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The new California law on peremptory challenges

ATTEMPTING TO ADDRESS AND REMEDY DISCRIMINATORY USAGE OF PEREMPTORY CHALLENGES IN JURY SELECTION

The new law discussed here goes into effect January 1, 2026

In picking a jury we all have kept our *Batson/Wheeler* objection ready. If a party wanted to object to the usage of a peremptory challenge being discriminatory, then a *Batson/Wheeler* objection had to be made. The purpose of making an objection there was because both the California and U.S. Supreme Courts found that using a peremptory challenge on the sole ground of group bias (i.e., because of their race, gender, etc.) violates the right to a fair and impartial jury as well as the Equal Protection Clause. (*People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79.)

Batson/Wheeler objection

The *Batson/Wheeler* motion had/has its own three-step process that has been in use in California courts when this objection is made: First, the trial court determines whether the objecting party has made a prima facie showing that the peremptory challenge was made based on race/protected category. Second, if the burden is shown, then it shifts to the other side to demonstrate that the challenges were for a race-neutral (non-discriminatory) reason. Third, and finally, the court then determines whether the objecting party has proven purposeful discrimination. The ultimate burden of persuasion regarding racial/discriminatory motivation rests with, and never shifts from, the objecting party. (See e.g., *People vs. Lomax* (2010) 49 Cal.4th 530, 569; *People vs. Lenix* (2008) 44 Cal.4th 602, 612-613.)

Over the years there were many complaints about the effectiveness, and shortcomings, of *Batson/Wheeler* objections – that discrimination in jury selection persisted and that rarely, if ever, were these motions granted or upheld on appeal. (See e.g., June 2020 "Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors" released by the Berkely Law Death Penalty Clinic, June 2020.)

"Recognizing the limitations of the *Batson/Wheeler* inquiry, the Legislature enacted Assembly Bill No. 3070 (2019-2020 Reg. Sess.) to add Code of Civil Procedure section 231.7, which creates new procedures for identifying unlawful discrimination in the use of peremptory challenges." (*People v. Jaime* (2023) 91 Cal.App.5th 941, 943, (*Jaime*); *People v. Ortiz* (2023) 96 Cal.App.5th 768, 791-792.)

The Legislature intended that the new law "be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges." (Stats. 2020, Ch. 318, § 1, subd. (c).)

The new law – CCP § 231.7

In 2020, Code of Civil Procedure section 231.7 was enacted and applied first to all criminal jury trials in which jury selection began on or after January 1, 2022, and applies to all civil cases beginning January 1, 2026. So, unless the Legislature changes Code of Civil Procedure section 231.7 and the Governor signs that change into law, the 231.7 process in use for the past three-plus years in criminal cases will also be applied to all civil cases.

Section 231.7, subdivision (a) prohibits the use of "a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups."

Who can make the Code of Civil Procedure section 231.7 objection? Either party, or the court on its own motion. (Code Civ. Proc., § 231.7, subd. (b).) The objection must be made before the jury is impaneled unless "information becomes known that could not have reasonably been known before the jury was impaneled." (*Ibid.*)

Does this standard apply to for-cause challenges as well? No. In *People v. Arlanda* (2023) 95 Cal.App.5th 311, the court held that this new process only applies to peremptory challenges.

A CCP § 231.7 objection was made, now what?

First, any further discussion of the motion "shall be conducted outside the presence of the panel." (Code Civ. Proc., § 231.7, subd. (b).)

Then, once the jury is out of the courtroom, the party who exercised the peremptory challenge "shall state the reasons the peremptory challenge" was exercised. (Code Civ. Proc., § 231.7, subd. (c).) This is different from *Batson/Wheeler*. Previously, the objecting party would have needed to have made a prima facie case of discrimination, and the judge would have needed to have found the burden was met, before the party exercising a peremptory challenge had to offer a reason for that challenge.

Then, once the reasons were given, it's the court's turn to evaluate the reasons given. In making its evaluation, the court "shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications for the use of the peremptory challenge." (Code Civ. Proc., § 231.7, subd. (d).) The statute says that the trial court shall sustain the objection "[i]f the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use

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of the peremptory challenge." (Code Civ. Proc., § 231.7, subd. (d); see also *People v. Ortiz* (2023) 96 Cal.App.5th 768, 792.)

What does "substantial likelihood" mean? According to the statute, "substantial likelihood' means more than a mere possibility but less than a standard of more likely than not." (Code Civ. Proc., § 231.7, subd. (d)(2)(B).)

The statute then goes on to provide a non-exhaustive list of circumstances the court may consider in making its ruling. (Code Civ. Proc., § 231.7, subd. (d)(3)(A through G).) Such as:

(A) Is the objecting party part of the same "perceived cognizable group"? is the victim, witnesses, or parties not part of that "perceived cognizable group"

(B) Does race, gender, ethnicity, etc. or membership in those groups bear on the facts of the case?

(C) Did the party exercising the peremptory challenge fail to question the juror about the reasons they gave to excuse them? Did they question that juror at all, or even a cursory amount? Was that juror asked different kinds of questions than was asked from other jurors?

(D) Did other jurors of other perceived cognizable group give similar answers, but were not excused?

(E) Was the reason given something that might be disproportionately associated with a race, ethnicity, etc.?

(F) Was the reason given supported by the record?

(G) Has the lawyer or the lawyer's office who exercised the peremptory challenge used peremptory challenges disproportionally against a given, race, gender, ethnicity, etc. in the past?

Then, the trial court judge is required to provide its ruling, and is required to explain its reasons for its ruling, on the record. (Code Civ. Proc., § 231.7, subd. (d)(1).)

Presumed invalid reasons for usage of a peremptory challenge

Code of Civil Procedure section 231.7, subdivision (e) contains a list of thirteen reasons for having used a peremptory challenge that are presumed to be invalid "unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case." (Code Civ. Proc., § 231.7, subd. (e).) The following thirteen reasons are presumed invalid:

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.

(3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

(4) A prospective juror's neighborhood.

(5) Having a child outside of marriage.

(6) Receiving state benefits.

(7) Not being a native English speaker.

(8) The ability to speak another language.

(9) Dress, attire, or personal appearance.

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).

(11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.

(12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

(Code Civ. Proc., § 231.7, subd. (e)(1-13).)

"Clear and convincing" evidence is then defined by subdivision (f) as referring "to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case." (Code Civ. Proc., § 231.7, subd. (f).)

Code of Civil Procedure section 231.7, subdivision (g) contains a different list of presumptively invalid reasons that "have historically been associated with improper discrimination in jury selection." (*Ibid*.) The reasons under subdivision (g) involve a prospective juror's demeanor, behavior, or manner: "The prospective juror was inattentive, or staring or failing to make eye contact" (Code Civ. Proc., § 231.7, subd. (g)(1)(A)), "[t]he prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor"

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(Code Civ. Proc., § 231.7(g)(1)(B)), and "[t]he prospective juror provided unintelligent or confused answers" (Code Civ. Proc., § 231.7(g)(1)(C)). If given as a reason, these three are also presumptively invalid

Thereafter, Code of Civil Procedure section 231.7, subdivision (g)(2) provides for a two-step process. (*People v. Ortiz* (2023) 96 Cal.App.5th 768, 794.) First is the "confirmation requirement." (*Ibid*.) "If a reason given by the party exercising the challenge falls within the presumptively invalid reasons listed in subdivision (g)(1)(A)–(C), the trial court must make a finding on whether the asserted behavior occurred. If the court confirms that the asserted behavior occurred, then the party exercising the peremptory challenge must satisfy what we will call the "explanation requirement."

In this step, the party must explain why that behavior "matters to the case to be tried." (*People v. Ortiz* (2023) 96 Cal.App.5th 768, 794.)

A CCP § 231.7 objection was sustained; now what?

The statute provides five possible outcomes of what the trial court can do following the sustaining of an objection under this new subsection.

First, the entire venire can be quashed and jury selection started anew. "This remedy shall be provided if requested by the objecting party." (Code Civ. Proc., § 231.7, subd. (h)(1).) Second, if the jury was impaneled, declare a mistrial and select a new jury. (Code Civ. Proc., § 231.7, subd. (h)(2).) Third, "seat the challenged juror," fourth "provide the objecting party additional challenges" or five another remedies the court deems appropriate. (Code Civ. Proc., § 231.7, subd. (h)(3-5).)

Criminal appellate cases evaluating the new law

As noted above, this new procedure has been in place in criminal jury trials since 2022. Since then, there have been a handful of cases evaluating the new law. For example,

- *People v. Uriostgui* (2024) 101 Cal.App.5th 271 – AG said "lack of life experience" as its reason for excusing a Hispanic female juror. The Court of Appeal found that the "lack of life experience" was based in part on her "lack of employment or underemployment" which is a presumed invalid reason under Code of Civil Procedure section 231.7, subdivision (e)(11).
- *People v. Caparrotta* (2024) 103 Cal.App.5th 874 – If the presumption of invalidity for a particular reason identified by counsel is not rebutted, that reason must be treated as conclusively invalid. The only way to rebut the presumption of invalidity is by applying the statutorily prescribed two-step process of (1) confirmation of the behavior by the trial court, and (2) explanation by counsel of why the behavior matters to the case.
- *People v. Ortiz* (2023) 96 Cal.App.5th 768 – Under the totality of the circumstances, there was not a substantial likelihood that an objectively reasonable person would view race as a factor in prosecutor's exercise of a peremptory challenge to strike Black juror in defendant's trial for sex crimes against minors, and prosecutor's exercise of the challenge thus did not violate statute barring the use of a peremptory challenge for a discriminatory reason, where record supported prosecutor's initial statement of reasons, reasons were legitimately related to juror's ability to fulfill duties and did not evidence conscious or unconscious bias, prosecutor questioned juror fairly and extensively, record did not indicate that prosecutor or office had disproportionately struck Black jurors, and issue of race did not pervade case.
- *People v. Jiminez* (2024) 99 Cal.App.5th – Appellate court found there was clear and convincing evidence that an objectively reasonable person would view prosecutor's presumptively invalid reason for using peremptory challenge to excuse Latina American prospective juror. This included her stated belief that there was racial bias in law enforcement and that this related to her ability to be fair and impartial and not to her membership in cognizable group. She repeatedly acknowledged that she would have difficulty setting aside her bias against officers to fairly consider their testimony, despite her initial statements that she could be fair.

The goal of this new law is to help eliminate discrimination in jury selection. Other states have attempted to address this situation. For example, Arizona eliminated peremptory challenges in both criminal and civil trials in 2021. (See Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47 of the Arizona Rules of Civil Procedure.) Washington State utilizes a similar basis that was enacted here in California – and was the basis for many parts of the new California law. (See Washington General Rule 37.)

If the law remains as written, then all civil trial attorneys will want to learn and know the procedures herein to make objections where members of a protected group are excused from trial due to usage of peremptory challenges. Whether the new law has its intended impact will take years to evaluate. Hopefully, this helps everyone in preparing for their civil jury trials starting next year.

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