

LOOKING INSIDE YOUR OWN MIND



Taking a look inward, guided by neuroscience and social science principles, can make you a better lawyer and allow you to see your cases more clearly.

W

e litigators spend significant time trying to understand, capture, and convince the minds of others—judges, jurors, and adjusters. This focus on the other’s mindset allows us to craft persuasive messages. But in our search to understand and appeal to other minds, do we misunderstand and neglect our own? What can we learn by self-consciously turning our intellectual spotlight inward—by attempting to read our *own minds* first?

For decades, social scientists and neuroscientists have been doing just that: studying our cognitive processes and learning powerful secrets to the unconscious ways we distort our own thinking. Cognitive science teaches us much about the cause-and-effect stories we automatically tell ourselves, as well as our reflexive tendency to confirm our own self-serving narrative presuppositions. Research also reveals how easily we fall prey to “group think,” which is often coupled with our unconscious willingness to sink more time and costs into losing cases. These cognitive dangers are ever present in the trial lawyer’s practice. But they can be overcome thanks to recent scientific advances.

Several cognitive flaws can harm or limit us as lawyers, but we can defeat them.¹ We recommend appointing case “naysayers,” conducting “pre-mortems,” and implementing cost-benefit spot checks as countermeasures to poor thinking. These require both professional detachment and focused introspection. Once embraced, they will enable you to see better into your mind, while at the same time envision clearer paths to justice for your clients.

Narrative and Self-Serving Biases

We have a built-in storyteller living in our brain just above and behind our left eye and in our right brain.² This is the region of the brain that, as we are inundated with billions of bits of information, attempts to make sense of it all by filtering data through many layers of attitudes, societal norms, fiscal needs, and personal agendas, among countless other influences. So that these influences cohere with our sensory intake, we are constantly and subconsciously concocting yarns and plots that connect causes to effects. We seek patterns that hold our narratives together as we experience our world. This is the “narrative bias” through which we all make sense of our lives.

Our narrative bias is primarily egocentric: We are almost always the protagonist or hero in our own self-serving tales.³ As such, we come to believe we are better, smarter, and more rational than others.⁴ This automatic, unconscious spin doctor in all of us manifests as the “self-serving bias.” Together, these two mental predispositions—the narrative and self-serving biases—dominate our hidden mental lives, influencing our behaviors and decisions beyond our conscious awareness.

So, for example, when confronted with negative facts and opposition, we do not realize how the closely related

biases cause us to deselect, ignore, downplay, avoid, and deny that which does not comport with the story we've created. No one is immune from the delusive hold of the inner spin doctor or the powerful grip of our storytelling mind. Experiments demonstrate that people in highly educated disciplines, such as medicine and law, often are the most susceptible to such biases.

Our susceptibility to believe that our story is *the* correct one diminishes our abilities as trial lawyers because it blinds us to other plausible case views. This reality reveals itself in various unnoticed ways throughout our cases. It surfaces at case inception, when we first hear the client. It is equally prevalent in our trial preparation. Indeed, professional mediators often observe that many lawyers—separate from “posturing”—become overly attached to their stories and truly do not understand problems inherent in their cases. And mediators spend considerable time educating counsel on case weaknesses.

Confirmation Bias


Closely related to the narrative and self-serving biases, and further jeopardizing our advocacy, is confirmation bias.⁵ We actively seek only those facts that fit our storyline and reject those that don't. Research has shown that when more information comes to us that includes opposite viewpoints and contrary data, we still accept only the facts that confirm our narrative, even though that seems counterintuitive. Often, instead of being shaken or changing our views, our beliefs become even more firm in the face of contrary evidence.

Take this example of confirmation bias at work: If you are conservative, you may tend to like people such as Ann Coulter and Rush Limbaugh. If you are liberal, you may be likely to enjoy and find credible Rachel Maddow. This much is obvious. But consider further that when you expose yourself to the other side's rhetoric, the confirmation bias may actually predispose you to further discount opposing viewpoints and

attach yourself even more securely to your prior beliefs.⁶

This bias comes up when we discover our client's complicated medical history that confounds proximate cause, or when we learn about diverse scientific opinions regarding a potential defective product, or when someone misperceives that we have a liability problem. How many times have we dismissed a client's preexisting medical problem as irrelevant or not important, or not even bothered to discover that history as we prepare the case? Have we ever searched for alternative experts whose opinions contradict our own? How often do we say certain defenses are ridiculous or irrelevant even though they may be true? What have we thought when we've listened to focus group opinions about a case or a client? Often, we are shocked and then dismissive.

If we do not understand our own mental biases and then strive to overcome them, we may make poor choices. Once you begin to understand the



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distorting effects of the narrative and confirmation biases, you can implement solutions.

First, appoint someone in the firm or the litigation team to be the naysayer—the antagonist as you prepare for trial. This should occur the moment the client retains you. This person should have complete freedom to attack your case. Permit this “in-house defense attorney” to present opposite viewpoints and outline other counterfactuals and hypotheticals to create a spectrum of “defense” outcomes. As part of the analysis, the “in-house lawyer” should

- create juror characteristics you do not want and why. For instance, do you want nurses on your malpractice case or engineers on your bad product claim?
- outline the three most important reasons you will lose the claim
- set forth the defense counsel’s and opposing experts’ strengths
- research the venue’s possible negatives
- document jury verdicts that are disconcerting
- talk with other plaintiff counsel who have lost similar claims.

This last step, in particular, deserves our attention. We frequently share our victories but shy away from publicizing our losses. This is a mistake. While we do not need to parade our failed cases before the bar, we certainly can share our stories of failure privately for our colleagues’ benefit. We often learn best from our mistakes. Detecting and overcoming confirmation bias through the in-house defense attorney should be our first order of business, ideally preventing losses that can be avoided by considering the disconfirming evidence earlier.

When these measures fail to overcome confirmation bias, consider consulting with a respected colleague from the defense bar. Check first for conflicts, and be sure to address confidentiality

and nondisclosure before involving a defense attorney. Once you address these matters, direct the defense lawyer to disprove your case theory. Resist your urge to overcome the defense deconstruction or counter-case, and instead attempt to understand how your own case ignores the evidence against you.

This same tendency to disregard harmful facts can be revealed by asking your client to list the three most damaging or harmful facts in the case. Your client may surprise you by raising problems you’ve yet to consider, including a non-legal perspective that may sway a juror. This exercise has the added advantage of educating the client about the realities of the case.

Group Think and Pre-Mortems

Closely related to confirmation bias is the cognitive distortion known as group think.⁷ When people like each other, are somewhat isolated, and face crucial decision deadlines, the group becomes empowered and believes its decision is solid, if not invulnerable. Brain science teaches us that when such groups decide matters, they show an innate tendency to stereotype, maintain harmony, and conform.⁸ This dynamic can hinder progress. The problem is exacerbated when a boss or a superior actively participates, or when the consequences of disagreement are extreme. People are afraid to speak up, and this diminishes healthy debate.⁹

To avoid such psychological barriers, at least one person must be able to express adverse opinions or suggest alternatives without fear. Here, again, the in-house defense attorney or naysayer can be most effective. Also, consider breaking the group into pairs to encourage separate discussions; this can counter group thinking, too.

Even better, as you develop your case, you can look ahead and assume you lost the trial—conduct a “pre-mortem” analysis of the case.

MORE ON BIASES

🔗 Visit the Web pages below for additional information.

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You should analyze numerous factors, such as client likability and credibility, the experts’ opinions, opposing counsel’s legal skill, the defendant’s positions and personalities, and preexisting and postincident complications. We advise creating an objective master chart that lists, for instance, the likability and credibility of the plaintiffs—as well as the experts on both sides—and any other comments that a naysayer notes. Then, if you add up the pluses and minuses (or ratings from 1 through 10), this helps give you an overview of how the case looks.

Other line items to consider: Was the case professionally focused, what was the theme, did we learn all we could about our judge and jury pool, and how did the relevant law affect matters? Then, point by point, respond with the goal of seeing each problem fairly and accurately. You should *not* at first try to defeat the problem as you envision it, because this will only reinforce your tendency to biased thinking. Instead, you must first understand the problem clearly from the other side’s perspective, assuming it to be valid and winning. Focus group results are helpful in this regard.

Likewise, use list servers and various

other lawyer or nonlawyer sources to solicit opinions, knowledge, and comments from those with similar cases and experiences. Do not be afraid to inquire why cases were won or lost to uncover issues that made the difference in victory or defeat. Become a legal clinician, using as much detachment as possible for your own case when listening to what people will share with you. As the famous philosopher Sir Karl Popper opined, use others' skepticism as a modus operandi to better critique your thinking. Thank those who give you these gifts, and resist the urge to confirm only what you want to believe or feel you already know.

Sunk Cost Fallacy

We all have cases we've spent so much time, money, and energy on that we just can't seem to let go. Scientific studies illustrate that our aversion to loss outweighs the promise of gains.¹⁰ We tend to stay aboard our sinking ships because we've put so much time and energy into building them and keeping them afloat. Be wary of this classic mistake, the hallmark of the "sunk cost" fallacy.

Similarly, where our investments of time and money on a certain case grow exponentially, there is a tendency to "stay the course." This reaction can be irrational. The intensified commitment causes us to cling to the past and ignore


the reality that we must move on and no longer prosecute a case.

To combat this fallacy, regularly compute the odds of succeeding and decide whether more investment is warranted for your client's sake. It is important to reassess a case over time through independent opinions and the approaches suggested here. It may save the firm and the clients from going down with the ship.

At various stages of your case's development, compute specific predictions about the chances of victory. Do this at the outset, before filing suit, during discovery, before settlement negotiations, and again before trial. Make this analysis part of your routine case work-up. Include a breakdown regarding liability and damages. Delineate percentages of success and failure, put down a case value, and note estimated case expenses and time spent on the litigation. Then track and compare statistically the final outcomes with the predictions. As the case becomes more complicated and takes more time, do quarterly reviews. Invite someone from the firm who has not been working on the claim and get his or her reactions to the case's evolution. Such a metric allows for greater accountability and reduces the likelihood of sunk costs.


Another way to reduce sunk costs is to consider alternatives. For example, devise multiple case strategies and backup tactics for deposition questions, expert opinions, and settlement scenarios. This will avoid the tendency to lock into binary thinking, the yes-no mindset that sees only two mutually exclusive options. Such a narrow mindset encourages sunk cost thinking. But by devising alternatives, you can both open the array of choices and challenge your underlying assumptions (or at least make them clear).

We should routinely search for observations, comments, and criticisms that prove us wrong. If we seek what lies outside our own viewpoint, we can separate

A woman with long dark hair, wearing a black blazer, is sitting at a dark table. She is looking off to the side with a thoughtful expression, her hand resting on her chin. The background is a blurred office setting with other people.

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wishful thinking from reality. Appointing a naysayer can reduce the influence of confirmation bias. Pre-mortem examinations can avoid both confirmation bias and group think. Systematic cost-benefit checks throughout the case help you avoid the sunk cost fallacy.

Just as important as these cognitive techniques, we must vigilantly consider our own thinking as lawyers. This may be the most important—and humbling—lesson for lawyers in the wake of the cognitive revolution in the sciences. The multitude of biases and cognitive distortions that grip our legal thinking are vast. This article covers only a handful, but these are some of the most damaging to a clear view of our cases and legal positions. By taking the time to explore these solutions, you will not only improve your own mind but also enhance your clients' cases. 



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NOTES

1. This article is a primer and therefore does not contain a plenary discussion of our suggested approach, nor does it include all recommended steps.
2. Jonathan Gottschall, *The Storytelling Animal, How Stories Make Us Human* 95–99 (Houghton Mifflin Harcourt 2012).
3. Carol Tavis & Elliot Aronson, *Mistakes Were Made (but Not by Me)* 79–82 (Harcourt Books 2008).
4. Joseph T. Hallinan, *Why We Make Mistakes: How We Look Without Seeing, Forget Things in Seconds, and Are All Pretty Sure We Are Way Above Average* 149–67 (Broadway Books 2009).
5. Rolf Dobelli, *The Art of Thinking Clearly* 19–22 (HarperCollins 2013).
6. Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* 84–85 (Pantheon Books 2012);

Michael Shermer, *The Believing Brain: From Ghosts and Gods to Politics and Conspiracies, How We Construct Beliefs and Reinforce Them as Truths* 262–63 (Times Books 2011).

7. David McRaney, *You Are Not So Smart: Why You Have Too Many Friends on Facebook, Why Your Memory Is Mostly Fiction, and 46*

Other Ways You're Deluding Yourself 127–30 (Penguin Group (USA), Inc. 2011).

8. Dobelli, *supra* n. 5, at 73–75.
9. Chip Heath & Dan Heath, *Decisive: How to Make Better Choices in Life and Work* 93–99 (Crown Business 2013).
10. Daniel Kahneman, *Thinking, Fast and Slow* 345–46 (Farrar, Straus and Giroux 2011).

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