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MIDDLESEX COUNTY BAR ASSOCIATION



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2021-22 Term

November 2, 2021

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Hon. Glenn Grant, AOC Director
25 West Market Street
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Via email: glenn.grant@njcourts.gov

Re: Judicial Conference – Report and Additional Representative

Dear Judge Grant:

TRUSTEES 2022

Christian P. Fleming
Valerie A. Jackson
Christine F. Marks
Elizabeth Rozin-Golinder
Elliott S. Solop

On August 20, 2021, I appointed an Ad Hoc Committee on Jury Selection Practices to examine the jury selection issues identified in State v. Andujar and prepare a report for our Board of Trustees' consideration.

The committee recently completed their mission and their report was unanimously approved by our Board today, November 2, 2021. We are submitting the report (attached) as written comments for the court's consideration and to be included as part of the written record.

In addition, as per Rule 1:35-1 (Judicial Conferences), Subsection (b)(6), we are entitled to one more representative at the November 10 and 12, 2021 Judicial Conference and that person will be:

- Representative – Rachel Holt, Esq.

If you have any questions or need additional information, please call me at 732.525.9000.

Thank you very much for your consideration.

Respectfully submitted,

Edward Testino

EDWARD TESTINO
President

ET/jpc

Cc: Hon. Stuart Rabner, Chief Justice, NJ Supreme Court
Hon. Michael Toto, AJSC
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All New Jersey County Bar Associations
New Jersey Association for Justice
Trial Attorneys of New Jersey
Association of Criminal Defense Lawyers of New Jersey
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TO: Hon. Glenn Grant, JSC, Acting Director, Administrative Office of the Courts
FROM: Middlesex County Bar Association Ad Hoc Committee on Jury Selection Practices
RE: Report on Bias in the Jury Selection Process
DATE: November 2, 2021

Purpose:

In State v. Andujar, New Jersey's Supreme Court found that certain actions on the part of a prosecution team deprived a defendant of his right to a fair trial as their removal of a juror was found to be the result of implicit bias. The Court in rendering its decision indicated that it was going to assemble a judicial conference to evaluate New Jersey's jury selection process and the bias in that process. The conference will also examine authoritative sources and current practices in New Jersey and other states and make recommendations for proposed rule changes and other improvements. The Court specifically identified peremptory challenges as an area of concern for abuse based upon bias.

Based upon the long history of the Court and the Administrative Office of the Courts (hereinafter "AOC") raising the possibility of a reduction in the number of peremptory challenges afforded to New Jersey litigants and their trial counsel, the Middlesex County Bar Association (hereinafter "MCBA") formed a Committee to explore the issues raised by the Court in Andujar and offer suggestions on how to address the Court's concerns regarding implicit bias in the jury selection process, the role of peremptory challenges in the jury selection process and the costs associated with certain aspects of jury selection. This Committee is comprised of accomplished civil and criminal attorneys, assistant prosecutors, and assistant deputy public defenders, all of whom have significant jury trial experience.

Goal of the Report:

The goal of this Report is to make practical recommendations to the Court that would simultaneously: (1) make the administration of jury trials less time consuming, more cost-effective, and less burdensome on the courts and the jury pool; (2) preserve the current peremptory challenge scheme in New Jersey; and (3) reduce the incidence of implicit and explicit bias in the jury selection process.

Budgetary and Efficiency Concern:

The members of this Committee have dozens of years of trial experience and involvement in the administration of justice. It is well known that for many years, the AOC has been frustrated

with the cost associated with jury trials. Namely, bringing large numbers of jurors to the courthouses of New Jersey for them to be excused either for availability concerns or by way of peremptory challenge. It is the collective experience of the members of this Committee that the greatest inefficiency in the jury selection process is the lack of in-depth preliminary juror screening for excusal based upon availability concerns.

Most of a trial judge's time during jury selection is spent on evaluating prospective juror's explanations for unavailability or hardship, such as: childcare, work schedules, health related issues, vacations, being paid for missed time at work and other general scheduling matters. Generally speaking, the time spent sorting through the availability issues of prospective jurors far exceeds the delay resulting from the use of peremptory challenges.

The Committee understands that costs associated with getting a juror to the courthouse includes: parking, payment of the juror, staff time fielding calls from potential jurors, trial judge court staff managing jurors, transporting jurors, etc. We also understand that the AOC is frustrated by such expenses being incurred for jurors to then be excused via the peremptory challenge, especially in criminal cases. We feel that this frustration is misplaced, as the peremptory challenge, percentage wise, is a small reason for a significant number of excusals. From a cost perspective, the Court would be better suited spending its time and resources screening jurors who know they will not be available to sit on a jury before they ever step foot into a courthouse.

The Committee makes the following recommendations to the Court in an effort to make the jury selection process more cost- and time-efficient for the parties involved in the process:

- 1) Institute a modified post card, telephone screening or online questionnaire to get information from potential jurors which will let the court know whether they are going to be available to serve for a particular time period;
- 2) Use Zoom, or a similar online platform, to do the initial screening of potential jurors for trial availability. Our Committee felt, unanimously, that one of the benefits of the hybrid jury selection was the large number of jurors which the court, litigants, and trial lawyers had access to with minimal inconvenience to the jurors. Virtual initial screening interviews will eliminate the cost and administrative effort involved in having jurors report for jury duty only to be excused because of a valid scheduling conflict;
- 3) It is this Committee's collective experience that there is little uniformity in the standards that trial court judges use in deciding whether to excuse a prospective juror, especially in instances where people do not want to serve. Many judges and trial lawyers are of the opinion that if a juror does not want to serve, then they should not be forced to sit on a jury. Yet other judges are of the mindset that serving is a civic duty, and even if service will cause the potential juror some hardship, they must serve. Establishing guidelines on excuses, hardships and lack of interest may result in a more efficient process, fairer jurors and it may also increase the diversity on our juries; and

- 4) We are also aware that in some vicinages there is significant cost associated with moving jurors from their parking lot to the courthouse, the courthouse to the parking lot and paying for their parking. Performing the initial juror screening, which would address availability, health and hardship issues, over Zoom, will certainly reduce those costs.

Implementation of these simple steps would undoubtedly save New Jersey courts a substantial amount of time spent on potential jurors who know well in advance of the trial that they will not be able to serve, a substantial amount of money spent getting those jurors to the courthouse and a substantial amount of court staff time spent on managing those jurors through the entire jury selection process.

While our Committee does not have access to statistics on the percentage of jurors called to the courthouse who are excused for availability reasons, we are sure that the AOC must maintain such statistics and would be able to readily determine the cost savings associated with more extensive pre-screening of potential jurors for logistical availability concerns.

We also note that Mary R. Rose, Ph.D. indicates in the conclusions of her June 1, 2021, report (hereinafter “Rose Report”), that challenge for cause is the most common way for people to be removed from jury service in criminal cases and the second leading cause in civil cases. However, the Rose Report does indicate that peremptory challenges are a significant cause of juror attrition in the jury selection process.

Reducing Bias, Including Implicit Bias, in the Jury Selection Process:

The Rose Report states that while “peremptory challenges can be linked sporadically to minority-group attrition patterns,” those challenges are not a primary reason for minority citizens failing to make a jury. See, Rose Report at p. ii. It is important to note that the members of our Committee are trial lawyers representing all areas of trial law practice, come from diverse backgrounds and practice all over the State of New Jersey. Our members’ experience supports Dr. Rose’s conclusion that peremptory challenges are infrequently used in an illegal and biased fashion. Nonetheless, our members recognize that bias, including implicit bias, certainly exists in the jury selection process and suggests ways to reduce both explicit and implicit bias.

Our Committee met several times over the past few months to discuss the issues of bias and peremptory challenges and their relationship, if any, to each other, in light of our research and shared experience. Based upon the extensive experience of our Committee members, we concluded that bias and peremptory challenges are separate issues. It was also clear during these discussions that the bias existing in our justice system is largely due to the system which the Court has put in place to call citizens to serve as jurors, and the most significant events which impact jury diversity occur before the parties and their lawyers even meet the jury panel. The Committee has several recommendations for the Court which will reduce bias in our jury selection process.

- 1) Expand the pool of jurors selected for jury venire by using additional sources for locating potential jurors, such as: state aid rolls, public housing assistance rolls, charity care rolls, etc.;
- 2) Restructure the regions from which jurors are pulled for the various vicinages so that they are similar to the manner in which the federal courts of New Jersey work. It is clear that based upon the sources used to create the jury pool, certain counties require the court to look beyond vicinage boundaries;
- 3) Use AOC resources, perhaps an algorithm, to create more diverse jury panels from which petit juries are selected. Currently, based upon the random selection of jury panels, there are instances where the original panel that is selected is not sufficiently diverse to guarantee a fair trial. In such cases, regardless of challenges for cause or peremptory challenges, the ultimate composition of the jury is similarly at risk of lacking diversity as well;
- 4) Expand voir dire so that New Jersey's voir dire provides the litigants and their trial counsel an opportunity to directly question the potential jurors to explore potential biases and prejudices. New Jersey is known for having a highly restrictive voir dire with very limited attorney involvement (research shows that jurors are more open when responding to questions asked by lawyers¹);
- 5) Provide greater education to all judges on biases of all types, including implicit bias, and teach them methods to identify it;
- 6) Require attorneys to complete at least one CLE hour per year in a course focused on bias, which includes identifying implicit bias and its effects;
- 7) Provide additional guidance to judges on challenges for cause based upon juror bias, so that they may more readily identify same and assist trial counsel in obtaining an impartial jury for the litigants. This is not a substitution for the peremptory challenge, however, it makes jury selection more efficient if jurors are excused at the "for cause" stage or voir dire as opposed to waiting for counsel to exercise peremptory challenges; and
- 8) At initial juror orientation, provide a brief explanation of implicit bias and ask jurors to be aware of same during the voir dire process and during their jury service should they be selected.

¹ THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT, By Hon. Gregory E. Mize (ret.), Paula Hannaford-Agor, J.D. & Nicole L. Waters, Ph.D. April 2007, at p.28: "Empirical research supports the contention that juror responses to attorney questions are generally more candid because jurors are less intimidated and less likely to respond to voir dire questions with socially desirable answers." (Citing Susan E. Jones, Judge versus Attorney-Conducted Voir Dire, 11 L. & HUMAN BEHAV. 131 (1987)).

Expediency v. Justice:

When many of us attended law school, the New Jersey court system was taught as the model that other states should follow as the judges were appointed and the trial process was fair and focused on justice. Over the last few decades, it has become apparent that the AOC is utilizing statistics to assure that cases are moving swiftly. There is no doubt that the AOC's focus on using statistics to measure judges' productivity, as well as encouraging lawyers to expedite trials and find quicker ways to empanel a jury have all eroded our sense of justice. Our judges should not be pressured with trial statistics and the need to move cases quickly. The speed of justice in our courtrooms should not override the quality of justice each litigant is entitled to in our court system. While it is understood that productivity and efficiency are highly valued in corporate America, these attributes alone do not ensure that justice will be achieved in our courtrooms.

New Jersey Courts' Statement of Core Values lists "four paramount values representing the core of what we stand for as an organization." Those four values are: independence, integrity, fairness and quality service. These words must not ring hollow in our halls of justice. The bedrock of our system of justice is an impartial adjudicator; judge or jury. In the criminal and civil divisions, it is generally the impartial jury that makes the decision when parties cannot reach a settlement. While a small number of cases ultimately proceed to a jury trial, it is imperative that litigants are able to use a process which will instill in them a sense of confidence in the adjudicator, so that win, lose or draw, they know that they had their meaningful day in court.

Cases are not widgets; they are disputes which have a very real impact on a person's life.

Peremptory Challenges and The Fundamental Right to a Fair Jury Trial:

The New Jersey Constitution is an extraordinary document. Newer than many other state constitutions, the drafters had the benefit of seeing the mistakes made previously when drafting ours. They understood that an independent judiciary was critical to the health of our State, as only a neutral adjudicator can ensure that there is public confidence in the resolution of disputes between citizens, corporate entities and governmental entities. Nonetheless, keeping in mind the system of checks and balances that made our federal Constitution such a revered document, the drafters placed certain powers associated with the judicial function in the hands of our Legislature.

Those powers include: setting the size of civil juries^{2 3}, as well as the setting of peremptory challenges.⁴

Our case law reflects the importance of the right to a jury trial, and the significance of the peremptory challenge as an integral part of that right. In Wright v. Bernstein, 23 N.J. 284, 293 (1957), our Supreme Court stated:

Our Constitution guarantees that the right of trial by jury shall remain inviolate, *Art. I, par. 9*, and the right to peremptory challenge is an incident of that trial. While at common law there existed no right of peremptory challenge in civil actions, in this State the right to peremptory challenges in civil actions was given by *L. 1911, c. 151, p. 222*, now *N.J.S. 2A:78-7*; Roberts v. Saunders, 118 N.J.L. 548, 554 (*E. & A.* 1937). This right of challenge is further implemented by *N.J.S. 2A:78-4* (now N.J.S.A. 2B:23-13) which, *inter alia*, provides that on the trial of any cause, civil or criminal, all parties may interrogate a person summoned as a juror before he is sworn, to elicit information for the purpose of "determining whether or not to interpose a peremptory challenge, and of disclosing whether or not there is cause for challenge." *R. 4:48-1* seeks to accomplish the same end by stating by whom and in what manner the examination shall be conducted.

We raise this issue to point out that the peremptory challenge is an important mechanism for trial lawyers to protect their clients against biased or prejudiced jurors which may cause an unjust verdict for reasons not related to the evidence nor due process.

² Article I, Paragraph 9, states, "The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury."

³ N.J.S.A. 2B:23-1. Number of jurors.

a. Juries in criminal cases shall consist of 12 persons. Except in trials of crimes punishable by death, the parties in criminal cases may stipulate in writing, before the verdict and with court approval, that the jury shall consist of fewer than 12 persons.

b. Juries in civil cases shall consist of 6 persons unless the court shall order a jury of 12 persons for good cause shown.

⁴ N.J.S.A. 2B:23-13 Peremptory challenges.

Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows:

a. In any civil action, each party, 6.

b. Upon an indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by subsection b. of N.J.S.2C:21-1, or perjury, the defendant, 20 peremptory challenges if tried alone and 10 challenges if tried jointly and the State, 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly.

c. Upon any other indictment, defendants, 10 each; the State, 10 peremptory challenges for each 10 challenges allowed to the defendants. When the case is to be tried by a jury from another county, each defendant, 5 peremptory challenges, and the State, 5 peremptory challenges for each 5 peremptory challenges afforded the defendants.

The purpose of voir dire is to examine jurors so that otherwise undisclosed biases and prejudices are brought out and that the courts, litigants and trial counsel are able to prevent the seating of jurors who might not be able to view the evidence at trial in an impartial manner because of their life experience, attitude or beliefs. As is evident by reading the news or social media posts, the public's faith in our governmental institutions is very low. In order for members of the public to trust our justice system and be confident that they are going to be judged by an impartial jury they must participate in the jury selection process. If we restrict the participation of the parties in that process, we will damage their confidence in the justice system. The message that the courts will be sending is that the public cannot be trusted to participate and that government knows better.

The trial lawyers on this Committee have all sat next to clients during the jury selection process and explained to that client why a jury may not reflect their peers. Peremptory challenges are integral to achieving a fair jury. They are not a "cure all" to eliminate juror bias and prejudice in the selection process, however, they do provide some level of reassurance to litigants that they have a say in who will be on the jury judging them. This is important to people that are facing time in prison or have been waiting several years to have a civil dispute adjudicated and be compensated for the upheaval that another's negligence has caused in their life.

Implicit Bias:

Overt bias is easier to recognize and address than implicit bias. This Committee has the following questions as we proceed through this process:

(1) Don't all human beings have implicit biases?

(2) Isn't it an impossible task to remove bias (especially, implicit bias) from the jury selection process when the trial is conducted by human beings and the judging is done by human beings?

(3) Aren't judges implicitly biased? If a judge is biased, how does that judge determine if actions taken by counsel are based upon implicit bias?

(4) Can't a decision to remove a juror, which one person may think is based upon a bias, implicit or otherwise, have a reasonable basis in trial strategy and not actually be the result of implicit bias?

(5) Doesn't a litigant have a right to make an effort to obtain a jury that shares his or her life experience? Don't they have the right to have their attorney attempt to obtain a jury that has members who can appreciate why the litigant did or did not do something, which may in part be explained by their life experiences?

(6) Doesn't a litigant have a right to participate in the selection of a jury in their own trial and tell their attorney that they don't want a particular person on a jury because they don't have a good "feeling" from someone or the person is giving them "dirty" looks?

Conclusion:

The members of the Committee believe strongly in the right to a fair jury trial and that this fundamental right should not be eroded because of logistics, financial nor expediency concerns. When a litigant walks into a New Jersey courthouse for a jury trial, they should know that they will be an active participant in the selection of the jury that will judge them, that they and their counsel will have a role in the selection of the jury that will judge them and that at the end of the trial, they were judged by an impartial factfinder. The improvement of diversity within New Jersey's jury pools will go a long way to creating such confidence, while the reduction or elimination of peremptory challenges would undermine such confidence.

We unanimously approve the report above.

MCBA Ad Hoc Committee on Jury Selection Practices

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