



New Jersey Courts

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Rule 1:8-3A (“Reduction of Bias in the Exercise of Peremptory Challenges”)

August 2022

Background

The Supreme Court in its [July 12, 2022 Order](#) adopted a new Court Rule that changes how objections to peremptory challenges will be handled.

New Rule 1:8-3A ("Reduction of Bias in the Exercise of Peremptory Challenges") is effective for all civil and criminal jury trials as of January 1, 2023.

Criminal cases that participate in the pilot program on attorney-conducted voir dire (ACVD) will be subject to the provisions of the new rule starting in September 2022.

Background

In recent years, a number of states have adopted court rules or statutes designed to reduce bias in the exercise of peremptory challenges.

Participants in the Judicial Conference expressed support for a new Court Rule along the lines of Washington General Rule 37 (GR 37).

The Committee of the Judicial Conference explored GR 37 along with recent legislation in California and a new rule in Connecticut.

Background

Breaking with the tradition established in Batson (and, in New Jersey, Gilmore/Osorio), these recent jury reforms eliminate the need for an allegation that a party has used a peremptory challenge in a purposely discriminatory manner and require review of a contested peremptory challenge according to an objective standard.

New Rule 1:8-3A mirrors those core aspects of GR 37 while incorporating certain differences.

Overview

The following slides set out the provisions of new Rule 1:8-3A and the Supreme Court Official Comment on the new rule.

This presentation highlights key takeaways for attorneys and judges to consider as New Jersey seeks to reduce bias in the exercise of peremptory challenges.

How Rule 1:8-3A Works

As described in the Report of the Committee of the Judicial Conference on Jury Selection, the process as outlined in Rule 1:8-3A is intended to be **straightforward** and **non-accusatory**...

How Rule 1:8-3A Works

1. a party seeks to exercise a peremptory;
2. the court or another party requests review;
3. the first party states the reason for use of the peremptory;
and
4. the court determines whether a **reasonable, fully informed person** would conclude that the peremptory challenge was exercised to remove a prospective juror based on the juror's actual or perceived membership in group protected under the United States or New Jersey Constitutions or the New Jersey LAD.

Key Takeaways

There is no need for an allegation that an attorney has attempted to exercise a peremptory in order to remove a juror based on actual or perceived membership in a protected group.

There is no requirement for a finding of purposeful discrimination, or even a finding of bias.

Review is objective, using the existing “reasonable, fully informed person” standard.

Rule 1:8-3A(a)

(a) A party may exercise a peremptory challenge for any reason, except that a party shall not use a peremptory challenge to remove a prospective juror based on actual or perceived membership in a group protected under the United States or New Jersey Constitutions or the New Jersey Law Against Discrimination. This Rule applies in all civil and criminal trials.

Key Takeaways

Consistent with New Jersey case law, Rule 1:8-3A affirms the presumptive validity of a peremptory challenge, which may be exercised “for any reason...”

Also consistent with Gilmore, Osorio, and their progeny, Rule 1:8-3A prohibits **misuse** of a peremptory in order to remove a juror based on the juror’s perceived membership in a protected class.

Comment to Rule 1:8-3A(a)

(1) Paragraph (a) prohibits the exercise of a peremptory challenge to remove a prospective juror based the juror's actual or perceived membership in groups protected by the United States or New Jersey Constitutions and the New Jersey Law Against Discrimination. ...

Comment to Rule 1:8-3A(a)

... Currently, the statute protects against discrimination on the basis of race or color; religion or creed; national origin, nationality, or ancestry; sex, pregnancy, or breastfeeding; sexual orientation; gender identity or expression; disability; marital status or domestic partnership/civil union status; and liability for military service. The Rule is intended to cover any future amendments to the statute.

Rule 1:8-3A(b)

(b) Upon the exercise of a peremptory challenge, the court or any party who believes that the challenge may violate paragraph (a) above may call for review of the challenge pursuant to this Rule.

Key Takeaways

The new rule explicitly provides for the court -- as well as a party -- to contest a peremptory challenge.

A request for review is made simply by reference to Rule 1:8-3A.

Comment to Rule 1:8-3A(b)

(2) Consistent with RPC 3.1, any call for a review of a peremptory challenge should be advanced in good faith.

Key Takeaways

As with any change to longstanding practice, there can be a concern that parties may engage in gamesmanship.

Consistent with professional ethics standards, this is not anticipated and will not be tolerated.

Thus, there is no expectation that attorneys will object to peremptories without good cause.

Rule 1:8-3A(c)

(c) Any such review [of a contested peremptory] shall take place outside the hearing of the jurors.

Key Takeaways

The mechanics of handling a Rule 1:8-3A objection to a peremptory will depend in part on the setup in the courtroom.

The Rule does not require the jury to leave the courtroom (nor the judge and attorneys to relocate to another location).

Rather, Rule 1:8-3A requires that the court address the objection outside of the hearing of the jury, as is the current common practice for discussing for-cause challenges.

Key Takeaways

Since new Rule 1:8-3A will go into effect as New Jersey engages in an exploration of Attorney-Conducted Voir Dire (ACVD) in some areas, the process may involve some variation.

The overall expectation is that peremptories will be exercised in the same way in a case involved in the ACVD pilot as in any other case.

Procedural questions will be addressed by the judge.

Rule 1:8-3A(d)

(d) In the review of a contested peremptory challenge,

(1) The party exercising the peremptory challenge shall give the reasons for doing so; and

(2) The court shall determine, under the totality of the circumstances, whether a **reasonable, fully informed person** would find that the challenge violates paragraph (a) of this Rule.

Key Takeaways

GR 37 and similar approaches in California and Connecticut incorporate an “objective observer” standard for review.

New Jersey has the benefit of an existing standard -- a reasonable, fully informed person -- that is included in Rule 1:8-3A.

The court’s finding as to a contested peremptory challenge must be made on the record.

Comment to Rule 1:8-3A(d)(1)

(3) In considering the reasons given for a peremptory challenge pursuant to paragraph (d)(1), the court shall bear in mind that the following reasons have historically been associated with improper discrimination, explicit bias, and implicit bias in jury selection and are therefore presumptively invalid:

Comment to Rule 1:8-3A(d)(1)

- “(i) having prior contact with law enforcement officers;
- (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
- (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
- (iv) living in a high-crime neighborhood;
- (v) having a child outside of marriage; ...

Comment to Rule 1:8-3A(d)(1)

(vi) receiving state benefits;

(vii) not being a native English speaker”;

(viii) having friends or family members who were victims of crime; and

(ix) understating the degree to which the juror or the juror’s family or friends have been victims of crime, based on a belief that only serious violent crime results in victimization. Wash. Gen. R. 37(h).

Key Takeaways

The Court in State v. Andujar cited most of the reasons enumerated in GR 37 as indicators of potential implicit bias.

These reasons are **presumptively** invalid as a justification for a peremptory challenge.

In addition, (ix) renders presumptively invalid a claim that a juror should be stricken because the juror answered certain voir dire questions based on an understanding that only serious violent crime results in victimization.

Comment to Rule 1:8-3A(d)(1)

A party exercising a challenge on one of those bases may overcome the presumption of invalidity by demonstrating to the court's satisfaction that the challenge was not exercised in violation of paragraph (a), but rather based on a legitimate concern about "the prospective juror's ability to be fair and impartial in light of particular facts and circumstances at issue in the case." See Conn. Proposed New Rule (h).

Key Takeaways

The reasons listed in Rule 1:8-3A(d)(1) are subject to a rebuttable presumption of invalidity.

Such a reason may form the basis for a reason why a prospective juror could not be fair or impartial based on the facts and circumstances of the specific case.

The party seeking to exercise the peremptory bears the burden of overcoming the presumption of invalidity.

Comment to Rule 1:8-3A(d)(1)

The court shall also consider that certain conduct-based reasons for peremptory challenges have also historically been associated with improper discrimination, explicit bias, and implicit bias in jury selection.

“Such reasons include allegations that a prospective juror: was sleeping, inattentive, staring, or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers.” Wash. Gen. R. 37(i).

Key Takeaways

Critics of Batson and the majority approach to peremptories often point to conduct-based justifications as a proxy for discrimination.

Rule 1:8-3A acknowledges the problems inherent in such claims without creating any presumption or any requirement for the proponent of the peremptory to further explain the rationale.

The Comment alerts practitioners as to the possible issues associated with justification of a peremptory on such grounds.

Comment to Rule 1:8-3A(d)(2)

(4) In making its determination as to a contested peremptory challenge pursuant to paragraph (d)(2), the court should consider circumstances that include, but are not limited to:

(i) “the number and types of questions posed to the prospective juror,” including whether and how “the party exercising the peremptory challenge[] questioned the prospective juror about the alleged concern;

(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the” challenged juror in comparison to other jurors;...

Comment to Rule 1:8-3A(d)(2)

(iii) whether other prospective jurors gave similar answers but were not challenged by that party;

(iv) whether a reason might be disproportionately associated with a protected group identified in paragraph (a); and

(v) “whether the party has used peremptory challenges disproportionately against” members of a protected group as defined in paragraph (a). See Wash. Gen. R. 37(g).

Key Takeaways

The Comment to Rule 1:8-3A(d)(2) provides substantial guidance to attorneys seeking to avoid an objection to a peremptory -- or seeking to defend against an objection if one is raised.

To the extent that a juror's response creates a basis for a future peremptory, did the attorney seek clarification or further information? Did other jurors provide similar responses without creating concern?

Key Takeaways

Since peremptory challenges generally will be exercised at the end of voir dire (whether judge-led or ACVD), the judge and attorneys should be mindful of such issues while questioning is still ongoing.

Rule 1:8-3A(e)

(e) A peremptory challenge violates paragraph (a) of this Rule if a reasonable, fully informed person would believe that a party removed a prospective juror based on the juror's actual or perceived membership in a group protected under that paragraph.

Rule 1:8-3A(f)

(f) If the court finds that a reasonable, fully informed person would view the contested peremptory challenge to violate paragraph (a) of this Rule, the court shall impose an appropriate remedy. No finding of purposeful discrimination or bias is required.

Key Takeaways

Like GR 37, new Rule 1:8-3A provides that no finding of purposeful discrimination is necessary (for the court to uphold an objection to a peremptory).

Consistent with the Court's holding in Andujar, the rule also provides that no finding of bias is necessary.

Key Takeaways

Rule 1:8-3A thus eliminates some of the most problematic aspects of Batson/Gilmore.

The proponent of a peremptory will no longer be accused of using the peremptory in order to discriminate.

If the objection to the peremptory is upheld, the court will make no finding of discrimination, nor even any finding of bias (explicit, implicit, or other) on the part of the party.

Key Takeaways

The standard is external and objective:

Whether a reasonable, fully informed person would find that the peremptory challenge was exercised to remove a juror based on perceived membership in a class protected by the US or NJ Constitution or the NJ LAD.

Comment to Rule 1:8-3A(f)

(5) Paragraph (f) calls upon the court to impose an appropriate remedy for a violation of paragraph (a). The following remedies may be applied in response to a court determination that a party has impermissibly exercised a peremptory challenge: ...

Comment to Rule 1:8-3A(f)

- (i) reseal impermissibly challenged juror(s);
- (ii) reseal impermissibly challenged juror(s) and order forfeiture of challenges;
- (iii) require subsequent peremptory challenges to be exercised at sidebar;

Comment to Rule 1:8-3A(f)

(iv) grant additional peremptory challenges to non-offending party or parties;

(v) dismiss empaneled jurors and start voir dire over; and

(vi) combine multiple remedies.

State v. Andrews, 216 N.J. 271 (2013).

Key Takeaways

The Comment to Rule 1:8-3A(f) reiterates the remedies established by the Court in State v. Andrews.

As always, the feasibility or propriety of any particular remedy will depend in part on the circumstances of the case.