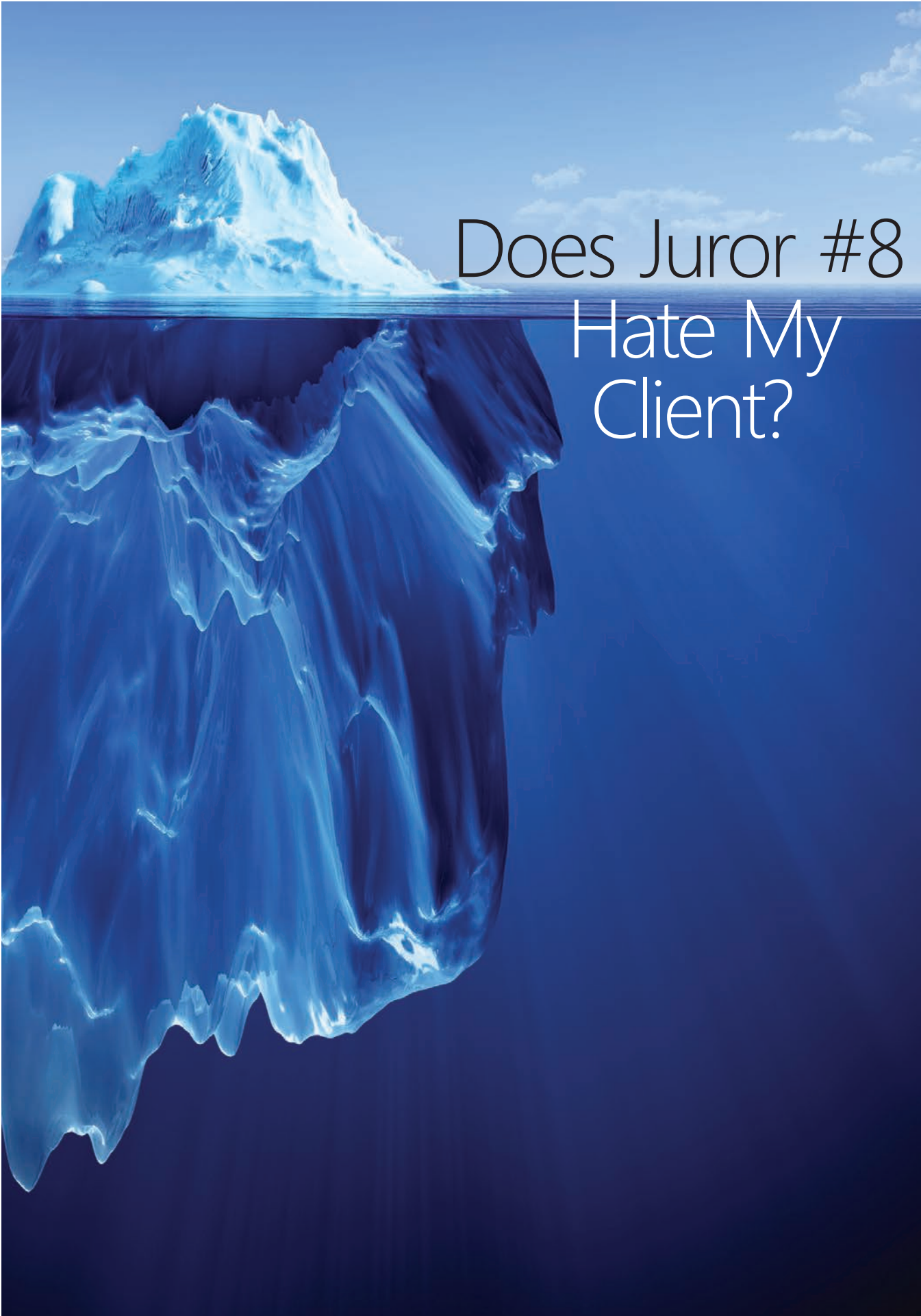# VOIR DIRE

A PUBLICATION OF THE AMERICAN BOARD OF TRIAL ADVOCATES

Assessing the challenge of juror bias in post 9-11 courtrooms

Does Juror #8 Hate My Client?

Litigators begin each jury trial faced with the daunting task of identifying biases in individuals they have never met under tight time pressure. Since the 9-11 attacks, attorneys representing clients who are Arab, Muslim, or who may be perceived to be Arab or Muslim, have

Jury Selection Post 9-11: Uncovering Bias against Arabs and Muslims

By Melissa Loberg

an even more challenging task, as they must quickly and accurately identify jurors who are likely to be prejudiced against their client based solely on the client's perceived culture or religion. The goal of this article is to aid trial attorneys in identifying jurors who are likely to stereotype individuals of minority status so that they may make informed decisions on the use of cause and peremptory strikes. Specifically, this article will describe strategies for identifying individuals who are biased against Arabs and/or Muslims or who have a general tendency to stereotype (against any outgroup).

Anti-Muslim and Anti-Arab Bias in America

The Muslim population in America is growing. Researchers have projected that by 2050, Islam will make-up about 2.1% of the U.S. population, making it the second most common religion in the U.S. below Christianity (Lipka, 2017). Admittedly, 2% of the population does not sound like a very large statistic. However, there are several reasons trial attorneys should consider and be prepared for juror bias against Muslims and Arabs.

First, jurors do not hold bias solely against Muslims, they hold bias against Muslims, Arabs or anyone who fits their stereotype of a Muslim or Arab. In fact, many Americans falsely believe that all Muslims are Arabs or all Arabs are Muslim (Arab American Institute, 2014). This means that a witness, whether Muslim or not, who simply has an Arab-sounding name, or who wears a headdress, is likely to experience prejudice from his/her peers on the jury.

Thus, the population of individuals in the U.S. who jurors hold prejudice against is considerably larger than the actual number of Muslims residing in America.

Second, people who have less exposure to Muslims are more biased against them (Arab American Institute, 2014). Thus, an attorney practicing in an area of the country with few Muslim residents will have a venire who has had little exposure

to Muslims and who will rely on their perception of Muslims based on the media, rather than personal interaction.

This can be of concern, particularly if many members of the *venire* are obtaining news from sources such as Fox News, whose audience holds more anti-Muslim beliefs than less conservative sources, such as CNN (Jones, Cox, Dionne, & Galston, 2011; Ogan, Willnat, Pennington, & Bashir, 2014).

Third, prejudice against Muslims and Arabs in America is widespread. According to Gallup (Younis, 2015), nearly half of all Americans, 43%, admit to holding prejudice against Muslims. Arabs do not fare much better with 39% of Americans holding an unfavorable view of Arabs (Arab American Institute, 2014). About half of Americans, 47%, believe Islam and American values are in conflict (Jones et al., 2011). In fact, some research has indicated that Americans' prejudice against Arab Americans is greater than prejudice against Hispanic Americans, Asian Americans or African Americans (Bushman & Bonacci, 2004).

While the statistics regarding Americans' self-reported prejudice may be disconcerting to an attorney representing a Muslim or Arab client, jurors who are willing to state openly that they hold prejudice are of little concern compared to those who hold "hidden" bias. Hidden bias is bias that: *(1)* a juror is not consciously aware of, *(2)* the juror is aware of, but does not want to admit because it is not socially appropriate, or *(3)* the juror is aware of but purposefully wants to conceal as part of an agenda.

A juror with hidden bias against your client, whether it is conscious or not, is potentially damaging to your case. This article was written to help the trial attorney identify jurors with bias, even when that bias is hidden because the juror is unaware of it or believes it is socially inappropriate. To learn more about identifying a juror with an agenda, or the "stealth juror," the reader is referred elsewhere (see Speckart, 1996).

The difference between self-reported, conscious prejudice and unconscious prejudice is referred to in the psychological literature as explicit versus implicit bias. Individuals holding explicit bias against an outgroup are aware of their bias and willingly self-report the bias. Thus, the survey statistics reported above are an example of explicit bias as Americans openly admitted to their prejudice when questioned.

Explicit bias in jury selection is *helpful* because the trial attorney can easily identify jurors who hold explicit bias against her client and can make a challenge for cause which would most likely be successful. Recommendations for identifying explicit bias will be described later in this article.

What is of greater concern in jury selection is *implicit* bias. Implicit bias among jurors is bias that the juror holds that he/she does not admit to openly. Importantly, correlations between measures of explicit and implicit bias are often low (Greenwald, Poehlman, Uhlmann & Banaji, 2009; Rowatt, Franklin & Cotton, 2005; Nosek, Smyth, Hansen, Devos, Lindner, Ranganath, Smith, Olson, Chugh, Greenwald, & Banaji, 2007). This means that individuals who hold bias do not necessarily admit to that bias when questioned. Therefore, if you only measure explicit bias during *voir dire*, you will not identify jurors with implicit bias against your client.

Implicit bias has often been measured through the use of computerized tasks such as the Implicit Association Test (IAT; Greenwald, McGhee, & Schwartz, 1998). The IAT measures accuracy as well as the length of time it takes a respondent to associate terms or images, such as Arab names and Caucasian names, with positive or negative images or words.

For example, respondents seated at a computer screen to complete the IAT can be instructed to "sort" Caucasian names and Arab names into categories of "good" and "bad" as they flash on the screen. If respondents quickly and accurately associate Caucasian names with positive words like "adore" and "friendship" and Arab names with

negative words like "hate" and "violent," but take more time and make more errors when instructed to associate Caucasian names with negative words and Arab names with positive words, that would indicate an implicit bias against Arabs. For an example, visit https://implicit.harvard.edu/implicit/.

Implicit bias, though it operates at an unconscious level, influences behavior as much or more than explicit bias. For example, Rooth (2010) found job recruiters were less likely to call back applicants with Arab-Muslim names than Swedish names. The bias against Arab-Muslim candidates was correlated with a measure of implicit bias, but only weakly correlated with explicit attitudes against Arab-Muslims. This means that many of the job recruiters in Rooth's study would likely state that they held no bias against Arabs or Muslims, while their actions indicated just the opposite.

Even more important for the trial attorney, research has shown that implicit bias, as much or more than explicit bias, affects juror behavior. Specifically, implicit bias affects how jurors recall and interpret information in a legal case (Levinson, 2007; Levinson & Young, 2010). Levinson (2007) found mock jurors recall case information in a manner that is consistent with racial prejudice. Mock jurors in Levinson's study recalled more aggressive actions as being committed by an African-American male than a Caucasian male, even though the story had been identical and only the names of the individuals was varied.

Additionally, Levinson and Young (2010) empirically tested how mock jurors viewed evidence in a criminal case in which they manipulated the skin color of the perpetrator who was caught on camera. Mock jurors' implicit racial bias was related to their interpretation of the evidence while their self-reported bias was not. Further, how jurors interpreted the evidence affected their verdicts of guilt. Thus, implicit bias affects how jurors view evidence, and ultimately, how jurors decide legal cases. In other words, jurors who do not admit to any bias when questioned during *voir*

dire may still recall and interpret evidence in ways that confirm their hidden bias and find against your client due to that hidden bias.

The challenge for the trial attorney is how to identify individuals in the venire who are likely to hold such hidden bias. The remainder of this article describes a multi-method approach to identifying jurors who are most likely to stereotype against a Muslim or Arab witness. Recommendations are made regarding the identification of both explicit and implicit bias.

Given different trial venues, and even judges within the same venue, often differ in jury selection procedures, the recommendations below should be used in accordance with the legal parameters of the Court. The first step for any trial attorney preparing for jury selection should be to determine how the Court will handle jury selection (*e.g.*, the amount of time for questioning jurors, the allowance of jury supplemental questionnaires, the types of questions the judge will/ will not allow).

**Demographic Correlates of Anti-Muslim/Arab Bias**

Juror demographics such as age, gender, and socio-economic status are easily and quickly assessed and therefore often of interest to the trial attorney who has limited time for *voir dire*. Demographic correlations have indicated that individuals who hold bias against Muslims tend to be older (Cifti, 2012; Nosek et al., 2007; Ogan et al., 2014), of lower education (Cifti, 2012; Gallup, 2017; Ogan et al., 2014), and republicans or political conservatives (Nosek et al., 2007; Ogan et al., 2014).

However, demographics alone are poor predictors of juror bias or verdicts. Some research has found males to be more biased against Arabs/Muslims than females (Nosek et al., 2007; Ogan et al., 2014) while other research has found no difference in anti-Muslim/ Arab attitudes when comparing the genders (Bushman & Bonacci, 2004).

Similarly, some research has found individuals with more anti-Muslim bias to be married than
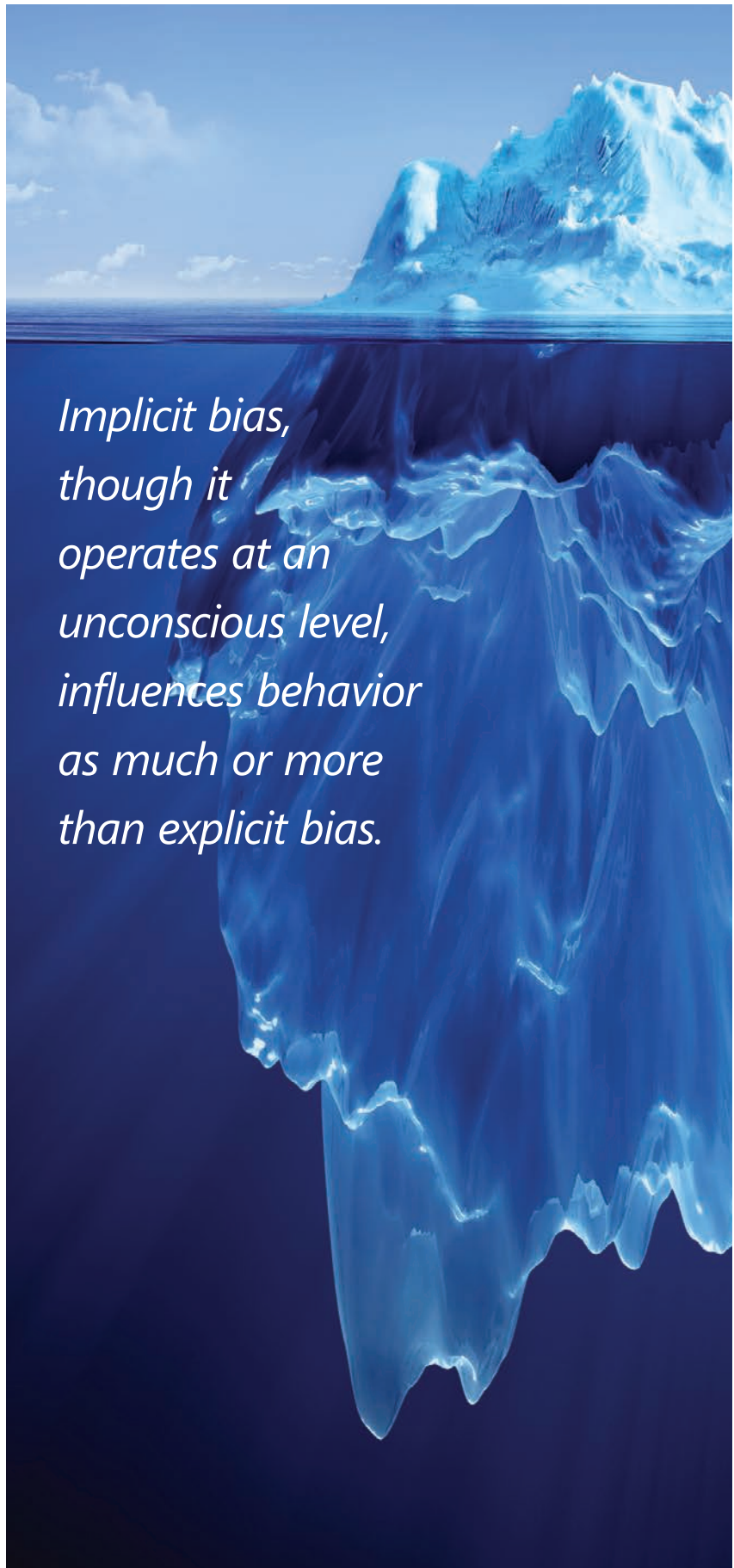
Implicit bias, though it operates at an unconscious level, influences behavior as much or more than explicit bias.
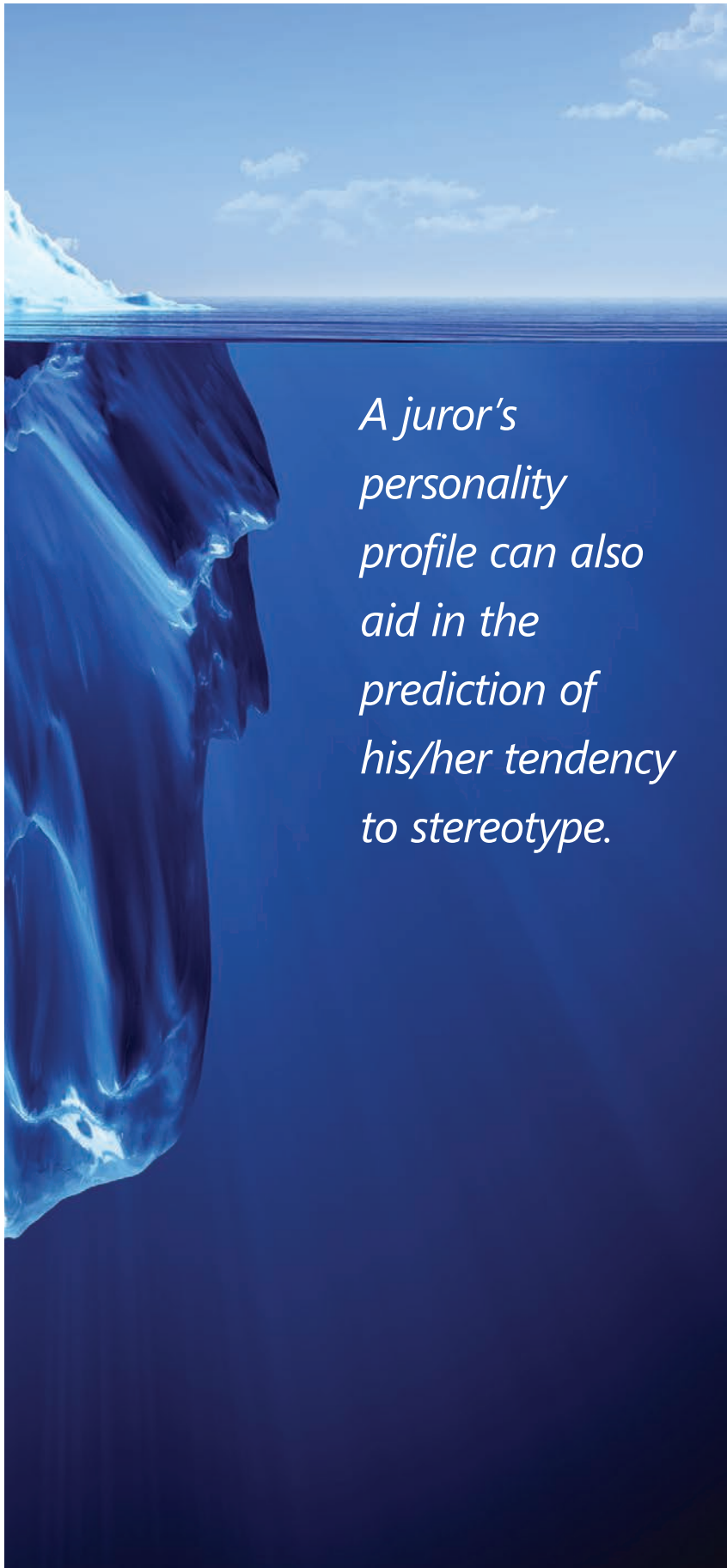
A juror's personality profile can also aid in the prediction of his/her tendency to stereotype.

those with less bias (Gallup, 2017) while other research has found no relationship between marital status and anti-Muslim attitudes (Ogan et al., 2014). Religiosity has also been a poor predictor of anti-Muslim bias (Ogan et al., 2014). Importantly, socio-economic status is not found to correlate with anti-Muslim bias (Cifti, 2012; Ogan et al., 2014).

Rather than rely on demographics which can be quite misleading, it is advised to explore jurors' background, experiences, attitudes, and personality to more accurately identify those with prejudice.

Identifying Explicit Prejudice Against Muslims and Arabs

Identifying implicit bias among jurors is considerably more difficult than identifying explicit bias. However, that does not mean that it is not important to assess explicit bias as well. This section provides recommendations for assessing explicit bias against Muslims or Arabs during *voir dire*.

As mentioned earlier, individuals who know someone who is Muslims or Arab are less likely to hold prejudice against them (Arab American Institute, 2014; Ogan et al., 2014). Thus, it is recommended to ask jurors whether they know anyone who is Muslim. Additionally, measures of social distance, first introduced by Bogardus (1925) are useful methods of identifying individuals with bias. For example:

- Would you be comfortable with a Muslim person living in your neighborhood?

- Would you be comfortable with a Muslim person coming to dinner at your house?

- Would you be comfortable with a family member marrying a Muslim?

Jurors who are biased against Arabs or Muslims often hold views that their safety is at risk. Questions assessing juror fear of Muslims/Arabs should also be asked. For example:

• Do you believe the President's recent travel ban would make Americans safer?

• When you compare Islam to other religions, do you believe Islam is *more* encouraging of violence than other religions, *equally* encouraging of violence, or *less* encouraging of violence than other religions?

The use of free association can also be informative. For example, "When you hear the word Muslim, what is the first adjective that comes to mind?" If asking this question during *voir dire*, it is best to start with jurors who you are most concerned about as many will simply repeat what others have said. This question can be more informative in a questionnaire given the jurors cannot simply adopt others' responses. Still, the responses they are willing to adopt can be informative as well, particularly when they are negative.

Identifying Implicit Bias Against Muslims and Arabs

Implicit bias, as mentioned earlier, is significantly more difficult to detect in jurors than explicit bias. Face-valid (obvious) questions will not detect implicit bias. The best approach is to use multiple methods (*e.g.*, questionnaire, verbal *voir dire*, background and social media search) to identify people who have a tendency to stereotype based on their personality, attitudes, and behaviors.

Juror Personality and Behavior

Psychologists studying personality have determined that all descriptors of personality can be condensed into five factors (Costa & McCrae, 1992). Each of the five factors exists on a continuum with individuals scoring high or low on each factor. The five factors are: Extraversion, Agreeableness, Conscientiousness, Neuroticism, and Openness to Experience (Costa & McCrae, 1992). Individuals who are high in Extraversion are outgoing, social, talkative people while those low in Extraversion are quiet individuals who prefer

a good book to a party.

Highly Agreeable individuals are caring and compassionate, empathize with others, and are sensitive to others' feelings; while those low in Agreeableness are highly competitive and view themselves and their in-groups as superior to others. Highly Conscientious individuals are hardworking and ambitious, highly disciplined, and organized; while individuals low in Conscientiousness are often late, quit easily, and are disorganized.

Highly Neurotic people are anxious and depressed while those low in Neuroticism are calm and self-satisfied. Individuals high in Openness are artsy, creative and enjoy variety while those low in Openness are more structured, regimented about their thoughts and behavior, and have a preference for routine and traditionalism. An individual's personality profile is described among psychologists by stating where along the continuum the individual falls on all five factors.

Assessing jurors' personality profiles can help to predict their influence on others in deliberations. For example, it is important to identify jurors who will be leaders or will be very active in deliberations. High Extraversion is associated with being selected as jury foreperson and some evidence suggests lengthier deliberations may occur in civil juries when the foreperson is high in Agreeableness (Clark, Boccaccini, Caillouet, & Chaplin, 2007).

Thus, if a juror is identified who is likely to be unfavorable to your side, personality traits such as Extraversion should certainly be considered in the decision to use a peremptory strike against the juror should you fail at a challenge for cause.

Stereotype-Prone Jurors

A juror's personality profile can also aid in the prediction of his/her tendency to stereotype. Several personality traits have been associated with the general tendency to stereotype. Specifically, low agreeableness, low openness to experience, low need for cognition, right-wing authoritarianism and social dominance orientation are

correlated with stereotyping and prejudice (Carter, Hall, Carney, & Rosip, 2006; Pratto, Sidanius, Stallworth, & Malle, 1994; Rowatt et al., 2005; Sibley & Duckitt, 2008). Each is described below along with examples of questions that could be adapted for use during *voir dire* or on supplemental juror questionnaires. It should be noted that the suggested questions should, when possible, be followed up with additional probes, such as "Please tell me more about that."

Low Agreeableness. Low Agreeableness and lack of trust in others is associated with a tendency to stereotype (Carter et al., 2006; Sibley & Duckitt, 2008). Individuals who are high in agreeableness tend to value cooperation and empathize with others' emotions while those low in agreeableness value competition and see themselves as superior to others. Attorneys may identify individuals who are low in agreeableness with questions like:

• Would others describe you as someone who is empathic, or tends to feel others' emotions?

• Is it important to you that other people feel at ease?

• Do you now, or have you in the past, volunteered with any charities or social organizations?

• Do you prefer to work as part of a team, or would you rather work independently?

Low Openness to Experience. Low Openness is characterized by a preference for traditionalism and routine. Individuals who are low in Openness are more rigid in their thinking and therefore less likely to change their minds based on new information (Costa & McCrae, 1992). Thus, individuals low in Openness are more likely to hold prejudice (Sibley & Duckitt, 2008). Individuals who are high in openness enjoy the arts, new experiences, and variety. New information, even if it challenges their preconceptions about outgroups, is more likely to be accepted by someone high in Openness. A few examples of

questions assessing Openness are:

• Do you play any musical instruments?

• Do you enjoy museums or art exhibits?

• If you were to have a friend or family member ask you to go out to eat, would you be more likely to choose a restaurant that you know well or would you enjoy trying a newly-opened restaurant?

• If you go shopping for groceries, do you prefer to have a list and stick to that list, or to browse the aisles (or online options) in case there is something new and different you would like to try?

• If you go on vacation, do you prefer to plan what you will do and when each day, or do you prefer to just "wing it" when you get there?

Low Openness to Experience is similar to Low Need for Cognition, discussed next. It should be noted that neither low Openness nor low Need for Cognition are the same as intelligence.

Low Need for Cognition. Low Need for Cognition is a preference or tendency toward less complex thought (Cacioppo, Petty & Kao, 1984). Stereotypes are forms of cognitive shortcuts and more likely to be used by those who avoid effortful cognitive analysis (Carter et al., 2006). Examples of questions measuring Low/High Need for Cognition are:

• Some people prefer to think about small, daily projects while others prefer to think about the long term. Which better describes you? (Adapted from Cacioppo et al., 1984)

• Do you enjoy solving riddles or brain-teasers?

• Do you enjoy watching Jeopardy or playing Trivial Pursuit?

• Do you enjoy movies that make you think, such as documentaries, or do you prefer those that allow more escapism, such as comedies?

Right-Wing Authoritarianism. Altemeyer (1996) describes Right-Wing Authoritarian (RWA) personality as someone who is highly submissive to authority and highly conventional. Right-wing authoritarianism is correlated with general prejudice and the tendency to stereotype (Altemeyer, 1996; Carter et al., 2006), and with self-reported anti-Muslim attitudes (Rowatt et al., 2005). Examples of questions measuring RWA include:

• Some people believe it is important to stick to our "old fashioned values" and others believe it is important to protest against things they don't like and to make their own "rules" about behavior. Which are you more like?

• Some people support the NFL players who recently chose to kneel/sit during the national anthem; others believe the players were just wrong and disrespectful. Which is closer to your view?

• Are you a member of any activist group (e.g., Black Lives Matter) or have you participated in any protests or marches?

Social Dominance Orientation. Social Dominance Orientation (SDO) is one's view of his/her in-group as being superior to out-groups (Pratto et al., 1994). SDO correlates with the tendency to stereotype generally (Carter et al., 2006). Also, more pertinent to the present article, SDO is associated with self-reported anti-Arab racism (Pratto et al., 1994) and self-reported anti-Muslim attitudes (Rowatt, Franklin & Cotton, 2005). Individuals high in SDO typically express strong support for the military and national defense though they express little support for environmental causes, women's rights, or activism regarding race

or sexual orientation (Pratto et al., 1994).

Generally, individuals who are more likely to view themselves and their in-group as dominant over other out-groups choose professions in what Pratto and colleagues (1994) refer to as "hierarchy-enhancing" such as the legal profession, law enforcement, or business. Examples of questions assessing SDO are listed below:

• Some people believe we should do what we can to equalize conditions for different groups in America, while others believe it is probably a good thing that certain groups are on top and others are on bottom. What is your opinion? (adapted from the Social Dominance Scale, Pratto et al., 1994)

• Do you believe immigrants entering America should be required to speak English?

Importantly, how an individual juror responds to any one question or series of questions measuring one construct is not enough to make an informed decision on the juror's hidden bias. Instead, the comprehensive profile of the juror's background, behaviors, attitudes, and personality should be taken together and compared with the other jurors in the venire to make educated cause and peremptory challenges. For example, a juror who has some propensity to stereotype because he is low in Need for Cognition but who is also low in Extraversion, is young and meek and who has never served on a jury before may be of little concern given he is unlikely to be a leader in deliberations. Assessing all important information about each juror and making decisions regarding which jurors are most likely to hold biases against your client is a difficult process. For an attorney who is busy asking questions during *voir dire*, it can be impossible to simultaneously evaluate the jurors. It is recommended to: *(1)* use multiple methods of gathering data on jurors, and *(2)* hire a consultant who is trained in the social sciences to assist.

Measuring Bias During Jury Selection

By employing multiple methods of learning about each juror on the panel, the trial team can formulate a more complete picture of the jurors' biases and leadership potential. When possible, attorneys should combine *voir dire* with juror supplemental questionnaires, background and social media research.

Juror Supplemental Questionnaires

Voir dire questioning provides the attorney with a sense of how each juror would like to be viewed by the audience in the courtroom as questions are asked in front of the judge, the trial teams, the parties involved and, most of the time, the other jurors. Individuals who hold racial prejudice are more likely to admit to that prejudice in a written questionnaire than in a verbal interview (Plant & Devine, 1998). Given there is a large number of people in the room during *voir dire*, it is likely that many jurors will hide their prejudice, particularly when the questions have strong social implications. To obtain more candid responses, a juror supplemental questionnaire is highly recommended.

The development of a juror questionnaire should involve a social scientist who can provide recommendations regarding how the construction of the questionnaire will affect juror responses. For example, question order in the juror supplemental questionnaire should be considered carefully. Questions about cultural stereotypes regarding Arabs and Muslims should be placed toward the latter part of the questionnaire, ideally after the juror has fatigued some from responding to the items. Echabe (2013) found that respondents under high cognitive load (e.g., dealing with time constraints or mentally taxing distractions) provide more honest responses to written questions regarding anti-Arab attitudes. It requires mental effort on the part of the respondent to answer in a manner that is socially desirable.

When respondents are mentally taxed or forced to answer quickly, many will endorse the easier, stereotyped response rather than the socially desirable response.

Similarly, instructions on juror supplemental questionnaires should be carefully drafted. It is recommended to ask jurors to provide their gut reaction or the first response that comes to mind. While it is possible that a juror who admits to bias in a questionnaire, when asked about the response later in front of a judge, may change his response, this does not indicate that the juror has given a more honest response after careful consideration. Instead, the juror has given the less-valid response he/she believes is socially desirable in the presence of the Court. Thus, it is important to pay more attention to jurors' first responses as opposed to the responses they provide after "rehabilitation."

Background and Social Media Research

The combination of written and oral questioning of jurors can be quite informative. However, a more complete picture of each juror is obtained by performing research. Background research can provide information such as previous lawsuits, criminal history, and political affiliation. Political affiliation is of particular interest in a case involving an Arab or Muslim client given the association between conservative political beliefs and prejudice. Often, attorneys are either not allowed or are unwilling to ask jurors overtly about political affiliation during *voir dire*. Some attorneys will resort to questions about where one obtains news and attempt to indirectly determine political affiliation. Certainly, with older jurors, answers such as "Fox News" or "NPR" are common enough to correctly categorize a juror. However, younger jurors, such as those in Generation Y, often report obtaining their news from online sources such as Facebook (Noffsinger, 2013). With jurors who have difficulty naming the actual source of their news, attorneys relying on this information to determine political affiliation will be at a loss. Thus, background research on juror political affiliation should be performed in every case, especially in cases involving Arab or Muslim clients.

Additionally, social media research can be very informative when attempting to determine a juror's political orientation. Many people in America, even those who did not post many political messages on social media prior to Donald Trump becoming President, have taken to social media to express political support or opposition. Reviewing posts from individuals who have public web pages or blogs can help the attorney get an idea of the jurors' political beliefs and activism.

Importantly, social media can provide information beyond juror political orientation. Also relevant to assessing jurors' hidden biases, social media can aid in the assessment of juror personality. For example, a juror who has a public Facebook page in which she posts videos of herself playing the guitar, pictures from her travels to a variety of places, and announcements of her upcoming poetry reading would be considered high in Openness. For a more in-depth description of the use of social media research in jury selection, see Noffsinger and Loberg (unpublished manuscript).

Conclusion

The present article was written to aid trial attorneys in their effort to identify jurors with a propensity to stereotype. Attorneys are advised to use multiple methods of gathering data on each juror and then construct a profile of each juror's background, social attitudes, personality and cognitive style. It is understandable that most trial attorneys, particularly when the Court has placed extreme limits on the time allotted for jury selection, will find the task overwhelming. A social scientist consultant can assist in the construction of questions for *voir dire* and/or juror supplemental questionnaires, the collection of background and social media data, the development of juror profiles, and ranking of jurors in relation to

the attorney's most strategic use of cause and peremptory strikes.

Importantly, in any legal case, juror verdicts are driven by many factors, not simply the culture or religion of a single witness/party. If the evidence in the case is very strong, then extralegal factors such as individual juror stereotypes will have less effect on juror verdicts. However, most cases with very strong evidence favoring one side are likely to resolve before trial; so, the cases that actually see the courtroom tend to have strengths and weaknesses on both sides. Therefore, extralegal factors such as juror personality and witness characteristics are typically very important in cases that are tried before a jury.

Understanding how juror personality will affect the verdict in a specific case is also more complicated than simply identifying biases against minorities. While juror personality can predict prejudice against a minority client, juror personality influences other aspects of how the juror will make decisions in each case. For example, authoritarian personality is associated not only with biases against minorities but also with a more prosecutorial stance in criminal cases (Narby, Cutler & Moran, 1993). Thus, the attorney representing a criminal defendant who is Muslim and who allegedly harmed a Caucasian will obviously be concerned about jurors with authoritarian personalities.

However, the attorney who is prosecuting a criminal case in which a Muslim victim has allegedly been injured by a Caucasian male will have a greater challenge in teasing out how jurors' personalities, backgrounds, and cognitive styles will affect their verdicts. Because each case is unique and many factors influence juror decisions, mock trials are recommended to provide insight into the strength of the evidence, juror evaluations of witnesses, and the particular aspects of juror personality that are associated with their decision-making in the individual case. By drawing on pre-trial research, carefully planned *voir dire*, juror supplemental questionnaires,

and background and social media research, the trial attorney is well prepared to identify the most risky jurors, strategically exercise cause and peremptory strikes, and position his/her client for success. ■

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