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PERSPECTIVE

GUEST COLUMN

New rules make peremptory challenges trickier (and pricier)

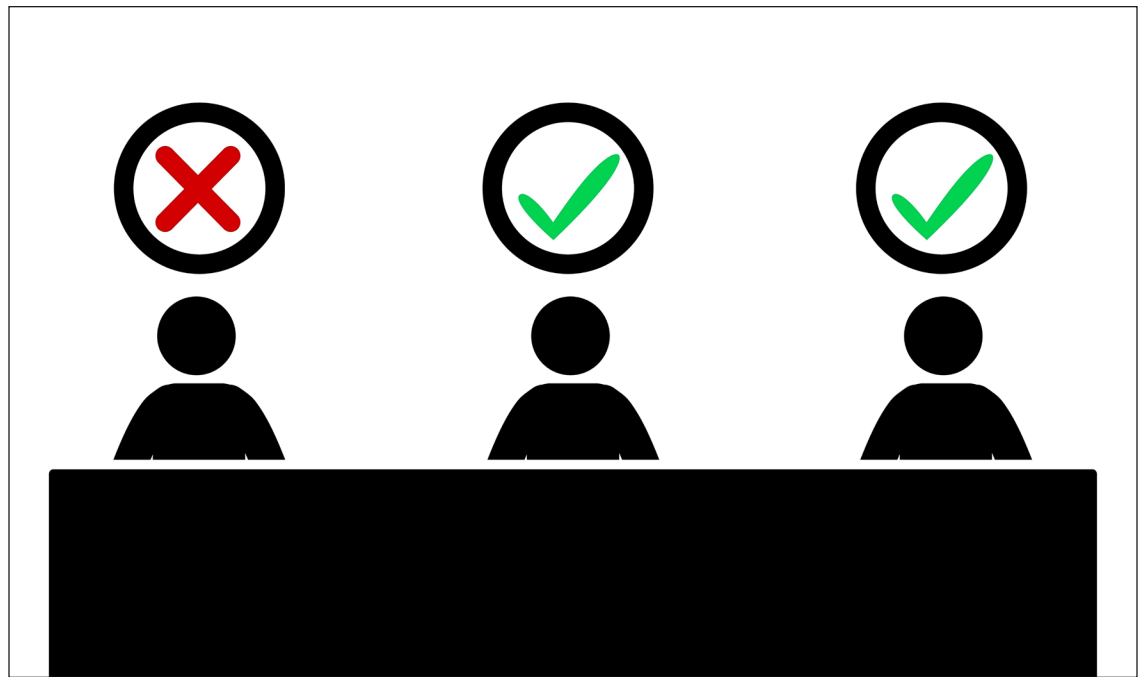
By Robert D. Foiles

Civil litigators, beware! Beginning in 2026, the rules regarding peremptory challenges will become fairer, more complicated and potentially more costly. Following the perceived shortcomings of the Batson/Wheeler framework, which failed to preclude purposeful peremptory challenges against cognizable classes of citizens, legislators in California took action to eliminate conscious and unconscious bias in allowing such challenges.

In California, this led to the enactment of Code of Civil Procedure (CCP) section 231.7. The new law places a greater burden on the striking party to provide a class-neutral reason for the peremptory. As a result of section 231.7, the courts now engage several steps in assessing the challenge. First, the court is to consider only counsel's articulated reasons for the challenge. Next, from the totality of circumstances, the judge must determine whether there is a substantial likelihood that an objectively reasonable person would view the class of juror as a factor in the use of a peremptory. Finally, section 231.7(e) sets forth 13 reasons that will be presumed invalid unless rebutted by clear and convincing evidence. They are:

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws



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have been enforced in a discriminatory manner.

(3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

(4) A prospective juror's neighborhood.

(5) Having a child outside of marriage.

(6) Receiving state benefits.

(7) Not being a native English speaker.

(8) The ability to speak another language.

(9) Dress, attire, or personal appearance.

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population dispropor-

tionately comprised of members of a group or groups listed in subdivision (a).

(11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.

(12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not

share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

CCP section 231.7 has been in place for criminal proceedings since 2022 and will be applicable in civil cases starting January 1, 2026. The implications of this statute in civil cases is worth consideration.

Implications for lawyers making peremptory challenges in civil cases

Civil litigators will have a new set of rules regarding peremptory challenges to consider. Depending upon the venire of the jury, the client, your opponent's client and the type

of case one is handling, a whole new host of considerations must be contemplated. The burden of proof has shifted. Under the previous Batson/Wheeler standard, the objector made a *prima facie* showing of purposeful discrimination. The judge would evaluate the argument and rule. If, in the judge's mind, the showing was insufficient, the court would deny the motion and state its findings. If there was a sufficient showing, the court would require the challenged party to explain their reasons, and the judge would apply a subjective test of the challenged party's actual (conscious) motivations. Studies showed that Batson/Wheeler objections were rarely granted. The new standard will likely change that. CCP 231.7 eliminates the initial step of judicial review and instead requires the attorney who executed the peremptory to explain their reasons for the challenge. The court then evaluates the stated reasons using an objective standard that includes the objectively reasonable person who is aware of implicit and institutional biases. The objection to the peremptory is sustained if there exists a substantial likelihood that an objectively reasonable person would view the juror's membership in the cognizable class as a factor for the challenge.

It is important to note that the rules underlying challenges for cause remain intact. In *People v. Aranda* (2023) 95 Cal.App.5th 311, the court found that CCP 231.7 applies

only to peremptory challenges, not challenges for cause. Thus, jurors of a perceived cognizable class who demonstrate an inability to be fair and impartial should be challenged for cause. Peremptory challenges all too often find their way into one of the presumptively invalid reasons and, unless the court finds otherwise, result in sustained objections. Such was the case in *People v. Caparotta* (2024) 103 Cal.App.5th 874. There the trial court sustained the prosecutor's objection, explaining that it "didn't really see" the body language that defense counsel described. *Id.* at 889. Without the trial court's confirmation of the juror's alleged conduct, the presumptive invalidity under 231.7 could not be rebutted. *People v. Ortiz* (2023) 96 Cal.App.5th 768 resulted in the opposite finding when the judge observed and made findings supporting the challenge. There the prosecutor executed a challenge to the only black juror who had been called to the jury box. When the defense objected, the prosecutor explained that the prospective juror seemed easily confused or unable to answer questions. After a significant colloquy, the trial judge concurred and the Court of Appeal affirmed. *People v. Gonzalez* (2024) 104 Cal.App.5th 1 is interesting because the prosecutor's challenge survived notwithstanding its appearing to fall within one of the 13 presumptive categories. After losing his challenge for cause, the prosecutor exercised a peremptory, arguing that the juror's negative feelings toward law

enforcement and his equivocation as to being fair to both sides necessitated the challenge. In finding clear and convincing evidence that the challenge was race-neutral, the court noted that this prosecutor had made no previous attempts to remove other African Americans and thus ruled in his favor. This was affirmed on appeal.

These fact summaries are cursory at best, and it is strongly suggested that trial lawyers familiarize themselves with the facts of these reported cases, as well as *People v. Uriostegui* (2024) 101 Cal.App.5th 271, *People v. San Miguel* (2024) 105 Cal.App.5th 880, *People v. Jaime* (2023) 91 Cal.App.5th 941 and *People v. Barnes* (2024) 107 Cal.App.5th 560. A review of the case law makes it clear that purposeful peremptory challenges against cognizable classes will not be tolerated. "A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, natural origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups." (CCP 2317(a)).

The cost calculation of the new statute

While CCP section 231.7 does present a promising new set of rules designed to overcome conscious and unconscious bias surrounding peremptory challenges in the jury selection process, the consequences could have a signif-

icant monetary impact. The reality is, there will be more sustained objections, and the remedy for the sustained objections, more often than not, will be a mistrial. The risk of a mistrial from a failed peremptory challenge has a cost calculation, which may influence attorneys, who may choose to make fewer challenges in close calls. At the same time, if attorneys fear exercising peremptories because of the potential objection under 231.7, the result may end up favoring one side over another. And this provides one more reason to hire a competent mediator well before a case goes to trial.

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