

# Breaking Down the Barriers to Bias: How to Uncover Bias During Jury Selection

## Introduction

All people – including potential jurors – are guided by “self-related motives,” meaning that a desire to maintain or promote favorable self-images influences their thoughts and actions. These motives significantly impact an individual’s ability and willingness to both detect and disclose their bias. This should be extremely troubling to all litigators, as something we depend on during jury selection is prospective jurors’ honesty. So faced with a group of complete strangers that have difficulty being honest with themselves, what are we to do? How can we confidently assess whether we should challenge a prospective juror if we cannot reliably gauge their biases? Application of five critical strategies set forth in this article will help you overcome prospective jurors’ tendency to “self-enhance,” thereby causing them to more freely admit their biases during *voir dire*.

## Psychological Background

Researchers in various disciplines of social and behavioral sciences have long studied the motivation behind human behavior and actions. Specifically, theorists, psychologists and neuroscientists have examined the phenomenon of “self-related” motives. These motives appear to have developed as a mechanism to protect a person’s social well-being, and are partially rooted in concerns about social approval and acceptance (Leary 2007).<sup>1</sup>

For instance, all people have a tendency to “self-enhance.” Two components comprise this tendency: (1) the desire to maintain or increase the positivity (or decrease the negativity) of one’s self-concept (a collection of beliefs about oneself); and (2) the desire to maintain, protect, and enhance one’s self-esteem (Blain & Crocker 1993).<sup>2</sup> Simply put, people “self-enhance” to boost their positive traits or decrease their negative ones, and their motivation for doing so is to have others perceive them as more socially desirable.

Four phenomena have been attributed to self-enhancement. These include:

1. Self-Serving Attributions – the tendency for people to attribute positive events to their own personal characteristics, but attribute negative events to factors beyond their control;
2. The Better-than-Average Effect – the tendency for people to evaluate themselves more positively than they rate the average person;
3. Implicit Egotism - the tendency for people’s positive, self-enhancing evaluations of themselves to spill over into their evaluations of objects, places, and people that are associated with them;
4. The Bias Blind Spot – the tendency for people to think that they are less biased than others (Pronin et al. 2004).<sup>3</sup>

## Real World Application

So what does this all mean? In essence, it means that people tend to view themselves as better than their peers, and want others to view them just as positively. A study conducted at the University of Southampton in England revealed the power and pervasiveness of the self-enhancement motive. Researchers in that study determined that the human tendency to consider ourselves better than our peers holds true even for convicted criminals (Sedikides et al. 2014).<sup>4</sup>

In the Southampton study, seventy-nine prisoners in south England completed a questionnaire that asked them to compare themselves to the average prisoner and the average member of the community based on nine attributes: morality, kindness to others, trustworthiness, honesty, dependability, compassion, generosity, self-control, and law-abidingness. With respect to *all nine* attributes, the prisoner participants rated themselves as superior to the average prisoner. More surprisingly, all seventy-nine prisoner participants rated themselves superior to the average member of the *non-prisoner* community on each of the nine attributes as well, with only one exception. Although prisoners did not rate themselves as more law abiding than non-prisoners, they did rate themselves as equal. The results suggest that even those who are incarcerated – like the rest of us – are strongly influenced by the self-enhancement motive, such that they desire to see themselves in a positive light and for others to look upon them positively as well.

## Application to Jury Selection

The self-enhancement motive that manifested in the Southampton study has dramatic significance in the context of jury selection. Even if we assume that potential jurors strive to answer questions asked in *voir dire* honestly and completely, their tendency to self-enhance suggests that for at least two reasons, they frequently will be neither honest nor open.

First, because potential jurors perceive themselves positively, they will be poor judges of their own bias. Prospective jurors view themselves as more open-minded, moral and unbiased than the average person. Consequently, they are reticent to acknowledge that they possess bias, because doing so would contradict their favorable self-image. For example, assume that potential jurors are asked during *voir dire*: “How many of you have a negative opinion of used car salesmen?” Most jurors will recognize the fundamental question being asked: “Are you biased against used car salesmen?” Believing themselves more open-minded, moral and unbiased than the average person, most prospective jurors will reject the possibility of bias and answer the question in the negative.

The tendency to self-enhance also impedes juror honesty and candor in another important way: even if self-enhancement does not prevent a juror from accurately assessing his/her own bias, it might prevent the juror from accurately **reporting** such bias. Although the tendency to view oneself positively is strong, the desire to be viewed positively by others may be even more powerful. Therefore, even potential jurors who acknowledge that they are biased will hesitate to admit what they deem to be a socially undesirable characteristic due to concerns about how they will be viewed by the judge, the attorneys and their fellow jurors. This hesitation will be particularly strong when no other prospective juror has acknowledged bias, such that an admission of bias would effectively constitute self-identification as the “least open-minded” of the group.

These barriers to bias pose a substantial threat to successfully ferreting out bias during jury selection. Recognizing that the tendency to self-enhance stifles juror acknowledgement of bias, the question becomes how to elicit bias despite these countervailing forces. Our experience and research establish that by applying the following five strategies you can surmount the self-enhancement phenomena.

## 5 Tips to Breaking Down the Barrier to Bias

Recognizing that the tendency to self-enhance stifles juror acknowledgement of bias, the question becomes how to elicit bias despite these countervailing psychological forces. Our experience and research teaches us that by applying the following five strategies you can surmount the self-enhancement phenomena:

**1. Build Conversational Rapport by Embracing the Concept of Bias.** At the outset of *voir dire*, explain that “bias” is not a pejorative four-letter word. Reassure potential jurors that we all have biases, that such predispositions are completely normal, and that it is okay to admit them both to ourselves and to others. Additionally, acknowledge how difficult and invasive the *voir dire* process can sometimes feel. Explain that you regret having to impose on potential jurors, but the process is absolutely critical to ensuring that justice is served.

Acknowledging the somewhat uncomfortable nature of the process will build rapport with jurors. This will increase the likelihood that they will feel more relaxed and let their guards down. When potential jurors feel comfortable with the questioning attorney during *voir dire*, they will be more likely to accurately assess and vocalize their beliefs and biases.

**2. Reward and Encourage Honesty.** The first time that a prospective juror discloses a bias, take a moment to acknowledge it. Thank the juror for their honesty, and note that it takes courage to be willing to speak frankly in public. Repeat that process to a lesser extent each time jurors disclose bias, thanking them for their honesty and willingness to meaningfully participate in the jury selection process. This approach will neutralize jurors’ subconscious perceptions of what is “good” (i.e., being completely unbiased and fair) and “bad” (i.e., being biased), thereby increasing their willingness to acknowledge and admit bias.

**3. Change the Conversation.** Due to juror tendency to self-enhance, loaded terms such as “fair” and “impartial” will signal to jurors what the “correct” answers are and fortify their barriers to bias. Rather than focusing the discussion on whether jurors believe they can be “fair,” “impartial,” and / or “unbiased,” center the discussion about open and honest beliefs and opinions. Jurors are far more likely to express bias when they can do so through a qualified statement of belief or opinion, rather than a confession they cannot be “fair,” “impartial” or “unbiased” on a particular issue.

**4. Circumvent the Barrier.** Frequently, an initial *voir dire* question that probes for bias will fall flat. For example, asking potential jurors “Do you assume that because a defendant is on trial, he/she must have done something wrong?” may not produce any affirmative responses. This does not necessarily mean, however, that jurors do not agree with the statement. Rather, jurors likely realize – whether consciously or subconsciously – that answering affirmatively will reveal that they are biased, something they are reluctant to admit to themselves and others.

Questions that more subtly explore potential biases are often more effective than leading with questions, such as the one above, that seek to elicit such a definitive expression of predisposition. For instance, before asking whether prospective jurors “assume that because a defendant is on trial, he / she must have done something wrong,” you might want to begin by asking questions along the lines of the following:

- What is the first thing that comes to your mind when you hear that someone has been arrested? Charged with a crime? Indicted? Why do you feel that way?
- How many of you feel that prosecutors usually get it right when they charge someone with a crime? Why do you feel that way?
- Some people feel that if someone is a criminal defendant, he / she must have done at least something wrong. How many of you agree with that? Why?
- By broaching the topic in the foregoing manner, prospective jurors will be far more willing to discuss their biases than when confronted with the all-or-nothing question of whether they will assume that the defendant is guilty.

**5. Turn the Tide.** An acknowledgment of bias from one potential juror can often be leveraged to elicit bias from other members of the panel. When an initial question designed to elicit bias fails to do so, do not assume that no bias exists. Continue probing by circumventing the barrier to bias, as discussed in the previous paragraph. Then, when a potential juror acknowledges bias, use that acknowledgment as an opportunity to elicit bias from other potential jurors. This can be as simple as asking: “Who agrees with [Juror X]?” Potential jurors will be more willing to align themselves with somebody else’s acknowledgment of impartiality than to risk singling themselves out as the only biased person with respect to a particular issue. With every new juror that acknowledges bias, it becomes easier for others to do the same. Capitalize on that momentum by revisiting other potential jurors after each new acknowledgment of bias.

## Conclusion

Most people possess “self-related motives.” Those motives cause people to view themselves as more moral, open-minded and unbiased than the average person, and to want others to view perceive them in exactly the same way. This tendency to “self-enhance” dramatically impacts jury selection by (1) interfering with jurors’ ability to identify their biases, and (2) discouraging them from disclosing bias during *voir dire*. Failing to identify and elicit these suppressed biases hinders practitioners’ ability de-select prospective jurors during jury selection. Employing the five strategies discussed above will help mitigate the effects of prospective jurors’ tendency to “self-enhance.”

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