

# Decision-making & Cognitive Errors

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Roadmap

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- Insights from the North Carolina Commission on the Administration of Law and Justice Final Report
- Insights from judges
  - On values
  - On courtesy
  - On fairness
- Insights from scholars
  - On cognitive errors
  - On decision-making



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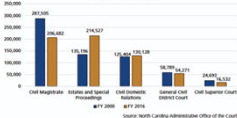
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NCCALJ Final Report p. 10

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Category	FY 2000	FY 2016
Civil Magistrate	135,196	124,527
Estates and Special Proceedings	135,196	214,527
Civil Domestic Relations	135,196	124,527
General Civil (District Court)	135,196	124,527
Civil Superior Court	135,196	124,527

Between 2000 and 2016, estates and special proceedings filings increased from 135,196 to 214,527 (an increase of 58%).

Civil magistrate, general civil district court (excluding domestic), and civil superior court filings all decreased.

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- “Ask citizens what they want from a court system and an immediate answer is likely to be ‘fairness.’”
- “Citizens should never have to doubt the fairness of their courts’ decisions.”

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#### Questions for discussion

- What is your process?
- What pressures do you face?
- What values do you hold?
- Judicial Decision-making and Civic Education, *Judicature*, vol. 105, no. 2, 2021.



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#### Questions for discussion

- **What is your process?**  
We’re going to return to this question in a while.
- What pressures do you face?
- What values do you hold?
- Judicial Decision-making and Civic Education, *Judicature*, vol. 105, no. 2, 2021.

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Questions for discussion

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- What is your process?
- What pressures do you face?
  - Parties
  - Intense issues
  - Media interest
  - Attorneys
  - Getting it right procedurally
  - Applying the substantive law correctly
- What values do you hold?

Judicial Decision-making and Civic Education, *Judicature*, vol. 105, no. 2, 2021.

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Values

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- What is your process?
- What pressures do you face?
- What values do you hold?
  - Evidence-based
  - Procedural due process
  - Rule of law

Judicial Decision-making and Civic Education, *Judicature*, vol. 105, no. 2, 2021.



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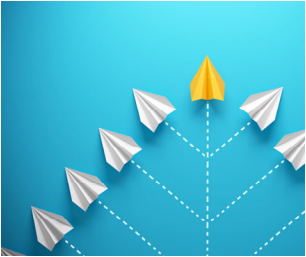
Values

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- Honest judicial officers can disagree about the facts
- Honest judicial officers can disagree about interpreting the law
- Honest judicial officers protect the process

Judicial Decision-making and Civic Education, *Judicature*, vol. 105, no. 2, 2021.



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“Both the law and etiquette provide rules for the promotion of continual harmony.”

*Judith Martin (Miss Manners)*



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Courtesy and subject matter jurisdiction 

- Some conflicts courtesy cannot resolve
- Some disagreements are outside the law
- Rules won't stop "aggressive jockeying and plain rudeness." p. 41
- Without courtesy, law cannot do its job
- Disagreements are a fact of life in a community ...
- ...and can be managed.



- All Judges are Political, Except When they are Not: Acceptable Hypocrisies and the Rule of Law, Keith J. Bybee (2010)

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What is discretion?

Between "must" and "cannot"



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What is your process for exercising discretion?



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Questions to ask yourself when exercising discretion

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- What am I allowed to consider?
- What am I forbidden from considering?
- What is fair to all parties in the matter?

Examples:

- “Which potential guardian is more worthy of trust?”
- “Do I believe the personal representative’s testimony is true?”

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Attorneys and self-represented litigants

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- A potential trouble spot
- What do you consider when there is an attorney on one side?
- What do you consider when one of the parties is self-represented?
- What do you do when one of the attorneys wants to run the hearing?

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Procedural fairness 

- Be a good listener
- Be a good communicator
- Care about the people before you
- Try to understand what brings them to court

• Judicial Decision-making and Civic Education, *Judicature*, vol. 105, no. 2, 2021.

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Survey on procedural fairness 

- Courts must be unbiased
- Courts must treat people with respect
- Courts must listen carefully to what people have to say
- Courts must care about the people before them and take their individual needs into account

• Warren, Roger K., "Court Review: Volume 42, Issue 1 - Judicial Accountability, Fairness, and Independence" (2005). *Court Review: The Journal of the American Judges Association*. 41.

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Cognitive Rationality



- Consider all relevant information
- Disregard irrelevant information
- Make decisions that do not depend on how info presented
- Use the rules of probability and logical inference

• Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).

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The Story Model and Coherence-based theories



- The court uses reliable and relevant evidence to tell a story.
- The court chooses the story that best explains the evidence.
- The story must not contain internal contradictions.
- Story created during the hearing.
- Courts “are often unaware of this coherence shift.” p. 388.

• Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).



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Cognitive errors



- Hindsight bias
- Context effects
- Anchoring
- Probability effects

- Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).

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Hindsight bias



- Overestimating the likelihood of an event after it happened.
- Considering the action in light of what happened later can lead you into error.
- To counter: consider alternate outcomes from the same initial act.



- Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).

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Order effect



- When the order in which information is presented to a court affects the judgment.
- Primacy or recency effects: earlier or later information influences the outcome more than information in the middle
- Studies show there is an advantage to presenting evidence last



- Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).

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Compromise and contrast effects



- The tendency of a court to choose an outcome in the middle rather than at an extreme.
- Camera survey: the addition of a more extreme option pulls courts to the middle option.
- This may not be a bad thing! May lead to more consistent and predictable results.
- Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).



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Omission bias



- Tendency to do nothing over acting when there are risks to both.
- Studies show that this tendency *increases the burden of proof*.
- Status quo bias: people tend to stick to the way things are
- Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).

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Anchoring effect



- Tendency to make judgments influenced by first number (anchor)
- Draws attention to information consistent with anchor
- Draws attention away from information inconsistent with anchor
- Even meaningless numbers can anchor!
- To counter: think about facts that undermine the anchor
- Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).



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Wells effect



- Hesitancy to apply the rules of probability to liability
- Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).

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Example



- Blue bus company runs 80% of the buses
- A bus crashed, causing injuries
- Is Blue liable?
- Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).



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Example



- Blue bus company runs 80% of the buses
- A bus crashed, causing injuries
- Just before the crash, a weigh-station attendant reported seeing a blue bus weigh in at the station
- The weigh station's records are wrong 20% of the time
- Is Blue liable?
- Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).

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### Base-rate neglect

- Ignoring statistical evidence
- Focusing only on individuating evidence, even when not relevant

- Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).

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### Example

- Jack is 45 years old
- Married, four children
- No political involvement
- Hobbies: carpentry, gardening, math
- He was randomly selected from a pool of 70 lawyers and 30 engineers.
- What is Jack's occupation?



- Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).

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### Circumstantial evidence: anti-inference bias

- Fact-finders are reluctant to rely on circumstantial evidence
- Circumstantial evidence requires drawing inferences
- But eyewitness testimony may be less accurate than an inference



- Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).

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Strategy: Consider the Opposite

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• First identify the bias

• Then imagine counterfactual scenarios that run against the effect of the bias

Doron Teichman & Eyal Zamir, Behavioral Economics and Court Decision-Making, 17 REV. L & ECON. 385 (July 2021).

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Fatigue

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• Poor speaking and writing

• Lack of new ideas

• Inflexible thought

• Attention on trivial matters

• Distraction

• Over-reliance on previous strategies

• Pamela Casey, Kevin Burke & Steve Leben, Minding the Court: Enhancing the Decision-Making Process, 49 CT. REV. 76 (2013).

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Depleted Resources

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• Glucose fuels the brain

- Controls attention
- Regulates emotions
- Resists impulsivity
- Copes with stress

• Consumed by self-control

• Pamela Casey, Kevin Burke & Steve Leben, Minding the Court: Enhancing the Decision-Making Process, 49 CT. REV. 76 (2013).

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Depleted Resources

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- Reflective processes
- Reflexive Processes
- Decision fatigue
- How to replenish: take a break and eat something
- Pamela Casey, Kevin Burke & Steve Leben, Minding the Court: Enhancing the Decision-Making Process, 49 CT. REV. 76 (2013).



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Mood

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- Positive moods associated with reflexive processes
- Negative moods suggest a problem, engage thought
- Pamela Casey, Kevin Burke & Steve Leben, Minding the Court: Enhancing the Decision-Making Process, 49 CT. REV. 76 (2013).



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Quick question

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A bat and ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost?



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Why did I ask you to do math on Thursday afternoon?
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- Familiar-looking information can prompt faster, incorrect responses
- Slowing down can lead to correct answers
- Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 49 CT. REV. 76 (2013).

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Multitasking
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- Rapid switching between tasks
- Taxes 97.5% of people
- Multitasking feels good
- Are you a supertasker? Remember this cognitive bias: base-rate neglect!
- Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 49 CT. REV. 76 (2013).

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Decision-making strategies
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- Use your full attention
  - Checks reflexive processes
  - Helps ensure fairness
- Use decision aids
  - Checklists
  - SOG Bench cards
- Seek feedback from colleagues
- Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 49 CT. REV. 76 (2013).

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Decision-making strategies

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• Read the dials

– Take stock of distractions

– Is the courtroom too hot or cold?

– Is the hallway too noisy?

– Is it time for a break?

• Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 49 CT. REV. 76 (2013).



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Litigants have a powerful need  
to be heard.

Hon. Kevin Burke & Hon. Steve Leben



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