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NEW JERSEY STATE BAR ASSOCIATION

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Honorable 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, NJ 08625-0037

Re: Comments on Proposed Juror Impartiality Initiatives

Dear Judge Grant:

The New Jersey State Bar Association (NJSBA) thanks the Judiciary for the opportunity to comment on the proposal for (1) new model *voir dire* questions and (2) updates to model civil and criminal jury charges. The NJSBA believes these are important proposals that warrant careful, thorough and thoughtful consideration before they are implemented.

The NJSBA supports the laudable goal of enhancing juror impartiality through education, awareness and discussion of implicit bias, however there are many questions about whether the proposed video, model *voir dire* questions and jury charge amendments will be able to achieve that goal.

The Video: It will be important to carefully prepare any proposed juror video to ensure it creates the proper tone, provides diverse and wide-ranging examples of what implicit bias can encompass, provides examples of how to identify implicit bias, and provides methods to minimize its impact on deliberations. Because the content of the actual video that will be shown to jurors is so central to the effectiveness of the proposal, the NJSBA believes it will be important to have an opportunity to review it before it is shown to any potential jurors. We urge the Judiciary to seek additional feedback when the video is complete.

Model Voir Dire Questions: The NJSBA questions whether the proposed additional model *voir dire* questions will be effective to address the implicit biases of potential jurors, even with the proposed video. It may not be realistic to expect jurors to be able to identify their individual biases and then pledge to set them aside. A more realistic inquiry might be whether jurors could fairly decide the case, notwithstanding any potential biases they may have.

The NJSBA also believes a more robust and detailed inquiry of potential jurors, tailored to the particular case, would be an effective component to the Judiciary's effort to identify and eliminate the influence of juror bias. For example, prospective jurors should be asked about the Me Too movement in sexual harassment cases, and there should be questions about the Black Lives Matter movement in cases where people of color are key or material witnesses.

Model Charges: The NJSBA is supportive of the changes to the model charges, but notes that, in the current proposal, the terms "unconscious bias" and "implicit bias" are both used in the amendments to the model charges. We recommend using only the term "implicit bias" to ensure consistency and not to cause any confusion or misunderstanding.

Additional Recommendations: The NJSBA urges the Judiciary to take additional steps to ensure that the trial court is able to fulfill its duty to "take all appropriate measures to ensure the fair and proper administration of a trial, including by searching out juror biases and seating an impartial jury." Specifically, we believe that juror biographical questions should be updated, juror *voir dire* should be expanded, peremptory challenges should affirmatively be kept intact, and the proposed changes should be tested with a focus group before being implemented throughout the state to ensure they achieve the desired outcome.

The current juror biographical questions should be updated to reflect current social realities, and should ask about interactions on social media sites and other online sources of news. The current biographical questions ask, "which television shows do you watch," and "from what sources do you learn the news, i.e., the newspapers you read or radio or TV news stations you listen to." Those references ignore other potential and important sources of information that are useful in uncovering potential implicit bias. The questions should be modified to ask jurors where they get their news, and ask specifically about what news organizations or other sources they get their facts from, whether they be television, radio or the Internet.

In addition, the NJSBA suggests that the current *voir dire* process be expanded to permit a more meaningful exchange between attorneys and jurors, with attorneys being able to ask more questions and engage in a direct exchange with potential jurors. Currently, the process relies upon model questions with limited case specific input by the attorneys. It is not unusual to have judges inform parties that they do not ask certain questions, even though the parties have jointly requested a question or series of questions. In some courtrooms, the "open ended questions" are limited to a particular list or a limit in the number of questions. Research suggests, however, that potential jurors respond more candidly and are less likely to give socially desirable answers to questions from lawyers than from judges. *See, e.g.,* Mark W. Bennett, "Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions," 4 Harv. L. & Pol. Rev. 149,160 (2010).

Additionally, it is not enough to rely on cause challenges alone to eliminate jury bias, especially when *voir dire* is as limited as it is in the current process. There is not enough information generated to create the necessary record to adequately evaluate true cause challenges emanating from juror bias related to case-specific issues. While not currently proposed, the NJSBA strongly urges that peremptory challenges be kept intact as an

important tool that allows attorneys to protect their clients from jurors who have demonstrated through their answers matters of concern that do not rise to the level of “cause” as judicially constructed.

Finally, as the empaneling of impartial jurors is such a vital component of the fair administration of justice, the NJSBA recommends that the Judiciary test any changes in the juror process through focus groups and mock trials. The exercise should be aimed at determining the most effective way to educate potential jurors about implicit bias and providing them with the necessary tools to refrain from allowing implicit biases to influence their decisions.

Again, the NJSBA appreciates the opportunity to provide these comments, and stands ready to provide more information or assist in further review. We applaud the efforts to address juror biases, but request that the concerns noted above be taken into consideration as the Judiciary proceeds forward.

Very truly yours.

A handwritten signature in black ink, reading "Kimberly A. Yonta". The signature is written in a cursive, flowing style.

Kimberly A. Yonta, Esq.
President

/sab

cc: Domenick Carmagnola, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director