

TECHNIQUES AND TIPS FOR ADDRESSING UNCONSCIOUS BIAS WITH JURIES:

The Use Of Model Jury Instructions, Implicit Bias Videos,
and Voir Dire

Video Background

A recent collaborative effort of the bar and bench that is addressing bias in our legal system is the unconscious bias video for jurors. The Committee on Bias in the Oregon Justice System (formerly known as the Ad Hoc Committee on Unconscious Bias in the Justice System) created the video, which is modeled after a similar video used in Washington federal courts. The committee is made up of both state and federal practitioners and judges. This video was equally funded by the Oregon state and federal courts.

Video - Understanding the Effects of Unconscious Bias: https://www.youtube.com/watch?v=BA-z4mS_Evg

Also available on county bar websites, e.g.,
Lane County:
<https://www.courts.oregon.gov/courts/lane/jury/Pages/Video-Gallery.aspx>

WASHINGTON JUROR SURVEY

- * Surveyed 125 jurors after trial**
- * 40% had never heard the term “implicit bias” before watching the video**
- * 119/125 answered “no” to the question: Did you find any component of the video offensive?**
- * 120/125 responded “yes,” the video should be shown to other juries**

WASHINGTON FEDERAL COURT JUROR SURVEY (2019)

6. Without discussing the substance of your deliberations, do you feel that the video influenced how you considered the testimony and evidence during your deliberation?

64 – Yes 55 – No 6 – Maybe

Notable comments: “Opens your mind to hearing the facts.”; “In the end, no. The testimony and the evidence considered as a whole led the way.”; “I think the judge’s instructions were what I relied upon most.”; “Maintained open mind to all testimony and evidence.”; Yes, I gave everything a second thought.”; “Mostly during the week and how I was listening to the presentation of facts.”

RAISING BIAS IN VOIR DIRE

THE BIKE THIEF VIDEO



VOIR DIRE TRANSCRIPTS

12 VENIREPERSON: I think it was correct.

13 MS. GIVENS: What was correct?

14 VENIREPERSON: Well, I mean, that type of bias, that
15 underlies all the profiling that we do as a society. We see
16 it -- I mean, it happens to me constantly. I happen to look
17 very different from what I do in real life. It's something
18 that I've experienced continually. And it's true. I mean, it
19 happens. That implicit bias lies within all of us. And it's
20 actually a defense mechanism. It's not good or bad or
21 anything, but it's created over time from all our senses and
22 experiences. And it exists. You even said it yourself. When
23 you see smoke, you thought something. You're not making a full
24 decision, but there's a signal that goes off.

25 MS. GIVENS: Now, you said you find that happening to

VOIR DIRE TRANSCRIPTS

15 like it did have something to do with race?

16 Juror Number 33?

17 VENIREPERSON: I have to say it was -- I was really
18 offended by the whole incident, in terms of showing the video,
19 because it seemed like you were leading me on as to look for
20 the man of color doing, you know, the stealing, in terms of the
21 desired outcome. So I was a little offended, to be honest with
22 you.

23 MS. GIVENS: No. I appreciate and welcome your
24 honesty. And I'm glad you said that, because I want to make
25 sure I understand what you're saying. You were offended that

VOIR DIRE TRANSCRIPTS

1 same.

2 MS. GIVENS: Okay.

3 VENIREPERSON: I just -- I just had a negative
4 response, because I felt like you assumed that we were
5 prejudiced; therefore, you needed to remind us not to be
6 prejudiced, when, in fact, I was more upset that nobody was
7 saying anything about this guy stealing a bike, either of them,
8 all three of them. So I felt a little disturbed about your
9 approach, and I don't think it was very effective. That was my
10 response.

VOIR DIRE TRANSCRIPTS

5 Juror Number 22?

6 VENIREPERSON: Also with regard to implicit bias, I
7 sort of felt like there was an implicit bias in the filming of
8 this, in that both young men were wearing different clothes
9 that could both bring with them a bias. So it seems like it
10 would have been a fair comparison if they were dressed the
11 same. You couldn't make one judgment over the other.

12 MS. GIVENS: Thank you.

VOIR DIRE – ATTORNEY RESPONSE

2 religious beliefs, national origin, sexual preference, or
3 gender of the defendant, any witness, and the lawyers should
4 play no part in your decision.

5 What I would add to that is all of us have feelings and
6 assumptions, perceptions, and fears based on stereotypes, and
7 we may not be consciously aware of them. We played that video
8 so that we could bring those to the surface, whatever your
9 opinion is. Everything is welcome today, but we want to know
10 what it is.

VOIR DIRE – ATTORNEY RESPONSE

10 what it is.

11 There is a question in this case about items, guns, drugs,
12 and other property and who it belongs to. And our concern is
13 that you may treat or may be inclined to treat, because of some
14 unconscious association, one type of witness differently than
15 another type of witness. And that's the reason why we played
16 the video, so we could spur this discussion. Does that make
17 sense?

18 I see, Juror Number 21, that you're nodding your head.
19 What are you thinking?

VOIR DIRE – ATTORNEY RESPONSE

18 I see, Juror Number 21, that you're nodding your head.

19 What are you thinking?

20 VENIREPERSON: I think that makes sense, what you
21 just said. And it's good to talk about it.

22 THE COURT: Could you raise your voice, please?

23 VENIREPERSON: I think it makes sense to bring it up,
24 and it's good to talk about it.

VOIR DIRE – LENSE QUESTIONS

10 MS. SYKES: Do you think it's possible
11 that people can see things -- based on, you know, their
12 racial composition, that people see things from a
13 different lens and that that can kind of direct
14 outcomes?

15 I haven't heard from you, sir.

16 PROSPECTIVE JUROR: Do I think that?
17 Yes, I do. I think that there's a -- probably a
18 discrepancy between, like, news broadcasting channels
19 that one might actually try to stir up some trouble
20 with a very biased reporting on issues that would
21 infuriate anybody, or some people, whereas another
22 station may report on the same -- same issue and
23 present it in a way that is -- does not infuriate a

VOIR DIRE – LENSE QUESTIONS

17 interactions, and then the -- the -- or the conclusion
18 or the reason is attributed to racial problems.

19 MS. SYKES: So that brings me kind of to
20 another question, which is, you know, you're going to
21 hear throughout the trial that there are going to be
22 different perceptions of events, you know, based on the
23 lens from which the person is seeing it.

24 How do you reconcile that in your mind
25 and -- you know, I'd like to ask people we haven't

1 heard from, but you.

2 PROSPECTIVE JUROR: Yeah, I mean the fact
3 that we view the same events through different lenses
4 because of the color of our skin is racism, right?

5 It's because we were raised in a systemically racist
6 society. And both sides can be presenting -- what they
7 see as the series of events can be true.

8 But the fact of the matter is we need to
9 recognize that we have a racist history in Oregon, and
10 we have a predominantly white society in Oregon, and we
11 have a lack of diversity in Oregon, and we need to take
12 those claims seriously. We need to try to see it from
13 other people's side, need to try to be empathetic to
14 racial relations.

VOIR DIRE – RAISING RACE

10 So -- and I have a limited amount of time, so I'm
11 going to try to move pretty quickly.

12 As you can see, my client is African American, and in
13 terms of the parties in this case, he is the only African
14 American person in here. Given the times, I do have some
15 questions about your attitudes and feelings about race, and it
16 is an uncomfortable topic for a lot of people to discuss, but I
17 don't think I'd be doing my job if I didn't inquire.

VOIR DIRE – RAISING RACE

6 MS. SYKES: Would anybody agree or
7 disagree there's more work to be done in eliminating
8 racism? Who agrees with that?

9 PROSPECTIVE JUROR KENT: Yeah, bottom
10 line.

VOIR DIRE – RAISING RACE

11 MS. SYKES: So others also raised their
12 hands. **Has anybody else been impacted by race**
13 **discrimination in their lives or know of someone else**
14 **who has?**

15 PROSPECTIVE JUROR: I haven't been
16 impacted, but I teach adults of all ethnic groups, and
17 I see it in the classroom all the time.

18 MS. SYKES: So where -- what classroom
19 setting?

20 PROSPECTIVE JUROR: I teach at Portland
21 Community College and Mt. Hood Community College, and
22 it's a class for people who are trying to open a foster
23 home, adult foster home.

24 MS. SYKES: **And what have you observed**
25 **with this class in the form of discrimination?**

VOIR DIRE – RAISING RACE

12 Who's familiar with the racial history of
13 Oregon? What is your experience?

14 PROSPECTIVE JUROR: That Oregon was
15 called the white utopia, and that while slavery was not
16 permitted, black people were not allowed in the state,
17 and we also have a -- well, a colored history with
18 Vanport, the shuffling off of minorities to undesirable
19 parts of the city. That's the resettling of people
20 that lived there after the flooding. It's -- we
21 built -- it doesn't surprise me that we have a long way
22 to go, considering our history here.

23 MS. SYKES: Does anybody have thoughts on
24 whether that still plays out today, that history
25 carrying forward?

VOIR DIRE – RAISING RACE

13 Anybody else find it difficult to talk
14 about race issues? It's a difficult topic. You
15 smiled. Do you have thoughts on that?

16 PROSPECTIVE JUROR: Me? I mean I -- I
17 grew up in West Linn; I went to school in West Linn.
18 It's one of the whitest suburbs around, honestly. And
19 yeah, I've thought a lot over the last couple of years
20 about the fact that race is difficult to talk about,
21 and I think that it hurts us that we don't talk about
22 it.

1 PROSPECTIVE JUROR: Comments on breaks,
2 comments sometimes even right to the face, too. And
3 it's not one ethnic group; it's all ethnic groups.

4 MS. SYKES: How did that make -- how does
5 that make you feel when you hear that kind of negative
6 race -- racially toned --

7 PROSPECTIVE JUROR: First of all I get
8 embarrassed, and then I think, "Oh, my God, what am I
9 going to do now to try to stop that?" I try to preface
10 that from the very beginning, no comments,
11 blah-blah-blah, everybody's got their own particular
12 curriculum kind of thing, but it always happens.

13 MS. SYKES: It's difficult to talk about
14 race, right?

15 PROSPECTIVE JUROR: And it comes up in my
16 curriculum, too.

GET BUY IN THAT UNCONSCIOUS BIAS EXISTS

18 Juror No. 1, I'll start with you. If I were to ask
19 you, sir, if you took a random 100 people, how many of those
20 people you think, in your opinion, would allow -- whether they
21 want to or not, would allow race to affect a decision like if
22 someone were being truthful or if they had to decide whether or
23 not someone committed a crime? What percentage of a hundred do
24 you think?

25 PROSPECTIVE JUROR NO. 1: Jeez, I don't know. I know

GET BUY IN THAT UNCONSCIOUS BIAS EXISTS

12 PROSPECTIVE JUROR NO. 2: I think it's actually a
13 pretty high percentage of most people.

14 MR. KIM: If you were to assign a number, what do you
15 think?

16 PROSPECTIVE JUROR NO. 2: I would say 70 percent. I
17 think people are just affected by race. It's unfortunate. I
18 hate it.

GET BUY IN THAT UNCONSCIOUS BIAS EXISTS

4 So I'll ask all of you this one question. How many
5 of you would allow race to affect your decision making in
6 deciding somebody's credibility if they were African American
7 or if they were charged with a crime and you have to decide
8 whether or not a person is guilty? Could I see a show of hands
9 of who would do that.

10 I see no hands.

GET BUY IN THAT UNCONSCIOUS BIAS EXISTS

11 So Juror No. 2, you have the microphone, I'll ask
12 you. You see the problem I have?

13 PROSPECTIVE JUROR NO. 2: Of course.

14 MR. KIM: What is that problem?

15 PROSPECTIVE JUROR NO. 2: The problem is no one will
16 admit it. I believe it is there, and you can do your best to
17 avoid that, but I think it's one of those things that it's kind
18 of ingrained in society.

RAISING UNCONSCIOUS BIAS IN VOIR DIRE

1. MAKE A RELATIONSHIP WITH YOUR JURY

- Invite exploration
- Welcome perspectives, don't ask for agreement
- Don't get defensive
- Use a trilogy of welcoming comments (thank you; I appreciate; we value...)

2. GOAL OF VOIR DIRE FOR UNCONSCIOUS BIAS IS BUY-IN AND ACCEPTANCE

- Get the jury to agree to use the tools
 - stop
 - look
 - listen

JURY INSTRUCTIONS

NEW OREGON JURY INSTRUCTIONS

UCRJI 1001 INTRODUCTION:

- As jurors you are being asked to make very important decisions in this case. You must not allow any personal feelings, sympathy, prejudice, or bias—whether conscious or unconscious—to influence your decision making. You must not be biased in favor of or against any party, witness, or lawyer because of the person’s disability, gender, gender identity, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or *insert any other impermissible form of bias against a group or status that is not a protected class, e.g., a person’s profession*].

NEW OREGON JURY INSTRUCTIONS

UcrJI 1001 (continued)

- [As part of your orientation, you were shown a video on unconscious bias.] *Unconscious bias* is a term used by social scientists to describe the reality that everyone[, including me,] has feelings, assumptions, perceptions, fears, and stereotypes, that is, “unconscious biases,” that we may not be aware of. These hidden thoughts can affect what we see and hear, how we remember what we see and hear, how we interact with others, and how we make important decisions. Our biases can affect how we act, favorably or unfavorably, toward someone. You should make every effort to be aware of your unconscious biases and what effect those may have on your decision making.

NEW OREGON JURY INSTRUCTIONS

UCJI 5.03 FUNCTIONS OF THE COURT AND JURY

- You should make every effort to be aware of your biases, including unconscious biases, and what effect those may have on your decision making. In your deliberations, you must not be biased in favor of or against any party, witness, or attorney because of the person's disability, gender, gender identity, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or *insert any other impermissible form of bias against a group or status that is not a protected class, e.g., a person's profession*]. We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of, and others we may not be fully aware of. These hidden thoughts can affect what we see and hear, how we remember what we see and hear, how we interact with others, and how we make important decisions.
- All parties are equal before the law, so do not allow any personal feelings, sympathy, prejudice, or bias – whether conscious or unconscious – to influence your decision making.