

“RACE MATTERS”
HANDOUT / RESOURCE MATERIALS

I. LEGAL PROFESSION REQUIREMENTS TO PREVENT BIAS

Attorney Requirement

Value #6 of the State Bar of California:

“We seek to promote economic, racial and geographic diversity in the legal community in an effort to solidify our ties to California’s vibrant multicultural demographic.” (Values of the State Bar, www.calbar.ca.gov)

Educational Requirement:

“Recognition and Elimination of Bias in the Legal Profession and Society”

One hour required every 3 years (www.calbar.ca.gov)

Rule of Professional Responsibility 2-400(B)

“In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

- (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
- (2) accepting or terminating representation of any client.”

Judicial Requirement

Canon 3(B)(5)

“A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (2) sexual harassment.”

Canon 3(B)(6)

“A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others. This canon does not preclude legitimate advocacy when race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, political affiliation, or other similar factors are issues in the proceeding.”

Judicial Standard 10.20 (Court Duty to Prevent Bias)

(a) General

To preserve the integrity and impartiality of the judicial system, each judge should:

1) Ensure fairness

Ensure that courtroom proceedings are conducted in a manner that is fair and impartial to all the participants

2) Refrain from and prohibit biased conduct

In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors or any other participants."

3) Ensure unbiased decisions

Ensure that all orders, rulings, and decisions are based on the sound exercise of judicial discretion and the balancing of competing rights and interests and are not influenced by stereotypes or biases.

(b) Creation of local committees on bias

Each court should establish local committees with local bar associations to assist in maintaining a courtroom environment free of bias or the appearance of bias. Courts within one or more counties may choose to form a single committee.

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II. DEFINITION AND PROBLEM OF BIAS

Key Definitions:

Explicit Bias: is a conscious preference (positive or negative) for a social category

Implicit Bias: is a preference (positive or negative) for a social category that operates outside of awareness

Schemas: are mental "maps" by which we process routine information with little or no conscious thought.

Components of Bias:

Stereotypes – generalizations about perceived "typical" characteristics of a social category (cognitive component)

Prejudice – how one feels about members of a given social category (affective component)

Discrimination – how one acts toward members of a given social category (behavioral component)

Resources:

“The Lens of Implicit Bias,” by Shawn C. Marsh, Ph.D, Juvenile and Family Justice Today, Summer 2009

Implicit Bias Test (<https://implicit.harvard.edu/implicit/takeatest/html>)

“A Hard Look at How We See Race,” Sam Scott, Stanford Magazine, September/October 2015

“Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post Racial Society,” by Cynthia Lee, 2013

From Oscar Grant to Trayvon Martin – A Dialogue about Race, Public Trust, and Confidence in the Judicial System (CJER video, July 29, 2014)

Bench Conduct for Temporary Judges, Training on Bias and Stereotypes, Administrative Office of the Courts, 2014

III. ISSUES OF BIAS IN JURY SELECTION

Resources (Diversity in the Jury Pool)

“Lack of Jury Diversity: A National Problem with Individual Consequences,” Voir Dire Magazine, Volume 22, Issue 2, Summer 2015

“Where Are You From? A Judge’s Dilemma,” Judge Katherine Mader, Los Angeles Superior Court, The Bench, Summer 2015

Resources (Bias in Jury Selection)

Standard of Judicial Administration 3.25(c)(2)

In the trial of this case the parties are entitled to have a fair, unbiased, and unprejudiced jury. If there is any reason why any of you might be biased or prejudiced in any way, you must disclosed such reason when you are asked to do so. It is your duty to make this disclosure.

Standard of Judicial Administration 3.25(c)(25)

It may appear that one or more of the parties, attorneys, or witnesses come from a particular national, racial, or religious group (or may have a lifestyle different from your own). Would this in any way affect your judgment or the weight and credibility you would give to their testimony or to their contentions?

(See also Judicial Administration 4.30(b)(20) for criminal trials)

CACI 113 Bias (For Civil Trials)

Each one of us has biases about or certain perceptions or stereotypes or other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases. Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions. As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socio economic status, or ----- . Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

CALCRIM 101 Cautionary Admonitions (Criminal Trials) “. . . Do not let bias, prejudice, or public opinion influence your decision . . . ”

Trial Transcript of Jury Voir Dire by Mr. Spence, October 31, 2012, from Harrington v. City of Council Bluffs in the United States District Court for the Southern District of Iowa

Wheeler/Batson Procedure at a Glance & Checklist of Circumstances to Consider, Hon. William Murray, March 20, 2015

Jury Management Bench Handbook, Administrative Office of the Courts, 2013

IV. RELEVANT CASE AUTHORITY

General Procedures

Batson v. Kentucky (1986) 476 U.S. 79 (holding that the Equal Protection Clause forbids a prosecutor from challenging a potential juror on the basis of race.) There is a 3 step process:

- 1.) Objecting party bears burden to produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred (prima facie case);
- 2.) The burden then shifts to prosecution to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes;
- 3.) If a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.
(Batson at 96-99.)

People v. Wheeler, (1978) 22 Cal.3d 258

Prior CA case prohibiting discriminatory peremptory challenges, holding that such challenges (by either prosecution or defense) based on group bias violates a defendant's

right to a trial by jury drawn from a representative cross section of the community under article I, Section 16 of the CA Constitution:

“when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds - we may call this ‘group bias’ - and peremptorily strikes all such persons for that reason alone, he not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross-section requirement. That purpose, as we have seen, is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences. Manifestly if jurors are struck simply because they may hold those very beliefs, such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority. Seen in this light, the presumed group bias that triggered the peremptory challenges against its members is indistinguishable from the group perspective we seek to encourage by the cross-section rule.” (Wheeler at 276.)

Johnson v. California (2005) 545 U.S. 162

Rejected *Wheeler’s* holding as to what constitutes a prima facie case. Instead of requiring that the objecting party must show that is ‘more likely than not’ that the challenges were based upon purposeful discrimination; a prima facie case can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives rise to an inference of discriminatory purpose.

People v. Scott (2015) 61 Cal.4th 363

Held that when a trial court denies a Batson challenge based on the lack of a prima facie case, the court may nonetheless ask the prosecutor for the reasons for the challenge and rule on whether or not there is purposeful discrimination. This procedure does not waive a finding of no prima facie case for purposes of review on appeal. Factors relevant to whether or not a prima facie case is found include the following: 1) that a party has struck most or all of the members of the identified group from the venire; 2) that a party has used a disproportionate number of strikes against the group; 3) that the party has failed to engage these jurors in more than desultory voir dire; 4) that the defendant is a member of the identified group, 5) that the victim is a member of the group to which the majority of the remaining jurors belong; 6) the nondiscriminatory reasons for a peremptory challenge that are apparent from and “clearly established” in the record that necessarily dispel any inference of bias. Additionally, the *Scott* case confirms that a Batson/Wheeler Objection can be made until the alternates are sworn.

Application to Civil Cases:

Holley v. J&S Sweeping Co. (1983) 143 Cal.App.3d 588 (Held that the procedural safeguard in *Wheeler* applied to civil cases; involved white defendant attempting to remove black potential jurors); *Edmonson v. Leesville Concrete Company*, (1991) 500 U.S. 614 (Race-based exclusion of jurors in civil case by peremptory challenges violates the equal protection rights of jurors); *Di Donato v. Santini* (1991) 232 Cal.App.3d 721 (Applied *Edmonson* analysis and held that a party

to a civil lawsuit may not use peremptories to exclude women and other cognizable groups from the jury panel.)

Recent Cases Finding Discriminatory Use of Peremptory Challenges

Shirley v. Yates, 2015 WL 7422606

Defendant was convicted of first degree burglary and robbery in 2005 and it was affirmed in state court. He sought a habeas relief on the basis of discriminatory jury selection and the District Court denied in 2013. The 9th Circuit reversed, finding a by a preponderance of the evidence that the prosecutor's challenge was motivated in substantial part by race.

Crittenden v. Chappell, 2015 WL 6445531

The defendant was convicted of double murder and sentenced to death in 1989. The California Supreme Court affirmed the conviction (*People v. Crittenden* (1994) 9 Cal.4th 83) and the defendant filed for federal habeas relief on the basis of discriminatory jury selection. The District Court denied the petition, and the 9th Circuit affirmed in part, vacated in part and remanded. On remand, the District Judge granted the petition and the 9th Circuit affirmed. The conviction is now overturned 26 years later.

Williams v. Piler, 2013 WL 6145241

Defendant was convicted of murder with special circumstances in 1998. He filed a writ of habeas corpus which was denied by the District Court in 2008. The 9th Circuit remanded on the *Batson* issue and the District Court conducted an evidentiary hearing. At the conclusion of the hearing, the Magistrate recommended granting the habeas, which was adopted in 2014. Upon retrial in 2015, Williams was acquitted.

Cases Finding Judicial Error in Jury Selection Regarding Bias

People v. Mello (2002) 97 Cal.App.4th 511

Judge's instructions to prospective jurors that if they had racial bias they should lie about it under oath and make up other reasons to be excused violated the defendant's right to fair and impartial jury and to due process of law.

People v. Abbaszadeh (2003) 106 Cal.App.642

Defendant was convicted of felonies that were reversed for *Mello* error. Trial Court did not tell jurors to lie, but he invited them to lie by telling them to do whatever necessary to get of the jury even if you have to answer my questions in such as a way as to get off other than by admitting to harboring racist feelings.

V. CURRENT EVENT ARTICLES

“Is Justice Really Colorblind?” by Eugene Robinson, The Washington Post, 1/5/16

“High Ranking judge who helped out is reversed on appeal,” Sacramento Bee 11/28/15

“Justices to reverse a death sentence – High court weighing ‘clear’ violation of race neutral jury rules?” Daily Journal, 11/5/15

“Enjoying Freedom after 19 years stolen,” Sacramento Bee, 11/5/15

“Retrial jury acquits Richard Williams of 1996 murder,” Sacramento Bee, 11/3/15

“Excluding Blacks for Juries,” The New York Times, 11/2/15

“Race-based jury pick overturns conviction,” Daily Journal, 10/17/15

“OJ trial lessons still with us today,” by Erwin Chemerinsky, Daily Journal, 10/13/15

“Have American Police Become More Cautious” NPR News, 10/26/15