NOTICE TO THE BAR

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS REQUESTING COMMENTS ON REVISITING OF OPINION 685

The Supreme Court Advisory Committee on Professional Ethics will be revisiting Opinion 685 and hereby requests comments from interested persons. This Opinion, issued in 1998, found that race-based peremptory challenges were not prohibited by Rule of Professional Conduct 8.4(g). While the Opinion recognizes that the use of race to assert peremptory challenges had been held to be unconstitutional, it found that lawyers who do so are not potentially subject to discipline. A copy of the Opinion is attached.

The Committee hereby requests comments from interested persons in both the legal community and the broader community regarding this matter. Comments should be sent by November 22, 2021 to:

Advisory Committee on Professional Ethics
Attention: Carol Johnston, Committee Secretary
Richard J. Hughes Justice Complex
P.O. Box 970
Trenton, NJ 08625-0970

Comments may also be submitted via Internet e-mail to the following address: Comments.Mailbox@njcourts.gov.

The Committee will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and

address and those submitting comments by e-mail should include their name and e-mail address.

Ronald K. Chen, Esq.
Chair, Advisory Committee on
Professional Ethics

Dated: October 7, 2021

Link to original WordPerfect Document

154 *N.J.L.J.* 434
November 9, 1998

7 *N.J.L.* 2554
November 9, 1998

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the New Jersey Supreme Court

OPINION 685

The Use of Peremptory Challenges to Exclude Minorities from Sitting on a Jury

The inquirer has asked whether the use of peremptory challenges to exclude minorities from sitting on a jury subjects an attorney to discipline for violation of RPC 8.4(g). The Rule, in pertinent part, provides:

> It is professional misconduct for a lawyer to:
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> (g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap, where the conduct is intended or likely to cause harm.

There is no doubt that the use of peremptory challenges to remove potential jurors on the basis of presumed racial bias violates both the United States and the New Jersey constitutions. *Batson v. Kentucky,* 476 *U.S.* 79, 106 *S. Ct.* 1712, 90 *L. Ed. 2d.* 69 (1986); *State v. Gilmore,* 103 *N.J.* 508 (1986). Indeed, it is fair to say that New Jersey

would prohibit discrimination in the exercise of peremptory challenges against any "cognizable group" which term includes, "at a minimum," those groups defined on the basis of "race, color, creed, national origin, ancestry, marital status or sex." *Id.* at 526. The prohibition applies to civil as criminal jury cases in this State. *Russell v. Rutgers Health Plan,* 280 *N.J. Super* 445, 453 (App. Div. 1995); and *see, Edmonson v. Leesville Concrete Co., Inc.,* 500 *U.S.* 614, 111 *S. Ct.* 2077, 114 *L. Ed. 2d.* 660 (1991). Thus, in New Jersey, the *Gilmore* rule applies to all attorneys on both sides of all civil and criminal jury trials.

It is suggested that RPC 8.4(g) should be invoked to place in jeopardy of disciplinary proceedings every lawyer who is found to have utilized peremptory challenges to exclude members of a cognizable group from a jury on the basis of assumed group bias. Moreover, since *Gilmore* establishes a procedure for the trial court to hear and decide whether there is impermissible use of peremptory challenges in this regard, it is highly unlikely that any disciplinary tribunal would disturb the determination of the trial court. *See* Supreme Court Comment to RPC 8.4(g) as it relates to adjudications in employment discrimination cases ("The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs."). Therefore, in the event of a finding by a trial court of impermissible use of peremptory challenges, a subsequent reporting of the incident to the appropriate disciplinary authority by the judge or opposing counsel, as required under RPC 8.3(a), would almost certainly result in a subsequent finding of punishable professional misconduct. Thus, the *Gilmore* hearing designed to make the substantive determination regarding the permissibility of certain peremptory challenges would become part and parcel of a disciplinary proceeding against the challenging lawyer.

It is submitted that neither *Gilmore* nor RPC 8.4(g) contemplated such an eventuality. Moreover, as a practical matter, we note that in determining whether a *Gilmore* violation has occurred, judges may be affected by the knowledge that a finding of violation would automatically expose the challenging attorney to a charge of violation of the Rules of Professional Conduct. While we want to believe that judges would not be so affected, we must and do face reality. If this were to occur, subjecting attorneys to charges of violation of RPC 8.4(g) under these circumstances would work at odds with the salutary result the Supreme Court intended in deciding *Gilmore.*

Gilmore not only establishes a procedure for determining whether peremptory challenges are being used to exclude discrete cognizable groups, but also provides the remedy. If the trial court finds the challenges are based upon assumptions of group bias, the selected jurors are dismissed, a different venire is drawn and selection begins anew. *State v. Gilmore, supra,* 103 *N.J.* at 539; *State v. Scott,* 309 *N.J. Super* 140, 150-152 (App. Div. 1998). There is no suggestion that the challenging lawyer should be

exposed to disciplinary proceedings. In fact, the Supreme Court, out of respect for the challenger, as well as the statutory basis and "very old credentials" of peremptory challenges, created a presumption of validity of the questioned peremptory challenges. *State v. Gilmore, supra,* 103 *N.J.* at 535. This presumption may be overcome by a showing that there is a substantial likelihood of assumed "group bias" rather than "situation specific bias," *Id.* at 536, but the Court cautioned that there is no "bright line" between "permissible grounds of situation specific bias and impermissible reasons evincing presumed group bias" and that the final determination must depend upon the judge's sense of fairness. *Id.* at 545.

In short, the Supreme Court has acknowledged that any peremptory challenge may involve assumptions of some form of bias, and has indicated that there may be close calls as to whether a particular assumption of bias is permissible. The serious question is whether lawyers who exercise peremptory challenges in the interests of their clients should, in the process, have to face the possibility of disciplinary action. In *Russell v. Rutgers Health Plan, supra*, 280 *N.J. Super* 445, a civil case, the conclusion reached by the trial court was that there was no assumption of group bias in the defendant's peremptory dismissal of a black juror. Counsel for a co-defendant in that case stated that he had also considered removing the same juror but refrained from doing so because plaintiff's counsel had warned defendants that a *Gilmore* hearing would be invoked. This chilling effect on peremptory challenges is bound to be infinitely greater if the threat of disciplinary action is now to be added to the mix.

Placing great emphasis on parsing the language of RPC 8.4(g) itself is not helpful in determining whether the use of impermissible peremptory challenges is intended to fall within the prohibition of the Rule. As the Supreme Court recognized in its reference to "situation specific bias," even permissible peremptory challenges may involve some elements of "discrimination." And it is clear that all peremptory challenges are "intended ... to cause harm" in the sense of obtaining a tactical advantage.

The only case mentioned in the Supreme Court Comment to RPC 8.4(g) is *In re Vincenti*, 114 *N.J.* 275 (1989). In *Vincenti*, the attorney's outrageous conduct included making direct and "invidious racial" comments about another lawyer in the case. Although *Gilmore* had long been in place when RPC 8.4(g) was adopted, no mention of it (or any of the relevant United States Supreme Court cases) was made in the original Comment or in any edition of the Rules since. The giant leap this Committee is being asked to make is to engraft on *Gilmore*, in addition to the remedy provided by the decision itself, an ethical violation which places an attorney in harm's way each time a peremptory challenge is made against a member of any one of the extensive catalog of cognizable groups. This we refuse to do.

Mention is made by the inquirer of a practice, which apparently "does not frequently occur," where prosecutors intentionally challenge black and Hispanic jurors, not simply to exclude them because of assumed group bias, but to get a generally more favorable jury panel under *Gilmore*. There are clearly adequate procedures available, including contempt proceedings, to deal with such willful obstruction of the trial proceedings. *R.*

1:10-1 and *R.* 1:10-1[2].

Although this Committee should, in so far as practicable, not identify the party making an inquiry, *R.* 1:19-3, in this particular case it seems important, and not in any way harmful to the inquirer, to note that the inquiry is made by another standing committee of the Supreme Court. Apparently, that committee is making an ongoing study of the extent of this particular practice of abusing *Gilmore*. Because of its status as a Supreme Court committee, the inquirer has access to the Supreme Court itself. Therefore, in addition to rendering this advisory opinion, we would encourage the Committee to advise the Supreme Court of its concerns and of the status of its study. In our view, however, so long as peremptory challenges are permitted, the trial bar should not be routinely exposed to disciplinary action simply by exercising them.

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