was unusual or surprising, and whether the information describes a narrative or causal relationship. It arises from our nonconscious tendency to minimize the amount of cognitive effort required to recall information or to imagine a particular scenario. The biases or errors these create result in an overestimation of the likelihood or

possible cause of a particular scenario based on how easily it is recalled or imagined and an underestimation of its likelihood if more mental effort is required.

In the context of persuasion, the availability heuristic may cause someone to overestimate the likelihood that a particular event caused an outcome or that a particular outcome was far more likely than statistically warranted. For example, consider a particularly deadly explosion at a local chemical plant in which 57 employees and contractors died horrific deaths. For months, local news stations ran segments on the explosion, the victims, the ensuing investigations, and the ultimate official determination that the cause was poor valve maintenance. Five years later, a less deadly explosion occurs at another facility. When the case finally gets to a trial, there is some evidence that improper valve maintenance caused the explosion, but the defense produces overwhelming evidence that the incident was caused by lightning for which the defendant cannot be held responsible. Although valve causation is very unlikely, the availability in the jurors' minds of a graphic, emotional memory of an explosion caused by faulty valves will likely cause them to give too much weight to the evidence of improper valve maintenance.

Alternatively, consider another scenario in which five years after the initial explosion, the second incident results in significant injury to a single contractor. The jury finds that the second incident was due to improper valve maintenance. During the punitive damage phase, the evidence is overwhelming that despite the improper maintenance, the risk of the particular incident was 1,000,000 to 1. Because of the availability of the memory of the prior explosion, however, the jurors are likely to conclude that the risk of the second incident was far higher than the evidence would establish.

Anchoring

"Anchoring" is a very powerful heuristic in a person's assessment of numerical values such as probabilities, percentages, and monetary verdicts. In making such determinations, people generally start out with an initial value, the anchor, and adjust the value upward or downward.

The classic litigation example of anchoring occurs during the jurors' assessment

of the value to be assigned to a monetary verdict. Consider a case in which a plaintiff's counsel values his or her client's claim at \$800,000 while the defense counsel believes that it has a maximum value of \$100,000. During closing arguments, the plaintiff's counsel suggests an award of \$1,250,000. As long as the jurors do not reject this figure as completely unreasonable, it becomes the anchor, and as long as it remains the anchor, it is unlikely that the best defense arguments will cause the jurors to adjust downward to \$100,000. Rather, the defense must negate the initial anchor by convincing the jurors that it is unreasonable, thus allowing defense counsel's arguments that the claim is worth no more than \$50,000 to create a new anchor.

Extremely important in the context of persuasion is the fact that it is exceptionally easy to create an anchor and only one anchor can exist at a time. Almost any number can serve as an anchor, and it does not need to have any relevance to the current issue. In one seminal study, test subjects first were asked to write down the last four digits of their Social Security number and then they were asked to bid on an item for sale. Those subjects with higher Social Security numbers consistently bid higher amounts because they were adjusting from a higher anchor. Once an anchor has been created, it is necessary to convince the judge or the jurors that the anchor is unreasonable before a new anchor can be created.

Halo Effect

The "halo effect" is not a single heuristic but rather a result of other heuristics and factors relating to trustworthiness and reliability. Put simply, the halo effect posits that positive feelings regarding someone will cause us to evaluate things associated with the person, including his or her statements and arguments, positively. Conversely, negative feelings will cause us to view someone's statements and arguments with skepticism. Although we can have conscious feelings of trust toward a person, halos exist and operate without conscious awareness and even when we believe that we are being unbiased.

Because halos are generally supported by multiple heuristics and other factors, once a halo is created, it is extremely difficult to overcome. It is generally easier for

a person to rationalize away facts that are inconsistent with a positive halo than to give up the halo completely. Obviously, a positive halo has tremendous value in persuasion because it causes people to view your position positively and to discount any adverse facts. It also emphasizes why we should strive to avoid any intentional or unintentional misrepresentation or gross exaggeration because it may create a negative halo.

Other Factors

Beyond heuristics, there are other characteristics of the System 1 nonconscious brain that can affect persuasion.

Pattern Recognition

System 1 is hard wired to identify patterns within information actively. This activity was important to identifying information that would allow our ancestors to predict that something good (finding food) or something bad (becoming food for a carnivore) was about to happen. In fact, this activity was so important that it was better to err by finding patterns when none existed than to miss a pattern that did exist. Our innate need to find patterns is directly related to our need to find causal relationships and the attraction of narratives. To the extent that our arguments fit within common patterns, they will be far more readily accepted. Conversely, showing how an opponent's narrative is inconsistent with a commonly accepted pattern is an effective means of refuting his or her argument.

Randomness

Because System 1 errs on the side of finding patterns even when none exist, very few people really understand and appreciate the role of randomness in our lives. The very idea that events may occur for no understandable reason is alien. We crave coherence, causal relationships, control, and an ability to make predictions. For this reason, it is probably a lost cause to ground any argument on the occurrence of a random event. Any narrative, even an exceptionally improbable one, will be more attractive than conceding that an event was random.

Probability

Numerous studies have demonstrated that people do not have an innate understand-

ing of percentages, statistics, and probability. System 1 evolved to alert us to potential threats in an environment in which most threats involved life or death situations. There was no evolutionary advantage to a nuanced response. If our ancestors heard a loud growl emanating from a cave, their System 1 concluded it was a saber-toothed tiger or other large predator and avoided it.

Our innate need to find patterns is directly related to our need to find causal relationships and the attraction of narratives.

Stopping to consider the odds that it was a giant sloth instead might result in getting eaten. Our ability to understand percentages, statistics, and probabilities is a System 2 function. This means that effort and attention are necessary to understanding the import of this type of information, and it is likely the people will disregard it in favor of a competing personal example or anecdote.

People's inherent difficulty dealing with percentages, statistics, and probability suggests that arguments based on such information are unlikely to be persuasive and should be avoided to the greatest extent possible. When it is absolutely necessary to use such information, research has shown that it is more readily understood and accepted in a narrative form. For example, describing that a particular medication kills "one in one thousand users" is more informative and persuasive than stating that it has a mortality rate of "0.1 percent."

Narrative

The narrative is the fundamental architecture of our internal mental dialogue and our perception of our environment and ourselves. We define ourselves by a life story created by stringing together certain memories and suppressing others so that we appear to have had some control over

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Witness, from page 22

The jury never gets to have a conversation and “get to know” the client witness; this is the best way to try to achieve that personalization. If the client witness has never been a defendant and testified at trial, this is another question to ask the client witness. This can help implicitly explain awkwardness, frustration, and anger that may be coming across to the jury. Chances are that none of the jurors have testified in a courtroom at trial, either, and this can assist to neutralize some of the bad body language, tone, and mannerisms of the client witness who generally makes a poor impression.

The urge for an attorney is to want to control a client witness who makes a bad impression, but this is not helpful to focusing the jury on the witness testimony. If you have trouble with your client witness or are afraid that he or she will go off track and say something harmful to the case, then first try asking short questions that will require short responses. Next, test the client witness with an open-ended question to see if the client witness will give the testimonial evidence that you need for the case; however, if the client witness starts wandering off topic, or ranting about something that will gain the ire of the jurors, jump in immediately. You cannot ask leading questions on direct examination, but you can ask “suggestive” questions to guide your witness to the critical testimony. The subtle difference is between “Please tell me whether or not ‘x’ happened,” versus “Please tell the jury whether or not ‘x’ happened.” Wright, *supra*, at 212–13 and 215–16. Another manner of questioning is to ask the client witness “What, if anything, did you observe [or what happened next, or what did you do next]?” It is advisable to tell your client witness in advance of testifying that you may ask questions in this way to draw out specific testimony.

Conclusion

Unfortunately, no matter what an attorney does with a client witness who is disinterested, detached, arrogant, or too emotionally engaged, sometimes it will still boil over to affect the witness’ testimony, and all the preparation and trial questioning techniques will do little to change the presentation. In that case, you have to rely on the rest of your witnesses, and the strength of your case. **FD**

Deposition, from page 27

facts of the case, the controlling law, the applicable court rules, the relevant documents, and what the witnesses will say under oath, you can avoid the temptation to mask your own insecurities by escalating the level of incivility.

Do Not Be Afraid to Speak Up

In the event that an opponent raises speaking objections or overuses objections, it is important to ask the attorney to clearly and concisely state the reason or reasons for the objection on the record, after which you should remind counsel of the appropriate parameters for objections and politely ask that all future objections be made only in conformity therewith. If the problem persists, it may be worth offering to give counsel a standing objection on the record to the particular line of questioning at issue to avoid any further distraction to the questioning counsel or the witness.

Create a Record of Improper Behavior

In the event that defending counsel instructs the deponent not to answer a question, you should again ask the attorney to clearly state the reason or reasons for his or her instruction on the record, after which you should then recite the rule governing the proper use of instructions not to answer and ask for the instruction to be reconsidered. If objecting counsel refuses, confirm with the witness on the record that he or she is following the attorney’s instruction not to answer. If the instruction is based on privilege, ask the witness a follow up question to confirm the basis of privilege or its waiver before moving on.

Stay Focused and Remain Calm

Dirty deposition tactics may also be used to distract, frustrate, or anger deposing counsel to avoid the uncovering of all relevant information. The most important thing that you can do in response to such misconduct is to remain calm and stay focused on the deponent. If opposing counsel is not cooperating, do not get into an argument. Instead, stay focused on discovering all relevant information from the witness and come back to the record at a later time to address the misconduct with the judge, if need be. **FD**

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our current situation. If we were able to review our lives objectively, we would likely find that for any outcome of a significant event, there were many equally likely alternative outcomes. Narrative, pattern recognition, and cause and effect satisfy our need to believe that we are less subject to random threats and events than we actually are.

Further, a narrative enhances the availability of its incorporated facts, making them easier to recall (recall the availability heuristic). Our memories are highly associative. It is not possible to recall a single object, event, or concept without recalling a host of related memories. A narrative focuses this free association into a single story line making it far more likely that someone will recall and believe all of the relevant associated facts. If the entire narrative is credible, the weaker parts of an argument can often be propped up by the stronger points.

It is not surprising, therefore, that a simple, compelling narrative incorporating the basic points of a legal argument can be tremendously persuasive. A persuasive narrative organizes information into an easily understood and remembered pattern that leads to a desired conclusion.

Conclusion

From a neuropsychological standpoint, every person whom we want to persuade has certain characteristics. He or she is a pattern-narrative-causation addict, suspicious of unfamiliar people and situations, and unlikely to give much weight to statistics, probabilities, and percentages. He or she does not really believe that events can happen for no reason, or for reasons that are too complex to understand, and he or she is excessively influenced by irrelevant and erroneous data. Amazingly, he or she is almost certainly not aware of any of this and will deny it if you brought it to his or her attention. Appeals to his or her logical, overworked, and easily distracted System 2 may result in small, temporary changes, but this “addict” is at constant risk of backsliding. Therefore, it is important for you to understand and to the extent possible, work with and not rely on overcoming the non-conscious characteristics and tendencies that will form the basis of any judgment or decision. **FD**

Questions, from page 49

that the jurors are motivated to understand and to process the information, and second, that the jurors may not agree on the basis for the opinions rendered. Studies have shown that the nature of the questions directed to experts in medical negligence cases generally reflect attempts by the jurors to understand and to evaluate the content of the testimony. Diamond *et al.*, *supra*, at 1963.

Many of the questions that we have reviewed focus on alternative possible causes for a plaintiff's injury. For example, in one medical malpractice case, a juror asked: "What were the other potential causes for the... damage that you observed, and why were they less plausible causes for [the plaintiff's injury] than the cause that you have ascertained?" In another case involving a claim of infliction of emotional distress, a juror asked the psychologist, "What does the term 'reasonable psychological probability' mean?" This demonstrates that the jurors were probing the basis of the expert's conclusions. *Id.*

This is proof that jurors are willing to deal directly with the issues being put before them in their quest to find the answers. While both sides can benefit from some direct questioning of experts by jurors, if those questions come after the plaintiff's expert has left the stand, the defense has all the advantage. It is too late for the plaintiff's attorney to respond with new opinion testimony. If the questions are asked of the plaintiff's expert, the defense then has the luxury of time to consider whether, and how, to respond the juror question the testimony by defense witnesses. The defendant may draw an objection that the question and answer later provided by the defense exceeds the scope of the disclosure of the witnesses' opinions. However, it is commonly and successfully argued that such a question is a logical corollary not only of the disclosed opinion but that it is a logical corollary of the question propounded by a juror and the judge is allowed to let the juror ask it. Once the judge allows the question to be asked of a witness, opening up a new issue, any party should be allowed to ask subsequent witness questions related to the same topic. **FD**

Gremlins, from page 65

to prison for paying approximately US \$8 million to bribe officials in Libya and India for the right to form joint ventures. The company acknowledged the scheme and agreed to pay a fine of approximately US \$35.91 million to resolve its liability. And even Brazil is investigating and prosecuting a German engineering firm. Bilfinger SE self-reported internal investigation results that bribes had been paid during the 2014 World Cup bidding process. It is reported in media accounts that the company is trying to reach a resolution with the Brazilian prosecution authority.

In places such as Nigeria and China prosecutions for bribery and corruption have been on the rise, but for seemingly political motivations in a largely domestic context. In Nigeria, current president Muhammadu Buhari ordered the arrest of the former national security advisor for bribery and theft of public funds. In China, the BBC reports that the Communist Party announced that it punished nearly 300,000 officials in 2015 for corruption, and it has continued making announcements in 2016 about continuing the fight against corruption. According to the reports of the Central Committee for Discipline Inspection, made to China's Parliament, 200,000 of those 300,000 officials received light punishment, while more severe penalties (including death in some instances) were taken against a further 80,000. According to the Telegraph, these were part of China's "Operation Fox Hunt" in 2014, "Operation Sky Net" in 2015, and the "Tigers" and "Flies" initiatives, in which China has also targeted Chinese fugitives in the United States, the United Kingdom, France, Canada, New Zealand, Australia, Thailand, Hong Kong, and Singapore. It is unreported whether or not these were all domestic bribery cases, but some were likely also against foreigners, much as in China's fairly recent foreign bribery GSK case.

The intricate web of country-level laws becomes more complex each year, and the economic political motivations in a country can change with the wind sometimes. Companies are no longer protected by only accounting for the known U.S. and U.K. anti-corruption laws, and it is clear that all jurisdictions where a company operates (and the local laws that will apply as

a result) need to be considered as part of a comprehensive, global compliance program. Further, polycentric investigations in which countries other than the United States take the lead may need to become part of a general counsel's considerations when initiating internal reviews of reports of misconduct.

Conclusion

With *Gremlins*, you can just turn the movie off when the scenes get too scary or gruesome to bear, or when you grow tired of the plot repetition. But businesses cannot just turn off the horror show when ugly problems emerge, and individuals sometimes have to face scary allegations in person. There is a whole new world of anti-corruption law gremlins out there; they do not always act predictably and they are difficult to challenge. Some don't look so bad at first, but they have a broad range of weapons to use against companies and individuals that can be deadly for a company or its employees (sometimes literally). For years, it was enough to analyze U.S. anticorruption efforts and calculate FCPA risk as a metric for the overall compliance risk faced by a company. Recent actions highlighted above suggest that companies may need to turn their focus somewhere else; undertaking an U.S. analysis alone may not be enough. Corporations should take note of the new global enforcement world and develop plans to protect and defend against these new threats on the anticorruption stage. Don't forget about the U.S. regulators, but they are not the only anticorruption gremlin in sight. **FD**

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