

NOTICE TO THE BAR

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

WITHDRAWING OPINION 685 AND REQUESTING COMMENTS ON POTENTIAL NEW OPINION

The Supreme Court Advisory Committee on Professional Ethics hereby withdraws Opinion 685 (1998) and requests comments from interested persons on a potential new opinion. Opinion 685 found that use of race-based peremptory challenges was not prohibited by Rule of Professional Conduct 8.4(g). Rule of Professional Conduct 8.4(g) prohibits lawyers from engaging in conduct “involving discrimination . . . 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.” While the Opinion recognized 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. The Committee finds that this Opinion is inconsistent with the plain meaning of the text of Rule of

Professional Conduct 8.4(g) and, therefore, it hereby withdraws the Opinion.

Withdrawing Opinion 685 does not imply that every use of a peremptory challenge found to fall within Batson v. Kentucky, 476 U.S. 79 (1986), or State v. Gilmore, 103 N.J. 508 (1986), is necessarily an ethical violation, but merely eliminates the categorical exclusion from consideration under Rule of Professional Conduct 8.4(g). Whether any particular use of a peremptory challenge also constitutes a violation of Rule of Professional Conduct 8.4(g) is a fact-based issue that would be determined by the appropriate adjudicatory bodies pursuant to the procedures and standards of proof described in Rule 1:20.

The Committee is considering issuing a new Opinion that would replace Opinion 685 and provide guidance to lawyers and the disciplinary authorities on the application of Rule of Professional Conduct 8.4(g) to lawyers' conduct in the jury selection process. The Committee is considering addressing both intentional and implicit discrimination in jury selection, and the concept of harm within the meaning of Rule of Professional Conduct 8.4(g).

The Committee recognizes that the Supreme Court has recently convened a Judicial Conference on Jury Selection to examine implicit bias in jury selection. The Committee is aware that the issues it is considering overlap, to a certain extent, with the issues being considered by the Conference. The Committee, however, is charged with the role of interpreting the Rules of Professional Conduct. Rule 1:19-2. Its focus is solely on Rule of Professional Conduct 8.4(g) and lawyers who engage in either intentional or implicit discrimination in jury selection.

The Committee hereby requests comments from interested persons in both the legal community and the broader community regarding this matter. It may hold a public hearing at a date to be announced.

Comments should be sent by February 22, 2022 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.

A handwritten signature in blue ink, appearing to read "Ronald K. Chen".

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

Dated: January 7, 2022