

# CENTER FOR APPELLATE LITIGATION

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## ISSUES TO DEVELOP AT TRIAL

March 2022

*This ITD is a followup to our March 2021 issue addressing implicit bias in voir dire and proposed tools to combat its insidious influence on juries.*

*In that issue we suggested requesting the court to instruct the venire and the sworn jury on the concept of implicit bias at key points in the trial, and integrating implicit bias into your voir dire. We suggested questions and lines of questions for you to consider in incorporating the reality of racial bias into your voir dire.*

*Since then, there have occurred two reforms within the criminal legal system in this area.*

*First, the New York State Court System has created a video entitled Jury Service and Fairness, which instructs jurors, during the orientation process, on implicit bias. It describes what implicit bias is, explains why the way our brains work can lead to bias, and discusses strategies that jurors can employ to help ensure they are making decisions without relying on underlying biases or stereotypes. You can watch the video [here](#).*

*Second, the CJI has adopted model implicit bias instructions for the court, on request, to provide in voir dire, preliminary instructions, and in final instructions. You can find these instructions at the end of this newsletter.*

*Below, in follow-up to our previous newsletter, we suggest litigation strategies in light of these two reforms.*

### **A. Request the Model Implicit Bias Instructions**

Under most circumstances, and certainly if your client is Black or Brown and the complainant is white, you should ask the court to provide instructions on implicit bias. If there are cop-witnesses, you should request the instructions.

Your defense may make such instruction particularly important. For example, if your Black or Brown client is asserting self-defense, an instruction on implicit bias may combat stereotyped and racist assumptions around aggressiveness that might undermine the defense.

### **B. Implicit Bias and Challenges for Cause**

With implicit bias now receiving the imprimatur of truth from the court system, you should have

no hesitancy in asking prospective jurors for their thoughts and feelings about it in voir dire if consistent with your defense strategy.

You can use the video and the court's instruction as a jumping off point, e.g.:

You learned about the concept of implicit bias in the orientation video you saw and from the court's instruction. 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 your feelings on whether it may influence you in your day-to-day decision-making.

You can follow up with questions such as:

- Did you learn anything new about implicit bias from the video?
- Do you believe that implicit bias affects your perceptions of people?
- Having seen the video and heard the court's instruction, can you recall a situation where you may have been acting based on implicit bias? Where you observed someone else possibly acting based on implicit bias?
- On a scale of 1-10, how much of an effect do you believe implicit bias has on your thoughts or actions? On people generally?

If a juror expresses skepticism or rejects the notion that implicit bias exists, frame a challenge for cause on the grounds that the juror's rejection or close-mindedness to the accepted concept of implied bias renders them susceptible to unchecked improper, unconscious influences on their decision-making. As such, they possess "a state of mind that is likely to preclude [them] from rendering an impartial verdict based upon the evidence adduced at trial." CPL § 270.20(10(b)).

If the court or DA attempt to rehabilitate the challenged juror by extracting an assurance that the juror accepts the court's instruction on implied bias, argue that the juror's assurance is not credible. Marshal whatever circumstances you can (perhaps from other avenues of voir dire that you pursue around the issue of race) to cast doubt on the believability of the juror's belated conversion.

### **C. Summation**

Consider ways to integrate the potential dangers of implicit bias into your summation in the specific circumstances of your case.

For example, if your client asserted a justification defense, remind the jurors they must be especially mindful of the implicit biases about which the court spoke – that implicit bias and the unconscious associations and assumptions it produces could operate to cause them to discredit that (for example) your young Black male client was lawfully protecting himself against the aggressions of an (for example) older white person.

**\*\*\* UPDATE\*\*\***

In our September 2020 ITD, we discussed preserving an objection to the admission of an autopsy report, based on the 6th Amendment, the Confrontation Clause, and *Crawford v. Washington*, when the pathologist who conducted the autopsy and wrote the report is not available for trial. We also proposed that you object to the surrogate testimony as inadmissible because it derives from an inadmissible report.

Further ammunition for this argument now comes from *Garlick v. Lee*, 1 F.4th 122 (2d Cir. 2021), which ratified the District Court's conclusion that the New York State courts were wrong in finding autopsy reports non-testimonial. As the Supreme Court recently denied cert to the People, *see Garlick v. Lee*, 2022 WL516383, No. 21-637 (Feb. 22, 2022), there is now settled federal law in our favor for you to cite on this issue.

## IMPLICIT BIAS INSTRUCTIONS

These instructions are in the model instructions for each of the items specified in the table of contents.

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### Voir Dire

A fair juror is a person who will keep the promise to be fair and impartial and will not base the decision in this case upon a bias or prejudice in favor of or against a person who may appear in this trial on account of that person's race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability, or sexual orientation.

A fair juror must be mindful of any stereotypes or attitudes about people or about groups of people that the juror may have, and must not allow those stereotypes or attitudes to affect their decision. As you learned from the video presentation you saw during your orientation, we all develop and hold unconscious views on many subjects. Some of those unconscious views may come from stereotypes and attitudes about people or about groups of people that may impact on a person's thinking and decision-making without that person even knowing it. As a juror, you are asked to make a very important decision about another member of the community. I know you would not want to make that decision based on such stereotypes or attitudes, that is, on implicit biases, and it would be wrong for you to do so. A fair juror must guard against the impact of such stereotypes or attitudes. You can do this by asking yourself during your deliberations whether your views and conclusions would be different if the defendant, witnesses, or others that you have heard about or seen in court were of a different race, color, national origin, ancestry, gender, gender identity or expression, religious practice, age or sexual orientation, or did not have a disability. If the answer is yes, then, in keeping with your promise to be fair, reconsider your views and conclusions along with the other jurors, and make sure your decision is based on the evidence and not on stereotypes or attitudes. Justice requires no less.

## **Preliminary Instructions**

Remember, you have promised to be a fair juror. A fair juror is a person who will keep their promise to be fair and impartial and who will not permit the verdict to be influenced by a bias or prejudice in favor of or against a person who appeared in this trial on account of that person's race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability, or sexual orientation, and further, a fair juror must be mindful of any stereotypes or attitudes about people or about groups of people that the juror may have, and must not allow those stereotypes or attitudes to affect their decision.

[As I explained during jury selection,] we all develop and hold unconscious views on many subjects. Some of those unconscious views may come from stereotypes and attitudes about people or about groups of people that may impact on a person's thinking and decision-making without that person even knowing it. As a juror, you are asked to make a very important decision about another member of the community, I know you would not want to make that decision based on such stereotypes or attitudes, that is, on implicit biases, and it would be wrong for you to do so. A fair juror must guard against the impact of such stereotypes or attitudes.

You can do this by asking yourself during your deliberations whether your views and conclusions would be different if the defendant, witnesses or others that you have heard about or seen in court were of a different race, color, national origin, ancestry, gender, gender identity or expression, religious practice, age or sexual orientation, or did not have a disability.

If the answer is yes, then, in keeping with your promise to be fair, reconsider your views and conclusions along with the other jurors, and make sure your decision is based on the evidence and not on stereotypes or attitudes. Justice requires no less.

## **Final Instructions**

Remember, you have promised to be a fair juror. A fair juror is a person who will keep their promise to be fair and impartial and who will not permit the verdict to be influenced by a bias or prejudice in favor of or against a person who appeared in this trial on account of that person's race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability or sexual orientation, and further, a fair juror must be mindful of any stereotypes or attitudes about people or

about groups of people that the juror may have, and must not allow those stereotypes or attitudes to affect their verdict.

[As I have explained] We all develop and hold unconscious views on many subjects. Some of those unconscious views may come from stereotypes and attitudes about people or groups of people that may impact on a person's thinking and decision-making without that person even knowing it. As a juror, you are asked to make a very important decision about another member of the community. I know you would not want to make that decision based on such stereotypes or attitudes, that is, on implicit biases, and it would be wrong for you to do so. A fair juror must guard against the impact of such stereotypes or attitudes. You can do this by asking yourself during your deliberations whether your views and conclusions would be different if the defendant, witnesses or others that you have heard about or seen in court were of a different race, color, national origin, ancestry, gender, gender identity or expression, religious practice, age or sexual orientation, or did not have a disability. If the answer is yes, then, in keeping with your promise to be fair, reconsider your views and conclusions along with the other jurors, and make sure your verdict is based on the evidence and not on stereotypes or attitudes. Justice requires no less.

### **Grand Jury Selection**

A fair grand juror is a person who will keep their promise to be fair and impartial and will not base their decision in any case upon a bias or prejudice in favor of, or against any person involved in a proceeding on account of that witness's race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability, or sexual orientation.

A fair grand juror must be mindful of any stereotypes or attitudes about people or about groups of people that the juror may have, and must not allow those stereotypes or attitudes to affect their decision.

Also, as you learned from the video presentation you saw during your orientation, we all develop and hold unconscious views on many subjects. Some of those unconscious views may come from stereotypes and attitudes about people or about groups of people that may impact on a person's thinking and decision-making without that person even knowing it. As a grand juror, you are asked to make a very important decision about another member of the community. I know you would not want to make that

decision based on such stereotypes or attitudes, that is, on implicit biases, and it would be wrong for you to do so. A fair grand juror must guard against the impact of such stereotypes or attitudes. You can do this by asking yourself during your deliberations whether your views and conclusions would be different if the defendant, witnesses or others that you have heard about or seen in court were of a different race, color, national origin, ancestry, gender, gender identity or expression, religious practice, age or sexual orientation, or did not have a disability. If the answer is yes, then, in keeping with your promise to be fair, reconsider your views and conclusions along with the other jurors, and make sure your verdict is based on the evidence and not on stereotypes or attitudes. Justice requires no less.

### **Grand Jury Impanelment**

Members of the grand jury, you are about to take on a very important responsibility. You must carry it out fairly and impartially, without fear or favor.

To judge fairly and impartially, a grand juror must not permit a decision in any case to be influenced by a bias or prejudice in favor of or against any person involved in a proceeding because of that person's race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability or sexual orientation, and further, a grand juror must be mindful of any stereotypes or attitudes about people or about groups of people that the juror may have, and must not allow those stereotypes or attitudes to affect their decision.

[As I explained during the selection process (and as you learned from the video presentation you saw during your orientation),] we all develop and hold unconscious views on many subjects. Some of those unconscious views may come from stereotypes and attitudes about people or about groups of people that may impact on a person's thinking and decision-making without that person even knowing it. As a grand juror, you are asked to make a very important decision about another member of the community. I know you would not want to make that decision based on such stereotypes or attitudes, that is, implicit biases, and it would be wrong for you to do so. A fair grand juror must guard against the impact of such stereotypes or attitudes. You can do this by asking yourself during your deliberations whether your views and conclusions would be different if the defendant, witnesses or others that you have heard about or seen in court were of a different race, color, national origin, ancestry, gender, gender identity or expression, religious practice, age or sexual orientation, or did

not have a disability. If the answer is yes, then, in keeping with your promise to be fair, reconsider your views and conclusions along with the other jurors, and make sure your decision is based on the evidence and not on stereotypes or attitudes. Justice requires no less.

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