

# MEMO

To: Supreme Court Advisory Committee  
From: Jury Rules Subcommittee  
Date: August 24, 2021  
Re: Amending Rule of Civil Procedure 226a to Address Implicit Bias

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By letter of June 2, 2021, Chief Justice Hecht requested the Supreme Court Advisory Committee review the Proposal of the State Bar of Texas Court Rules Committee to amend Texas Rule of Civil Procedure 226a to add an instruction regarding implicit bias. The recommendation of the State Bar Rules Committee and its statement of reasons is attached.

Our subcommittee recommends that the SCAC recommend adoption of this proposal.

TCR/rd  
Attachment

**STATE BAR OF TEXAS COURT RULES COMMITTEE**  
**PROPOSED AMENDMENT TO**  
**TEXAS RULE OF CIVIL PROCEDURE 226a, §§2 AND 3**

**I. Exact Language of Existing Rule**

**Tex. R. Civ. P. 226a, §§ 2 and 3**

**II.**

That the following oral and written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury immediately after the jurors are selected for the case:

Members of the Jury [or Ladies and Gentlemen]:

You have been chosen to serve on this jury. Because of the oath you have taken and your selection for the jury, you become officials of this court and active participants in our justice system.

[Hand out the written instructions.]

You have each received a set of written instructions. I am going to read them with you now. Some of them you have heard before and some are new.

1. Turn off all phones and other electronic devices. While you are in the courtroom and while you are deliberating, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not post information about the case on the Internet before these court proceedings end and you are released from jury duty. Do not record or photograph any part of these court proceedings, because it is prohibited by law.

2. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like “hello” and “good morning.” Other than that, do not talk with them at all. They have to follow these instructions too, so you should not be offended when they follow the instructions.

3. Do not accept any favors from the lawyers, witnesses, parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

4. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social

networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

5. Do not discuss this case with anyone during the trial, not even with the other jurors, until the end of the trial. You should not discuss the case with your fellow jurors until the end of the trial so that you do not form opinions about the case before you have heard everything.

After you have heard all the evidence, received all of my instructions, and heard all of the lawyers' arguments, you will then go to the jury room to discuss the case with the other jurors and reach a verdict.

6. Do not investigate this case on your own. For example, do not:

- a. try to get information about the case, lawyers, witnesses, or issues from outside this courtroom;
- b. go to places mentioned in the case to inspect the places;
- c. inspect items mentioned in this case unless they are presented as evidence in court;
- d. look anything up in a law book, dictionary, or public record to try to learn more about the case;
- e. look anything up on the Internet to try to learn more about the case; or
- f. let anyone else do any of these things for you.

This rule is very important because we want a trial based only on evidence admitted in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom because the law does not permit you to base your conclusions on information that has not been presented to you in open court. All the information must be presented in open court so the parties and their lawyers can test it and object to it. Information from other sources, like the Internet, will not go through this important process in the courtroom. In addition, information from other sources could be completely unreliable. As a result, if you investigate this case on your own, you could compromise the fairness to all parties in this case and jeopardize the results of this trial.

7. Do not tell other jurors about your own experiences or other people's experiences. For example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what happened in this case or another similar case. Do not tell the other jurors about it. Telling other jurors about it is wrong because it means the jury will be considering things that were not admitted in court.

8. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

9. Do not consider or guess whether any party is covered by insurance unless I tell you to.

10. During the trial, if taking notes will help focus your attention on the evidence, you may take notes using the materials the court has provided. Do not use any personal electronic devices to take notes. If taking notes will distract your attention from the evidence, you should not take notes. Your notes are for your own personal use. They are not evidence. Do not show or read your notes to anyone, including other jurors.

You must leave your notes in the jury room or with the bailiff. The bailiff is instructed not to read your notes and to give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone.

[You may take your notes back into the jury room and consult them during deliberations. But keep in mind that your notes are not evidence. When you deliberate, each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes. After you complete your deliberations, the bailiff will collect your notes.]

When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

11. I will decide matters of law in this case. It is your duty to listen to and consider the evidence and to determine fact issues that I may submit to you at the end of the trial. After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked and you should not consider which side will win. Instead, you will need to answer the specific questions I give you.

Every juror must obey my instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I may have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

Do you understand these instructions? If you do not, please tell me now.

Please keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

### **III.**

#### **COURT'S CHARGE**

Before closing arguments begin, the court must give to each member of the jury a copy of the charge, which must include the following written instructions, with such modifications as the circumstances of the particular case may require:

Members of the Jury [or Ladies & Gentlemen of the Jury]:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. [I will give you a number where others may contact you in case of an emergency.]

[Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.]

[You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.]

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.
2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.
3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.
4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.
5. All the questions and answers are important. No one should say that any question or answer is not important.
6. Answer “yes” or “no” to all questions unless you are told otherwise. A “yes” answer must be based on a preponderance of the evidence [unless you are told otherwise]. Whenever a question

requires an answer other than “yes” or “no,” your answer must be based on a preponderance of the evidence [unless you are told otherwise].

The term “preponderance of the evidence” means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a “yes” answer, then answer “no.” A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, “I will answer this question your way if you answer another question my way.”

11. [Unless otherwise instructed] The answers to the questions must be based on the decision of at least 10 of the 12 [5 of the 6] jurors. The same 10 [5] jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 [5] jurors, even if it would be a majority. As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions, and special instructions given to the jury will be transcribed here. If exemplary damages are sought against a defendant, the jury must unanimously find, with respect to that defendant, (i) liability on at least one claim for actual damages that will support an award of exemplary damages, (ii) any additional conduct, such as malice or gross negligence, required for an award of exemplary damages, and (iii) the amount of exemplary damages to be awarded. The jury's answers to questions regarding (ii) and (iii) must be conditioned on a unanimous finding regarding (i), except in an extraordinary circumstance when the conditioning instruction would be erroneous. The jury need not be unanimous in finding the amount of actual damages. Thus, if questions regarding (ii) and (iii) are submitted to the jury for defendants D1 and D2, instructions in substantially the following form must immediately precede such questions:

Preceding question (ii):

Answer Question (ii) for D1 only if you unanimously answered “Yes” to Question[s] (i) regarding D1. Otherwise, do not answer Question (ii) for D1. [Repeat for D2.]

You are instructed that in order to answer “Yes” to [any part of] Question (ii), your answer must be unanimous. You may answer “No” to [any part of] Question (ii) only upon a vote of 10 [5] or more jurors. Otherwise, you must not answer [that part of] Question (ii).

Preceding question (iii):

Answer Question (iii) for D1 only if you answered “Yes” to Question (ii) for D1. Otherwise, do not answer Question (iii) for D1. [Repeat for D2. ]

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

These examples are given by way of illustration.]

**Presiding Juror:**

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.
2. The presiding juror has these duties:
  - a. have the complete charge read aloud if it will be helpful to your deliberations;
  - b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;
  - c. give written questions or comments to the bailiff who will give them to the judge;
  - d. write down the answers you agree on;
  - e. get the signatures for the verdict certificate; and
  - f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

**Instructions for Signing the Verdict Certificate:**

1. [Unless otherwise instructed] You may answer the questions on a vote of 10 [5] jurors. The same 10 [5] jurors must agree on every answer in the charge. This means you may not have one group of 10 [5] jurors agree on one answer and a different group of 10 [5] jurors agree on another answer.
2. If 10 [5] jurors agree on every answer, those 10 [5] jurors sign the verdict.

If 11 jurors agree on every answer, those 11 jurors sign the verdict.

If all 12 [6] of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all 12 [6] of you agreeing on some answers, while only 10 [5] or 11 of you agree on other answers. But when you sign the verdict, only those 10 [5] who agree on every answer will sign the verdict.

4. [Added if the charge requires some unanimity] There are some special instructions before Questions \_\_\_ explaining how to answer those questions. Please follow the instructions. If all 12 [6] of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

\_\_\_\_\_  
Judge Presiding

### **Verdict Certificate**

Check one:

\_\_\_ Our verdict is unanimous. All 12 [6] of us have agreed to each and every answer. The presiding juror has signed the certificate for all 12 [6] of us.

\_\_\_\_\_  
Signature of Presiding Juror

\_\_\_\_\_  
Printed Name of Presiding Juror

\_\_\_ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

\_\_\_ Our verdict is not unanimous. Ten [Five] of us have agreed to each and every answer and have signed the certificate below.

SIGNATURE

NAME PRINTED

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_
7. \_\_\_\_\_
8. \_\_\_\_\_
9. \_\_\_\_\_
10. \_\_\_\_\_



11. \_\_\_\_\_

If you have answered Question No. \_\_\_\_ [the exemplary damages amount], then you must sign this certificate also.

### **Additional Certificate**

[Used when some questions require unanimous answers]

I certify that the jury was unanimous in answering the following questions. All 12 [6] of us agreed to each of the answers. The presiding juror has signed the certificate for all 12 [6] of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

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Signature of Presiding Juror

Printed Name of Presiding Juror

## **II. Proposed Amendment to Existing Rule**

**Tex. R. Civ. P. 226a, §§ 2 and 3**

### **II.**

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Internet before these court proceedings end and you are released from jury duty. Do not record or photograph any part of these court proceedings, because it is prohibited by law.

2. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like “hello” and “good morning.” Other than that, do not talk with them at all. They have to follow these instructions too, so you should not be offended when they follow the instructions.

3. Do not accept any favors from the lawyers, witnesses, parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

4. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

5. Do not discuss this case with anyone during the trial, not even with the other jurors, until the end of the trial. You should not discuss the case with your fellow jurors until the end of the trial so that you do not form opinions about the case before you have heard everything.

After you have heard all the evidence, received all of my instructions, and heard all of the lawyers' arguments, you will then go to the jury room to discuss the case with the other jurors and reach a verdict.

6. Do not investigate this case on your own. For example, do not:

- a. try to get information about the case, lawyers, witnesses, or issues from outside this courtroom;
- b. go to places mentioned in the case to inspect the places;
- c. inspect items mentioned in this case unless they are presented as evidence in court;
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This rule is very important because we want a trial based only on evidence admitted in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom because the law does not permit you to base your conclusions on information that has not been presented to you in open court. All the information must be presented in open court so

the parties and their lawyers can test it and object to it. Information from other sources, like the Internet, will not go through this important process in the courtroom. In addition, information from other sources could be completely unreliable. As a result, if you investigate this case on your own, you could compromise the fairness to all parties in this case and jeopardize the results of this trial.

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.

8. 7. Do not tell other jurors about your own experiences or other people's experiences. For example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what happened in this case or another similar case. Do not tell the other jurors about it. Telling other jurors about it is wrong because it means the jury will be considering things that were not admitted in court.

9. 8. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

10. 9. Do not consider or guess whether any party is covered by insurance unless I tell you to.

11. 10. During the trial, if taking notes will help focus your attention on the evidence, you may take notes using the materials the court has provided. Do not use any personal electronic devices to take notes. If taking notes will distract your attention from the evidence, you should not take notes. Your notes are for your own personal use. They are not evidence. Do not show or read your notes to anyone, including other jurors.

You must leave your notes in the jury room or with the bailiff. The bailiff is instructed not to read your notes and to give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone.

[You may take your notes back into the jury room and consult them during deliberations. But keep in mind that your notes are not evidence. When you deliberate, each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes. After you complete your deliberations, the bailiff will collect your notes.]

When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

~~12. 11.~~ I will decide matters of law in this case. It is your duty to listen to and consider the evidence and to determine fact issues that I may submit to you at the end of the trial. After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked and you should not consider which side will win. Instead, you will need to answer the specific questions I give you.

Every juror must obey my instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I may have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

Do you understand these instructions? If you do not, please tell me now.

Please keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

### **III.**

#### **COURT'S CHARGE**

Before closing arguments begin, the court must give to each member of the jury a copy of the charge, which must include the following written instructions, with such modifications as the circumstances of the particular case may require:

Members of the Jury [or Ladies & Gentlemen of the Jury]:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. [I will give you a number where others may contact you in case of an emergency.]

[Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.]

[You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in

a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.]

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision. As we discussed at the beginning of your jury service, everyone, 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.

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer “yes” or “no” to all questions unless you are told otherwise. A “yes” answer must be based on a preponderance of the evidence [unless you are told otherwise]. Whenever a question requires an answer other than “yes” or “no,” your answer must be based on a preponderance of the evidence [unless you are told otherwise].

The term “preponderance of the evidence” means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a “yes” answer, then answer “no.” A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. [Unless otherwise instructed] The answers to the questions must be based on the decision of at least 10 of the 12 [5 of the 6] jurors. The same 10 [5] jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 [5] jurors, even if it would be a majority. As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions, and special instructions given to the jury will be transcribed here. If exemplary damages are sought against a defendant, the jury must unanimously find, with respect to that defendant, (i) liability on at least one claim for actual damages that will support an award of exemplary damages, (ii) any additional conduct, such as malice or gross negligence, required for an award of exemplary damages, and (iii) the amount of exemplary damages to be awarded. The jury's answers to questions regarding (ii) and (iii) must be conditioned on a unanimous finding regarding (i), except in an extraordinary circumstance when the conditioning instruction would be erroneous. The jury need not be unanimous in finding the amount of actual damages. Thus, if questions regarding (ii) and (iii) are submitted to the jury for defendants D1 and D2, instructions in substantially the following form must immediately precede such questions:

Preceding question (ii):

Answer Question (ii) for D1 only if you unanimously answered "Yes" to Question[s] (i) regarding D1. Otherwise, do not answer Question (ii) for D1. [Repeat for D2.]

You are instructed that in order to answer "Yes" to [any part of] Question (ii), your answer must be unanimous. You may answer "No" to [any part of] Question (ii) only upon a vote of 10 [5] or more jurors. Otherwise, you must not answer [that part of] Question (ii).

Preceding question (iii):

Answer Question (iii) for D1 only if you answered "Yes" to Question (ii) for D1. Otherwise, do not answer Question (iii) for D1. [Repeat for D2. ]

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

These examples are given by way of illustration.]

**Presiding Juror:**

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

- a. have the complete charge read aloud if it will be helpful to your deliberations;
- b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;
- c. give written questions or comments to the bailiff who will give them to the judge;
- d. write down the answers you agree on;
- e. get the signatures for the verdict certificate; and
- f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

**Instructions for Signing the Verdict Certificate:**

1. [Unless otherwise instructed] You may answer the questions on a vote of 10 [5] jurors. The same 10 [5] jurors must agree on every answer in the charge. This means you may not have one group of 10 [5] jurors agree on one answer and a different group of 10 [5] jurors agree on another answer.

2. If 10 [5] jurors agree on every answer, those 10 [5] jurors sign the verdict.

If 11 jurors agree on every answer, those 11 jurors sign the verdict.

If all 12 [6] of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all 12 [6] of you agreeing on some answers, while only 10 [5] or 11 of you agree on other answers. But when you sign the verdict, only those 10 [5] who agree on every answer will sign the verdict.

4. [Added if the charge requires some unanimity] There are some special instructions before Questions \_\_\_\_ explaining how to answer those questions. Please follow the instructions. If all 12 [6] of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

---

Judge Presiding

### Verdict Certificate

Check one:

\_\_\_ Our verdict is unanimous. All 12 [6] of us have agreed to each and every answer. The presiding juror has signed the certificate for all 12 [6] of us.

---

Signature of Presiding Juror

Printed Name of Presiding Juror

\_\_\_ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

\_\_\_ Our verdict is not unanimous. Ten [Five] of us have agreed to each and every answer and have signed the certificate below.

SIGNATURE

NAME PRINTED

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_
7. \_\_\_\_\_
8. \_\_\_\_\_
9. \_\_\_\_\_
10. \_\_\_\_\_
11. \_\_\_\_\_

If you have answered Question No. \_\_\_ [the exemplary damages amount], then you must sign this certificate also.

### Additional Certificate

[Used when some questions require unanimous answers]

I certify that the jury was unanimous in answering the following questions. All 12 [6] of us agreed to each of the answers. The presiding juror has signed the certificate for all 12 [6] of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

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Signature of Presiding Juror

Printed Name of Presiding Juror

### **III. Brief Statement of Reasons for Requested Amendments to Tex. R. Civ. P. 226a §§ 2 and 3 and Advantages Served by Them**

Implicit bias is an important issue that needs to be, but is not, addressed in Tex. R. Civ. P. 226a. This proposed instruction is intended to address implicit bias through instructions given to jurors. The proposed instruction is designed to instruct jurors on the appropriate basis to weigh the evidence presented to them and the importance of making an unbiased and just decision through their verdict. The proposed addition is designed to help jurors better understand bias and provide trial judges and advocates a basis to better discuss biases and prejudices in voir dire should they desire or think it appropriate. The Committee chose not to use “implicit” in the proposed instruction to avoid alienation of potential jurors or imply any current public or political interpretation of the term. The Committee also sought to avoid language that may lead to a politically or emotionally charged interpretation of the overall instruction.

The Committee spent considerable time over the past year reviewing other examples of “implicit bias” instructions from other jurisdictions including federal, state, and various Texas counties. The Committee also actively solicited, received, and considered suggestions from various stakeholders with an interest in the proposed instruction. These stakeholders included local bar associations and judges, as well as State Bar of Texas committees, sections, and members. Critical focus was paid to removing surplus or duplicative words that impacted the clarity and length of the instruction. The Committee limited the use of words or terms that might imply to a juror that they could not use their personal judgment or common sense.

Further, the proposed addition is based on efforts by the Travis County Bar Association and members of the Dallas Bar Association to implement such instructions in civil cases. The Dallas Civil District Courts engaged in a pilot program where a similar instruction was given in smaller civil matters by agreement of the parties. Ninety-four percent of the jurors surveyed following the trials in which this instruction was used indicated that they considered the instruction in their deliberations. Fifty-four percent of the jurors surveyed following the trials in which this instruction was used reported that the instruction influenced the way in which they processed evidence and deliberated. Strong evidence, through this Dallas pilot program, shows that an instruction on implicit bias, as the one the committee now proposes, increases juror self-awareness during trial about how they processed the evidence and motivated them to be fair in their deliberations.

The proposed instruction is consistent with the September 2020 charge from the Public Trust & Confidence Committee of the Texas Judicial Council (chaired by Chief Justice Hecht) that “implicit bias” be addressed in the Texas legal system, including through annual training for judges on that topic.

This proposed instruction is consistent with many such instructions given across the United States, including those provided in the United States District Court for the Northern District of the State of Iowa,<sup>1</sup> the United States District Court for the Northern

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<sup>1</sup> Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The*

District of the State of California<sup>2</sup> the State of Missouri, the State of Washington, and the United States Court of Appeals for the Ninth Circuit.

The proposed instruction is consistent with the 2019 ABA resolution calling on all states to implement an “implicit bias” instruction in their jury instructions.

The proposed instruction is calculated to be impartial and applicable to all cases without comment on the evidence.

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*Problems of Judge-Dominated Voir Dire, The Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol’y Rev. 149 (2010). See also, [www.perception.org](http://www.perception.org) (Emphasis added) (Last visited 03/18/2018) (defining implicit bias as “an *attitude* toward, preference for, aversion against or the phenomena of associating *stereotypes* with people *without conscious knowledge*.”)

<sup>2</sup> <https://www.cand.uscourts.gov/attorneys/unconscious-bias-video-for-potential-jurors/>