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November 16, 2021

Hon. Chief Justice Stuart Rabner
R. J. Hughes Justice Complex
P.O. Box 970
Trenton, NJ 08625

Dear Chief Justice Rabner:

I currently serve as President of the Trial Attorneys of New Jersey (TANJ). On TANJ's behalf, I want to thank Chief Justice Rabner, the Honorable Glenn Grant and other organizers of the Judicial Conference for the opportunity to offer this submission. TANJ was formed more than 50 years ago for the purpose of fostering the interests of the public, bench and bar, specifically in regard to the trial practice in New Jersey. TANJ is comprised of hundreds of trial lawyers and, as I often note, it is a "non-denominational" group representing criminal practitioners, civil practitioners, plaintiff and defense attorneys. TANJ's core mission is to play a meaningful role in maintaining and improving the trial process – always with an eye toward ensuring fair trials pursuant to Constitutional mandate.

There is no more meaningful opportunity to serve TANJ's mission than to offer an informed voice on behalf of New Jersey's trial attorneys regarding the jury selection process – specifically as it relates to the noble effort to rid that process of impermissible bias. Chief Justice Rabner noted his goal of fostering a thoughtful and collaborative approach in this process, and on TANJ's behalf, I applaud the effort to solicit diverse and informed views, to conduct a careful analysis of current process for jury selection and potential reforms to that process. The ultimate goal is to ensure that the public, litigants, the bench and bar can have justified confidence in that process, and to that end, it is imperative that impermissible bias be removed from the process.

On TANJ's behalf, I remain mindful of the sobering reality of inequities that persist in society and the perceived deficiencies in our judicial system, including the current jury selection process. Dr. Eddie Glaude's comments during the Conference offered a stark reminder of what is at stake during our effort to analyze and improve the jury selection process in New Jersey. In our collective effort to improve that process, we must continue to think like people of action, and act like people of thought.

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TANJ's Board of Trustees and Officers convened to undertake a careful analysis of issues anticipated to be addressed during the Judicial Conference. The ultimate result of TANJ's deliberations was the endorsement of the New Jersey State Bar Association's Working Group on Jury Selection's Interim Report in connection with the Conference. The analytics and views set forth in that Interim Report encapsulate many, if not all, of the concerns and views shared by TANJ's membership.

I will attempt to briefly amplify the analytics underpinning TANJ's endorsement of the NJSBA's interim report. TANJ is fully supportive of a holistic, exhaustive and data-driven analysis regarding potential improvements to the jury selection process. Central to the analysis and report prepared by Dr. Mary Rose, as she thoughtfully distilled the available data, was her determination that additional analysis and data collection must be done to determine root causes for systematic underrepresentation of certain cognizable groups during the jury selection process.

That necessary data collection and analysis is at its nascent stages, and further work in that regard is critical to determine how best to address current limitations in our process. The collection of demographic data as mandated by *State v. Dangcil* will provide important metrics in that effort, and TANJ believes that any decisions altering the current process, particularly regarding peremptory challenges, would be premature without the benefit of such additional necessary data.

While Dr. Rose confirmed that additional study must be undertaken to thoroughly analyze weak points in our current system so they can be corrected, there are a few key points that seem more readily discernible.

First, it appears abundantly clear from Dr. Rose's analysis that the process by which jurors are summoned for participation in venires can and should be studied and modified to ensure that the pool of potential jurors adequately reflects our communities. For the sake of brevity, I will refrain from delving with specificity into certain proposals to remedy the systemic underrepresentation that currently exists. That said, TANJ supports and endorses the notion, as more fully set forth in the NJSBA's Interim Report, that revised methods must be utilized to ensure that potential jurors who are summoned and who appear adequately reflect our communities.

Second, it appears abundantly clear that no compelling evidence exists to date from within Dr. Rose's analysis, or otherwise, that attorneys in New Jersey are using peremptory challenges to contribute to patterns of underrepresentation on juries. To quote a portion of Dr. Rose's report regarding the use of peremptory challenges, "patterns of peremptory challenges did not explain many of the examples of concerning levels of underrepresentation." Dr. Rose also noted that "attorneys' use of peremptory strikes on minority group members played only a case-specific and generally attenuated role in explaining patterns of underrepresentation on juries."

While no compelling evidence yet has been offered suggesting a pattern of discriminatory use of peremptory challenges in New Jersey, it also is important to note the critical role that peremptory challenges play for litigants. That is particularly true for individuals in the criminal context facing threat to liberty. Peremptory challenges also serve a critically important function in the civil trial context. The opportunity to exercise a peremptory challenge is indeed an important substantive right secured by statute, court rule and decisional law. Any decision to limit or eliminate available peremptory challenges based on the information available thus far would be premature. Such a step would not be properly data-driven or thoroughly analyzed. TANJ thus opposes any such initiative.

TANJ's members have served "in the trenches" and have tried many cases in New Jersey. Many TANJ members also have tried cases in other jurisdictions, and have had a chance to compare and contrast the jury selection process in New Jersey versus in other states. One notable area distinguishing New Jersey from other jurisdictions is the relatively truncated role attorneys play during the voir dire process. While the robust number of peremptory challenges afforded to litigants in New Jersey has been highlighted as an outlier and/or an area of concern to some stakeholders, it is important to note that the voir dire process in New Jersey is significantly less "attorney-driven" than in other jurisdictions.

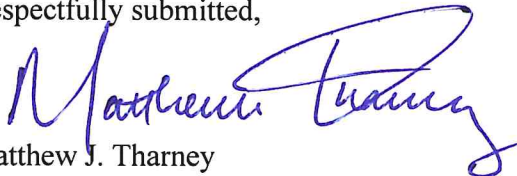
Experience garnered by trying cases in New Jersey reveals that potential jurors often are looking to provide the "right answer" when pressed by a judge in the context of a challenge for cause. That is often true even though the prospective juror has expressed notable equivocation and/or outright doubts about his or her ability to be fair and impartial if empaneled as a juror. When such circumstances occur, as they often do, peremptory challenges serve a critically important function for litigants who harbor legitimate doubts about a potential juror's ability to truly be fair and impartial, despite the so-called "right answer" to the Judge's "cure" question. Indeed, Judges often attempt to rehabilitate potential jurors during the for cause challenge process, and such efforts threaten to undermine the fair and impartial constitution of the jury without the protections afforded by peremptory challenges.

As noted, TANJ is opposed to any reduction or limitation of peremptory challenges based on available information to date. Further, from TANJ's perspective, any thought of reducing or eliminating peremptory challenges must be coupled with a corresponding recognition of the need to expand attorney involvement in the voir dire process. Various versions exist of expanded attorney involvement, and those mechanistic considerations are beyond the scope of TANJ's assessments at present. That said, TANJ welcomes the opportunity to offer an informed view regarding any alteration of the voir dire process.

In summary, at present, TANJ is opposed to any reduction of peremptory challenges, and TANJ encourages further data collection and analysis to improve the process by which potential jurors are summoned to court. TANJ also takes the position that it would be very beneficial to have attorneys more involved in the voir dire process. More generally, TANJ endorses the NJSBA's Interim Report, which includes considered recommendations regarding implementation of revised standards for *Batson/Gilmore*-based challenges, as well as other helpful suggestions regarding this important initiative.

Once again, I wish to thank the organizers of the Judicial Conference for the opportunity to speak on TANJ's behalf.

Respectfully submitted,


Matthew J. Tharney
President, Trial Attorneys of New Jersey