



Peremptory Challenges: **A New Rule in Washington**

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On April 5, 2018, the Supreme Court of Washington implemented a pioneering rule intended to “eliminate the unfair exclusion of potential jurors based on race or ethnicity”.¹

The rule went into effect on April 24, 2018. “General Rule 37” expands the prohibition against peremptory challenges based upon race or ethnicity (often called the *Batson* rule). Rule 37 paves an avenue for counsel, or the court, to challenge a peremptory strike if an “objective observer could view race or ethnicity as a factor” in the use of the challenge. An “objective observer” is someone who is “aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors.” The court need not find the discrimination purposeful to deny the strike.

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In general, implicit and unconscious bias refers to an individual’s subconscious attitudes or stereotypes about a wide variety of concepts including people, places, and ideas. Because they are subconscious, implicit biases operate automatically and without awareness on the part of the individual in which they operate. Implicit biases can be positive or negative and affect an individual’s perceptions, actions, and decisions. With Rule 37, the court has focused on implicit bias about race and ethnicity.

In making its ruling on a Rule 37 challenge, circumstances the court should consider include, but are not limited to:

- the number and type of questions posed to the prospective juror,
- a comparison of the answers provided by the challenged juror and other jurors,
- whether a reason provided by counsel for challenging the prospective juror might be disproportionately associated with a race or ethnicity, and
- if counsel has used peremptory challenges disproportionately against a particular race or ethnicity.

With the passage of Rule 37, attorneys must be prepared to offer justifications for strikes that have minimal association with juror race or ethnicity. Because of this, counsel handling cases in civil or criminal Washington state courts might consider requesting more time for *voir dire* to have the opportunity to hear from each prospective juror to learn more about personal experiences and attitudes that might influence a juror’s ability to be a fair and impartial trier of fact. In the past several years, state and federal courts across the country have noted the possible challenges posed by the influence of implicit bias on the perceptions and decisions of jurors, attorneys, and judges. Thus, the passage of General Rule 37 may soon be the impetus for similar rules in other courts.

¹ (see <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/GR37.pdf#search=general%20rule%2037>).