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Subject:	[External]Commentary for the Judicial Conference on Jury Selection

To Hon. Glenn A. Grant, the New Jersey Supreme Court, and those organizing the New Jersey Judicial Conference on Jury Selection:
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I would like to submit the following commentary for consideration at the Judicial Conference on Jury Selection.

First, I would like to express appreciation that the court is exploring ways to improve jury selection practices. The jury selection process is designed to allow parties in a criminal and civil case to have their matter heard by an impartial jury. Unfortunately, in most court systems, there is an inadequate understanding of bias and poor procedures to assist both attorneys and judges in understanding how a juror's experiences or beliefs will influence how they listen to and judge a case. As a result, a number of discriminatory and erroneous jury selection practices have evolved over the decades.

- Attorneys and judges are not trained in law school on how to ask open-ended questions in voir dire. Open-ended questions invite jurors to disclose prior experiences or attitudes that may affect their listening and decision-making that may give rise to a bias.
- Attorneys are taught to be strong advocates, which has often led them to giving speeches or exacting promises from jurors in voir dire rather than helping jurors to disclose personal information which may affect their service.
- Because of this prior training, most voir dire is conducted in the model of witness examination, or by oath taking, neither of which allows for full disclosure and discussion of juror experience or beliefs.
- As a result, most judges in Federal court and many judges in state court do not allow attorney conducted voir dire. If they do, they allot time limitations for attorneys rather than focus on the quality of information that the court is receiving from jurors. This is also compounded by the desire on a given judge's part to get a trial underway or to deal with an insufficient pool of jurors.
- The preceding circumstances have resulted in the attorneys and the courts having insufficient information, data as it were, about jurors and how their backgrounds and beliefs may affect the way they listen to the case.
- This has led attorneys to using peremptory challenges based on demographic information: race, gender, age, education, etc.
- Which has obviously led to a discriminatory use of peremptory challenges.
- Which has led Washington and California to change their Batson procedures and Arizona to eliminate peremptory challenges altogether.

Rather than looking at eliminating or reducing peremptory challenges, or making other changes to jury selection procedures through legislative or procedural rules, it is more prudent to address jury

selection reforms through education and training. Here are a number of principles to start addressing these necessary reforms.

- Bias is a spectrum that can range from impressions to preferences to preconceptions to strongly held beliefs or actual prejudice. While the courts have traditionally defined bias as falling into categories of "explicit", "implied", and "inferred", bias does not operate in these distinct categories.
- Bias can be both positive and negative. You can biased in favor of something or biased against something.
- Everyone has biases: jurors, judges, and attorneys. It is not whether a juror, attorney, or judge has a bias, it is *how* that bias affects their analysis and judgement.
- Most bias is implicit bias. It operates on a subconscious level.
- Making a person aware of their implicit biases rarely cures the bias. However, efforts can be made to adjust for the bias.
- People cannot just "set aside" a bias or "put it out of their mind," despite their promises to do so or assurances. However, they can be made more aware and can check themselves to evaluate whether they are being affected by prior experiences or beliefs.

Here are a number of practices that will assist the courts and attorneys to better understand bias so they can better evaluate cause and peremptory challenges.

- Use written questionnaires. Many can be targeted to bias issues in the case and can be relatively short. Jurors are more candid and less likely to give socially acceptable answers in written form.
- Have attorneys articulate in pre-trial conferences or motions the particular biases they are concerned about.
- Because most bias issues in a case will fall into implicit bias categories, voir dire on bias issues should be conducted to explore the experience or belief *with* the jurors. Implicit bias means that jurors themselves do not even know they have the belief. Therefore, it is best to conduct voir dire in the spirit of inquiry and curiosity rather than judgement.
- When asking jurors about a bias, focus on the principles of length, strength, and frequency. In other words, how long ago was the experience, how long have they held the belief, how strongly do they feel about the experience or belief, and how often do they think about or express their feelings?
- Don't use the word "bias" when speaking with the juror. This will automatically inhibit their willingness to disclose their true feelings.

There are many more practices that will assist judges and attorneys to make appropriate decisions in jury selection and to prevent the discriminatory use of challenges. I urge the Committee to strongly consider training and education to address the important issue of maintaining diversity in our jury pools.

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