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Legal Ethics

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Drawing the Line in Jury Selection: Unlawful Discrimination vs. Legitimate Advocacy

Jury selection is one of the most engaging and exciting parts of trial. The jurors ultimately selected become the lens through which every fact, witness, and case theme is viewed. The selection process is essentially a mix of people-watching and a search for patterns that will hopefully benefit the client's case. A potential juror's demeanor, educational background, relevant life experience, and personal hobbies can give an attorney a glimpse into how that juror may react to certain trial themes, how they may weigh witness credibility issues, or even whether they may naturally connect with one set of lawyers over the other. But, what can an attorney legally and ethically consider when asserting a peremptory challenge? This issue was recently addressed by the American Bar Association's Standing Committee on Ethics and Professional Responsibility Formal Opinion 517.

The key takeaway of the Opinion is that if a lawyer knows, or reasonably should know, that a peremptory strike would constitute unlawful discrimination under applicable law, using that strike violates Rule 8.4(g). As we know, Rule 8.4(g) prohibits discrimination and harassment in conduct related to the practice of law. At the same time, however, the Opinion notes that "legitimate advocacy" remains protected, and that not all "discriminatory" strikes are unlawful in this context if those strikes are permitted under a jurisdiction's substantive law.

The Legal Landscape: Batson and Rule 8.4(g)

Formal Opinion 517 begins by analyzing Supreme Court precedent in *Batson v. Kentucky,* 476 US. 79 (1986). *Batson* was a landmark case that established that the Equal Protection Clause of the Fourteenth Amendment prevented the use of peremptory challenges to remove potential jurors based solely on their race. *Batson* was later applied in criminal and civil matters and the Equal Protection Clause in this context was extended to protected traits such as race, gender, religion and sexual orientation. Notably, some states have enacted broader statutory or rule-based restrictions.

At the same time, however, the Opinion underscores that not all forms of discrimination in peremptory use are unlawful as courts have permitted strikes based on age, marital status, or socioeconomic status in certain jurisdictions. *See, e.g., Sanchez v. Roden*, 808 F.3d 85, 90 (1st Cir. 2015) ("Age is not a protected category under *Batson*"); *United States v. McAllister*, 693 F.3d 572, 579 (6th Cir. 2012) (unemployment is a permissible ground for striking a juror); *United States v. Omoruyi*, 7 F.3d 880, 881 (9th Cir. 1993) ("Peremptory challenges based on marital status do not violate Batson").

Model Rule 8.4(g), which is similar to Rule 8.5(j) of the Illinois Rules of Professional Conduct, prohibits discrimination and harassment in conduct related to the practice of law but preserves "legitimate advice or advocacy consistent with these Rules." The Opinion rejects any reading that would treat conduct already unlawful under jury

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selection law as "legitimate advocacy." Conversely, the Committee cautions against using Rule 8.4(g) to create a free-floating ethics ban on strikes that are otherwise lawful under governing jury selection standards.

Ethical Guardrails

The Opinion centers on four issues that collectively establish the ethical guardrails for peremptory challenges.

The first is establishing the line between unlawful discrimination and legitimate advocacy. Peremptory strikes that violate governing law are not legitimate advocacy and fall squarely within the conduct prohibited by Rule 8.4(g). The standard is not whether the lawyer personally intended to discriminate. Rather, the standard is whether the lawyer knew or reasonably should have known that the strike was unlawful under the substantive law of jury selection.

The second issue is the objective standard of whether a lawyer "knows or reasonably should know," which is defined as what a lawyer of reasonable prudence and competence would ascertain. In practice, this means:

If the lawyer exercises peremptories based on reasons that the lawyer understands and that are lawful under applicable *Batson* and state law, there is no Rule 8.4(g) issue.

If the lawyer's stated reasons are legally mistaken, or if neutral reasons are pretextual, the question becomes whether a reasonably prudent and competent lawyer should have recognized the unlawfulness. When red flags are apparent, a duty of inquiry exists. This is particularly true when the strikes are proposed by clients, consultants, or software, including AI.

If a client discloses a discriminatory purpose, the lawyer cannot not act on it. Client instruction does not trump unlawful conduct.

The third issue is the evidentiary weight *Batson* rulings in attorney discipline. Of course, a trial judge's *Batson* finding, on its own, does not conclusively establish a violation of Rule 8.4(g) because disciplinary proceedings may apply different burdens of proof. Additionally, a disciplinary proceeding can provide a lawyer the opportunity to develop a fuller, more complete record, including the disclosure of privileged strategy if appropriate under Rule 1.6(b)(5) ("[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary… to respond to allegations in any proceeding concerning the lawyer's representation of the client.") Ill. R. Prof. Conduct 1.6(b)(5). However, while the existence of a *Batson* finding does not automatically warrant discipline, such a finding is not irrelevant either. It may trigger review, particularly where the record reveals knowledge or recklessness as to unlawful peremptory practices.

Finally, the Opinion addresses the permissibility of "discriminatory but lawful" strikes. Candidly, "discriminatory but lawful" may seem inherently contradictory. But if certain juror attributes are not prohibited grounds for peremptory challenges under applicable law, then a lawyer's use does not violate Rule 8.4(g). This is consistent with a long-recognized distinction between 1) constitutionally or statutorily forbidden grounds and 2) other demographic or experiential attributes that courts have permitted trial lawyers in certain jurisdictions to consider, such as age, marital status, or socioeconomic status.

Practice Pointers

For litigators, the Opinion translates into several practice pointers. First, litigators should refine their jury selection frameworks and training. Counsel teams should likewise refresh their *voir dire* playbooks to reflect the Opinion's knowledge standard and "duty of inquiry." This could include protocols for generating and documenting race-neutral and

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gender-neutral reasons for strikes, guidance on evaluating patterns that could draw *Batson* challenges, and procedures to implement when advice from clients, consultants, or software raises concerns.

Second, litigators should vet and monitor jury consultants. While consultants remain valuable partners, we need to ensure that their methodologies and scoring rubrics are designed to avoid unlawful and discriminatory criteria. Perhaps consider including terms in the engagement letter that expressly prohibit discriminatory bases and require transparency around factors used in rankings or recommendations.

Third, establish some form of governance when utilizing AI or other analytics tools. While AI can certainly help build the profile of an ideal juror or even rank jurors, we still need to recognize the risks of bias embedded in the programing of the AI tool. Lawyers must acquire a reasonable understanding of software tool risks. When AI tools generate recommendations, we should be prepared to articulate the case-specific (and lawful) reasons for any strike, independent of the AI tool's score.

Fourth, document all legitimate, non-discriminatory reasons for peremptory strikes contemporaneously. After all, documentation is the quiet hero of defensibility, and capturing in real time the neutral, non-discriminatory, and case-related reasons for each peremptory strike not only allows an attorney to respond to any *Batson* inquiries but it also helps demonstrate the absence of misconduct in any subsequent disciplinary review.

Fifth, align client expectations with ethical limitations. While clients may sometimes press for strategies that edge toward or cross ethical lines, lawyers should proactively explain what the law permits and prohibits in jury selection and why protected classifications are off-limits. If a client suggests employing impermissible criteria, lawyers should decline and steer toward permissible selection theories grounded in case needs rather than demographic stereotypes. Consider documenting these boundary-setting discussions, particularly in high-stakes matters.

Finally, account for jurisdictional variations. While the federal constitutional framework is generally familiar, some states have expanded protections for classes beyond race and gender, or established specific procedures governing peremptories.

About the Author

Katherine G. Schnake of *Hinshaw & Culbertson, LLP* in Chicago devotes her practice to representing and advising lawyers and law firms facing civil claims from their clients or third parties, including malpractice, breach of fiduciary duty, aiding and abetting, fraud, defamation, civil conspiracy, statutory violations and preliminary injunctions.

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