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February 22, 2022

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

Re: Request for Comments on Applying Rule of Professional Conduct 8.4(g) to Govern Lawyers' Conduct in the Jury Selection Process

Dear Ms. Johnston:

On behalf of the American Civil Liberties Union of New Jersey ("ACLU-NJ"), I thank you for the opportunity to provide comments on Rule of Professional Conduct 8.4(g) ("RPC 8.4(g)) and the application of the rule to lawyers' conduct in the jury selection process.

The ACLU-NJ is committed to the essential protections of the Sixth Amendment for criminal defendants and to upholding the equity principles at the heart of jury selection for all litigants: fair trials and the elimination of unconstitutional bias. To this end, we support interrupting acts of intentional and implicit discrimination in jury selection through Rule 8.4(g) sanctions where lawyers and judges engage in conduct involving discrimination during the jury selection process.

I. INTENTIONAL AND IMPLICIT DISCRIMINATION IN JURY SELECTION

As a preliminary matter, the question of intentional and implicit discrimination in jury selection in New Jersey has been subjected to extensive scrutiny in order to determine whether New Jersey juries are racially representative, to explore whether sources of attrition from jury service are systemic and/or systematic, and to provide data points from which to conduct these analyses. In her June 2021 Report for the New Jersey Supreme Court, Dr. Mary R. Rose scrutinized data from 95 trials across 14 counties, concluding that final juries "fail to represent the panels from which they are drawn, and, in some instances, all members of a minority group failed to be seated on a jury." *See* Dr. Mary R. Rose, FINAL REPORT ON NEW JERSEY'S EMPIRICAL STUDY OF JURY SELECTION PRACTICES AND JURY REPRESENTATIVENESS, June 2021 at i-ii. Dr. Rose also found that "peremptory challenges are not the primary reason why African American, Latino, or Asian jurors fail to make it on to a jury." *Id.*

Given these findings, the need to apply RPC 8.4(g) to attorney behavior during jury selection might seem unnecessary. However, racist practices within the criminal justice system have continued to evolve and adapt, driving discrimination towards alternative expressions. While juries may show signs of representativeness, the entire universe around juror selection still contains age-old racial fissures. Ultimately, New Jersey juries fail to be sufficiently representative, and that truth requires an understanding of and appreciation for the ways discrimination manifests during jury selection and in the criminal justice system generally.

A. *Examining the Likelihood of Harm*

In the now-withdrawn Opinion 685, this Committee submitted 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*.
>
> [THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE MINORITIES FROM SITTING ON A JURY, 1998 WL 793295, at *2.]

While *State v. Gilmore*, 103 N.J. 508 (1986), explicitly held that the removal of potential jurors based on presumed racial bias constitutes a violation of New Jersey and United States' constitutions, as codes switch and intentional discrimination mutates into "race-neutral" expressions, the "salutary" effect of *Gilmore* has become increasingly hard to find. Accordingly, the questions of harm—what is likely to cause it, what it looks like, and what harm is sufficient to make one subject to discipline—are central to the use of RPC 8.4(g) as a sanction.

1. State v. Andujar

State v. Andujar, 247 N.J. 275 (2021) serves as an exemplary case study of harm. In *Andujar*, the prosecutor's actions sat within a matrix of *Batson*-adjacent and -informed power abuses outside "the permissible middle ground of reasonable, nondiscriminatory prosecutorial discretion." *Gilmore*, 103 N.J. at 538. The prosecutor in *Andujar* evaded *Batson*'s prohibition on racialized peremptory challenge use by substituting a criminal background check for a peremptory challenge of a Black male juror, F.G., from Newark. By subsequently arresting the juror on an open warrant for an infraction for which he had not been convicted, the prosecutor violated Mr. Andujar's constitutional rights by purposefully making F.G. "unavailable" to serve. Rather than defend impermissible racial considerations implicated by her failure to use a preemptory, the prosecutor shifted the framework from one requiring facial neutrality to one consisting of a manufactured criminality.

Both prosecutors' arguments to the judge supporting a for cause challenge were similarly disturbing. The first prosecutor stated: "[y]ou know . . . he uses all of the lingo about, you know, the criminal justice system, talked about people getting picked up, talked about people getting trigger locked, talked about CDS, talks about the lifestyle. I just think that *given his background and his extensive background in the criminal justice system with friends and family and knowing what the testimony in this case is going to be is problematic*. And I think the juror should be excused for cause based on his answers to those questions."[1] (Emphasis added). This was immediately followed by the second prosecutor's addition: "[w]hat I think is very concerning his close friends hustle, engaged in criminal activity. That is how his friends make a living. *That draws into question whether he respects the criminal justice system, whether he respects what his role is here, and whether he is going to uphold all of the principles that he was instructed by your Honor*."[2] (Emphasis added).

In arguing for F.G.'s for cause dismissal, the prosecutors asserted that merely knowing people involved in the criminal justice system (a) constitutes bias; and (b) calls into question an individual's respect for the criminal justice system, their fitness to serve, and their ability to uphold legal principles of fairness and equity. The harms detailed in the above interaction are fourfold: 1) they circumvent the checks put in place to prevent racial bias displayed through a peremptory challenge; 2) they circumvent a judge's finding that the cause challenge is without merit; 3) they conflate relationships of Black people from certain places with non-qualification for jury service on bases entirely unrelated to the statutory requirements; and 4) they cause psychic harm to the juror who intends to carry out his civic duty and finds himself in a jail cell.

We note that the *Andujar* Court held that "[b]ased on all of the circumstances, we infer that F.G.'s removal from the jury panel may have stemmed from implicit or unconscious bias on the part of the State, which can violate a defendant's right to a fair trial in the same way that purposeful discrimination can." We disagree with the assessment that the bias was unconscious. Associating those impacted by the criminal justice system with an automatic inability to "uphold the principles" of the criminal legal system demonstrates a raced assessment of an individual juror entirely dependent on base racial stereotyping. Regardless of whether the bias was intentional or not, the *outcome* resulted in clear harms to F.G.; harms for which RPC 8.4(g) could have acted as a powerful check and corrective.

The criminalization of a juror, taken to such an extent, cannot be erased. It was written on the body and the mind of the potential juror, demeaning the just functioning of the law and damaging the desire of the individual to fully participate in legal systems as promised by the Constitution. The harms created in *Andujar* are slippery—they do not sit neatly within and cannot be caught in the nets constructed for the purpose of avoiding the harms in the first place. Accordingly, the response of using RPC 8.4(g) must be able to adequately adjust to the fluid nature of racialized intent regarding removing jurors of color from the pool.

[1] Transcript, *State v. Andujar*, dated May 31, 2017 at 95:3-12.

[2] *Id*. at 95:14-20.

B. *Suggested Guidance Regarding the Application of RPC 8.4(g) as a Tool of Ethical Regulation of Lawyer Conduct in Jury Selection*

As the Committee noted in its request for comments, the withdrawal of Opinion 685 "does not imply that every use of a peremptory challenge found to fall within . . . [*Batson* or *Gilmore*] is necessarily an ethical violation, but merely eliminates the categorical exclusion from consideration under Rule of Processional Conduct 8.4(g)." Advisory Committee on Professional Ethics Lawyers Request for Comments, 2. The withdrawal removes the shield, but creates no sword. Introducing a potential ethics violation during the jury selection process would thus only influence the use of a peremptory challenge to the extent that *any* behavior governed by 8.4(g) would, and any violations would follow *Gilmore*'s fulsome protocol for determining a violation.

As part of an effort to reflect and reinforce New Jersey's strong commitment to eradicating discrimination, the ACLU-NJ lays out the following considerations regarding the application of sanctions under RPC 8.4(g) for racially biased practices during jury selection.

1. The Committee Should Clearly Define Mens Rea Within the Context of RPC 8.4(g)

Key to the usage of 8.4(g) as an anti-bias mechanism is that the attorney engaged in conduct "intended" or "likely to cause" harm. As part of defining RPC 8.4(g)'s *mens rea* component through which disciplinary actions could be advanced or bolstered, the ACLU-NJ encourages the Committee to examine the Washington State Supreme Court's findings in *State v. Jefferson*, which reversed a murder conviction after citing numerous procedural and practical limitations of the *Batson* doctrine.[3] Washington's General Rule 37, set up in light of the *Jefferson* ruling, substitutes subjective assessments of how to draw the line between deliberate and unintentional discrimination with consideration of how an "objective observer could view race or ethnicity as a factor in the use of the peremptory challenge" during the adjudication of a *Batson* challenge.[4] The rule requires that the "objective observer" be a person in possession of "sophisticated knowledge of institutional and subconscious racism," which should be the level of any practicing attorney.

A violation should be reserved for instances where an attorney engages in conduct—including a pattern or practice of behavior—that violates RPC 8.4(g) with intent to do so or with a conscious disregard of doing so, and where there is no good-faith reason for doing so. Trial and Appellate Courts, alongside disciplinary bodies should, wherever possible, distinguish between "good-faith error" and attorney misconduct in written opinions and provide clear guidance regarding specific attorney conduct deemed improper to avoid confusion or vagueness in the future.

[3] 429 P.3d 467 (Wash. 2018).

[4] Wash. State Ct. Gen. R. 37.

We encourage the Committee to recommend that the Administrative Office of the Courts develop guidance and tools for judges presiding over voir dire to remind attorneys appearing before them of their professional responsibilities with regard to jury selection and racial bias.

2. Education for Attorneys and the Public

The ACLU-NJ asks the Committee to provide clarity to the legal community and the public regarding the harm experienced and the remedies available when racial bias infects the legal process. In *Andujar*, the arrest of the juror went well beyond legitimate advocacy to purposefully absent an acceptable juror from the pool. Those actions were at the outer limits; the actions proceeding the arrest, however, occupy the same unacceptable space. At every step in the process, the legal community should be on notice that all biased acts, and not just the key event of excluding a juror, may rise to the level of an ethics violation.

A lurking problem with these sorts of challenges is the idea that "civility" in the courtroom requires the turning or closing of eyes to behavior that is problematic lest one lose relationships with the other attorneys in the room or face the wrath of judges in front of whom the lawyer may regularly appear. The ACLU-NJ recommends that the Committee develop clear, written procedures regarding how allegations of error and misconduct against lawyers on their respective staffs will be processed and reviewed.

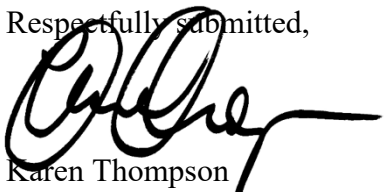
To ensure that attorneys and judges are not the only actors with the power to hold our legal system accountable when racial bias has infected the jury selection process, the ACLU-NJ recommends that members of the public, including potential jurors, understand the role of the Ethics Committee, the Disciplinary Review Board, and the Office of Attorney Ethics and how to report misconduct that they have witnessed or have been subjected to. Information should be disseminated to the jury pools explaining the function and practice of the various committees and the procedures for filing a complaint.

All efforts should be carefully tracked with data collected to determine the type of behavior resulting in an infraction of RPC 8.4(g) and how often such infractions occur.

CONCLUSION

As the facts of *State v. Andujar* made plain, the rights of New Jerseyans are diminished when racial bias infects what should be a fair process. These infected places not only demean the just functioning of the law, but irrevocably damage the desire of the individual to fully participate in institutions. The ACLU of New Jersey appreciates this opportunity to provide suggestions on how to create institutions that serve all people.

Respectfully submitted,



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