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Sent: Thursday, August 19, 2021 9:17 PM
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Cc: Babcock, Chip
Subject: RE: 2021-08-17 Letter to Legislative Subcommittee re June 2, 2021 Assignment [IMAN-JWDOCS.FID961666]--Proposed change to jury instructions

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7. Do not let bias, prejudice, or sympathy play any part in your evaluation of the evidence admitted or testimony heard in this case. [As we discussed in jury selection,] [E]veryone, including me, has feelings, assumptions, perceptions, fears, and stereotypes that we may not be aware of but that can affect what we see and hear, how we remember what we see and hear, and how we make decisions. Because you are making important decisions as the jurors in this case, you must evaluate the evidence carefully, and you must not jump to conclusions based on personal likes or dislikes, generalizations, prejudices, sympathies, stereotypes, or biases. Our system of justice is counting on you to render a just verdict based on the evidence, not on biases.

Dear Subcommittee member: as long as we are talking about the reasoning process for jurors, the biggest problem in a trial is omitted from the suggested language, and that is making up your mind before you have heard both sides.

Possible instruction: “You should not decide a question without seeing and considering evidence from both sides of the case.”

Or

“You should not make up your mind until you have heard all the evidence and have deliberated with your other Jurors.”

Wikipedia definition of bias: “Bias is a disproportionate weight in favor of or against an idea or thing, usually in a way that is closed-minded, prejudicial, or unfair. Biases can be innate or learned. People may develop biases for or against an individual, a group, or a belief.”

<https://en.wikipedia.org/wiki/Bias>

Wikipedia definition of prejudice,
<https://en.wikipedia.org/wiki/Prejudice>

“Prejudice[1][need quotation to verify] can be an affective feeling towards a person based on their perceived group membership.[citation needed] The word is often used to refer to a preconceived (usually unfavourable) evaluation or classification of another person based on that person's perceived political affiliation, sex, gender, beliefs, values, social class, age, disability, religion, sexuality, race, ethnicity, language, nationality, complexion, beauty, height, occupation, wealth, education, criminality, sport-team affiliation, music tastes or other personal characteristics.[2][need quotation to verify]

The word "prejudice" can also refer to unfounded or pigeonholed beliefs[3][4] and it may apply to "any unreasonable attitude that is unusually resistant to rational influence".[5] Gordon Allport defined prejudice as a "feeling, favorable or unfavorable, toward a person or thing, prior to, or not based on, actual experience".[6] Auestad (2015) defines prejudice as characterized by "symbolic transfer", transfer of a value-laden meaning content onto a socially-formed category and then on to individuals who are taken to belong to that category, resistance to change, and overgeneralization.[7]”

Wikipedia definition of sympathy: “Sympathy is the perception, understanding, and reaction to the distress or need of another life form.[1] According to David Hume, this sympathetic concern is driven by a switch in viewpoint from a personal perspective to the perspective of another group or individual who is in need. Hume explained that this is the case because "the minds of all men are similar in their feelings and operations" and that "the motion of one communicates itself to the rest" so that as affectations readily pass from one to another, they beget corresponding movements.”

<https://en.wikipedia.org/wiki/Sympathy>

As long as we are talking about errors in judgment formation, here is a list of cognitive biases.

https://en.wikipedia.org/wiki/List_of_cognitive_biases. This is the scientifically-based analysis of problems with the way that humans form judgments. There is a large body of psychological research and publications on cognitive biases.

We can't address all cognitive biases in jury instructions, but we can address some. The biggest cognitive bias I have encountered in 45 years of practicing law and trying many jury trials is confirmation bias. Here is what Wikipedia says about confirmation bias,

https://en.wikipedia.org/wiki/Confirmation_bias:

“Confirmation bias is the tendency to search for, interpret, favor, and recall information in a way that confirms or supports one's prior beliefs or values.[1] People display this bias when they select information that supports their views, ignoring contrary information, or when they interpret ambiguous evidence as supporting their existing attitudes. The effect is strongest for desired outcomes, for emotionally charged issues, and for deeply entrenched beliefs. Confirmation bias cannot be eliminated entirely, but it can be managed, for example, by education and training in critical thinking skills.

Confirmation bias is a broad construct covering a number of explanations. Biased search for information, biased interpretation of this information, and biased memory recall, have been invoked to explain four specific effects: 1) attitude polarization (when a disagreement becomes more extreme even though the different parties are exposed to the same evidence); 2) belief perseverance (when beliefs persist after the evidence for them is shown to be false); 3) the irrational primacy effect (a greater reliance on information encountered early in a series); and 4) illusory correlation (when people falsely perceive an association between two events or situations).

A series of psychological experiments in the 1960s suggested that people are biased toward confirming their existing beliefs. Later work re-interpreted these results as a tendency to test ideas in a one-sided way, focusing on one possibility and ignoring alternatives (myside bias, an alternative name for confirmation bias). In general, current explanations for the observed biases reveal the limited human capacity to process the complete set of information available, leading to a failure to investigate in a neutral, scientific way.”

Flawed decisions due to confirmation bias have been found in political, organizational, financial and scientific contexts. These biases contribute to overconfidence in personal beliefs and can maintain or strengthen beliefs in the face of contrary evidence. For example, confirmation bias produces systematic errors in scientific research based on inductive reasoning (the gradual accumulation of supportive evidence). Similarly, a police detective may identify a suspect early in an investigation, but then may only seek confirming rather than disconfirming evidence. A medical practitioner may prematurely focus on a particular disorder early in a diagnostic session, and then seek only confirming evidence. In

social media, confirmation bias is amplified by the use of filter bubbles, or "algorithmic editing", which display to individuals only information they are likely to agree with, while excluding opposing views.”

Another problem that arises in making judgments is called heuristics. Here is the Wikipedia definition of heuristics, <https://en.wikipedia.org/wiki/Heuristic>

“A heuristic or heuristic technique (/hjʊəˈrɪstɪk/; Ancient Greek: εὐρίσκω, *heurískō*, 'I find, discover'), is any approach to problem solving or self-discovery that employs a practical method that is not guaranteed to be optimal, perfect, or rational, but is nevertheless sufficient for reaching an immediate, short-term goal or approximation. Where finding an optimal solution is impossible or impractical, heuristic methods can be used to speed up the process of finding a satisfactory solution. Heuristics can be mental shortcuts that ease the cognitive load of making a decision.[1][2]”

Examples that employ heuristics include using trial and error, a rule of thumb or an educated guess.”

Merely saying not to let “bias, prejudice, or sympathy” play a part in your verdict is pretty worthless as an instruction. I think that it is a great idea to go down this path of making the jury instructions more meaningful and more beneficial to the litigants, but I suggest that we give some thought to what the biggest problems are with juries and addressing them in the instructions. There is a lot of research about judgment formation generally and jury decision-making in particular.

Richard