

The Supreme Court  
State of Washington

CHARLES W. JOHNSON  
JUSTICE  
TEMPLE OF JUSTICE  
POST OFFICE BOX 40929  
OLYMPIA, WASHINGTON  
98504-0929



(360) 357-2020  
FACSIMILE (360) 357-2103  
E-MAIL J.C.JOHNSON@COURTS.WA.GOV

SENT BY EMAIL ONLY

April 5, 2018

TO: PROPOSED NEW GR 37—JURY SELECTION WORKGROUP MEMBERS  
Mr. Sal Mungia, American Civil Liberties Union of Washington  
Ms. La Rond Baker, American Civil Liberties Union of Washington  
Ms. Pam Loginsky, Washington Association of Prosecuting Attorneys  
Judge Laurel Siddoway, Court of Appeals Presiding Chief Judge  
Judge Sean O'Donnell, Superior Court Judges' Association  
Judge Scott Ahlf, District and Municipal Court Judges' Association

FROM: Justice Charles W. Johnson, Rules Committee Chair

SUBJECT: ADOPTION OF NEW GENERAL RULE (GR) 37—JURY SELECTION

On behalf of the court, I am notifying you that the court adopted proposed new General Rule (GR) 37—Jury Selection after review of the original proposals, the comments submitted thereto, and the final report of the Proposed New GR 37—Jury Selection Workgroup. This rule will become effective upon publication in the Washington Reports.

cc: Chief Justice Mary Fairhurst  
Justice Barbara A. Madsen  
Justice Susan Owens  
Justice Debra Stephens  
Justice Charles K. Wiggins  
Justice Steven C. Gonzalez  
Justice Sheryl Gordon McCloud  
Justice Mary I. Yu  
Lynne Alfasso, AOC  
Janet Skreen, AOC  
Sharon Harvey, AOC

Attachment (BY EMAIL)



DATED at Olympia, Washington this 5<sup>th</sup> day of April, 2018.

Johnson, J.

Madsen, J. \*

Cover, J.

Stephens, J.

Fairhurst, C.J.

Wiggins, J.

Conzetta, J.

Robt. McLeod, J.

Jr. J.

\* I agree with sections (a) - (g). I disagree with (h) and (i) as both overinclusive and underinclusive.

## **NEW General Rule 37. JURY SELECTION**

**(a) Policy and Purpose.** The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

**(b) Scope.** This rule applies in all jury trials.

**(c) Objection.** A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

**(d) Response.** Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.

**(e) Determination.** The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

**(f) Nature of Observer.** For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

**(g) Circumstances Considered.** In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; and (v) if the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

**(h) Reasons Presumptively Invalid Because** historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge: (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.

**(i) Reliance on Conduct.** The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.