

Juror Confirmation Bias: Powerful. Perilous. Preventable.



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In science, you move closer to the truth by seeking evidence contrary to a hypothesis. A general rule among scientists is called “empirical criticism,” which means focusing on seeking data that disconfirm a hypothesis rather than seeking supportive, confirmatory data. In civil litigation, jurors are instructed to find the truth by impartially evaluating the evidence and coming to an unbiased conclusion. Unfortunately, what actually takes place is a far cry from impartial and unbiased. Here’s how it generally works:

- Jurors come up with a hypothesis early in a trial;
- They immediately begin working to prove it right instead of working to prove it wrong;
- They give preferential treatment to evidence and testimony supporting their existing belief;
- They tend to better recall evidence and testimony supporting the side they favor;
- They entrench themselves deeply into their stance, before the trial is complete.

At this point, they simply stop working. They stop listening. They stop thinking. And importantly, jurors do this unintentionally and automatically. They do this unwittingly, without intending to treat evidence or testimony in a biased way or even being aware of doing so. Importantly, this is not just a “juror thing.” Rather, it is a “human thing,” and we are all guilty of it. No one is immune from it, and it transcends all demographic categories. This important phenomenon is called “Confirmation Bias.”



Powerful

Simply stated, confirmation biases are errors in jurors’ information processing and decision making. There is a tendency for jurors to search for, interpret, or remember information in a way that “confirms” their preconceptions, biases or beliefs. In other words, jurors selectively collect (or omit) new evidence, interpret evidence in a biased way, or selectively recall information from memory. This means that during a trial, most jurors seek information that confirms their existing attitudes and beliefs rather than genuinely weigh evidence from both the plaintiff and the defendant. This completely contradicts how jurors are instructed to make decisions by the judge during a trial. In fact, the reality is that most jurors do precisely the opposite of what they are instructed to do: they evaluate arguments in a one-sided way, by searching for evidence consistent with their current views and preconceptions. Many are reluctant to consider alternative stances and views, and instead set higher standards for arguments that go against their current expectations. Confirmation bias is perhaps more dangerous than other biases because it actively keeps jurors from arriving at the truth and allows them to wallow in comforting prejudice and partiality.

Confirmation bias is powerful. So powerful, that Psychology research shows that many people tend to stick to a position even after the evidence had shown it was false. Psychology researchers Ross and Anderson (1982) say it best: “Beliefs can survive potent logical or empirical challenges. They can survive and even be bolstered by evidence that

most uncommitted observers would agree logically demands some weakening of such beliefs. They can even survive the total destruction of their original evidential bases.” The problem is how jurors’ brains instinctively examine and evaluate contrasting positions (i.e., the opposing arguments presented by plaintiff and defendant). The brain is hard-wired or “programmed” to confirm propositions and arguments rather than falsify them. This is because confirmatory information is easier for the brain to process compared to data that falsifies a position. In other words, it is much easier for a juror to see how a piece of data supports a position than it is to see how it refutes the position. Therefore, people give an excessive amount of value to confirmatory information, i.e. positive or supportive data.

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To see confirmation bias at work on a large scale, one only need review the conspiracy theories offered for the JFK assassination and the 9/11 attacks. These theorists see the evidence in a one-sided way, searching only for evidence consistent with the theory they hold at the time. They also look for the consequences they would expect if their theory were true, rather than what would happen if it were false. Other common, real-world examples include:

- Interpersonal Communication: People notice when they get a phone call from a person they

were just thinking about but don’t remember how often they didn’t get such a call when thinking about a person.

- Medicine: A family physician may quickly form a diagnosis in his mind during a brief discussion with a patient, and then convince himself that the other complaints and physical exam fit that initial diagnosis.
- Politics: Republicans tend to watch Fox News and Democrats tend to watch MSNBC or CNN, both ignoring and avoiding views that contradict their own.
- Government Policy: Keeping the military engaged in a war/conflict while ignoring countless pieces of evidence that it is a lost cause (e.g., Vietnam).
- Media: A reporter who is writing an article on an important issue may only interview experts that support her or his personal views on the issue.
- Employment: An employer who believes that a job applicant is highly intelligent may pay attention to only information that is consistent with the belief that the job applicant is highly intelligent, and ignore clear flaws.
- Science: Scientists can set up experiments or frame their data in ways that will tend to confirm their hypotheses, and then proceed in ways that avoid dealing with data that would contradict their hypotheses.
- Health: A person reads about a particular medical condition on the internet, and then looks for those symptoms in one’s own body, thereby increasing the chances of detecting them.

As you can see, confirmation bias is a powerful, ubiquitous phenomenon: it’s everywhere, like it or not. It is a good lesson to observe how easily

intelligent people can see intricate connections and patterns that support their viewpoint and how easily they can see the faults in viewpoints contrary to their own.



Perilous

Decades of jury decision-making research has repeatedly shown that demographic variables do not accurately predict verdict outcomes or damage awards in civil litigation. This is because demographic factors such as intelligence, education, income, and race are not relevant when it comes to confirmation biases, as it is simply a natural aspect of our personal biases and its appearance is not a sign that a juror is dumb. In situations characterized by interactions among numerous variables and in which the cause-effect relationships are unclear (i.e., evidence and testimony in a civil trial), data tend to be open to many interpretations. In these instances, confirmation bias can have a profound effect, and attorneys should not be surprised to see intelligent, well-intentioned people draw support for diametrically opposed views from the same evidence and testimony presented at trial.

Confirmation biases are stronger and more prevalent for issues that are emotionally significant to jurors and for established beliefs which shape a juror's identity. For example, sympathetic cases involving significant injury, suffering and/or death (especially with infants, children, adolescents and/or mothers) can further fuel confirmation bias. Additionally, cases that relate to jurors' lives and work roles (i.e., employment matters, divorce, religion, politics, gender, etc.) can also lead to higher levels of confirmation bias in the

courtroom. Bottom line: the more emotionally and personally involved jurors are with a belief, the more likely it is that jurors will ignore whatever facts or arguments undermine that belief.

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Ironically, trial attorneys are extremely susceptible to confirmation bias as well. For example, defense attorneys are highly reluctant to strike educated, intelligent people in higher income brackets during jury selection, incorrectly assuming that they aren't as biased as less educated people. They assume that "smart" people are rational and level-headed, will be able to better understand their case arguments, and will therefore be more logical and fair in their decision making during deliberations. On the flip side, they assume jurors with less education and lower income status are not smart enough to understand their case, are more sympathetic to plaintiff themes, and tend to award high damages because they don't understand economics. As a result, during the *voir dire* and jury selection process, a defense attorney will actively seek out data to satisfy his working hypothesis (related to the above demographics) and ignore/avoid data that goes against it (i.e., a less-educated juror who expresses pro-defense characteristics). They will often stick to

their hypotheses related to demographic variables, even in the face of evidence to the contrary. This results in the attorney striking or not striking particular jurors for completely illogical reasons. In the end, this heavy reliance on demographic variables can be costly, as analysis of pro-plaintiff oriented juries who award high damages often have a significant percentage of educated, intelligent individuals in higher income brackets.

A second example of how trial attorneys fall victim to confirmation bias is the process of early case assessment. Trial attorneys are required to generate “case assessment reports” for their clients very early in a case, and then send updates to the client as discovery progresses. These initial assessments frequently act as a cognitive anchor that prevents the trial attorney from considering alternative views of liability and damages as the case progresses. This can result in a trial attorney sticking with ineffective themes and arguments because he deemphasized or even ignored subsequent information (i.e., expert witness opinion, liability and damages data from mock trial research, etc.) in an effort to confirm his original assessment. This cognitive blunder can lead to an adverse verdict with high damages, which can negatively impact the trial attorney’s self-confidence, as well as the confidence that his client has in his abilities. Again, it’s not the attorneys “fault” *per se*, as confirmation bias is unintentional and unplanned. It’s powerful. It’s perilous. But is it preventable?



Preventable

At the jury level, it is impossible to completely prevent confirmation bias from occurring. It is

a natural and powerful cognitive tendency that cannot be totally extinguished. However, it is indeed possible to interrupt it and perhaps even weaken it. Trial attorneys can use the jury selection process and their opening statement to expose confirmation bias to jurors and actually educate them about this inadvertent, automatic cognitive error that results in faulty thinking. Helping jurors understand cognitive bias (generally) and challenging them to see the evidence presented at trial in a different way (i.e., resisting the temptation to confirm their hypotheses and instead giving equal weight to all of evidence) is the very best way to control confirmation bias. By making jurors aware of their cognitive errors before the trial starts and providing them with a new methodology to assess evidence and testimony can at least interrupt or slow down confirmation bias. In other words, it is important to challenge jurors and place a burden on them to “rethink how they think.” Ideally, this can create juror “Cognitive Dissonance,” an uncomfortable mental state that results from conflicting thoughts and feelings that surface when bias and impartiality mix with this new burden being placed on them. Specifically, you want to pre-program jurors during jury selection and opening statements to be aware of confirmation bias and to essentially “feel bad” about becoming biased and impartial during the trial. Again, this won’t completely prevent juror confirmation bias, but it may result in at least some of the jurors evaluating the evidence and testimony differently.

However, it is clear that education and new burdens will not completely solve the problem of confirmation bias. Therefore, it is critical to identify those jurors with the strongest biases during jury selection and strike them from the panel. This requires the

trial attorney to focus *voir dire* on jurors' attitudes and beliefs, rather than other variables that are poor predictors of verdict and damages. Some of the worst *voir dire* questions ever written (but are frequently used by trial attorneys and judges) are: "Can you be fair in this trial? "; "Can you follow the Judge's instructions?"; and "Can you keep an open mind, and wait until the end of the trial to make judgments?" These questions elicit information that is useless in determining true bias and impartiality, as the vast majority of jurors quickly and obediently respond with a simple "yes." Instead, trial attorneys need to tap into jurors' attitudes and beliefs to truly figure out how they tick. This requires both a) a deep understanding of Psychology, specifically human attitudinal and belief systems, and b) painstaking levels of work to construct the appropriate *voir dire* questions that will elicit meaningful information that one can use to make wise strikes. Since the vast majority of trial attorneys have little to no training in Psychology, it is important that they receive the appropriate training and/or expert consultation to ensure that they can construct the most useful and effective *voir dire* questions.

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At the trial attorney level, confirmation bias can be contained by developing a new system of case assessment and reassessment. While cognitively difficult, trial attorneys need to learn to not drop the anchor so fast when assessing liability and

damages. They need to take a step back, maintain an open mind, and give *full* weight to subsequent information that becomes available as the case progresses. After getting "hammered" in a mock trial (i.e., a plaintiff verdict with high damages), a defense attorney recently commented: "*Many cases are lost in the conference room, not the deliberation room. We (trial attorneys) can't see the case like a jury would see it...we start thinking things that REAL people do not think ...we get wrapped up in our case, tending to believe only the things WE want to believe...people with law degrees don't think like real people.*" Again, trial attorneys need the proper training and/or expert consultation to prevent themselves from falling victim to confirmation bias in their case assessments.



Conclusion

As you can see, confirmation bias is a potentially devastating element of litigation psychology that can affect both jurors and trial attorneys alike. Confirmation bias can prevent jurors from hearing both sides of a case, as it causes them to selectively perceive and recall evidence and testimony presented at trial. Additionally, confirmation bias can inhibit trial attorneys from making key strategic adjustments during discovery and trial, potentially leading to expensive settlements at mediation or high damage awards at trial. Many trial attorneys can avoid falling prey to confirmation bias by partnering with litigation psychology experts who can teach them strategies to inhibit juror confirmation bias and eliminate attorney confirmation bias.



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