

1.08 Implicit bias

We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of and others we might not be fully aware of, which is why they are called “implicit biases” or “unconscious biases.”

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must resist jumping to conclusions based on personal likes or dislikes. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness 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*]].

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist, and help each other to resist, any urge to reach a verdict that is influenced by bias for or against any party or witness.

Instruction, Notes on Use and Comment approved May 2018.

Notes on Use

This instruction should be given at the start of trial and again before the jury begins its deliberations. Jurors, in their role as impartial decision-makers, need to be aware of their own implicit biases so that these biases do not affect their view of the case. Ideally, jurors would have already seen a short video about implicit bias when they were waiting in the Jury Assembly Room, as is done in some jurisdictions, but even if they are not shown such a video, they should still be given this instruction.

Comment

Implicit bias has been the subject of much scholarly attention. *See, e.g.,* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017); Judge Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, in ENHANCING JUSTICE: REDUCING BIAS (2017). It has also been the focus of attention by organizations dedicated to improving the courts and legal profession, such as the National Center for State Courts and the American Bar Association. *See, e.g.,* Jerry Kang, Nat’l Ctr. for State Cts., *Implicit Bias: A Primer for Courts* (Aug. 2009); Jennifer K. Elek & Paula Hannaford-Agor, *Implicit Bias and the American Juror*, 51 CT. REV. 116 (2015); Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 CT. REV. 190 (2013); Am. Bar. Ass’n, *Achieving an Impartial Jury (AIJ) Toolbox*, available at,

https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.aucthecheckdam.pdf.

The literature on implicit bias explains that everyone has implicit biases. This means that judges and jurors are not immune. Although judges can attend workshops that teach about implicit bias, jurors do not receive any such training. Therefore, it is important for the court to make jurors aware that everyone is affected by implicit biases. It is particularly important for judges and jurors, who strive to be impartial decision-makers, to be aware of this phenomenon and to try to guard against it for purposes of the trial.

Although Illinois case law does not require an implicit bias instruction, the Illinois Supreme Court has recognized the importance of training judges about implicit bias. *See, e.g.,* Chief Justice Lloyd A. Karmeier, *Another Step Toward Equal Justice: Identifying Implicit Bias*, ILLINOIS COURTS CONNECT, (Feb. 1, 2018), at http://www.illinoiscourts.gov/Media/enews/2017/112917_chief_message.asp. To that end, the Illinois Supreme Court created the Committee on Equality in 2015. The Committee on Equality has been charged with working with other offices and agencies in Illinois to “coordinate ongoing judicial education around the state to help judges incorporate anti-bias ideas and procedures into judicial decision-making.” Illinois Supreme Court Press Release, *Illinois Supreme Court Announces Findings, Next Steps Following Judicial Decision-Making Study* (Nov. 6, 2017). The press release notes that while implicit biases cannot be eliminated they may be “mitigated by promoting self-awareness.” *Id.*

Some states, such as California, have added an instruction on implicit bias. *See* JUDICIAL COUNCIL OF CALIFORNIA, CALIFORNIA CIVIL JURY INSTRUCTIONS (CACI) 113 (2017) (Bias). Federal courts in other states, such as the Western District of Washington, have added a short video addressing the topic. *See Understanding the Effects of Unconscious Bias*, at <http://www.wawd.uscourts.gov/jury/unconscious-bias>, along with instructions. *See id.* Some courthouses in Washington show the video to prospective jurors while they are waiting in the Jury Assembly Room to be assigned to a courtroom. Although empirical studies have not established that awareness—whether through instructions or videos--can eliminate people’s implicit biases, there is general agreement that awareness is the best step forward and does more good than harm. *See, e.g.,* Kang et al., *supra*, at 1184.