

#005



P.O. Box 22524  
Trenton, NJ 08607

P.O. Box 7316  
Trenton, NJ 08628

March 12, 2021

Via Electronic Mail  
Comments.Mailbox@njcourts.gov

Honorable Glenn A. Grant, J.A.D.  
Acting Administrative Director of the Courts  
Comments on Proposed Jury Impartiality Initiatives  
Hughes Justice Complex - P.O. Box 037  
Trenton, New Jersey 08625-0037

Dear Judge Grant:

The Association of Black Women Lawyers of New Jersey (ABWL-NJ) and the Garden State Bar Association (GSBA) commend the New Jersey Supreme Court's efforts to advance the constitutional right to fair and impartial jury trials.<sup>1</sup> The Court is in the forefront and poised to join Arkansas, California, Connecticut, Illinois, Massachusetts,<sup>2</sup> Michigan, Missouri, Oregon, Pennsylvania, Washington, the Ninth Circuit and the United States District Court, Western District of Washington, in implementing juror-focused strategies to reduce implicit bias.<sup>3</sup>

We acknowledge the extensive body of social science, neuroscience, and academic research on understanding how the brain works, implicit bias, and the broad implications that implicit bias may affect understanding, decision-making and behavior in ways that promote disadvantage (and advantage) to some groups in the justice

<sup>1</sup> Court Notice Implicit Bias Proposal <https://njcourts.gov/notices/2021/n210204a.pdf?c=9Zh>

<sup>2</sup> <https://www.mass.gov/files/documents/2019/04/04/jud-dc-1100-impaneling-the-jury-march-2019.pdf> (last visited March 11, 2021). See page 5 of instruction.

<sup>3</sup> See, *Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson, Supreme Court of Connecticut, Dec. 31, 2020, p. 35, fn. 58* (collecting annotations state and federal implicit bias instructions, except Massachusetts). Northern District of Iowa, District Court Judge Mark W. Bennett, recognized as the first judge to give implicit bias instructions, but it is not District court wide.

system. We have no doubt that the Juror Impartiality Working Group, Supreme Court Model Criminal and Model Civil Jury Charge committees engaged in earnest in this complex undertaking, including considering the debate of whether such enhancements will help or harm. Nevertheless, we welcome this window of opportunity to offer additions, further enhancing the proposed amendments.

The Working Group's proposed mandatory juror orientation video, two open-ended *voir dire* questions and three amendments to the criminal and civil model jury instructions are important first steps in juror implicit bias awareness education. However, we note that more information about the proposed video may have aided our review and may help stakeholders in any subsequent comment opportunity. In the absence of a definition of "implicit bias" in the proposal, the comments of ABWL-NJ and GSBA are based on a definition of "implicit bias" as "automatic and non-conscious attitudes and stereotypes held toward members of certain groups.<sup>4</sup> An "attitude" is an association between a social group and positive or negative evaluation of that group (likes and dislikes, favorable and unfavorable).<sup>5</sup> A "stereotype" is an association between a social group or category and a specific trait.<sup>6</sup>

The Working Group's proposal has close similarities to the multi-prong approach used by the United States District Court, Western District of Washington. First, prospective jurors view a video, now accessible on the District Court's website, which has been shown for all juror orientations in the Western District's Seattle and Tacoma courthouses. The 11-minute video, [link embedded] is the first of its kind in the nation. The protocol then provides four additional opportunities to increase juror awareness of implicit bias concepts: in two preliminary instructions (one for all prospective jurors incident to *voir dire* and the second for the jurors selected to serve), a witness credibility instruction, and a final closing instruction. This "priming approach" is premised on the notion that it may be more effective to provide guidance at the beginning, and earlier stages, and not wait until the end of the evidence. The substance of the protocol is deserving of high marks.

ABWL-NJ and GSBA recommend content that our Court should consider from the Western District's model.<sup>7</sup> Also, it is in order to add more specificity to describe a process, how, jurors can counteract implicit bias. A charge recently endorsed in a Connecticut jury selection report dated December 31, 2020, does just that and would

---

<sup>4</sup> See, e.g., Sharon Price-Cates, Esq., *Implicit Bias: New Science in Search of New Legal Strategies Toward Fair and Impartial Criminal Trials*, 313 NJ LAWYER 65 (August 2018); Anthony G. Greenwald and Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Cal. L. Rev. 945, 964-47 (2006).

<sup>5</sup> *Id.* at 948-49.

<sup>6</sup> *Id.* at 949-50.

<sup>7</sup> <http://www.wawd.uscourts.gov> (last visited March 6, 2021).

make the Working Group's proposal even stronger in helping jurors carry out their obligations of impartiality and fairness.<sup>8</sup>

A. Working Group's Two Proposed Implicit Bias Voir Dire Questions

**ABWL-NJ and GSBA** recommend that the Court adopt the Western District's initial preliminary instruction, which is given to the entire jury panel incident to *voir dire* as follows:

*It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender [et.] of the [plaintiff,] defendant, any witnesses, and the lawyers, should play no part in the exercise of your judgment throughout trial. Accordingly, during this voir dire and jury selection process, I [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.*

This first formal instruction incident to *voir dire* addresses a recommendation from the American Bar Association<sup>9</sup> for broad-based implicit bias instructions that encompass references to protected categories, such as those protected under state and federal law. It also serves to bring within its ambit the broader class of persons to whom neutrality and impartiality also must be accorded in order to ensure a fair trial.

B. Working Group's Proposed Jury Instructions

I. Working Group's Proposed Revisions to the "Preliminary Instructions to the Jury" Model Criminal Jury Charge - Revisions Shown in Bold/Underscore Font.

(Page 1 of 8 & 2 of 8)

Everyone of us makes implicit or unconscious associations and assumptions, and has biases of which we are not consciously aware. Implicit or unconscious thinking, including implicit bias, affects what we see and hear, how we remember what we see and hear, and how we make decisions. Jurors have an obligation to judge the facts and apply the law as instructed without bias, prejudice or partiality. To do so, jurors need to acknowledge their own implicit or unconscious biases so as to not to be affected by them during the trial and jury deliberations.

(Page 3 of 8)

---

<sup>8</sup> See, *Report of the Jury Selection Task Force To Chief Justice Richard A. Robinson, supra.* at 34-41.

<sup>9</sup> ABA House of Delegates, Resolution 116, Aug. 2016, approving support for specialized implicit bias jury instructions.

This includes recognizing and not being affected by implicit or unconscious bias.

**ABWL-NJ and GSBA** urge the Court to include additional content to the proposed Preliminary Instruction, starting with a plain language definition of implicit bias. It is not addressed in the proposed Preliminary Preliminary instruction. Even if such a definition will be reflected in the proposed video, the working definition that jurors are expected to keep in mind is critical and significant to warrant repeating.

*Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control or intention. Like [explicit] conscious bias, [implicit] unconscious bias, too, can affect how we evaluate information and make decisions.*<sup>10</sup>

II. Working Group's Proposed Revisions to the "Instructions After Jury is Sworn" Model Criminal Jury Charge - Revisions Shown in Bold/Underscore Font.

(Page 6 of 11)

The responsibility of all jurors is to reach a fair verdict on the law as the judge explains it and on the evidence in the case. The court's goal in every jury trial is to seat jurors who will decide the case before them without prejudice or bias because under our Constitution everyone deserves a fair trial.

Jurors fulfill this responsibility by remaining impartial, or neutral, until the jury reaches a verdict. Remaining impartial throughout the trial means ensuring that jurors are not affected or influenced by biases or any preconceived ideas about the case.

It is your duty to weigh the evidence calmly, impartially, and without explicit or implicit bias, passion, prejudice or sympathy, and to decide the issues [upon] on the merits.

**ABWL-NJ and GSBA** urge further, as a part of the credibility instruction enhancement, the following language:

You must avoid *bias, conscious or unconscious, based on witness's race, color, religious beliefs, national origin, age, disability, gender, sexual orientation, gender identity, or expression, in your determination of credibility.*<sup>11</sup>

III. Working Group's Proposed Revisions to the "Final Instructions to the Jury" Model Criminal Jury Charge - Revisions Shown in Bold/Underscored Font  
(Page 5 of 13 - 6 of 13)

---

<sup>10</sup> Western District Preliminary Instruction, Duty of Jurors, at page 3 of 5.

<sup>11</sup> This formulation is taken from a portion of the Western District Court credibility instruction.

As jurors, your oath requires that you not be affected or influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including implicit, or unconscious, bias. During your deliberations if you think unconscious bias is affecting your evaluation, think about the evidence again with the video and this instruction in mind.

**ABWL-NJ and GSBA** observe that the current proposals do not offer jurors a specific “how to,” practical process or technique to evaluate whether implicit bias may be at work in one’s decision-making. Therefore, ABWL-NJ and GSBA urge the Court to add more specificity in what individuals can do to counteract implicit bias. Portions of an experimental jury instruction from the National Center for State Courts are instructive. Also, considering the concepts of primacy and recency — that what is learned first and last tend to be best retained and remembered — we urge that our recommendations in this section be reflected in the Final Instruction.

*We can only correct for hidden biases when we recognize them and how they can affect us. For this reason, you are encouraged to thoroughly and carefully examine your decision-making process to ensure that the conclusions you draw are a fair reflection of the law and the evidence. Please examine your reasoning for possible bias by reconsidering your first impressions of the people and evidence in this case.*

A portion of ABA “Achieving an Impartial Jury” (AIJ) project instruction is also directed toward explaining to jurors how to re-examine initial conclusions that may be affected by implicit bias.

*Take the time you need to test what might be reflective unconscious responses and to reflect carefully and consciously about the evidence. Focus on individual facts, don’t jump to conclusions that may have been influenced by unintended stereotypes or associations. Try taking another perspective. Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group? You must each reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives than yours. Working together will help achieve a fair result.*<sup>12</sup>

Similarly, the Connecticut judiciary has a criminal implicit bias jury instruction, which is under review for revision and to extend to civil cases, as set forth in its recent Task Force Report just released on December 31, 2020. The Connecticut proposed jury

---

<sup>12</sup> ABA-AIJ instruction, supra at 17 of 68 and fn. 65-66 pointing out similar language in National Center for State Court formulation and District Court Judge Bennett. It also noted that the formulation positive effects of less of authoritarian instructions.

instruction amendment embodies language embraced by the ABA-AIJ project. The Connecticut Report noted concerns that merely introducing the concept of implicit bias is insufficient, explaining that a fuller explanation is likely to help jurors understand the concept better and motivate jurors to try to correct for the effects of bias, while explicitly instructing them on a process to do so.<sup>13</sup> The language is inclusive [our, we, us, all of us] and gives the jurors a who, what, why, and how “de-biasing” approach, thus promoting understanding the reasoning behind the instruction. It also places the jurors in the system of justice as indispensable partners, with the judge, to counter reflective responses needed to deliver fair and just decisions. <sup>14</sup> The Connecticut Task Force Report, characterized it as having jurors feel like an “in-group” with the judge.

As I indicated earlier, your verdict must be based on the evidence, and you may not go outside the evidence to find facts; that is, you may not resort to guesswork, conjecture or suspicion.

Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. All people deserve fair treatment in our system of justice, regardless of their race, national origin, religion, age, ability, gender, sexual orientation, education, income level or any other personal characteristic. Scientists studying the way our brains work, however, have shown that for all of our first responses are often like reflexes. Just like our knees reflex, our mental responses are quick and automatic.

Even though these quick responses may not be what we consciously think, they can influence how we judge people and how we remember or evaluate the evidence. This kind of quick, unconscious response is what is known as an implicit bias. Although our implicit biases can affect how we perceive, remember and evaluate information, being aware of them can help you avoid their influence.

Here are some techniques to identify and counter implicit biases. Slow down and examine your thought processes thoroughly to identify where you may be relying on reflexive, gut reactions or making assumptions that have no basis in the evidence. Ask yourself whether you would view the evidence differently if the defendant or victim were of a different race, gender, or ethnicity than they are - for instance, if the defendant is White and the victim is Black, whether you would view the evidence differently if the defendants were Black and the victims were White. Listen carefully to

---

<sup>13</sup> See Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson, *supra*. at 34-39.

<sup>14</sup> *Id.* at 40-41. Full proposed charge with tracking changes from the existing criminal implicit bias instruction. The Report’s recommendation also urges the instruction be given at the beginning and end of the trial. Proposal also calls for a video on the Western District Court model.

the opinions of your fellow jurors, each of whom brings a different, valid perspective to the table. <sup>15</sup>

In sum, ABWL-NJ and GSBA applaud the multi-prong approach advanced by the Working Group to promote juror implicit bias awareness in protecting the right to fair and impartial jury trials, although noting that more detail or outline of the video content would be helpful. Bias, whether implicit or explicit, has no place in our justice system. The Court recognizes that implicit bias exists and cannot be ignored. This first step - promoting awareness - is significant as the window of opportunity to address juror education is narrow. Our recommendations seek a plain language definition of implicit bias in the jury instructions. We are seeking further enhancements to acknowledge the specific broad-based personal characteristics that cannot be the source of bias and discrimination in the dispensation of justice. Finally, we offer (1) examples of more specific and robust instructions, focusing on techniques that may assist jurors in counteracting implicit bias and recommend (2) placing them in the final instruction where they are most likely to be remembered.

Thank you for your consideration.

/s/ Marsetta Lee, Esq., President ABWL-NJ

/s/ Dean L. Burrell, Esq., President GSBA

/s/ Sharon Price-Cates, Esq., Past President ABWL-NJ (Comment Contact [sprice.cates@gmail.com](mailto:sprice.cates@gmail.com) )

---

<sup>15</sup> Id.