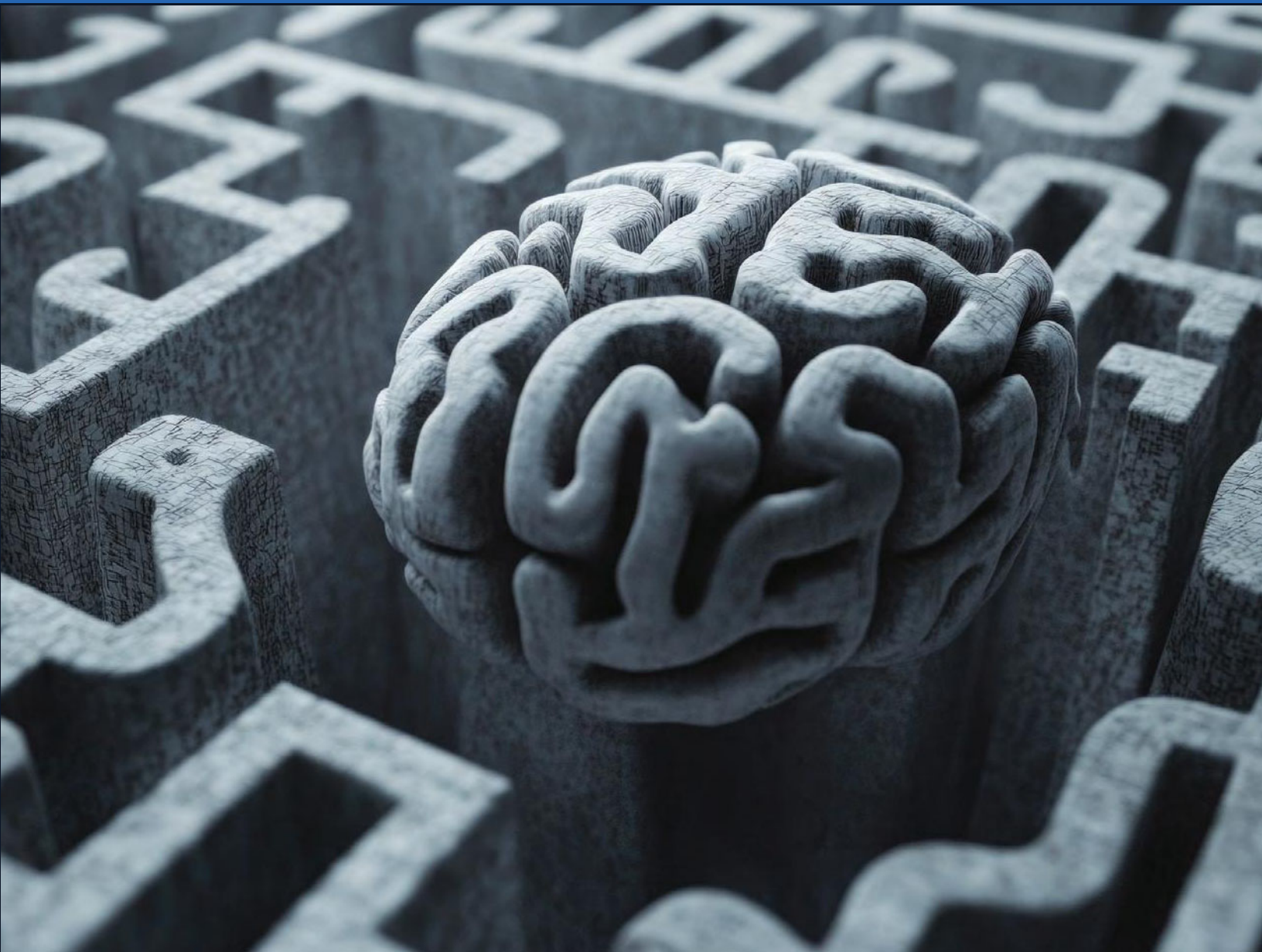


# Cognitive Shortcuts in the Jury Box: Overcoming Confirmation Bias in *Voir Dire*



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# COGNITIVE SHORTCUTS IN THE JURY BOX: OVERCOMING CONFIRMATION BIAS IN *VOIR DIRE*

In science, truth-seeking involves testing hypotheses by searching for disconfirming evidence. This process, called empirical criticism, drives objective discovery. In the courtroom, jurors are instructed to find truth by impartially evaluating evidence. However, human cognition rarely aligns with this ideal. Jurors typically develop early hypotheses during a trial, favor evidence supporting their initial beliefs, and unintentionally disregard contrary information. For instance, a juror may decide early on that a corporation acted irresponsibly and subsequently interpret all evidence through this lens, dismissing contrary facts as exceptions. This phenomenon, known as confirmation bias, is not limited to jurors; it is a universal human tendency. In the context of civil litigation, confirmation bias—exacerbated by modern tactics like the Reptile/Edge Theory—can lead to devastating outcomes, including catastrophic verdicts.

**IN THE CONTEXT OF CIVIL LITIGATION, CONFIRMATION BIAS—EXACERBATED BY MODERN TACTICS LIKE THE REPTILE/EDGE THEORY—CAN LEAD TO DEVASTATING OUTCOMES, INCLUDING CATASTROPHIC VERDICTS.**

Reptile/Edge Theory attempts to exploit jurors' instinctive desire to prioritize safety and community protection. These 'safety rules' often include generalized principles like ensuring public well-being or preventing avoidable harm, which are framed as paramount duties violated by the defendant. By framing the defendant's actions as violations of fundamental 'safety rules,' Reptile/Edge Theory triggers jurors' biases. Confirmation bias compounds this effect by amplifying danger perceptions, anchoring emotional appeals, and making jurors' narratives rigid and resistant to counterarguments.

Compounding this problem is the challenge defense counsel faces during *voir dire*. With fewer trials taking place, attorneys have less opportunity to refine their *voir dire* skills. Many rely on surface-level questions focused on jurors' experiences (e.g., "Have you ever been involved in a lawsuit?") rather than probing deeper into core attitudes and belief systems, which is what truly drives juror thought processes and decision-making. Furthermore, attorneys often fail to assess jurors cognitively and emotionally, missing critical insights into how they process information. These shortcomings allow confirmation bias to remain unchallenged, ultimately tilting the playing field against the defense.

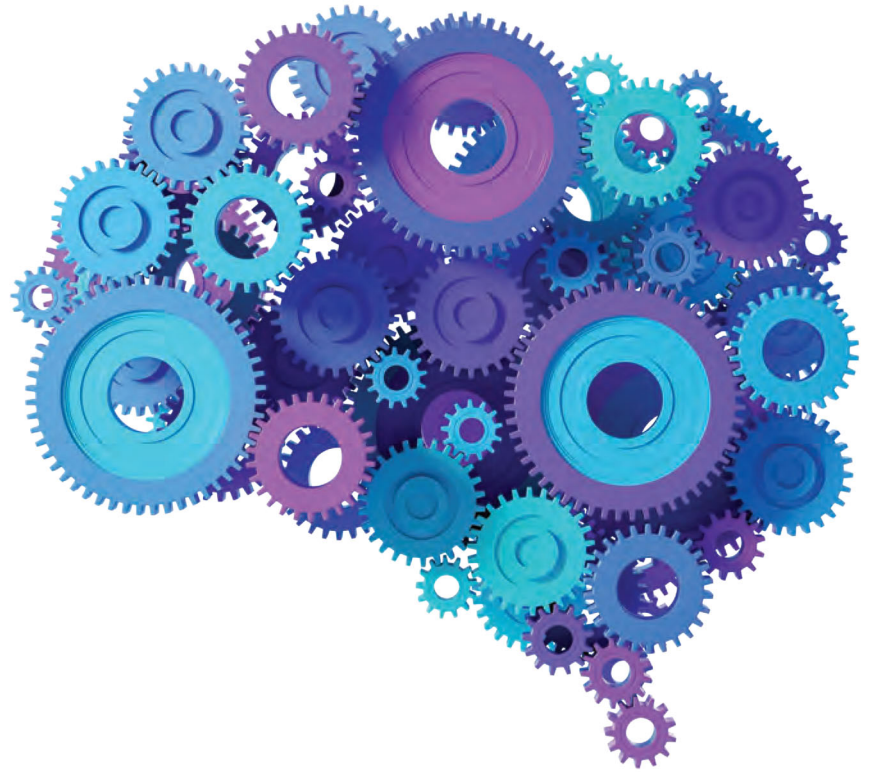
*Voir dire* offers the defense's best opportunity to combat these biases before they crystallize, making it a critical component of trial strategy. This article focuses exclusively on overcoming confirmation bias in *voir dire*, providing actionable strategies to address the challenges of modern juror decision-making.



# STRATEGIC *VOIR DIRE* PROCESS

The foundational problem with *voir dire* lies in the lack of frequent trial opportunities for defense attorneys to refine their questioning skills. With fewer cases reaching trial, attorneys often rely on rudimentary questions that focus on jurors' experiences rather than probing deeper into their core attitudes and belief systems. These surface-level inquiries yield only superficial information, leaving critical cognitive and emotional biases unaddressed.

To combat confirmation bias effectively, defense attorneys must employ a comprehensive process that goes beyond basic questioning. This system is designed to guide attorneys in taking a deeper dive into jurors' thought processes and decision-making tendencies, uncovering insights that can shape strategic jury selection.



## COGNITIVE PROFILING

Cognitive profiling involves assessing a juror's flexibility and openness to new information. This step is essential for identifying individuals who can move beyond initial impressions to evaluate evidence impartially. Attorneys should use open-ended questions that require introspection, such as:

"Can you describe a time when you made a decision quickly but later changed your mind after considering new information?"

"Have you ever discovered that your initial impression of someone or something was incorrect? What led you to reassess?"

"In your personal experience, are first impressions typically accurate or inaccurate?"

Responses to questions like these help evaluate jurors' ability to adapt and consider diverse perspectives, ensuring they are less likely to rely on rigid cognitive shortcuts. One way to get jurors to express their true thoughts and feelings is to give them an example of how YOU yourself have made such cognitive errors in the past. Tell jurors a story about how you rushed to judge someone or something, then did a complete 180 when more information became available. This is a highly effective technique that shows jurors that we are all human and all make these mental short cuts in life.



# EMOTIONAL PROFILING

Emotional profiling is the process of evaluating a juror's emotional tendencies and responses to identify potential biases. It focuses on understanding how jurors process emotionally charged stimuli and how their past experiences shape their decision-making. This deeper insight allows defense attorneys to anticipate and address emotional reasoning that could undermine impartiality.

## Emotional profiling has two key components:

- 1 Assessing how jurors respond to emotionally charged, case-specific stimuli, such as graphic images of a trucking accident or a "day in the life" video clip from a catastrophically injured plaintiff. This technique, when allowed by the judge, is extraordinarily effective. If there is pushback, defense counsel can argue to the court that because the information is so graphic, emotional, or disturbing, it would be impossible to assess jurors' biases without introducing some of that evidence to them in jury selection. Asking jurors "How do you feel about seeing graphic or upsetting evidence if it's necessary to understanding the facts of a case?" will not be adequate in such circumstances.
- 2 Exploring how jurors have responded to emotional situations in their past to understand their baseline emotional processing and potential biases.

## Questions should be emotionally resonant to elicit genuine reactions:

"When you've witnessed graphic or upsetting things on the news or on social media, do you avoid looking at it closely?"

"Has someone tried to show you something graphic or upsetting, and you politely declined?"

"Have you ever been in a situation where emotions influenced your ability to remain objective? How did you manage that?"

By exposing jurors to intense emotional stimuli and probing their past experiences, attorneys can accurately assess their emotional profiles and identify individuals whose heightened emotions might lead to biased decision-making.

# SOCIAL DESIRABILITY PROFILING

Jurors often provide responses they believe are socially acceptable rather than expressing their true feelings. To counter this tendency, questions must be phrased neutrally. Examples include:

"What personal challenges do you think you might face in evaluating a case like this impartially?"

"Are there specific factors about this case that might make it difficult for you to set aside personal experiences during deliberation?"

"After seeing these difficult images and hearing about these challenging topics, do you think you would be a good fit for this case, or might you be better suited to a different type of case?"

Encouraging jurors to acknowledge potential biases without judgment fosters honesty and introspection, providing attorneys with a clearer understanding of jurors' true decision-making tendencies. Again, a very successful technique is telling jurors that YOU yourself would be a terrible fit for some types of cases because of your past experiences or feelings. "Show" jurors that being a poor fit for a case is very common and fully acceptable, rather than merely telling them.

# DIRECT CONFIRMATION BIAS ASSESSMENT

The final step in the *voir dire* process focuses on directly assessing jurors' susceptibility to confirmation bias.

The set up is the key: begin by explaining confirmation bias and using cognitive, emotional, and social desirability profiling as described above. Then, introduce the "intention-behavior gap" - the disconnect between positive intentions and actual behavior. While jurors may intend to be fair, cognitive, emotional, and social barriers often prevent them from following through.

## SELF-EFFICACY SCALE:

Use a 10-point scale to assess jurors' confidence in their ability to evaluate evidence impartially. For example:

"As you've heard, this case involves emotionally charged topics and conflicting evidence. On a scale from 0 (cannot do) to 10 (highly confident), how confident are you in your ability to evaluate all evidence impartially, even if it challenges your initial impressions?"

## FOLLOW-UP QUESTIONS:

Tailor questions based on jurors' self-reported scores:

### For low scores (<5):

"Can you explain why you feel you might struggle to evaluate all evidence impartially?"

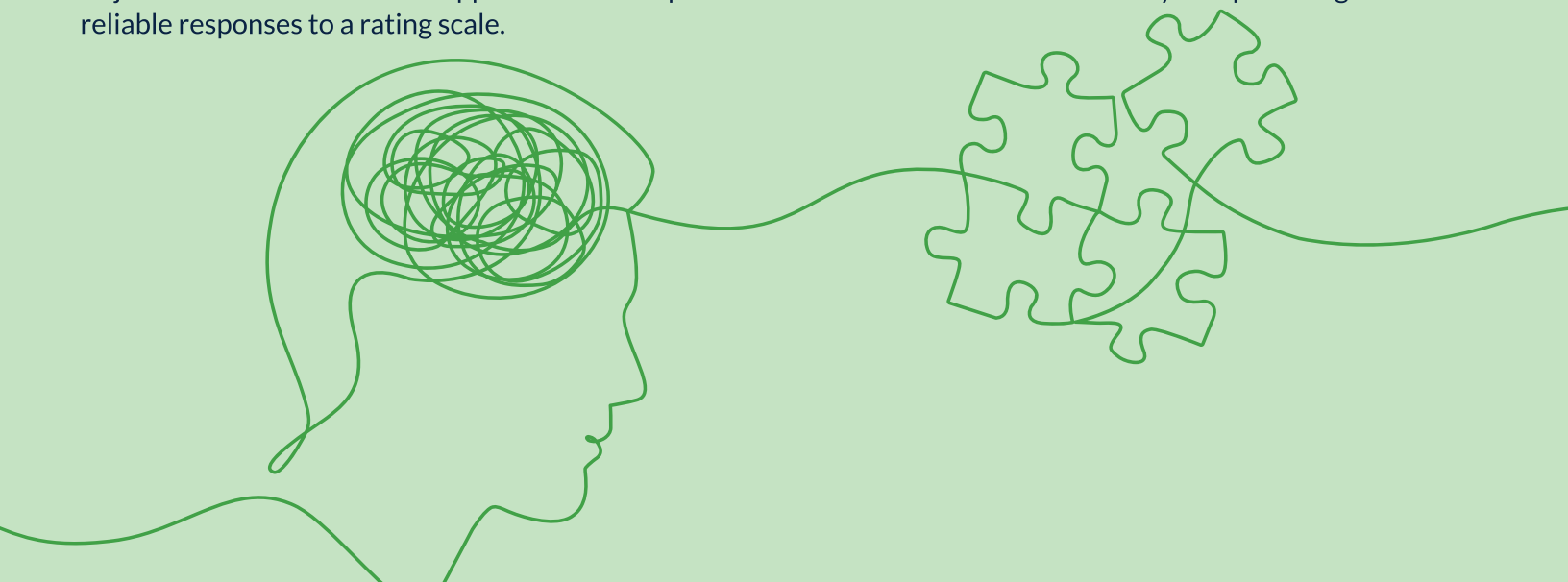
### For mid-range scores (6-7):

"What factors might make it challenging for you to consider evidence that opposes your initial impression? Why are you not an 8 or 9?"

### For high scores (8-10):

"Why are you confident in your ability to remain impartial despite emotional challenges?"

This final step helps identify jurors whose positive intentions may not translate into impartial behavior, providing critical data for cause challenges and informed selection decisions. This same methodology has been used successfully in assessing juror sympathy as well (Kanasky, W. F. Assessing sympathy in *voir dire*: Exploring jurors' intention-behavior gap. (2018, Summer). *Voir dire*, 24-26). Notably, this final assessment must occur later in *voir dire*, as jurors need time to build rapport and develop trust with defense counsel before they can provide genuine and reliable responses to a rating scale.



# SKEPTICISM: THE CORNERSTONE OF IMPARTIAL JURY SELECTION

The ultimate goal of the strategic *voir dire* process is to ensure that skeptical jurors remain on the panel. Skepticism, empirically defined, refers to a cognitive disposition characterized by the willingness to question assumptions, critically evaluate information, and suspend judgment until sufficient evidence is presented. Unlike jurors who may default to emotional reasoning or rely on cognitive shortcuts, skeptical jurors are better equipped to weigh evidence impartially and resist manipulative tactics, such as those employed in Reptile/Edge Theory.

Skepticism is vital for defense success because it serves as a natural counterbalance to confirmation bias. Skeptical jurors are less likely to accept initial narratives at face value and more likely to consider alternate explanations, including the defense's perspective. By leveraging cognitive, emotional, and social desirability profiling, as well as confirmation bias assessment, attorneys can identify jurors with strong skeptical tendencies. These jurors provide a crucial safeguard against emotional or biased decision-making, fostering a more balanced and rational deliberation process.

## CONCLUSION

In the nuclear verdict era, the stakes for defense counsel could not be higher. *Voir dire* is more than a procedural step—it is the critical battleground for shaping a fair and impartial jury. The innovative approaches outlined in this article empower defense attorneys to move beyond traditional questioning, directly addressing the psychological forces that influence juror decision-making.

By integrating these techniques into a cohesive *voir dire* strategy, defense teams can dismantle the cognitive shortcuts that lead to biased outcomes. These methods not only expose potential biases but also elevate juror skepticism—ensuring that individuals who remain on the panel are equipped to critically evaluate the evidence without falling prey to emotional appeals or manipulative tactics.

The defense's ultimate goal is to safeguard the integrity of the trial process by fostering an environment of rational, evidence-based deliberation. Achieving this requires not just skillful questioning, but a deep understanding of the psychological dynamics at play. By applying these scientifically grounded methods, defense attorneys can take control of *voir dire*, leveling the playing field and setting the stage for a just outcome.