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March 12, 2021

Hon. Glenn A. Grant, J.A.D.

Acting Administrative Director of the Courts  
Comments on Proposed Juror Impartiality Initiatives

Hughes Justice Complex; P.O. Box 037

Trenton, New Jersey 08625-0037

**Re: NOTICE TO THE BAR - Supporting Juror Impartiality by Addressing Implicit Bias – Proposal for (1) New Model *Voir Dire* Questions and (2) Updates to Model Civil and Criminal Jury Charges**

Dear Judge Grant:

The New Jersey Association for Justice (NJAJ) welcomes the opportunity to offer our comments on these important issues. On behalf of our more than 2,700 members I thank you for your commitment to combatting implicit bias.

NJAJ’s Statement of Mission and Values calls on trial attorneys to “advocate tirelessly for the fair administration of justice and for the constitutional right to a trial by jury; and to promote the administration of equal justice for all, for the public good ... [and] to zealously and honorably advocate for the rights of those for whom we speak; and to exhibit fidelity to the administration of the law with fairness, compassion, understanding and truth.” We respectfully offer these comments consistent with our mission and values and in an effort to partner with New Jersey’s Judiciary to support juror impartiality by addressing implicit bias.

NJAJ welcomes the opportunity to discuss and implement practices that name and acknowledge the existence of bias in the courtroom. To effectively comment upon this proposal, NJAJ has relied upon the extensive expertise of Gloria McDonald, MSOD. She is the organization’s Diversity, Equity, and Inclusion professional consultant and has worked with NJAJ for several years on diversity, equity, and inclusion issues. She designs and teaches extensive programs aimed at educating our leaders and members regarding bias and related concepts.<sup>1</sup> Her deep experience in educating professionals regarding the concepts of bias informs these comments.

NJAJ respectfully submits that all stakeholders be provided the opportunity to review and comment upon any visual and written media proposed to be used during juror orientation as well as any additional materials proposed to be used at any other time during jury service. The Proposal indicates that the existing juror orientation process will be supplemented with “a concise video about bias, including both explicit and implicit bias, which emphasizes the importance for jurors to recognize the effects of implicit biases so that they can discharge their duty of impartiality.” NJAJ believes that consideration of comments and opinions from the Bar on the tools and techniques used to educate and inform jurors will improve the effectiveness of those tools and techniques.

Bias, whether conscious or unconscious, is deeply embedded in all of us. No one is immune from their own stereotypes, prejudices, and fears. Our biases can influence how we categorize the information we take in. They can influence what we see and hear, and how we perceive a person or a situation. They can affect the facts and opinions we remember and how we remember them. They can influence the “gut feelings” and

<sup>1</sup> NJAJ requires its leaders to participate in implicit bias training and has included implicit bias training as part of many of its educational programs for the last three years.

*Protecting People’s Rights.*



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conclusions we form regarding individuals and events causing us to view them more positively or negatively than facts may support.

When we are aware of these biases, we can attempt to interrupt them in an effort to limit their influence on our decision making. But often, we are not aware that they exist. We can only correct for hidden biases when we recognize them and how they affect us. The process of creating awareness is not simple or easy but can occur through sustained effort utilizing multiple sources. Consistent messaging and reinforcement from judges and attorneys during *voir dire* is necessary to stimulate anti-bias thinking.

Expanding juror orientation to include implicit and explicit bias instruction will provide the opportunity for introducing the panel to bias and its effect on our decision-making processes. The tools used to inform the jurors as well as their timing and reinforcement will have a major impact on juror ability to understand and retain concepts that support juror impartiality.

The reduction of conscious or unconscious bias in decision making requires:

1. Education
2. Self-awareness
3. Self-discipline
4. Motivation to change

The most prevalent bias is likely to be **Blind Spot Bias**. People tend to see themselves as less susceptible to bias and cognitive influences and instead see others as more susceptible to bias.

Judges, attorneys and jurors also are subject to Blind Spot Bias.

Science has proven the existence of the bias blind spot. A study conducted at Stanford University, <https://psychology-spot.com/bias-blind-spot/>, revealed that most people (exactly 87%) consider that they are better than the average. Sixty-three percent think that the self-portrait they have of themselves is objective and reliable, so they do not recognize the existence of biases, and 13% even claim to be very modest when describing themselves.

These psychologists discovered that only 24% of people, when they are informed of the existence of the bias blind spot, are able to recognize that perhaps their self-concept could be mediated by some cognitive bias.

Demonstration of impartiality (adjustment of thoughts and behavior) takes time and practice in multiple situations and settings. Education through a single video viewed on the day of jury selection will not provide the time necessary for introspection or allow jurors time to identify and shift patterns of thinking. It will not meet the needs of those who require more time to process or those who learn better by reading or discussion with others.

The typical juror selection and jury instruction process occurs in a space of sensory overload. Jurors are in an unfamiliar setting, being personally examined and asked to retain a high volume of critical information that can change the life of another person. Any or all of these can create extra stress and discomfort. This is not the best time to gain mastery of new concepts.



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NJAJ respectfully requests the opportunity to supplement these comments upon review of the visual and written materials proposed to be used during juror orientation.

NJAJ respectfully requests consideration of the following recommendations based upon the proposed procedure and available materials:

- NJAJ recommends that the oath taken by jurors before they are brought to the courtroom include language requiring each juror to affirm that they will be honest and truthful in response to *voir dire* questioning.
- NJAJ recommends that all written materials for jurors be drafted using clear and easily understood language. This will reduce bias that favors certain types of education and work/life experience.
- NJAJ recommends that the court mandate that the proposed additional questions addressing implicit bias are not intended to take the place of the presently existing right of each party to have open-ended questions as proposed by the parties directed to the jurors.
- NJAJ recommends that all prospective jurors be given access to implicit bias training in both video and written format *before* they report for jury selection. This will allow prospective jurors to familiarize themselves with potentially unfamiliar concepts. This should not replace any onsite training, but rather be used to allow jurors to prepare for a process which might otherwise lead to sensory overload during their first day of jury service.
- NJAJ recommends that attorneys be granted discretion regarding who (judge or attorney) directs the follow up questions necessitated by responses to the proposed additional questions as well as any other inquiries proposed by the parties.
- NJAJ recommends that the court review all communications to correct any language that may marginalize any individual in the courtroom. One example of this is to use gender neutral pronouns where possible.
- NJAJ recommends that a pilot program be instituted to include a survey of lawyers, judges, jury control personnel and jurors following trial regarding observations of the impact of implicit bias processes.

NJAJ proposes additional language be added to the "Final Instructions to the Jury" Model Criminal Jury Charge and the Model Civil Jury Charge. Without the following language these charges would be deficient because the language fails to take into account that in most, if not all, criminal and civil jury trials, prospective jurors will express some bias, like or dislike (be it against a protected class or otherwise) during *voir dire* but when questioned by the Court and counsel will affirmatively express that they can put the stated bias aside and decide the case fairly based solely upon the evidence presented during the trial and the law given to the jury by the Court. As written, the proposed additional language to

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be added to the final charge fails to remind jurors that during *voir dire*, they committed to the Court, the parties and their lawyers that they could put aside whatever bias they expressed and decide the case fairly based solely upon the evidence presented during the trial and the law that the Court provides in its charge and that the jurors need to honor that commitment in the jury room all the way to the end of their deliberations until such time as they have rendered a verdict in the case. To this end, it is suggested the following additional language be added right after the Court's already-proposed additional language:

I will also remind you that during the jury selection process, some of you expressed to the Court some degree of bias, like or dislike but then committed to this Court, the parties and their lawyers that you would put the bias, like or dislike aside and decide the case fairly based solely upon the evidence presented to you during the trial and the law that I provide to you. Each of you needs to honor this commitment in the jury room throughout the entirety of your deliberations as jurors until such time as you have rendered a verdict in this case and have been discharged as jurors in this case.

It is respectfully submitted that there is no good reason that the proposed instruction should differ between criminal and civil jury trials.

Finally, it is respectfully submitted that videos and revised jury instructions that include reference to implicit and explicit bias cannot serve as a substitute for thorough *voir dire* to find bias in prospective jurors. This is particularly the case given that the prospective jurors who have the most ingrained biases and deeply held beliefs may find it most difficult to admit to bias during *voir dire* and deny any bias if all they receive is a cursory examination.

A 2016 article from Psychology Today bears this out.

“In fact, one characteristic of strong and resilient beliefs is their internal logic and structure, even when they defy logical verification as a whole. As a result, believers come to arguments well-prepared, having become adept at using their confirmation bias – the natural inclination to avoid any information that contradicts a strongly held belief, while seeking out information that strengthens it.”

<https://www.psychologytoday.com/us/blog/true-believers/201603/5-reasons-why-people-stick-their-beliefs-no-matter-what>.

Jurors who are fully capable of admitting to bias are the ones more likely to readily express whatever bias they may have. Thus, it is likely that a lack of thorough *voir dire* makes it more likely that those jurors with the strongest biases will end up being selected for jury service.



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The Court's commitment in this regard to improving the jury charges and *voir dire* to root out jury bias is greatly appreciated.

Thank you for the opportunity to provide comments on this important proposal to support juror impartiality by addressing implicit bias.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "E. Capozzi".

Edward P. Capozzi, Esq.

President