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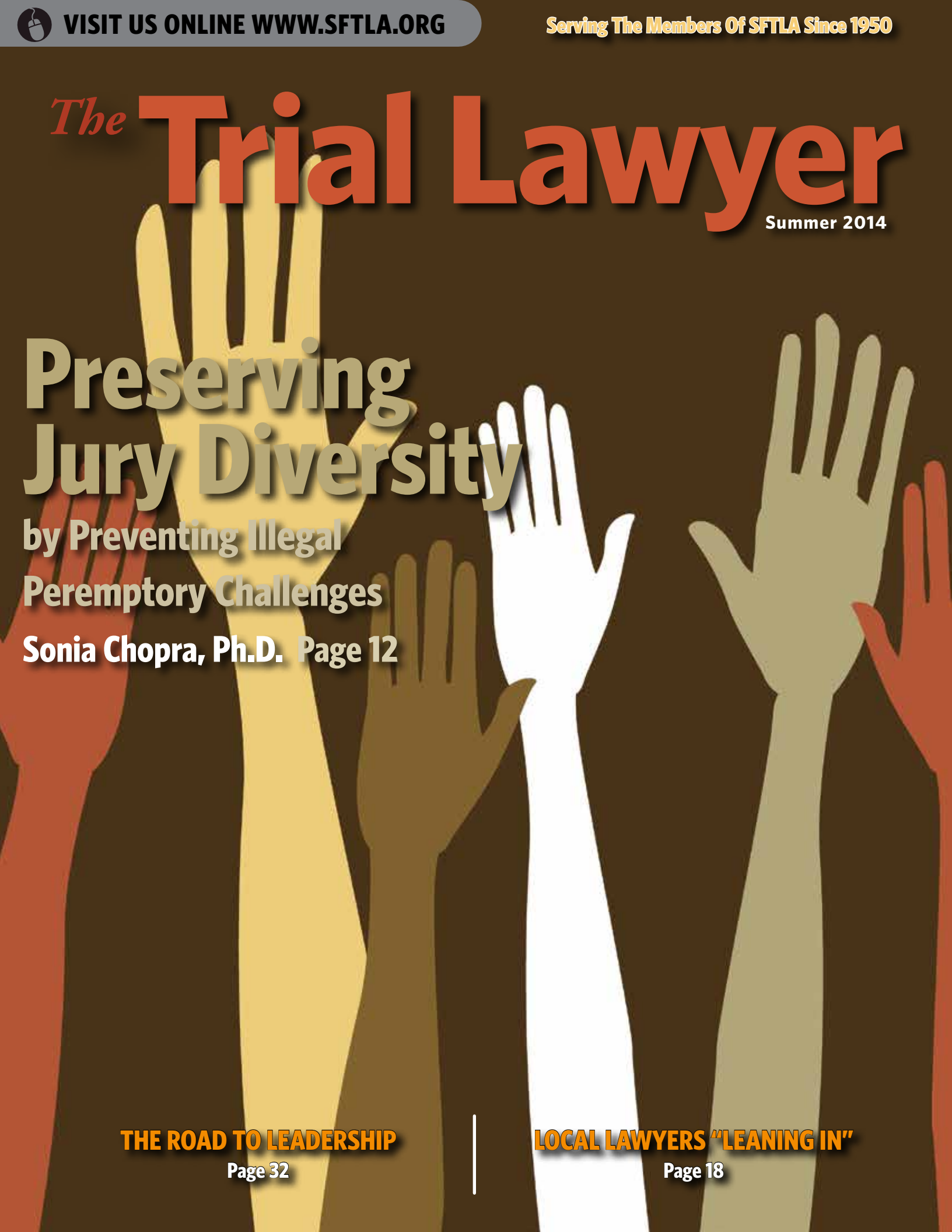

Preserving Jury Diversity

by Preventing Illegal Peremptory Challenges

Sonia Chopra, Ph.D. Page 12

THE ROAD TO LEADERSHIP
Page 32

LOCAL LAWYERS "LEANING IN"
Page 18

Preserving Jury Diversity by Preventing Illegal Peremptory Challenges: How to Make a Batson/ Wheeler Motion at Trial (and Why You Should)

By Sonia Chopra, Ph.D.

Your clients deserve a hearing in front of a jury that (to the best extent possible) represents a cross section of the community. What this means in most California jurisdictions is that juries should be demographically diverse. Not only are diverse juries more representative, social science research shows that heterogeneous juries also make better decisions. A recent study found that diverse juries had longer deliberations, discussed more case facts, made fewer inaccurate statements, and were more likely to correct inaccurate statements.[1] When it came to issues of race, the diverse juries were more likely to discuss race related topics generally, and to raise questions about racism specifically. In addition to better quality deliberations, other research suggests that jury verdicts are perceived as more fair by outsiders when they are rendered by diverse versus homogeneous juries.[2]

The unfortunate reality in courtrooms across the country, however, is that the people who show up for jury duty are not representative of the racial and ethnic diversity of the communities from which they are selected.[3] Recent data collected in Alameda County by the ACLU showed that both African American and Latinos are underrepresented in jury pools reporting for trials.[4] The demographic disparity between the population and the "venire" (i.e. panel from which the jury is drawn) typically increases further after hardship screening, particularly in lengthy cases.[5] All too often, the exercise of peremptory challenges results in an even less representative jury. Why? Stereotype based decisions in jury selection, e.g., *"Such and such racial group is more pro-plaintiff," "Women act this way, men that way."* Every attorney has heard these supposed truisms about jurors based on demographic categorization. But the fact is that jury selection based on demographic stereotypes is lazy--and often inaccurate--decision making.

Jury selection based solely on a jurors' membership in protected classes like race, ethnicity, gender, sexual orientation, or religion is also illegal under both the United States and California Constitutions as outlined in *Batson v. Kentucky*[6] and *People v. Wheeler*.[7] This prohibition extends to jury selection in civil cases.[8] California Code of Civil Procedure 231.5 also precludes the use of discriminatory peremptory challenges, stating, "A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds."

What can you do to preserve the diversity of the jury if you fear the other side is likely to make racial, ethnic, or gender based peremptory challenges? You bring a *Batson/Wheeler* Motion before the Court. Most civil litigators have never brought a *Batson/Wheeler* motion (or had one brought against them.) Frankly, most civil judges are not particularly familiar with the process either. This article will provide you the nuts and bolts about how to raise a *Batson* challenge and prepare you to educate the judge (and/or make a good record) about why you should succeed on your motion.

THE THREE STEP PROCEDURE

The Court in *Batson* set out a three-stage process for determining whether or not a peremptory challenge violates the Equal Protection Clause of the U.S. Constitution. First, the Court must determine whether or not the party who is bringing the motion has established a prima facie case of a discriminatory peremptory challenge. Second, if the showing is made, the burden shifts to the party who made the peremptory challenge at issue to provide non-discriminatory explanations for why they challenged the juror in question. Third, the Court makes a determination as to whether or not the party bringing the motion has carried their burden of proving purposeful discrimination.

There are several important cases you should be aware of and ready to cite at each stage of the process.[9] In addition, you should be prepared to make a record about various aspects of the venire and the jury selection process as you go along. Tips for each stage are outlined below.

In the trial courts, rulings have been inconsistent, making it common for defendants to file the same motion in multiple cases but get varying results...

Step 1: Prima Facie Case

Preparing During Voir Dire

As soon as you see your venire, do your best to make notes as to the racial/ethnic and gender composition of the panel, both pre- and post-hardship screening if possible. If you are using a jury questionnaire, include a question about race/ethnicity and gender so you are able to have data about the venire should *Batson/Wheeler* issues arise. During the selection process keep track of the number of members of the cognizable groups[10] you are concerned about that are called into the box, questioned, and dismissed, and for what reasons they are let go. Pay close attention to the manner in which opposing counsel questions the panel. You may need to put this information on the record depending on what happens.

Timing of the Motion

If an impermissible strike has occurred, the first step is to raise the *Batson/Wheeler* objection. In order to be considered timely, most jurisdictions require the challenge to be made before the jury is sworn.[11] *Raising the challenge as soon as it arises* is much more effective in maintaining jury diversity as opposed to waiting until the end of jury selection or even waiting until several members of the cognizable group have been challenged and dismissed. Bringing your motion early puts the other side on notice that you are not going to stand for systematic removal of cognizable classes of jurors and that you will be challenging them each time. This can have a chilling effect on the discriminatory behavior and

ultimately result in a more diverse seated jury.

Single Strikes: No Pattern Necessary

Many attorneys and even many judges mistakenly believe that there must be a "pattern" of discriminatory strikes before a *Batson* motion can be raised. This is untrue. The U.S. Supreme Court has made it clear that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose"[12] and that "the exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system."[13] While Courts may be reluctant to find purposeful discrimination based on one challenged juror, if there is a situation where opposing counsel has done little to no questioning of a juror and is unlikely to have a legitimate reason for striking him or her, it can be worth it to raise the challenge anyway for the record. Even if your initial challenge is denied, if opposing counsel's behavior continues, raise the objection each and every time.

Making the Motion

Your *Batson* challenge can be made in a few different ways. You can simply stand up and say, "I object to opposing counsel's strike of juror X on *Batson/Wheeler* grounds" as soon as they say who they are releasing, before the juror leaves the courtroom. You may also stand up and say you would like to approach and that you would like to have the challenged juror remain,[14] and then raise the objection at sidebar. Regardless of your initial approach, discussion between the parties and the Court must be on the record, and most often takes place out of the presence of the jury.

After raising the objection, state your grounds by first naming the cognizable group(s) that have been excluded, and then listing the factual basis for your belief that "the totality of the relevant facts gives rise to an inference of discrimination."[15] Note that the burden of proof for establishing a prima facie case of discrimination is low. Under *Johnson v. California*,[16] an inference is less than a "strong likelihood" and less than "more likely than not." It is "not an onerous" showing.

The Court is required to consider "all relevant circumstances" when considering whether a prima facie case has been proven.[18] You should provide as much information as possible to support your position, including: 1) any pattern of discriminatory challenges that have been made, 2) the disparate impact that the challenge has had on the venire, 3) differential, cursory, or non-existent questioning of the challenged juror compared to other jurors, 4) juror responses that were neutral or favorable to the opposing party and 5) lack of any "demeanor" or "body language" from the juror that would suggest hostility.[19]

Judicial Speculation Not Permitted

Be ready to remind the judge that she is not allowed to "speculate" as to why opposing counsel exercised their challenge. The decision must only be made on the evidence presented. In other words, the Court is not allowed to say they could think of reasons why the challenge was made and if this happens you should be prepared to object under *Johnson*.[20]

Ruling

The trial judge may not end up "officially" ruling on whether or not a prima facie case has been made, she may instead turn to opposing counsel and ask for their explanations--or opposing counsel may blurt out a response before a ruling is entered. The Supreme Court has held that if the trial judge asks for the opponent's explanations and then rules on the motion, then the issue of a prima facie showing is deemed moot.[21]

Step 2: Burden Shifts to Opposition for Neutral Explanation

Once the Court has ruled that a prima facie showing has been made, has asked for an explanation, or the other side starts offering up explanations, Step 2 of the process begins. At Step 2 the Court does not weigh the *credibility* of the explanation; that comes in Step 3.

Most of your opponents will appear shocked and outraged that you "accuse" them of a *Batson/Wheeler* violation. This process is novel to most civil litigators and they are not used to ever having to explain the reason(s) for a peremptory challenge. As a result, attorneys who are challenged often will not have a readily available plausible explanation.

Explanations that Are Insufficient

If the judge does not turn to you after hearing from opposing counsel, be sure to ask to respond to their explanations before the Court moves to Step 3 to make a ruling. Common responses from opposing counsel at Step 2 which have been found by the Courts to be inadequate and which you should challenge include the following:

1. Refusing to State/Failing to Recall the Reason

I've actually heard an attorney say to a judge at Step 2, "I don't have to tell you why, its work product," to which the judge replied, "I don't think you understand how this works!" Refusing to give an explanation is considered support for a determination that the challenge was discriminatory.[22] You should also argue that refusing to state/failing to recall the reasons means that opposing counsel has not met their burden to provide a race (gender) neutral reason for the challenge.

Continues on page 22 »

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» Preserving Jury Diversity continues from page 14

2. Assertions of Good Faith or Denial of Discriminatory Motive

This sort of statement comes out of opposing counsel's mouth almost every time a challenge is raised, "I'm not racist and I'm offended that you are suggesting that I am." "Explanations" like these are inadequate to justify a strike as a matter of law.[23]

3. Accusing One's Opponent of Misusing Peremptory Challenges

Opposing counsel may try to argue that you have been systematically striking a certain cognizable group, or even that you have used a peremptory on a member of the group you are accusing them of discriminating against. Your challenges "are irrelevant to the determination" of whether or not the other side has acted discriminatorily.[24]

4. Facially Racial or Inherently Discriminatory Explanations

a. Assumptions of Shared Race. Most attorneys are sophisticated enough to know they would likely lose a *Batson/Wheeler* motion if their explanation is that they thought the juror would be sympathetic to the plaintiff because of a "shared race." If that happens to arise as an explanation, cite *Batson* 476 U.S. at 97 to show it is inadequate.

b. "Proxy" or "Surrogate" Explanations. What are much more common are explanations that are proxies for race (or for gender). These are basically code words for race (gender) that do not appear inherently racial (sexist) on their face. For example, opposing counsel may cite the neighborhood that a juror lives in, the way that he or she speaks, their family structure, style of dress or appearance as a reason for challenges that are truly race (gender) based. When women are the cognizable group being removed the other side may say they are concerned about "caregivers" or "emotional" people. Appellate courts have held that "neighborhood" may be considered proxy for race [25] and trial courts may be receptive to arguments that other explanations are not legitimate reasons but are instead surrogates for race, gender, or other protected class membership.

Step 3: Trial Court Determines if Explanations are Credible or Pre-Textual

At this final step of the analysis the Court should consider all of the relevant circumstances, including everything that was raised by you in establishing a prima facie case at Step 1 [26] and the explanations given by opposing counsel at Step 2. Most trial judges don't clearly demark when they are moving on to Step 3, they just make a ruling. Because Steps 2 and 3 are often fused together, you should be prepared to raise arguments and cite cases that the Courts have applied to the Step 3 analysis when you are given the opportunity to respond to your opponent's explanations at Step 2. Examples of evidence that appellate courts have considered include the pattern of strikes, a comparative analysis of jurors who were challenged vs. those were not, explanations that included misrepresentations about the challenged jurors, post hoc explanations, [27] the reasonableness of the explanations, including whether the explanation has some basis in trial strategy, and the demeanor of the attorney who exercised the questionable challenge. [28]

Factors to be Considered in Evaluating Credibility

1. Explanations that are Unrelated to the Case

Under *Batson*, the party making the strike must provide "a neutral explanation related to the particular case to be tried."[29] Explanations that are "implausible or fantastic... may (and probably will) be found to be pretext for purposeful discrimination" at Step 3.[30] If the explanations the other side gives have nothing to do with the case at hand, make no sense, or seem like desperate attempts to justify discriminatory challenges, be sure to make note of this on the record.

2. Explanations Based on Juror Demeanor

As previously mentioned, nothing is easier to assert and harder to refute on appeal than explanations for challenges based on juror "demeanor," "body language," "tone of voice," and so on, and as a result, most of the time you will hear something like this in opposing counsel's explanations to the Court. While the case law on demeanor based strikes is not great, you must still challenge the legitimacy of these types of justifications to preserve the issue for appeal.[31]

Make your own record refuting opposing counsel's depiction of the challenged juror. Some arguments you can raise to discredit demeanor based explanations include the judge not observing the demeanor, opposing counsel misstating the demeanor, other non-stricken jurors' exhibiting the same (or even more troubling) demeanor, and your belief that the demeanor based explanation is a proxy or surrogate for race (or gender, or other protected class). Because the appellate courts give great discretion to the trial judge on decisions involving demeanor based explanations you also need to ask the judge to specifically state on the record if he or she is crediting the explanation about demeanor and their basis for doing so.

3. Cognizable Group Members Seated/Still in the Venire

The other side will no doubt argue that there still members of the protected class in the venire or in the jury box whom they have not exercised challenges on. While the Court may consider this in determining credibility of the explanation, it cannot be the only basis for a finding that the challenge was not discriminatory. [32]

4. False, Unsupported or Post Hoc Explanations

If opposing counsel says something that is not supported by the record, didn't happen, or is patently untrue this explanation should not only be dismissed by the Court, it should also weigh against the credibility of other seemingly neutral explanations.[33] Often times opposing counsel will offer multiple reasons for the strike. If one doesn't work, they will throw out something else. Multiple explanations offered by opposing counsel after either the Court has rejected or you have challenged their initial response should be discredited.[34]

5. Comparative Analysis

Recently, the most important aspect of appellate review of *Batson* challenges at Step 3 has been a comparative juror analysis. *Miller El II* lays out the elements of comparative analysis but basically this involves "side by side" comparisons of "similarly situated" jurors who were challenged and those who were seated. If the stated reason for a peremptory challenge applies "just as well" to the challenged juror and to a seated juror that can be considered "evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." [35]

You should always try to include at least a basic comparative analysis in your arguments to the Court. This requires keeping good notes during jury selection, or having access to daily transcripts. Sometimes you can even anticipate what the other side might raise as their explanation based on their questioning of a particular juror (or lack thereof) and you can be prepared to show that other jurors fit the same criteria when you make the initial motion. For example, let's say in an injury case you think opposing counsel will raise the fact that a Hispanic panel member had a workers comp case as the basis for their challenge. First, consider whether or not they asked other non-Latino jurors about this experience. Second, determine and be prepared to list other non-challenged jurors who share this experience. Failure to do a comparative analysis does not waive the issue on appeal, but it makes a more persuasive case at the trial level, which is where you really want to be winning your *Batson/Wheeler* motion.

Speaking of winning, what if you do? What happens if the Court grants your motion?

REMEDIES

Mistrial or quashing the panel is not the only remedy available if a *Batson/Wheeler* challenge is granted. The Supreme Court in *Batson* left open the possibility of the court denying the discriminatory peremptory challenge and reinstating the juror.[36] In California, *People v. Willis* allows alternative remedies like reseating the juror, or imposing sanctions against the offending party.[37] Other options include calling in more jurors and giving additional challenges to the party who made the motion.[38] Personally, I can think of nothing more satisfying than having the discriminatorily challenged juror be returned to the jury to decide your case. TL

Endnotes

1. Samuel Sommers, On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations. 90 (4) Journal of Personality and Social Psychology 597 (2006).
2. Leslie Ellis & Shari Seidman Diamond, Race, Diversity and Jury Composition: Battering and Bolstering Legitimacy. 78 (3) Chicago-Kent Law Review 1033 (2003).
3. See generally, David Kairys, Nina Chernoff, & Joseph Kadane, The Law of Jury Composition Challenges in JURYWORK: SYSTEMATIC TECHNIQUES (Krauss & Chopra, eds., 2013-2014).
4. ACLU of Northern California, Racial and Ethnic Disparities in Alameda County Jury Pools. (October 2010). African Americans in Alameda County make up 18% of the jury eligible population, but accounted for just 8% of the venire. The estimated jury eligible Hispanic population in Alameda County is 12%, but only 8% of those who reported were of Hispanic origin. Interestingly, Asian American/Pacific Islanders were overrepresented in Alameda County jury pools. Fifteen percent of the jury eligible population identifies as Asian American/Pacific islander, but this group accounted for 26% of the jurors who reported for duty in the study. White jurors were neither over nor underrepresented.
5. See Samuel Sommers, Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications and Directions for Future Research, 2(1) Social Issues and Policy Review 65 (2008); Nancy King, Racial Jurymandering: Cancer or Cure?: A Contemporary Review of Affirmative Action in Jury Selection, 68 New York University Law Review 707 (1993).
6. Batson v. Kentucky, 476 U.S. 79 (1986).
7. People v. Wheeler, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978).
8. Edmonson v. Leesville Concrete Co. 500 U.S. 614 (1991); Holly v. J& S Sweeping Co. 143 Cal.App.3d 588, 590 (1983).
9. Since Batson there have been a great number of cases further defining each step of the analysis, only the most relevant are presented here. Those interested in a comprehensive analysis of post-Batson case law are directed to Elisabeth Semel & Tom Meyer, Batson and the Discriminatory Use of Peremptory Challenges in the 21st Century in JURYWORK: SYSTEMATIC TECHNIQUES (Krauss & Chopra, eds., 2013-2014)
10. Cognizable groups under U.S. Supreme Court law include: African Americans See Batson v. Kentucky, supra note 6, Hispanics/Latinos, See Hernandez v. New York, 500 U.S. 352, 355, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) and women, See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, at 142 n. 13, 114 S. Ct. 1419, 128 L. Ed. 2d 89, 64 Empl. Prac Dec. (CCH) P 42967 (1994). Lower courts have extended Batson to apply to Native Americans, See Kesser v. Cambra, 465 F.3d 351 (9th Cir. 2006), Asian-Americans/Pacific Islanders, See U.S. v. Murillo, 288 F.3d 1126, 1135, 59 Fed. R Evid. Serv. 23 (9th Cir. 2002); U.S. v. Annigoni, 57 F.3d 739, 743 (9th Cir. 1995); U.S. v. Lorenzo, 995 F.2d 1148 (9th Cir. 1993), Sexual Orientation, See People v. Garcia, 77 Cal. App. 4th 1269, 1276, 92 Cal. Rptr. 2d 339 (4th Dist. 2000), as modified on denial of reh'g, (Feb. 22, 2000); Cal. Code Civ. Proc. §231.5, and Religion, See U.S. v. Brown, 352 F.3d 654, 668-69 (2d Cir. 2003); U.S. v. Somerstein, 959 F. Supp. 592, 595 (E.D.N.Y. 1997).
11. See State v. Jones, 218 Wis. 2d 599, 581 N.W.2d 561, 563 (Ct. App. 1998).
12. Snyder v. Louisiana, 522 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008).
13. J.E.B. v. Alabama supra note 12 at 142 n. 13.
14. Why do you want the juror to remain? Because a potential "remedy" for an established Batson violation is to reseat the improperly challenged juror. People v. Willis, 27 Cal. 4th 811, 118 Cal. Rptr. 2d 301, 43 P.3d 130 (2002).
15. Batson v. Kentucky, supra note 6 at 93-94.
16. Johnson v. California, 545 U.S. 162, 170, 173, 125 S. Ct. 2410, 162 L. Ed. 2d 129, 8 A.L.R. Fed. 2d 849 (2005).
17. Batson v. Kentucky, supra note 8 at 96-97.
18. E.g., "The population of African American's in this county is 18%. Out of only 3 African American potential jurors in the panel of 70, opposing counsel has challenged the first to enter the jury box. Only 2 African Americans remain in the pool."
19. Attorneys who have nothing to say at Step 2 will often fall back on statements about "gut feelings" regarding a juror's hostility, body language, demeanor, and so forth. Preempt this argument on the record ahead of time.
20. Johnson v. California, supra note 16 at 172. "The Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process," "...It does not matter that the prosecutor might have had good reasons...what matters is the real reason they were stricken" (quoting Holloway v. Horn, 355 F 3d. 707, 725 (3d Cir. 2004)).
21. Hernandez, supra note 10 at 359.

Continues on page 29 »