



# UNDERSTANDING AND APPLYING IMPLICIT BIAS LANGUAGE IN 8<sup>TH</sup> CIRCUIT JURY INSTRUCTIONS

**Eastern District of Missouri, Criminal Justice Act Seminar**

Michelle E. Jones, Senior Litigation Counsel, District of Minnesota  
Kevin C. Curran, First Assistant Federal Public Defender, EDMO



# How Jury Instructions are Drafted and Adopted

## Eighth Circuit Jury Instruction Committee

- ◆ Honorable Joan N. Ericksen, United States District Judge (MN)
- ◆ Honorable Helen C. Adams, United States Magistrate Judge (S.D. IA)
- ◆ Honorable Henry E. Autrey, United States District Judge (E.D. MO)
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## **Implicit Bias/Unconscious Bias**

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.

\* New York State Bar draft instruction



## Implicit Bias Language in Other Jurisdictions

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- ◇ W.D. Washington
- ◇ Ninth Circuit
- ◇ Pennsylvania
- ◇ Washington
- ◇ New York
- ◇ California
- ◇ Connecticut
- ◇ Ohio
- ◇ Iowa
- ◇ Missouri
- ◇ Illinois
- ◇ Oregon
- ◇ Arkansas
- ◇ Michigan



## Western District Washington

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the [plaintiff,] defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial.

Accordingly, during this voir dire and jury selection process, I [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.



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## Missouri Approved Instructions

- ◇ MAI 400.02 Before Voir Dire
- ◇ MAI 402.01 Duties of Judge and Jury
- ◇ MAI 402.05 Unanimous Verdict



## Eighth Circuit Implicit Bias Language

- ◇ 0.01 INSTRUCTIONS BEFORE VOIR DIRE
- ◇ 1.05 CREDIBILITY OF WITNESSES
- ◇ 1.08 CONDUCT OF THE JURY
- ◇ 3.02 DUTY OF JURY





## Excerpt from 0.01

[It is also important that you discharge your duties without discrimination, meaning that bias regarding the race, color, ethnicity, national origin, religion, gender, gender identity, sexual orientation, disability, or economic circumstances of the defendant, any witnesses, or other participant(s) associated with the trial should play no part in the exercise of your judgment throughout the trial.]



## Excerpt from 0.01

[Because personal opinions, biases, and other beliefs, whether conscious or unconscious, favorable or unfavorable, can affect your thoughts, how you remember, what you see and hear, whom you believe or disbelieve, and how you make important decisions, **the attorneys may ask** you some questions related to these issues. ...]



## Excerpt from 0.01

[ ... Some biases we are aware of and others might not be fully aware of, which is why they are called “implicit biases” or “unconscious biases.” Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may express without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.]



## Excerpt from 1.05

[Again you must avoid bias, conscious or unconscious, based on a witness's race, color, ethnicity, national origin, religion, gender, gender identity, sexual orientation, disability, or economic circumstances in your determination(s) of credibility.]



## Excerpt from 1.08

- ◆ [ ... A first response is often like a reflex; it may be quick and automatic. Even though a quick response may not be the result of conscious thought, it may influence how we judge people or even how we remember or evaluate evidence. ... ]
- ◆ [ ... Take the time to reflect carefully and consciously about the evidence.]



## Excerpt from 3.02

[ ... Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may express without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions. ... ]



## Social Media Admonitions

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- ◆ 0.01 INSTRUCTIONS BEFORE VOIR DIRE
- ◆ 0.02 INSTRUCTIONS AT END OF VOIR DIRE
- ◆ 1.08 CONDUCT OF THE JURY
- ◆ 2.01 DUTIES OF JURY—RECESSES
- ◆ 2.25 DUTIES OF JURY—AT THE CLOSE OF THE CASE



## Advocating for the [Language]

### Potential Issues

- ◇ Is Implicit/Unconscious bias real?
- ◇ Why appropriate in this case?
- ◇ Not appropriate in all cases
- ◇ Would language potentially insult the venire?
- ◇ Repetition in multiple instructions
- ◇ May not be part of judges' standard instructions
- ◇ Cite Death Penalty instruction/verdict form - 18 USC 3594
- ◇ Civil Instructions





# Thanks!

Any questions?