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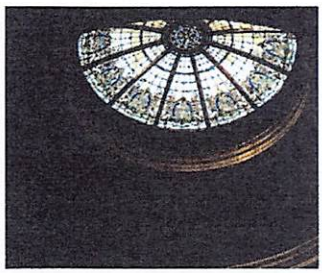

"With Honor and Dignity"

October 28, 2021

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Jury Selection Process (Pre-Judicial Conference)
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

VIA EMAIL TO
COMMENTS.MAILBOX@NJCOURTS.GOV

RE: 2021 Judicial Conference of New Jersey on Jury Selection

Dear Judge Grant and Members of the Judicial Conference:

Please accept this letter submission from the Essex County Bar Association (ECBA) regarding the 2021 Judicial Conference of New Jersey scheduled to be held on November 10 and 12, 2021, which is "designed to provide the New Jersey Supreme Court with information and recommendations to improve the process of jury selection" and will "examine implicit bias in jury selection, including in the use of peremptory challenges." Pursuant to Rule 1:35-1, the ECBA has appointed four delegates to the conference, including: Raymond M. Brown, Nancy Erika Smith, Kevin G. Walsh and myself.

While preparing this submission, the ECBA formally solicited comments from its members during a public forum convened on October 21, 2021. This letter synthesizes the comments received from our members and suggests ways to eradicate the evils of implicit bias that infect many aspects of the criminal and civil jury trial system in New Jersey. Please know that the ECBA shares the Supreme Court's goal of improving our jury system so that all participants in the trial process – litigants, defendants, judges, attorneys, court employees, and the public – come away from any contested trial believing that justice was sought and the process of arriving at a verdict was eminently fair.

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Introduction

The ECBA believes that a comprehensive study into the entire jury selection process is warranted and welcomes the opportunity to share our suggestions. This exhaustive examination should include all aspects of the selection process beginning with the representation of the community when first summoned for jury service, hardship excusals before a juror enters the courthouse, hardship excusals once at the courthouse, voir dire, and training on implicit bias that is critically needed for judges, lawyers, and jurors.

The ECBA is committed to ridding the entire jury selection process of bias -- overt, implicit, systematic, structural, institutional, or otherwise. This is a goal we all strive to achieve in the pursuit of justice.

The analysis of the fairness of jury selection must begin at the beginning: a review of the pool itself and a determination of whether a fair representation of the community is included or excluded during the early stages.

1. **Representation of the community in the jury pool is a necessary first step.**

Issues as to the pool itself and the basis for initial excusals are critical components of the very structure of a fair representation of the community. An analysis of these core issues, to determine the existence and extent of structural bias, should be conducted at the outset to determine what effect these built-in procedures have on a jury pool. Stated differently, examining the interactions between potential jurors and the jury management office before any juror has even stepped foot into the courthouse is a critical starting point of analysis. Indeed, the study of the very structure of the pool and the initial excusals must by necessity be step one in any analysis of jury selection.

Specifically, the issues necessitating study and reflection include:

A) A meaningful discussion about the propriety and wisdom of automatically excluding those citizens with a criminal conviction from serving on a jury.

B) Consideration of changing the remuneration paid to jurors so that more potential jurors may be able to serve. The existing limited payment structure leads to the excusal of many jurors who represent the community and would otherwise be able to serve, including those with hourly pay jobs and child care issues. To speak plainly, it is our collective experience that persons of color as well as our neighbors with limited socioeconomic means are most likely to need to work each day to make ends meet. Consequently, they are least able to forego their daily salary and wages in order to serve on a jury.

C) Any comprehensive study must analyze which jurors are excused for hardship by jury management or the Assignment Judge before they appear at the courthouse and those excused for hardship after appearing at the courthouse. The demographic data that must start being collected, pursuant to **State v Dangcil**, 248 N.J. 114 (2021), should be digested before any changes to jury selection are contemplated. Only after this data is understood can a determination be made of the impact that hardship excusals have on the overall makeup of the pool.

D) The Court would be wise to study multi-county jury pools to determine if such a process is feasible and if it would result in fairer demographic representations on juries. There is no sacred magic that would limit jury pools to be derived from the residents of only one county for a trial. The federal courts already do employ this method.

2. **Reducing or limiting peremptory challenges is not a solution and could actually increase bias in the trial system.**

Reducing or eliminating peremptory challenges is not a solution to removing or lessening overt or implicit bias in jury selection. Trial lawyers in Essex County, probably more than any other group of trial lawyers in the State, know all too well what bias means for their clients. Essex County is a densely populated, racially and economically diverse county. Essex County trial lawyers represent litigants who are often the targets of the very discrimination we seek to eliminate. It is that very bias the trial lawyer seeks to eradicate when exercising a peremptory challenge - the last remaining tool that trial lawyers can use to protect their clients from discrimination that could imperil the fairness of a trial verdict.

More specifically, the ECBA offers the following suggestions and concerns:

A) Certified criminal and civil trial attorneys can add much to this discussion. Trial lawyers understand the realities and the granular (and sometime strategic) mechanics of picking a jury, more so than any others. Our Supreme Court has mandated that certified criminal and civil trial attorneys meet rigorous criteria, including a minimum number of jury trials, before receiving certification. No change should be made regarding peremptory challenges without consulting and listening to that group of highly talented lawyers. A survey to all certified criminal and civil trial attorneys should be conducted and considered before any change is even contemplated.

B) Eliminating peremptory challenges will result in a judge being more involved in jury selection than appropriate. The selection of a jury is the job of the trial lawyers, not the judge. Obviously, the judge must be the "referee" and ensure fairness in the proceedings but should not be the primary person in the courtroom to

determine the makeup of the jury. Expanding (or stretching the need for) for-cause challenges simply shifts to the Court the question of whether a juror is suitable to sit or not. This will take the decision largely out of the trial lawyers' hands. The jury as constituted should reflect the choices of counsel, not the Court, since they know their cases best and know the strategies they intend to employ during trial.

C) No one can forget the NJ Sentencing Commission's finding that our State has the highest rate **in all of the United States** of African-American males ending up in state prison. We cannot ignore this fact. In a very real way, peremptory challenges are tools used by defense attorneys to obtain a fairer jury.

D) Reducing peremptory challenges will make picking a jury more time consuming, not less. With fewer or no peremptory challenges, each challenge for-cause will become a far more significant event, imbued with far-reaching consequences for the result of the trial.

E) Judges are inconsistent in evaluating challenges for-cause and this fact results in actual or perceived unfairness in trial proceedings. For example, a juror's self-assessment, which may indeed be genuinely held, that they will be fair, should not be required to be relied upon by the trial lawyer. If implicit bias exists, which it does, it follows that each of us saying we can be fair and impartial at all times loses much of its meaning during the trial process.

F) The Court must review other states' procedures to determine the effect of the removal of peremptory challenges, more expansive voir dire, hardship issues, juror compensation rates, and the use of for-cause challenges. This review and subsequent analysis must occur before anyone advocates for altering state law to curtail or eliminate peremptory challenges. In this regard, a review of other states' procedures for bringing **State v. Gilmore**, 103 N.J. 508 (1986) type challenges must be done and a better mechanism to advance these arguments should be sought.

G) The Rose Report[1], included among the resources provided as background for this Judicial Conference, does not support the conclusion that peremptory challenges will eradicate implicit bias. Indeed, while the report suggests that the use of peremptory challenges may be a reason that large numbers of jurors must be summoned, it acknowledges that no data exists at this time to support that conclusion. (Rose Report p. 92). This fact reinforces our position that the

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[1] Mary Rose, **Final Report on New Jersey's Empirical Study of Jury Selection Practices and Jury Representativenes** (2021). https://www.njcourts.gov/courts/supreme/judconfjury.html#addresources (October 2021).

demographic data to be collected, pursuant to **Dangcil**, and hardship excusals must first be analyzed before an informed debate about peremptory challenges can even occur.

Recommendations:

We implore the New Jersey Supreme Court to act deliberately, carefully, and with due regard for trial attorneys and their search for truth during a jury trial. Namely, through further study and discussion, in which the ECBA is ready to engage in partnership with all stakeholders in the jury trial system, we believe the Supreme Court should seek to:

1. eradicate implicit bias from every facet and stage of a jury trial;
2. loosen restrictions on who can serve as a juror;
3. increase juror compensation rates to encourage low-wage earners to affirmatively agree to jury service;
4. scrutinize excusals to avoid jury pools that are not reflective of the community; and
5. conduct a comprehensive study regarding the demographic data collected pursuant to **Dangcil** before taking any action as to peremptory challenges.

On behalf of the ECBA Officers, Trustees, Members and specifically those members who have agreed to serve as Essex County Delegates to this Judicial Conference, I reiterate our Association's commitment to this effort and willingness to work together to identify and eradicate bias within the jury selection process, wherever it lies.

Respectfully submitted,

Eileen O'Connor

Eileen O'Connor
President

cc. Honorable Stuart Rabner, Chief Justice, NJ Supreme Court
Domenick Carmagnola, NJSBA President
Officers & Trustees, Essex County Bar Association