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September 2010 Jury Tip: “Jurors vote for their views, not your evidence”

Not too long ago, I read a news article entitled “People choose news that fits their views.” The topic was timely—more and more these days, people are tuning in to polarizing television and news sources that fit their views. Gone are the days when everyone would watch the same, mainstream, “objective” news. More and more, viewers with liberal points-of-view will only watch MSNBC or Jon Stewart for their news and political commentary, and those with conservative values will gravitate toward Fox News or listen exclusively to Sean Hannity, Rush Limbaugh, or Glenn Beck.

But while this topic may be timely, the concept is not. What Americans have been noticing with political television and radio is what psychology calls “confirmation bias.” What confirmation bias essentially means is that people have a habit of searching for and believing what they already believe. This tendency is not only subconscious, it’s also irrational. Without meaning to, we allow biased information we self-select to reinforce what we already believe. Even though they already believed the information before they tuned in, what they hear then confirms, reinforces, and strengthens their own beliefs, making people increasingly inflexible and less willing to accept a different point of view.

Confirmation bias involves much more than the tendency to accept and believe what we already believe. A process called “selective attention” involves our tendency to focus on things we agree with while tuning out or ignoring things we disagree with. A process called “selective retention” involves our tendency to actually remember messages that fit our interests, values, and beliefs more accurately than we remember dissenting messages. I’m sure everyone has heard of the term “selective memory,” and that’s what this is. A process called “selective distortion” involves our tendency to interpret information in a way that supports what we already believe, so that our prior beliefs actually color (or even misrepresent) what we hear.

Here’s another reason why jury selection and the makeup of your jury is so essential—just like in everyday life, people choose to pay attention to information that already fits their views, they interpret information in ways that support what they already believe, and they even remember messages that fit their values much better than information they disagree with. This is what jurors do in every case—they pay much more attention to evidence that fits their predispositions, they focus on and remember evidence that fits their way of thinking, and they distort evidence to fit what they already believe. It’s a scary thought, but any juror on your panel who doesn’t already agree with you is far less likely to pay attention to your case, far less likely to remember your messages, and even likely to reinterpret your best evidence in ways that support the OTHER SIDE.

There are two lessons to be learned from confirmation bias—one simple and obvious, the other complex and challenging. The obvious lesson: be extra careful to select a jury whose values and points-of-view fit your case. Be sure to ask at least one or two voir dire questions to identify any potential jurors who simply cannot conceive of your case as likely or simply cannot tolerate your position in trial. Don't be afraid to be direct and blunt. As long as you pose the question in a way that doesn't insult your jurors and doesn't imply that jurors who speak up are wrong, you'll often succeed in identifying biased jurors to strike. Ask your jurors if anyone "has the feeling that it seems unfair" to sue a doctor who was trying to save a patient's life, to ask for monetary damages for emotional distress, for an ex-employee to change jobs and compete against their old company, or about anything crucial to your case that some jurors might simply disagree with on principle. Jurors whose values clash with the values in your case will exhibit extreme confirmation bias and immediately reject your arguments at first glance. Just as importantly, ask your jurors if anyone "has the feeling that it might seem hard or even impossible to believe that" a manufacturer would ever knowingly sell a dangerous product, or that a competing company could come up with the same idea for a product/process on their own without having stolen the idea, or any part of your story that clashes with your jurors' beliefs and expectations. Friendly jurors who are skeptical about your case will be just as closed-minded as jurors who are hostile toward your case, so identify both.

The more complex, challenging lesson you should learn from confirmation bias is that it's essential that your case supports what your jurors already believe, so you'll need to find a way to convince your jurors—even the hostile or skeptical ones—that your case fits their values and beliefs. If you've selected a favorable, receptive jury, you'll have the luxury of preaching to the choir and delivering the same opening statement you wrote days (or hours) before jury selection began. But the other 95% of the time, when your jury isn't perfect, delivering your ideal opening statement as originally written is a huge mistake. As I discussed in December's jury tip on using voir dire as a focus group, you need to take your jury's pulse during voir dire and adjust your trial themes and opening statement to match their unique values and beliefs. You cannot persuade a cynical jury panel with a passionate, idealistic opening statement, and vice versa. If your jury is a mixed bag, like most juries are, if you have a largely unreceptive jury you're unhappy with, or if you have even one or two opinionated jurors who are unreceptive to your case, you'll need to adjust your trial themes accordingly.

Confirmation bias means that when a juror begins hearing information in an opening statement that he or she disagrees with, that juror will become less attentive to what you are saying, will remember less of what you are saying, and will pay much more attention to (and remember much more of) opposing counsel's arguments. In most trials, jurors are presented with a large number of issues and have to choose which issues are relevant. When they deliberate, the jury—not the lawyers—choose which issues matter, which minor issues to magnify, and which major issues get completely ignored. In every mock jury research project I orchestrate, the lawyers are shocked at the issues the mock jurors find to be irrelevant or completely ignore during their deliberations. Can you guess which issues get ignored? Confirmation bias should help. Jurors inevitably focus on the

arguments they already agreed with, and they tend to ignore and dismiss the arguments that clash with their values and beliefs. Selective attention and selective retention is why you can decisively win every battle you deem important and still lose the case.

Even more dangerous is selective distortion, because what your jurors already believe going into trial is more important than what the evidence objectively shows. Let me give an example: in a recent mock trial of a product liability case, the mock jurors were told (by the plaintiff's counsel) that the defendant had no evidence of doing any safety testing on the product in question, and the defense counsel agreed. The mock jurors, however, did not agree; in fact, they interpreted this stipulated piece of evidence three wildly different ways. Most of the mock jurors who were leaning toward the defendant after hearing the opening statements believed that the lack of safety testing was "proof that the company had no idea their product was dangerous," and interpreted the evidence as positive support for the defendant's liability theory. Most of the mock jurors who were leaning plaintiff but had expressed pro-corporate views in voir dire interpreted the same evidence the opposite way, believing that the lack of safety testing "showed that the company didn't care enough about safety to even test their products." And most of the third group—the pro-plaintiff, anti-corporate mock jurors—believed that the lack of safety testing was "a lie" and that "the company must have done safety testing, saw terrible results, and destroyed the evidence of the testing." Same evidence, totally different points-of-view, and wildly different interpretations.

Besides trying your best to select a perfect jury, what else can you do? You have to build credibility from the start of your opening statement by incorporating what your jurors already believe into your trial themes and your message. I've already written about building credibility by adapting your case to your jurors BELIEFS, but I haven't yet talked about building credibility by adapting your message to their VALUES. Most great trial lawyers do a wonderful job of making their case about more than just the individual plaintiff and defendant for their jurors. Persuasive cases have a broader message, and a case cannot be truly persuasive unless the underlying values of your case match your jurors' own values. So getting your jurors to pay attention to your case, to remember your messages, to interpret your evidence in ways that help you, and to make their confirmation bias work for (and not against) you requires you to convince your jurors that the verdict you're arguing for will help advance their values and their sense of fairness and justice, no matter what side you're on.

This isn't easy for the plaintiff lawyer trying a case in front of a jury that distrusts plaintiffs, has a distaste for lawsuits, and thinks jury damages are out of control. Building credibility is just as challenging for the lawyer defending corporations, CEOs, or businesspeople in the wake of Enron, AIG, and Bernie Madoff. But you can and must tailor your message to match the values of your jurors. Use every opportunity—voir dire, opening statement, through witnesses, and during closing—to show jurors how your case fits their values. If you're suing a corporation and your jurors are generally supportive of corporations, a message about "teaching greedy companies a lesson and punishing wrongdoing" will likely fall on deaf ears. But the same jury may respond much more receptively when they are told that a plaintiff's verdict is an opportunity to "help companies be more careful and responsible" or perhaps to "reward the honest, responsible companies by punishing the bad ones." Your jurors are aware of the big picture from the very beginning of trial, so convincing them that your verdict will make the world a better place (according to their own values) is essential to keeping their attention during trial.

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