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**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**

**HANY A. MAWLA**
**JUDGE**

**216 HADDON AVENUE**
**WESTMONT, NEW JERSEY 08108**
**(856) 854-3493**

March 22, 2021

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
Via email Comments.Mailbox@njcourts.gov

Re: Comments on Proposed Juror Impartiality Initiatives

Dear Judge Grant:

The Supreme Court Committee on Diversity, Inclusion and Community Engagement ("SCC-DI&CE") Executive Board offers these comments on the proposed juror impartiality initiatives currently published for public comment.

As you are aware, the SCC-DI&CE has had a longstanding interest in ensuring diverse and representative jury pools as well as empaneled juries in order to ensure fair trials and outcomes by eliminating the impact of implicit bias and promoting juror impartiality. Accordingly we write, in the Committee's advisory role, in full support of the proposed juror impartiality initiatives published for comment via the February 2, 2021 Notice to the Bar. The SCC-DI&CE supports the use of an educational video on implicit bias, the adoption of model *voir dire* questions, and the incorporation of model instructions regarding implicit bias at the three identified points in the jury selection/trial process.

Implicit bias is real. It is scientifically documented that humans make implicit associations, draw implicit assumptions, and engage in implicitly-biased thought processes and decision-making. Science further shows that most biases actually function at the unconscious level. "Unconscious bias is far more prevalent than conscious prejudice."[1] Indeed, as one author has noted:

> Most of us would like to be free of biases, attitudes, and stereotypes that lead us to judge individuals based on the social categories they belong to, such as race and gender. But wishing things does not make them so. And the best scientific evidence suggests that we-all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity-have implicit mental associations that will, in some circumstances, alter our behavior. They manifest everywhere, even in the hallowed courtroom. Indeed, one of our key points here is not to single out the courtroom as a place where bias especially reigns but rather to suggest that there is no evidence for courtroom exceptionalism. There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice.[2]

The science on bias shows the pervasiveness of implicit bias and more than suggests that general instructions warning against biases, sympathies, and prejudices might no longer be sufficient to address the reality and effects of implicit bias. Responsive to the growing body of scientific knowledge about implicit bias, initiatives such as those currently under consideration by the Court are essential to ensuring that the impacts of implicit bias in the context of jury trials are minimized. A writer who explored the potential uses of implicit association tests in both measuring biases and increasing awareness of bias writes in "(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias," 44 CONN. L. REV. 827, (2012) as follows:

> [E]ducation should begin while the jurors are still being oriented. Orientation is not only universal, but, as research into "priming" and "framing" suggests, a crucial period for the forming of first impressions.

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[1] *See*, "Unconscious Bias," University of California-San Francisco Office of Diversity and Outreach, http://diversity.ucsf.edu/resources/unconscious-bias

[2] *See*, Jerry Kang et al, "Implicit Bias in the Courtroom," 59 UCLA L. REV. 1186 (2012).

The New Jersey Judiciary's approach to minimizing the effects of implicit bias in the context of jury trials is holistic and well-designed. The proposals we reviewed demonstrate solid grounding in current knowledge on best approaches to optimizing awareness of implicit bias. The proposals reflect a well-paced delivery of awareness messaging that links each discussion point from the proposed video through the instructions and open-ended *voir dire* questions. This approach also recognizes the potential harms that can result from both unfavorable and favorable implicit biases. Further, in our view, the proposed initiatives provide meaningful opportunities to ensure jurors fulfill their responsibilities impartially and unguided by implicit associations, assumptions, and biases, and that jurors will do their best to manage any implicit associational thinking towards any party involved in the trial including judges, counsel, witnesses, and parties.

> It is clear that implicit bias is pervasive, and that it affects the most important functions of jurors: evaluation of witnesses and evidence, evaluation of behavior, recall of facts, and judgment of guilt.[3]

The use of tools like the forthcoming instructional video, the model *voir dire* questions, and the model instructions can effectively limit the impact of unchecked implicit bias as well as implicit associations and implicit assumptions, but there can be no guarantee nor any promise made that implicit bias will never affect a juror's evaluations and decision-making. The most important and beneficial outcome of employing a video on juror impartiality and implicit bias and adopting the proposed *voir dire* questions and model instructions is that a juror will now not be guided by their implicit bias(es). Furthermore, jurors will be equipped to ensure their thought-processes and decision-making are not knowingly impacted by the effects of implicit biases. The use of plain language and consistency across civil and criminal contexts are valuable aspects of these proposals.

Judge Theresa Doyle, writing in *Bar Bulletin: The Newsletter for the King County Bar Association* (April 2017), discusses the science underlying the well-received approach adopted by the U.S. District Court for the Western District of Washington, which appears similar in concept and functionality to New Jersey's proposal insofar as both include a video and pattern instruction:

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[3] *See* Justin D. Levinson, *Race, Death, and the Complicitous Mind,* 58 DEPAUL L. REV. 599, 600-01 (2009) (noting that biases manifest when a person "categorize[s] information, remember[s] facts, and make[s] decisions").

> Introducing the topic of implicit bias during juror orientation is optimal. Research shows that awareness of unconscious biases is key to minimizing their effects on perceptions and decision-making. Social science research also shows that impressions formed early can shape the understanding of what follows; this is termed "priming" and "cognitive filtering." (quoting Anna Roberts in "(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias," 44 CONN. L. REV. 827, (2012)).
>
> Such timing is important because it is during orientation that jurors are introduced to the concepts of the right to fair trial, the role of the jury system, and the need to discard bias and prejudice to decide the case fairly. Awareness of unconscious stereotypes and biases is logically related.
>
> Building on the juror orientation video are the pattern jury instructions. Preliminary instructions prepare jurors for questioning during *voir dire* related to conscious and unconscious bias.

The structure of the *voir dire* questions and the model instructions overall reflect current knowledge regarding implicit bias. However, to maintain the highest level of precision in terms of "the brain science" on implicit bias, we offer for the Court's consideration this substantive recommendation in regard to the current proposed wording:

> Where the questions and instructions use the word *affected*, the SCC-DI&CE proposes it would more precisely reflect the science on how implicit associations, assumptions, and biases manifest in thought processes and decision-making to replace the term with either *knowingly influenced by* or *knowingly guided by*.

We base this recommendation on the following: By definition, implicit bias is an unconscious bias. While the intention to not be affected at all by implicit bias is well-presented and appreciated, the notion of not ever being affected by an implicit bias is not realistic in the context of the nature of implicit bias and given the science on how implicit biases function.

With full support for the proposed juror impartiality initiatives and in furtherance of the Court's ongoing work to adopt inclusive practices in support of advancing procedural fairness, we also respectfully suggest consideration be given to the following:

(1) the elimination of gendered pronouns (e.g., she/he) and the adoption of non-gendered terms (e.g., using "members of the jury" rather than "ladies and gentlemen of the jury") throughout the body of the existing model instructions into which the impartiality instructions are proposed to be added; and

(2) the use of plain English when possible, e.g., referring to *jury selection* rather than to *voir dire*, in materials, narrative, and text intended primarily for a general audience.

Mindful of the scope of subject matter expertise available to the Judiciary regarding elimination of bias and the technical expertise relating to video production, we look forward to the adoption of a juror educational video on implicit bias that both enhances awareness and provides general tools for jurors to recognize implicit associations, assumptions, and biases that might impact their thought processes and decision-making during trial. Building on the content of the video as noted in the Notice to the Bar, the proposed model *voir dire* questions, and model instructions for both civil and criminal jury trials are well-positioned to meaningfully limit the effects of implicit bias in jury trials. Further, given the Judiciary's already strong judicial education program, we look forward to a robust training for judges to accompany the implementation of the final model *voir dire* questions and instructions.

We thank the Court for the opportunity to provide commentary on its efforts in this critically important area.

Respectfully submitted,

Hany A. Mawla, J.A.D., Chair
Supreme Court Committee on Diversity, Inclusion, and Community Engagement

cc: Steven D. Bonville, Chief of Staff
Dr. Yolande P. Marlow, Diversity, Inclusion, and Community Engagement Program Director
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