New Jury Selection Procedure in California: Is This the End of Peremptory Challenges? Is This the End of Batson?

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Jury selection in California is undergoing significant change. In August 2020, the California legislature passed AB 3070, which was signed by Governor Gavin Newsome on September 30. Beginning in 2022, objections to peremptory challenges in criminal cases will have more teeth, including a list of presumptively invalid reasons for striking a prospective juror and a new standard of review for appellate review of a trial court’s decision. While AB 3070 does not apply officially to civil jury trials until 2026, the significant overhaul in procedure effectuated by this new law is likely to influence a court’s analysis of the civil jury selection process before that
time. The new law’s aim is noble: to bring an end to discrimination in jury selection. However, critics, including many within the California judiciary, say the new procedure is “unworkable.”

**Existing Law**

California currently permits a party in a civil case six (6) peremptory challenges, and 10 in non-capital criminal cases. See Cal. Code of Civ. Proc. (CCP) § 231(a),(c). Unlike “for cause” challenges, no reason for a peremptory challenge need be given. CCP § 226(b). If a party believes the challenge was given for a discriminatory purpose, the court will follow the procedure set out by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), which requires a *prima facie* case of discrimination to be made before a party must explain the exclusion of a prospective juror by offering a facially neutral justification for the strike.

AB 3070

The new statute, which will become Cal. Code of Civ. Proc. § 231.7, gives a party or the trial court the opportunity to challenge opposing counsel’s use of peremptory challenges.

The procedure is set out as follows:

1. **Challenge:** An objection can be made by alleging a party’s peremptory challenge is made on the basis of the juror’s race, ethnicity, gender, gender identity, sexual orientation, national origin or religious affiliation. See CCP § 231.7(a)-(b). Once a party objects to a peremptory challenge, further discussion will be held outside the presence of the panel of potential jurors.

2. **Evaluation of Objection:** After an objection is made, the challenged party must give a reason for the peremptory challenge. The court will then consider whether there is a substantial likelihood that an objectively reasonable person – defined as one who is aware of unconscious bias and its impact on the justice system – would view the challenge as related to one of the cognizable groups listed in Section I. Critically, the court need not find purposeful discrimination to sustain the objection. Rather, relevant factors include consideration of the perceived cognizable groups of the alleged victim, witnesses and other parties, and whether the counsel or counsel’s office has a history of *Batson* violations or disproportionate use of peremptory challenges. See CCP § 231.7(d)(2)(G).

The statute also includes a presumption that a number of enumerated reasons for a peremptory challenge are invalid. Overcoming the presumption requires *clear and convincing evidence* that an objectively reasonable person would view the reason as unrelated to the prospective juror’s perceived membership in a cognizable group. These reasons include, among others, receiving state benefits, dress and appearance, the ability to speak another language, and even having a child outside of marriage. The full list can be found here: [leginfo.legislature.ca.gov](http://leginfo.legislature.ca.gov)

Further, a challenge based on a prospective juror’s behavior or perceived attitude is presumptively invalid unless confirmed by the court’s own
3. **Grant of Objection.** If the objection is sustained, the court will explain its ruling on the record. If the objecting party requests it, the court must quash the venire and restart the jury selection process. If the objection is made after the jury is impaneled, the court will declare a mistrial. Other remedies include seating the challenged juror, providing the objecting party additional challenges, or any other remedy the court deems appropriate. CCP § 231.7(h).

4. **Denial of Objection – Review.** In contrast, if an objection is denied, it may be given *de novo* review by an appellate court. The trial court’s factual findings will be reviewed for substantial evidence.

**Commentary**

The law’s primary change to the *Batson* procedure is the law’s focus on implicit bias. The law outlines an objective test to measure discrimination, rather than rely on a subjective test of the party’s actual motivations. Perhaps most significantly, the bill explicitly disallows particular reasons for striking a prospective juror, rather than permitting any “facially neutral” explanation to be offered. The bill’s sponsor, California Attorneys for Criminal Justice (CACJ), a statewide association of criminal defense attorneys, believes the new law creates “an effective procedure for bringing an end to discrimination in the selection of juries.”

However, the bill drew notable opposition from a number of judicial groups, including the Alliance of California Judges: “The procedure [the bill] sets forth [is] unworkable.” The group went on to state, “Lawyers could challenge every peremptory challenge made by the other side.... This bill, however well-intentioned, would only create confusion and delay.”

Other groups opposed on the basis that the bill did not undergo sufficient review:

- The Association of African American California Judicial Officers requested withdrawal of the bill because “far reaching reform proposals ... should be subject to full review and discussion before it is offered to the full Assembly for consideration.”

- The California District Attorneys Association (CDAA) wrote that the bill “represents nothing less than an upheaval of California’s jury selection process, and it is being advanced without the benefit of extensive debate, careful review and sober consideration that should attend such expansive changes to our justice system.”

California is often a catalyst for change in other jurisdictions, and so California as well as non-California practitioners should keep an eye on the development of this peremptory challenge jurisprudence. This overhaul of the jury selection procedure will have a measurable effect on jury trials, and should inform strategy as trial approaches – particularly, building in time to confront objections to peremptory challenges from opposing counsel. Consequently, entities that might find themselves as a litigant in California should follow carefully along as CCP § 231.7 is implemented and perhaps litigated in the years to come.
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