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IN THIS ISSUE

Although most lawyers think of the Batson challenge as something that is obsolete, it is very much relevant in today's jury trials. While most people may tend to believe a lawyer who receives such a challenge had to have known they were doing something wrong, in most cases, it turns out that the lawyer simply did not understand the rules. This article will provide the reader with a practical update on the Batson challenge.

Batson Challenges: A Practical Update

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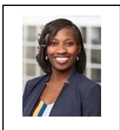

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In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court of course mandated a radical change in the jury selection process. No longer would peremptory challenges to jurors be permitted for any reason and without explanation, as they had been for centuries. *See, e.g., Swain v. Alabama*, 380 U.S. 202, 220 (1965) (defining a peremptory challenge as one "exercised without a reason stated, without inquiry and without being subject to the court's control"). Rather, the Court held in *Batson* that purposeful racial discrimination in the exercise of peremptory challenges violates the Equal Protection Clause and, therefore, the Court articulated a three step process for adjudicating allegations of discrimination in the use of such strikes. *Batson*, 476 U.S. at 84-90. Over the thirty-three years since *Batson* was decided, its reach has expanded and a large body of interpretive case law has developed.

This article provides a brief update regarding the overall state of *Batson* jurisprudence and, more importantly, addresses several essential procedural and substantive issues regarding *Batson* challenges that every trial lawyer should understand before entering the courtroom for voir dire and jury selection.

The Reach of Batson

Just a few years after it decided *Batson*, the Supreme Court extended the principle of non-discrimination in jury selection to civil cases, reasoning that private litigants act as "government actors" for purposes of jury selection and, therefore, that discrimination in the jury selection process violates the equal protection rights of potential jurors. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). Courts have since held that the objecting litigant need not be of the same racial identity as the stricken juror, and that it does not matter whether the stricken juror or the objecting litigant is a member of a minority versus a majority race. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 411-17 (1991); *U.S. v. Allen-Brown*, 243 F.3d 1293, 1297 (11th Cir. 2001) ("[B]y its terms *Batson* is not limited to members of racial minorities. It applies to anyone who is excluded from jury participation 'on account of his race.'")

The Supreme Court has also explicitly extended the reach of *Batson* challenges to gender, and has treated ethnicity the same as race. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (gender); *Hernandez v. New York*, 500 U.S. 352 (1991) (ethnicity). What is less clear, however, is what other classifications may support a *Batson* challenge, and practitioners should thus be mindful of any state-specific statutes or case law that may address this issue. California statutory law, for example, broadly forbids peremptory strikes based on "race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability . . ." *See* Cal. Civ. Proc. Code Ann. § 231.5 & Cal. Gov't Code Ann. § 11135.

Some state and federal courts have expanded *Batson* to cover religious affiliation, but the Supreme Court has not directly addressed this issue. *See Davis v. Minnesota*, 511 U.S. 115, 114 S. Ct. 2120, 128 L. Ed. 2d 679 (1994) (denying certiorari on the question); *U.S. v. Mahbub*, 818 F.3d 213, 225 (6th Cir. 2016) ("W]hether *Batson*'s reasoning extends to religion remains unclear"); *U.S. v. Brown*, 352 F.3d 654 (2d Cir. 2003) (holding that exercise of a peremptory strike due to a venire

member's religious affiliation would violate *Batson*; listing case decisions).

To date, only the Ninth Circuit has extended *Batson*'s protections to include sexual orientation. *See SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014). However, given the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), in which it recognized a due process and equal protection right to same sex marriage, the Court may eventually hold peremptory strikes based on sexual orientation to be subject to *Batson* scrutiny.

Classifications that are generally considered **not** to support *Batson* challenges (absent a controlling state statute to the contrary) include the following:

Age. *See Sanchez v. Roden*, 808 F.3d 85, 90 (1st Cir. 2015) ("Age is not a protected category under *Batson*"); *United States v. Helmstetter*, 479 F.3d 750, 754 (10th Cir. 2007) (same; noting that "every other circuit to address the issue has rejected the argument that jury-selection procedures discriminating on the basis of age violate equal protection").

Marital status. *See U.S. v. Omoruyi*, 7 F.3d 880, 881 (9th Cir. 1993) ("Peremptory challenges based on marital status do not violate *Batson*"); *United States v. Nichols, 937* F.2d 1257, 1264 (7th Cir.1991), cert. denied, 502 U.S. 1080, 112 S.Ct. 989, 117 L.Ed.2d 151 (1992).

Disability status. *See U.S. v. Harris*, 197 F.3d 870 (7th Cir. 1999) (use of peremptory challenge to strike potential juror due to her disability did not violate equal protection); *U.S. v. Santiago-Martinez*, 58 F.3d 422 (9th Cir. 1995) (recognizing obese persons as disabled for purposes of ADA but holding that *Batson* equal protection analysis thus does not prohibit peremptory strikes on the basis of that disability); *Donelson v. Fritz*, 70 P.3d 539, 544 (Colo. App. 2002) (rejecting argument that *Batson* precludes exclusion of jurors with disabilities; collecting uniform case law on the subject).

<u>Asserting the Challenge: Timing</u>

A timely challenge is "an essential element of a claim of racial discrimination in the exercise of preemptory challenges" under *Batson. See Sawyer v. Butler*, 881 F.2d 1273, 1286 (5th Cir. 1989), aff'd sub nom. *Sawyer v. Smith*, 497 U.S. 227 (1990). What constitutes a timely *Batson* objection has not been precisely defined by the Supreme Court, however, as different state and federal courts follow varying procedures and methods of jury selection. Consequently, this is another issue on which counsel must be familiar with local rules and practice.

The general consensus of the federal circuit courts is that a *Batson* challenge must be asserted "prior to the time that the venire is dismissed" (*see U.S. v. Reid*, 764 F.3d 528, 533 (6th Cir. 2014)) or at least "before the jury is sworn and the trial commences." *See U.S. v. Tomlinson*, 764 F.3d 535, 539 (6th Cir. 2014). The Court in *Tomlinson* explained the competing practical considerations of "selecting the time frame for a *Batson* objection that provides sufficient time for counsel to ascertain the propriety of an objection (as to one strike or a pattern of strikes) while the jurors are still present, thereby alleviating premature *Batson*

objections, hasty determinations of *Batson* waivers, and post-trial *Batson* inquiries . . . [while] . . . assuring that both the *Batson* inquiry and the trial will proceed efficiently." *Id*. at 539.

The Three Part Inquiry

> A *Batson* challenge prompts the following three-part inquiry:
>
> 1. The objecting party must establish a prima facie case of purposeful discrimination in the use of peremptory strikes by the opposing party;
>
> 2. If the prima facie case is established, then the proponent of the strike or strikes must come forward with a neutral explanation; and
>
> 3. The trial court then determines whether the objecting party has proven "purposeful discrimination."
>
> *See, e.g., Batson*, 476 U.S. at 94.

Step One: The Prima Facie Showing

To establish a prima facie case of purposeful discrimination in selection of the jury, the objecting party must demonstrate that the persons challenged are members of a certain gender or a "cognizable" racial group, that the opposing party has exercised peremptory challenges to remove one or more such persons from the jury, and that "all relevant circumstances" raise an inference that the peremptory strikes were employed based on race or gender. *See Batson v. Kentucky,* 476 U.S. at 79, holding modified by *Powers v. Ohio*, 499 U.S. 400 (1991). By way of illustration, this showing can be made by pointing to a "pattern" of strikes of jurors of a certain race or gender, by the opposing party's "questions and statements during voir dire examination," or by any other relevant circumstances. *Id*. One court has summarized the potentially relevant factors as including:

> 1. Evidence that the jurors in question shared only the one characteristic -- their membership in the group -- and that in all other respects they were as heterogeneous as the community as a whole.
>
> 2. A pattern of strikes against jurors on the particular venire; e.g., 4 of 6 peremptory challenges were used to strike jurors of a certain race or gender.
>
> 3. The past conduct of a prosecutor in using peremptory challenges to strike all jurors of a certain race or gender.
>
> 4. The type and manner of the opposing attorney's questions and statements during voir dire, including nothing more than "desultory" voir dire.
>
> 5. The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions.
>
> 6. Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner.

7. Disparate examination of members of the venire; e.g., questions designed to provoke a certain response that is likely to disqualify jurors of a certain race or gender.

8. Circumstantial evidence of intent may be proven by disparate impact, where all or most of the challenges were used to strike jurors of a certain race or gender.

9. The use of peremptory challenges to dismiss all or most jurors of a certain race or gender.

See, e.g., Ex parte Branch, 526 So. 2d 609, 624 (Ala. 1987) (citing *Batson* and various cases from other jurisdictions).

As to the burden of persuasion that the challenging party bears in making out this prima facie showing, the Supreme Court has explained that it is not "so onerous that a [party] would have to persuade the judge -- on the basis of all the facts, some of which are impossible for the defendant to know with certainty -- that the challenge was ***more likely than not*** the product of purposeful discrimination." *Johnson v. California*, 545 U.S. 162, 170 (2005) (emphasis added). Rather, a party "satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an ***inference*** that discrimination has occurred." *Johnson,* 545 U.S. at 170.

Importantly, both counsel and the trial court must remain mindful of the fact that no explanation of the reasons for striking certain jurors should be required unless or until the prima facie showing has been made. In other words, "[n]o party challenging the opposing party's use of a peremptory strike — whether that party be the government, a criminal defendant, or a civil litigant — is entitled to an explanation for that strike, much less to have it disallowed, unless and until a prima facie showing of racial discrimination is made." *United States v. Stewart*, 65 F.3d 918, 925 (11th Cir. 1995), citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) ("As with race-based *Batson* claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike").

Step Two: Rebutting the Prima Facie Case with Neutral Reasons

Once the prima facie showing has been made, the burden shifts to the proponent of the challenged strike to come forward with a race-neutral and gender-neutral explanation. *Batson*, 476 U.S. at 97. The proponent "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," *Id*. at 98. The neutral explanation must be "based on something other than the race [or gender] of the juror" and must have "facial validity." *Hernandez v. New York*, 500 U.S. 352, 360 (1991). The explanation "need not rise to the level justifying exercise of a challenge for cause," but must be "related to the particular case to be tried" and amount to more than a general denial of discriminatory motive or affirmance of "good faith." *Batson* at 97-99. In other words, "[u]nless a discriminatory intent is inherent in the . . . explanation, the reason offered will be deemed . . . neutral." *Hernandez*, 500 U.S. at 360. In fact, the stated reason need not be persuasive, plausible, or

even make sense – as long as it is neutral. *Purkett v. Elem*, 514 U.S. 765, 768–69 (1995).

Notwithstanding this wide latitude that is generally afforded attorneys in articulating neutral reasons, it must be remembered that a party seeking to support a proffered neutral justification for a strike must be ready to show that it utilized that justification consistently. *See, e.g., Miller-El v. Dreke*, 545 U.S. 231 (2005) (overturning conviction where prosecutor's explanation for striking black juror was not applied to white jurors); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019) (finding *Batson* violation, citing "the prosecutor's proffered reasons for striking one black juror . . . while allowing other similarly situated white jurors to serve on the jury"). Likewise, a proffered neutral reason for striking juror will not be considered valid if the court deems it to be a "proxy" or "surrogate" for race or gender. *See, e.g.*, *U.S. v. Bishop*, 959 F.2d 820, 822 (9th Cir 1992) (holding that, while residence can be a valid race-neutral reason depending on the circumstances, prosecutor's justification that juror was struck due to residence in predominantly black neighborhood of Compton amounted to an impermissible proxy for race); *see also Clayton v. State*, 797 S.E.2d 639, 643 (Ga. App. 2017) ("[A]n explanation is not racially-neutral if it is based upon either a characteristic that is specific to a racial group or a stereotypical belief that is imputed to a particular race").

While there are of course a vast multitude of cases evaluating proffered neutral reasons under *Batson*, the following justifications have been accepted as neutral (when employed consistently and related in some way to the individual's fitness to serve on the jury in the case at hand):

Age. *See Hidalgo v. Fagen, Inc.*, 206 F.3d 1013 (10th Cir. 2000) (youth can be an acceptable neutral justification); *U.S. v. Grimmond*, 137 F.3d 823, 834 (4th Cir. 1998) (elderly status is a legitimate neutral factor); *Sanchez v. Roden*, 808 F.3d 85, 90 (1st Cir. 2015) ("Age is not a protected category under *Batson*").

Appearance / grooming. *See Purkett v. Elem*, 514 U.S. 765, 769 (1995) (juror having long, unkempt hair, a mustache, and a beard is race-neutral; reasoning that "[t]he wearing of beards is not a characteristic that is peculiar to any race . . . And neither is the growing of long, unkempt hair").

Community ties insufficient. *See United States v. Atkins*, 25 F.3d 1401, 1406 (8th Cir.) (sporadic work history showing lack of attachment to community was permissible reason), cert. denied, 513 U.S. 953, 115 S.Ct. 371, 130 L.Ed.2d 322 (1994); *United States v. Maxwell*, 473 F.3d 868, 872 (8th Cir. 2007) (potential juror's "absence of community attachment" may serve as legitimate race-neutral reason).

Criminal history of the juror or family members. *See U.S. v. Wilcox*, 487 F.3d 1163, 1170 (8th Cir. 2007) ("That a prospective juror has a criminal record is a proper race-neutral reason for striking the venire member"); *U.S. v. Hendrix*, 509 F.3d 362, 370 (7th Cir. 2007) (striking of jurors who had relatives in prison is valid and race-neutral); *United States v. Boyd*, 168 F.3d 1077, 1077-78 (8th Cir.1999) (per curiam) (incarceration of family member is a "valid race-neutral reason").

Demeanor or behavior during voir dire. *See Thaler v. Haynes*, 559 U.S. 43, 48 (2010) ("[W]here the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the voir dire. But *Batson* plainly did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor"); *but see Snyder v. Louisiana*, 552 U.S. 472, 479 (2008) (holding that prosecutor's strike of juror for looking "nervous" was not sufficiently race-neutral to survive *Batson* scrutiny because trial court did not make a finding on the record regarding the juror's demeanor; noting that "race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's firsthand observations of even greater importance"); *see also United States v. Maxwell*, 473 F.3d 868, 872 (8th Cir.2007) ("[A] juror's demeanor and body language may serve as legitimate, race-neutral reasons to strike a potential juror"); *U.S. v. Thompson*, 735 F.3d 291, 298-301 (5th Cir. 2013) ("look[ing] perturbed" and "looking up to the ceiling"); *Stubbs v. Gomez,* 189 F.3d 1099, 1105 (9th Cir. 1999) ("inattentiveness"); *U.S. v. Gooch*, 665 F.3d 1318, 1330 (D.C. Cir. 2012) (inappropriate laughter during voir dire); *Hayes v. Woodford*, 301 F.3d 1054, 1082 (9th Cir. 2002) ("prone to exaggeration, including a comment that he had a 'photostatic' mind"); *Dunham v. Frank's Nursery & Crafts*, 967 F.2d 1121 (7th Cir.1992) (failing to make eye contact or makes continuous eye contact with one party over the other).

Education level. *See U.S. v. Lane*, 866 F.2d 103, 106 (4th Cir. 1989) (accepting as race-neutral strike of potential juror who had not completed high school based on attorney's statement that "we are looking for a jury that is all in all a little more educated"); *United States v. Moeller*, 80 F.3d 1053, 1060 (5th Cir. 1996) (holding that the prosecution had articulated a race-neutral reason for striking minority jurors on the basis of their lack of formal education, including one panel member who "was unable to competently fill out the juror questionnaire," given "the complex nature of the conspiracy [charged], and the number of interconnected offenses alleged"); *U.S. v. Campbell*, 317 F.3d 597, 605 (6th Cir. 2003) (striking juror who was not a high school graduate was race-neutral).

Jury service in past. *See U.S. v. Mitchell*, 502 F.3d 931, 958 (9th Cir. 2007) (prosecution's strike of potential juror who acquitted defendant in prior case was a valid race-neutral reason); *United States v. Thompson*, 827 F.2d 1254, 1260 (9th Cir.1987) ("Excluding jurors because ... they acquitted in a prior case ... is wholly within the prosecutor's privilege"); *McKenna v. W & W Services, Inc.*, 301 S.W.3d 336, 343 (Tex. App.--Tyler 2009) (in employment discrimination case, it was gender-neutral for employer's counsel to strike potential juror whose husband had served as juror on prior case involving same counsel and had "almost hung the jury").

Language barriers. *See Galarza v. Keane*, 252 F.3d 630, 639 (2d Cir. 2001) (race-neutral to strike potential jurors who had problems understanding proceedings due to language barrier); *U.S. v. Gainer*, 151 Fed. Appx. 887, 888 (11th Cir. 2005) (unpublished) (race-neutral to strike potential juror who spoke

English as a second language and did not understand English well enough to follow the case, which involved complex banking terminology).

Litigation History. *See U.S. v. Copeland,* 304 F.3d 533, 549 (6th Cir. 2002), opinion amended and superseded, 321 F.3d 582 (6th Cir. 2003) (in criminal case, race-neutral to strike individual who was plaintiff in a personal injury lawsuit); *Tinner v. United Insurance Co. of America*, 308 F.3d 697, 703 (7th Cir. 2002) (In Title VII action alleging race discrimination, race-neutral for employer to strike juror whose sister had filed discrimination claim against her employer).

Marital status. *See, e.g., U.S. v. Omoruyi*, 7 F.3d 880, 881 (9th Cir. 1993) ("Peremptory challenges based on marital status do not violate *Batson*").

Mental capacity. See *U.S. v. Montgomery*, 210 F.3d 446, 454 (5th Cir. 2000) (affirming trial court's acceptance as race-neutral justification that potential juror "lacked the necessary intelligence" in light of the district court's unique perspective from which to assess the credibility of the prosecutor's response, while acknowledging that the issue was a "close one"); *Hicks v. Ercole*, 09-CV-2531 AJN, 2015 WL 1266800, at *12 (S.D.N.Y. Mar. 18, 2015) (a "juror's lack of mental capacity" will be presumed non-pretextual as a race-neutral strike).

Personal connection to parties or witnesses. *See U.S. v. Patterson*, 258 F.3d 788, 790 (8th Cir. 2001) (race-neutral to strike potential juror who knew defendant and several potential witnesses).

Occupation. *See Alverio v. Sam's Warehouse Club, Inc.,* 253 F.3d 933, 941 (7th Cir. 2001) ("We have approved the exclusion of potential jurors because of their professions . . . and their lack of a profession"); *U.S. v. Maxwell*, 473 F.3d 868, 872 (8th Cir. 2007) (teacher); *Mahaffey v. Ramos*, 588 F.3d 1142, 1147 (7th Cir. 2009) (background in psychology); *U.S. v. Novaton*, 271 F.3d 968, 1003 (11th Cir. 2001) (social worker); *U.S. v. Nelson*, 450 F.3d 1201, 1208 (10th Cir. 2006) (college professor).

Questionnaire errors or omissions. *See U.S. v. Carter*, 481 F.3d 601, 610 (8th Cir. 2007), rev'd on other grounds, 128 S. Ct. 2559 (2008) (venire member's nearly empty questionnaire that showed a lack of interest in the process is a valid race-neutral reason); *United U.S. v. Smith*, 324 F.3d 922, 927 (7th Cir. 2003) (mistakes on juror questionnaire).

Renting versus owning home. *See U.S. v. Adams*, 604 F.3d 596, 601 (8th Cir. 2010) (individual's status as renter "may indicate he or she does not have substantial ties to the community" and is race-neutral).

Residence. *See Morgan v. City of Chicago,* 822 F.3d 317, 327 (7th Cir. 2016) (race-neutral to strike potential jurors who lived near or had contacts with the block where arrest occurred); *U.S. v. Williams*, 264 F.3d 561, 571 (5th Cir. 2001) (in criminal trial of political figure, it was race-neutral to strike potential jurors who lived in defendant's voting district or ward); *United States v. Briscoe*, 896 F.2d 1476, 1488-89 (7th Cir.), cert. denied, 498 U.S. 863, 111 S.Ct. 173, 112 L.Ed.2d 137 (1990) (peremptory strike of venireperson who lived near two witnesses was legitimate); *but see U.S. v. Bishop*, *supra*, 959 F.2d 820, 822 (9th

Cir 1992) (holding that, while residence can be a valid race-neutral reason depending on the circumstances, prosecutor's justification that juror was struck due to residence in predominantly black neighborhood of Compton amounted to an impermissible proxy for race).

Unemployment. *See U.S. v. McAllister*, 693 F.3d 572, 579 (6th Cir. 2012) (unemployment is race-neutral for *Batson* purposes); *U.S. v. Yang*, 281 F.3d 534, 549 (6th Cir. 2002) (unemployment is a valid race-neutral reason); *Swope v. Razzaq*, 428 F.3d 1152, 1154 (8th Cir. 2005) (unemployment accepted as valid race-neutral reason); *Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992) (unemployed status of potential juror was a race-neutral reason and related to plaintiff's lost income claim).

Views expressed in voir dire. *See U.S. v. Allen,* 644 F.3d 748, 753 (8th Cir. 2011) (potential juror's expression of past dissatisfaction with law enforcement officers is legitimate race-neutral reason to strike).

<u>Step Three: The Court's Determination</u>

As Justice Kavanaugh pointed out in the recent *Flowers v. Mississippi* decision, the job of enforcing *Batson* rests first and foremost with trial judges, who "operate at the front lines of American justice" and are charged with "prevent[ing] racial discrimination from seeping into the jury selection process." *Flowers*, 139 S. Ct. at 2243. Once a prima facie case of discrimination has been established and neutral reasons have been tendered, the trial court must consider the explanations "in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." *Id*. The objecting party carries the "burden of persuasion" to "prove the existence of purposeful discrimination;" in other words, that burden "rests with, and never shifts from, the opponent of the strike." *See, e.g., Johnson, supra,* 545 U.S. at 170–71.

The trial judge must determine "whether . . . the proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the striking party instead exercised peremptory strikes on the basis of race." *Id.* at 2244. The factors to be considered may include disparate questioning or investigation of prospective jurors, a side-by-side comparison of prospective jurors who were struck and not struck, any misrepresentations of the record by an attorney when defending strikes during the *Batson* hearing, and any "other relevant circumstances" that bear upon the issue of discrimination. *Id.* at 2243. The ultimate inquiry is whether the party in question was "motivated in substantial part by discriminatory intent." *Id*.

The trial judge's assessment of the striking party's credibility is often important, and "the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge." *Flowers*, 139 S. Ct. at 2243. Indeed, "[s]ince the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Id.*, quoting *Batson*, 476 U.S. at 98, n. 21. Thus, "[o]n appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Id.*

Remedies upon a Finding of Discrimination

In *Batson*, the Supreme Court expressed no "view as to whether it is more appropriate in a particular case . . . for the trial court to discharge the venire and select a new jury or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire." *Batson*, 476 U.S. at 99, n.24. Thus, the choice of remedy for a *Batson* violation is left to the sound discretion of the trial court, which is "encouraged to take into account the practicalities of the situation." *U.S. v. Walker*, 490 F.3d 1282, 1294 (11th Cir. 2007) (affirming re-seating of improperly dismissed jurors; noting that the trial court's choice of remedy is reviewed only for abuse of discretion).

Practical Considerations

During the entire jury selection process, counsel should remain vigilant in listening to and observing both the potential jurors and opposing counsel. In conducting voir dire, counsel should be careful to fairly cover all potential grounds for strikes while avoiding disparate questioning of jurors of one particular race or gender. Notes should be carefully taken, so that counsel is prepared to assert (or defend against) a *Batson* challenge, if needed. In particular, the trial team should keep lists of how all potential jurors respond to each question posed in voir dire and on written questionnaires, as this information is critical to the analysis of whether proffered race-neutral and gender-neutral justifications for strikes have been applied consistently. While deciding on which jurors to remove with peremptory strikes, counsel should make a note of the appropriate reason for each strike, so that any potential *Batson* challenge can be rebutted.

Any *Batson* challenges must of course be raised in a timely fashion. To preserve the record for appeal, counsel should ensure that any written jury questionnaires are included in the record, and that all aspects of voir dire, jury selection, and the *Batson* hearing are conducted on the record. Counsel opposing a *Batson* challenge should be prepared to state the applicable race and gender-neutral reasons for each strike in a clear and specific manner, and the proponent of the challenge must then assert all pertinent objections to the proffered justifications. It is also important to make sure that the record reflects the race and gender of each member of the venire as well as any relevant observations of counsel (or the judge) with regard to the demeanor, behavior, or appearance of any potential juror who is removed by a peremptory strike.

TRIAL TIP:

ENLISTING HELP: HOW YOU CAN USE YOUR SUPPORT STAFF TO READ YOUR JURY

BY KIRSTIN L. ABEL

"We do not see things as they are, nor do we even see them as we are, but only as we believe our story to have been." -Eric Micha'el Leventhal

Despite our best efforts as trial lawyers, we are anything but objective about our own cases. It is not a flaw – it is an unavoidable reflection of our human nature. Unfortunately, to adapt in trial and give our case the very best chance of success, we need to be as objective as possible about how the jury is responding to us, our witnesses and our story. Are there professionals who can do this for us? Sure, but those professionals come at a significant financial expense for our clients and it is just not possible to have consultants in every case. I have tried having an associate, paralegal or assistant sit in on trial to watch the jury's responses and report back. The problem with those people is they are typically as knee deep in the case as I am, or at least conditioned to see things from the defense perspective.

While a trained professional is always going to yield the most information, the observations of the lay person should not be overlooked. For that reason, consider enlisting the help of office services staff: a receptionist, file clerk or bookkeeper. The only prerequisite is they should be adept at picking up on social cues. Have them observe whether jurors appear to be following along, look confused or stressed? Do they look uncomfortable, do they nod along, and are there any subtle shakes of the head? During voir dire, observing the jurors' response to other jurors can be particularly helpful and as the attorney, it is not easy to observe the entire venire when you are engaged with one particular juror. Of course, any observations should be taken with a grain of salt because we all know jurors are very difficult to read, but a second set of (mostly) unbiased eyes might pick up on significant non-verbal cues that you and your trial team are too deep in the trenches to see.

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