

# CENTER FOR APPELLATE LITIGATION

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## ISSUES TO DEVELOP AT TRIAL

### RACIAL JUSTICE SERIES

March 2021

*Welcome to the first in a series of ITD newsletters devoted to combating racism in our courtrooms. Over the coming months, we plan to bring to your attention a number of issues that will help your client while advancing racial justice. When trials resume in earnest, we hope you will bring these ideas back into the courtroom with you.*

*This inaugural issue discusses integrating the concept of implicit bias into voir dire. If you are unfamiliar with the concept of implicit bias, no worries. We define and discuss below.*

*The influence of race on juries is a gigantic field of study, though you don't need any scholarly articles to tell you that your client's race affects the outcome of the case (as well as every aspect of the prosecution, from arrest through sentencing). The influence of implicit bias is also a well-studied field, replete with scholarly articles, empirical and sociological studies, and practice manuals. We are not intending to do a full survey here, or anything close, but we can boil down for you the key takeaways and provide some concrete suggestions for your practice.*

*We offer two suggestions below: (1) ask the court to instruct the venire and the sworn jury at key points on the concept of implicit bias, and (2) integrate implicit bias into your voir dire of prospective jurors. Both are consistent with recommendations made in the [Report from the Special Adviser on Equal Justice in the New York State Courts](#), commissioned by Chief Judge DiFiore to investigate racial bias throughout the New York State court system. The Report, which was issued on October 1, 2020, specifically addressed juror bias (among many other things) and recommended (1) an educational video about implicit bias to be shown before voir dire; (2) the creation of uniform rules to explicitly permit and endorse voir dire of jurors on racial bias; and (3) creation of a model jury instruction on implicit bias.*

*For those of you who have already integrated racial bias questioning into your voir dire, we'd love to hear your experiences. For those of you who fear that addressing race with prospective jurors (especially in an otherwise non-racially charged case) will alienate jurors, you should put that fear aside. The consensus holds that raising juror awareness of implicit bias, and engaging in thoughtful and sensitive voir dire with jurors around race, helps motivate jurors to treat defendants of color and white defendants equally and to combat the impediments your client of color inevitably faces in getting a fair trial due to structural racism, embedded stereotypes and assumptions, and explicit and implicit biases.<sup>1</sup> Undertaken carefully and thoughtfully, questioning about race can make a positive difference and create a more impartial jury.*

*Notably, too, there is convincing evidence that racial bias plays **more** of a role in cases that do **not** involve an overt racial element, because jurors are less likely to be monitoring themselves when race is not itself a central issue. Therefore it is more the "run of the mill case" than the racially charged one*

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<sup>1</sup>Cynthia Lee, [A New Approach to Voir Dire on Racial Bias](#), 5 UC Irvine L.R 843, 846-47 (2015).

*that calls for voir dire to examine the concept of implicit bias.*

*Thanks to the commission's report, positive, systemic change may be on the way. But putting the recommended initiatives into effect will take time. In the meantime, you, standing as the bulwark between your client and the State, can be an agent of change, to the benefit of your client.*

### **What is implicit (or unconscious) bias?**

From the Anti-Defamation League:

“The unconscious attitudes, stereotypes and unintentional actions (positive or negative) towards members of a group merely because of their membership in that group.

These associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages. When people are acting out of their implicit bias, they are not even aware that their actions are biased. In fact, those biases may be in direct conflict with a person's explicit beliefs and values.”

*In other words, even “good,” liberal-minded people who believe that all individuals should be treated equally regardless of race nonetheless harbor biases for or against individuals based on their race. The danger is that jurors who say they can be fair and who truly believe they are may still end up convicting your client because of biases they harbor that are outside of conscious awareness.*

*A wealth of social science research demonstrates that most Americans are affected by implicit bias!*

**The science behind implicit bias:** The brain looks for shortcuts to navigate the world. Many of these shortcuts are good and necessary or your brain would constantly have to rebuild and replicate connections. Unfortunately, some of these mental shortcuts are based on broad overgeneralizations about people based off of cultural and social cues. These shortcuts can become a hindrance to fully assessing an individual because our assessments rest on assumptions and stereotype. See Anona Su, A Proposal to Properly Address Implicit Bias in the Jury, 31 Hastings Women's Law Journal 79 (Winter 2020) (“A Proposal”).

### **Why raise the issue of implicit bias with jurors?**

Once you know that implicit bias exists, it is clear why steps must be taken to eliminate it. Jurors may harbor stereotypes and not realize they're employing them towards witnesses and defendants. They may improperly evaluate these individuals based on stereotypes instead of the whole picture – a picture that should not include any implicit biases they are bringing into the courtroom. And it can work both ways – dismissing a witness because of some implicit bias they didn't realize they were employing, or overly trusting a witness without a full evaluation. No trial is perfect but it is reasonable to ask for a trial that is free from biases and prejudice! See A Proposal, supra, at 83-84.

### **Should you raise the issue of implicit bias in every case or only some cases?**

If your client is a person of color, you should raise the issue, even if the crime is not interracial.

Implicit bias can affect a juror's evaluation of all witnesses and can involve both unfair negative and positive assumptions (i.e. negative for Black people, positive for white police officers). If your client is white, that doesn't mean they're immune from the perils of implicit bias. Consider whether members of the jury pool could have implicit biases against your client because of his or her race or due to some other bias. Or maybe jurors could have an implicit bias directed at you.

The depth and extent of the questioning in any particular case will likely depend on such factors as whether the crime is interracial, your client's race, the nature of the crime, and your defense. At a minimum, request the court to give an implicit bias instruction.

### **To Address Implicit Bias, Request a Jury Instruction and Integrate Questioning about Race Through Your Voir Dire**

#### ● **Jury Instruction**

Implicit bias instructions have been adopted by a number of states already and are designed to give jurors at least some grasp on the concept of implicit bias and its potential influence. Even if these instructions cannot combat the full effect of implicit biases carried by people for a lifetime, they are a necessary first step to educating jurors on a phenomenon they may not otherwise know even exists. And coming from the court (not just you) will give the message added weight.

To be most effective, the instruction should be provided at multiple points: to the prospective jurors, before opening statements, in connection with any instructions on witness credibility, and before deliberations. If provided only at the end, the jury would have to apply it retroactively to evidence they already considered (and on which they already brought their biases to bear).

Making your application:

- State your request in clear, constitutional terms: “Judge I want an instruction on implicit bias because it is essential to my client’s constitutional rights to a fair trial and an impartial jury.” In further support,
  - Argue that most, if not all, Americans harbor implicit biases, and that instruction from the court is an essential first step to educating jurors to help combat those insidious biases which risk influencing their assessments of the evidence and their deliberations. Cite the Special Adviser’s Report commissioned by Judge DiFiore as evidence of consensus both as to the existence of implicit bias and the need for a court instruction to address it. Argue that your client should not have to wait for guidelines to be established to prove something the Chief Judge’s blue-ribbon commission has endorsed!
  - Argue that the charge must be given at four separate points to be as effective as possible: to prospective jurors before voir dire; in preliminary instructions before opening statement; as part of witness credibility instructions; and in closing instructions.
  - Cite the multiple states that now incorporate such a charge: Washington, Illinois, California, and Arkansas. The American Bar Association’s Criminal Justice Section proposed an implicit bias instruction in its comprehensive [2020 Voir Dire Toolbox](#), specifically directed to Achieving an Impartial Jury.

- Provide the written charge at the end of these materials, which was part of a New York State Bar Association training and is based on a charges developed in Washington State, Illinois, and California. The ABA’s Voir Dire toolbox, linked above, provides an alternative version you may want to check out.

- **Voir Dire**

Rooting out implicit bias through voir dire is hard - after all, implicit bias isn’t something people (including attorneys and judges) are aware of or recognize in themselves. The questions we offer at the end of these materials, based on materials we located in defender manuals, articles, and CLEs, are designed to get jurors to open up about race generally, in the hope that a person’s implicit biases will emerge. Some questions may contribute to “de-biasing” - countering the effects of implicit bias. If you’re still on the fence about tackling this area, consider this:

- Discussing race will allow you to discover jurors’ views, how strongly they are held, and how they may impact the verdict;
- Exchanges about race will enhance your ability to intelligently exercise peremptory challenges and challenges for cause;
- If you don’t have this conversation, you may end up relying on your own stereotypes and implicit biases about jurors and make faulty assumptions based on the juror’s race;
- Educating the jury can lead to “de-biasing” - When issues of race are brought up, individuals tend to think more critically about the issues and examine their own assumptions more closely. The influence of stereotypes and implicit biases on decision-making recedes;
- Discussing race allows you to explore whether the jurors are comfortable discussing race and recognize its relevance; a juror who says race “doesn’t matter” may be a juror you want to strike.

- **How to discuss race with jurors**

It is important to create conditions that allow jurors to speak openly about race. To that end, experts caution against jumping into a conversation about race by asking potential jurors if they harbor racial bias. That kind of blunt question is likely to lead to defensiveness, possibly hostility, and a socially correct answer that will provide little useful information about their views.

Open-ended questions, as you probably know from your own voir dires on other subjects, elicit more information and can provide a platform for continuing the conversation with other jurors. As one commentator wrote, “Open-ended questions that encourage reflection and thought about the powerful influence of race would be better than close-ended questions that simply encourage the prospective juror to give the politically correct response.”<sup>2</sup>

*Involve your client! Your client may be relieved that you plan to address issues of race or ethnicity*

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<sup>2</sup> Lee, supra.

during voir dire, but may also have concerns. It's important for your client to understand what you plan to discuss with potential jurors and why.

**Sample questions, culled from articles and practice materials, including a script for introducing the topic, are included in a handout attached to this newsletter.**

**Must the court allow you to discuss race with prospective jurors?**

Not necessarily but there's room to argue that it should:

- There are only two circumstances where the federal constitution entitles the defense to question prospective jurors about racial bias: (1) where a capital defendant is accused of an interracial crime, see Turner v. Murray, 476 U.S. 28, 29-30 (1986); and (2) where the facts in a case are such that it would violate due process to deny questioning on the issue of racial bias – if, in other words, the circumstances of the case suggest a “significant likelihood” of prejudice by the jurors. Ristaino v. Ross, 424 U.S. 589, 596-97 (1976); The defendant and victim being of different races has not been understood to provide such a special circumstances, at least as a constitutional matter. Ristaino, supra.
- In all other cases, at least in the state court system, it's within the court's discretion to grant or deny. (In federal court, where the court is tasked with conducting voir dire, the Supreme Court established a non-constitutional rule holding that federal courts must inquire into racial prejudice “when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups.” Rosales-Lopez v. United States, 451 U.S. 182, 192 (1981)).

**Making your application to the court**

Whether and to what extent, you'll be permitted to address race will ultimately depend on the nature of the case, your defense, as well as the judge and their practices. In making an application (if needed beyond a simple request), whether to win the judge over or preserve the issue for appeal, here are some arguments you can marshal:

- If your theory of the defense involves consideration of racial issues, e.g., cross-racial misidentification, use of racial epithets or racial biases held by prosecution witnesses, cite Ristaino to argue that your client's state and federal constitutional rights to due process and an impartial jury entitle you to inquire into racial bias.
- Same, if the charge itself implicates race, such as a hate crime charged under Penal Law § 485.05.
- If those arguments fail, or race is not a central feature of your case, you must appeal to the court's discretion. Arguments you can make:
  - ◆ Most Americans harbor implicit biases, and inquiry to sensitize jurors about their unconscious biases is necessary to enable you to intelligently exercise cause

and peremptory challenges. Cite the Special Adviser’s Report commissioned by Judge DiFiore as evidence of consensus both as to the existence of implicit bias and the need for voir dire to address it. Argue that your client should not have to wait for guidelines to be established to prove something the Chief Judge’s blue-ribbon commission has endorsed.

- ◆ If your case involves an interracial crime of violence, cite Rosales-Lopez v. United States, and its rule requiring federal courts to conduct voir dire on racial prejudice on defense request in such crimes, to support that state trial courts should similarly exercise their supervisory powers over the trial process, or, at least, their discretion, to allow voir dire on race and implicit bias.
- ◆ Cite U.S. Supreme Court law long recognizing that voir dire is an essential tool for uncovering racial bias - including biases that are hidden or of which the prospective jurors themselves are unaware. See Aldridge v. United States, 183 U.S. 308, 131-15 (1931); Ham v. South Carolina, 409 U.S. 524, 529 (1973); Turner, supra, at 35 (in finding voir dire on race in a capital case constitutionally required, Court recognizes that “less consciously held racial attitudes could also influence a juror’s decision in this case,” i.e., the influence of implicit bias); J.E.B. v. Alabama, 511 U.S. 127, 143-44 (1994) (“If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.”)(emphasis added).
- ◆ Highlight empirical findings suggesting that “juror racial bias is most likely to occur in run-of-the-mill trials,” not cases with overt racial issues. (If you need authority for that proposition, here you go: Samuel R. Sommers, On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations, 90 J. Personality and Soc. Psychol. 597, 601 (2006); Kang, et al., Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124, 1146 (2012)).

- **Juror Questionnaires**

Even if you can create an open and non-judgmental environment, you are likely get fuller and more candid answers if the juror does not have to answer questions out loud in front of other people. This may be especially so if the case involves particularly sensitive race issues. If this is a concern, consider using a questionnaire for prospective jurors to complete.

**A sample questionnaire is attached at the end of these materials.**

*See the last page of the materials for a “cheat sheet” summarizing the above proposals*

## Practice Materials for Addressing Implicit Bias in Voir Dire<sup>3</sup>

### General Practice Tips:

- Formulate your questions ahead of time,
- Consider practicing them with others to ensure they don't evoke defensive responses and that you're comfortable asking them and are prepared to respond to the answers you receive non-judgmentally and in a way that furthers the conversation.
- If your defense involves racial considerations, tailor your questions to your factual theory.
- Don't expect to use the same questions in every case.
- Be prepared to deal with prosecutor objections on the ground of relevance. Your response should reiterate (1) that voir dire is the best tool, as recognized by Supreme Court law, for uncovering biases, both explicit and implicit; (2) that jurors are not likely (or even able to) acknowledge embedded implicit biases, so subtle questioning about a jurors' experiences with people of other races, and how the juror talks about them, is the most effective way to draw these biases out.
- *Note that all of the proposed questions can be adapted to reflect your client's race/ethnicity. Note also that the racial makeup of the venire in your jurisdiction may make some of the questions more or less relevant.*

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<sup>3</sup>Materials, questions, and practice pointers are culled from The North Carolina Defender Manual, Chapter 8, *Addressing Race at Trial* (Sept. 2014), and numerous sources discussed therein, including Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U.J. Legs. & Pub. Pol'y 999, 1032-35 (2013); Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, *The Advocate*, May 2008, at 57, 60; The American Bar Association, Criminal Justice Section, *Voir Dire Toolbox* (2020)(available through the hyperlink in the materials above and online) and assorted CLE materials.

## Sample Introduction

To get into the topic of race, consider this approach:

*First, introduce the concept of implicit bias - if the court provided a definition, then you can just move on to juror reaction. If the court refuses to provide a charge, educate the jurors yourself:*

Scientific research has established that we all have biases we are not fully aware of, and which are therefore referred to as “implicit biases” or unconscious biases. Unconscious or implicit biases are stereotypes, attitudes, or preferences that we express without conscious awareness, control, or intention. For example, an employer might pass over a Black applicant for a job based on lack of relevant experience and consider a White applicant with a similar experience level, even though that employer does not consciously believe in discriminating against people based on their race. While everyone has implicit biases and would not want them to influence their decision-making in a trial, the concern is that they may result in unequal treatment when they go unexamined.

*One commentator suggests then following up to determine the jurors’ reactions:*

You have just learned about the concept of implicit racial bias. Not everyone agrees on the power of its influence or that they are personally susceptible to it. I’d like to get a sense of your reaction to the concept of subconscious racial bias and whether you are open to believing it may influence you in our day-to-day decision-making.

*If a prospective juror expresses skepticism, thank the juror (you want to reward candor), and use it as a platform for eliciting other jurors’ views:*

I appreciate your candor and thank you for sharing this view. It is certainly not an uncommon reaction to first learning about implicit racial bias. Do others share Juror X’s skepticism?

## Sample questions

*Below we provide different options and approaches for exploring jurors’ racial attitudes and experiences, without directly asking them whether they are racist:*

The North Carolina Defender Training Manual proposes these sample questions, which ask jurors to think about how they acted or felt in an actual situation instead of how they think they would act in a hypothetical situation, or how they generally “feel” about racism.

- Tell us about the most serious incident you or someone close to you saw where someone was treated badly because of their race
- Tell us about the worst experience you or someone close to you had because someone stereotyped you or them because of race
- Tell us about the best experience, or most significant interaction, you have had with a person of a different race
- Tell us about a situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of their race and turned out to be wrong.

- Tell us about the most diverse environment you have worked in
- Tell us about the most diverse neighborhood you have lived in.
- Tell us about the most memorable story you have heard, either in the news or from a friend or family member, of a white person experiencing discrimination on the basis of his or her race.
- Tell us about the last time you heard other people express racially prejudiced beliefs or opinions. Did you respond? How?

The ABA's Voir Dire Toolbox proposes these open-ended questions, with a view toward bringing to the fore both negative associations you would want to know about and positive associations that might contribute to "de-biasing" the juror:

- What is your work environment/neighborhood like? (Perhaps follow up with more questions about who works there, the kind of work, and the kind of clientele. This may reveal that the work environment includes positive exposure to other groups or races, though it may not. Consider these answers again in later questions).
- Where did you grow up? What was it like growing up there?
- What experiences have you had with people who are different from you (e.g., from a culture other than your own)?
- What (other) experiences have you had with persons of different races/ethnicities [or, as is appropriate to the case, with disabilities (mental or physical) or other groups].
- Do you have children in school and, if so, what kind of school do they attend? What is this experience like?
- What, if anything, do you know about implicit or unconscious bias?

Another approach asks jurors to put themselves in your client's shoes, an approach which might bring to the juror's consciousness the reality of bias.

*These questions are designed to get jurors to think about how a minority defendant might feel in the courtroom surrounded by people of a different race. Tailor the questions to your client's race/ethnicity.*

**I. Assume that you are on trial – the alleged victim was a Black person. The judge and the lawyers are all Black people. The police officers are all Black people. All the jurors who make up your jury are Black people and you are the lone white person in the courtroom:**

- What are you feeling?
- Right now as I describe this all Black-person courtroom in which you are the only white face, what is going through your mind? Tell me about that.
- Why do you feel this way?
- Why are you fearful of being the only one who is white in a sea of Black faces?
- Have you ever been in a situation where you were in the minority racially?
- Tell me about that. How did that situation make you feel?

*Depending on the jury pool in your jurisdiction, this set of questions could be used:*

**II. Mr./Ms. \_\_\_\_\_ may be tried by an all white jury. How do you think/feel that an all white jury may affect the verdict?**

**Why? (ask several people)**

If you find that this question is not generating responses from the jury, ask:

- How many people think that the fact that Mr./Ms. \_\_\_\_\_ may be tried by an all white jury will have no impact on the verdict?
- Why do you think this? Tell me more. Who feels otherwise?

Or, style the question so the prospective jurors have to choose:

Some people think an all white jury will have no impact, while others feel it will make it more difficult for my Black client to get a fair trial. What do you think? Why? If the jury does end up being all white, how will you make sure the case is decided only on the evidence?

### **Raise your hand technique:**

Another recommended voir dire strategy is the “show of hands technique,” which puts propositions to the jurors and allows you to identify jurors to follow up with based on their raised or unraised hands. You’ll need to have a mechanism ready for taking notes.

- Is racism against Black people a thing of the past?
- Do affirmative action programs discriminate against white people?
- Do Black people commit more crimes per capita than white people?
- Have any of you seen an example of racism?

### **Jury Questionnaires**

Prospective jurors may be more likely to reflect honestly and independently when answers are given in writing and individually as versus in the public and intimidating environs of a criminal court. Some sample questions follow. Again, tailor to your client’s race/ethnicity. Be sure to leave several lines after each question so as to encourage fuller responses:

#### **RACIAL PREJUDICE: Personal Experience:**

##### **A. Free response questions:**

Racial prejudice can take many forms. Tell us about your experiences with racial prejudice or where you have felt labeled.

Have you ever felt like you were the target of racial prejudice. Tell us about that situation or experience?

Have you ever had racially prejudiced thoughts about another person, even if those thoughts made you feel uncomfortable or uneasy?

Please tell us about experiences you have had where other people expressed racially prejudiced beliefs or opinions.

How do you feel when someone uses a racial slur or tells a racial joke?

What has been your most memorable experience with a Black person?

When you are sitting at a stoplight and two young Black men approach the crosswalk, do you check to see if your doors are locked? Why do you check?

Would you do the same thing if two young white men approached the cross walk?

Do you have any Black friends? If yes, please tell us about them.

How would you feel if a member of your family wanted to marry a Black person?

Have you ever invited a Black person to your home?

If your child used a racial slur, what would you tell your child?

Would you be more inclined to believe that a Black police officer would be more likely to commit a crime than a white police officer? Why?

Is there any other feeling or opinion you have regarding race that you feel you should share with us?

**B. Multiple choice questions: Circle the answer that you feel is most true:**

I would not want my child to marry a (*insert race/ethnicity of client*) person.

Strongly agree      Agree      Disagree      Strongly Disagree

I have become angry when I hear negative remarks about (*insert race/ethnicity of client*) people.

Strongly agree      Agree      Disagree      Strongly Disagree

(*Insert race/ethnicity of client*) people are less disciplined than white people.

Strongly agree      Agree      Disagree      Strongly Disagree

No respectable white woman would ever have consensual sex with a (*insert race/ethnicity of client*) man.

Strongly agree      Agree      Disagree      Strongly Disagree

**C. RACIAL PREJUDICE: Beliefs about societal prejudice: Circle the answer that you feel is most true:**

Racial prejudice still exists.

Strongly agree      Agree      Disagree      Strongly Disagree

There is more racial prejudice today than there was 30 years ago.

Strongly agree      Agree      Disagree      Strongly Disagree

**(Insert race/ethnicity of client)** people commit more violent crimes per capita than white people.

Strongly agree    Agree    Disagree    Strongly Disagree

White parents who encourage their children not to marry (*insert race/ethnicity of client*) people are making a wise choice.

Strongly agree    Agree    Disagree    Strongly Disagree

White people are being discriminated against due to affirmative action programs.

Strongly agree    Agree    Disagree    Strongly Disagree

**(Insert race/ethnicity of client)** people use more illegal drugs than white people.

Strongly agree    Agree    Disagree    Strongly Disagree

## **PROPOSED IMPLICIT BIAS JURY INSTRUCTION LANGUAGE<sup>1</sup>**

### **To be included in the Preliminary Instructions given before Jury Selection**

We all have, or have had, feelings, assumptions, perceptions, fears, and stereotypes, also known as biases, about people and places that have affected our memories, our thoughts, what we see or hear and/or the decisions we make or have made. Some biases we are aware or conscious of and others we might not be fully aware of, which is why they are called “implicit biases” or “unconscious biases.” Unconscious/implicit biases are stereotypes, attitudes, or preferences that we express without conscious awareness, control or intention. Like conscious bias, unconscious/implicit bias, too, can affect how we evaluate information and make decisions.

It is important that if you are selected as a juror, you must discharge your duties without discrimination, meaning that bias or stereotypes regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity or gender of the defendant, any of the witnesses or the lawyers will play absolutely no role in the exercise of your judgment throughout the trial.

### **To be included in the Preliminary Instructions given before Opening Statements**

You now are the jurors in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the laws as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, stereotypes, opinions, prejudices, sympathy, or biases regarding the defendant, witnesses or attorneys.

### **To be included in general Witness Credibility Instructions:**

You must avoid bias, conscious or unconscious, based on the witness’s race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender in your determination of credibility.

### **To be included during Closing Instruction**

I want to remind you about your duties as jurors. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and in that process to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not.

You must decide the case solely on the evidence and the law before you and resist jumping to conclusions based in favor of or against any party, witness or the defendant

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<sup>1</sup> Modified from: Model Ninth Circuit Criminal Instruction 1.1, Western District of Washington, Illinois Pattern Jury Instructions 1.08 and California Civil Jury Instructions 113.

because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status or [*insert any other impermissible form of bias*]. You must resist making any decisions based upon unconscious/implicit bias.

As I said at the beginning of the case, unconscious/implicit biases are stereotypes, attitudes, or preferences that we express without conscious awareness, control or intention that can affect how we evaluate information and make decisions.

If you suspect that you, or a fellow juror, are about to reach a conclusion about an individual in this case through a stereotypical lens, stop yourself and focus solely on the evidence and the legal instructions I have given you. For guidance, if you find yourself or a fellow juror influenced by a stereotype about an individual, presume the individual does not have said stereotype and then again focus solely on the evidence presented and the legal instructions I have given you.

## IN BRIEF

- Request an instruction on implicit bias at the start of jury selection, citing due process and your client's right to an impartial jury. Note, in particular, that the Report commissioned by the Chief Judge specifically recommends such a charge as an antidote to implicit biases in jurors. Ask for the charge to be given at multiple points.
- Request the opportunity to voir dire prospective jurors on racial bias as necessary to root out implicit bias and allow the intelligent exercise of for-cause and peremptory challenges. Again note that the Report commissioned by the Chief Judge recommends such questioning be permitted.
  - invoke the state and federal constitution (due process and impartial jury under state and federal constitutions ) if the charge against your client implicates race or race is a feature of the defense or prosecution (Ristaino v. Ross, 424 U.S. 589 (1976)). .
  - also invoke the court's supervisory powers over the trial process (Rosales-Lopez v. United States, 451 U.S. 182 (1981)- rule requiring court to conduct voir dire into racial prejudice on defense request in interracial crimes of violence)
  - appeal to the court's discretion - cite in particular the Special Adviser's report endorsing voir dire on implicit bias. Cite Rosales- Lopez v. United States if the case involves an interracial crime of violence.
  - Formulate open-ended questions ahead of time, practice, and discuss with your client.
- Consider jury questionnaires in sensitive cases.