COMMENTARY

New Jersey Needs an Open Discussion on the Future of Peremptory Challenges

Has the time come to give serious consideration to elimination or serious restriction of the peremptory challenge?

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By Law Journal Editorial Board

On Aug. 30, 2021, the Arizona Supreme Court made Arizona the first state in the country to abolish the use of peremptory challenges in jury selection for both criminal and civil trials.

At the same time, our state Supreme Court, in connection with its decision in State v. Andujar, 247 N.J. 275 (2021), has called for a comprehensive review of the jury selection process, and asked the director of the Administrative Office of the Courts to arrange for a Judicial Conference on Jury Selection this fall to explore the nature of discrimination in the jury selection process. It then added that, “The Court invites the legal community as a whole to take part in a probing conversation about additional steps needed to root out discrimination in the selection of juries.”

Has the time come to give serious consideration to elimination or serious restriction of the peremptory challenge? We think it is much too premature for us to be able to give any informed opinion on the underlying substantive question. But we do take to heart the court’s entreaty that the legal community be willing to engage in a “probing
conversation” and not summarily close off serious discussion merely due to the ancient provenance and engrained tradition underlying the practice.

It is undeniable that the peremptory challenge has a long history, and that many conscientious lawyers have used their skill in assessing venire persons for hidden bias as one of the most effective tools available to protect their clients’ interests in a fair tribunal. On the other hand, there is little doubt that the same tool in less honorable hands can sometimes inject the scourge of racism in jury selection that is inconsistent with our profession’s laudable commitment against such discrimination, particularly in the criminal justice system.

We acknowledge that there is no practice in our legal system that is immune from the possibility of misuse, but concentrating the power of jury selection through unilateral use of the peremptory challenge is not a typical tool. Again, all we can call for at this point is an open mind and a willingness to discuss the issue without purely reflexive opposition to change.