

ALTERNATIVE RULE 24(D)(5)

To: Criminal Rules Committee
From: Robert M. Russel
Date: July 12, 2022
Re: Proposal for Rule 24(d)

I will sponsor this alternative to the current proposal:

(5) **Improper Bias.** The exclusion of potential jurors based on race, ethnicity, gender, sexual orientation, national origin, or religious affiliation is prohibited.

(A) **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.

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

(C) **Determination.** The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. The court shall deny the peremptory challenge if the court finds that the challenge was based, even in part, on race, ethnicity, gender, sexual orientation, national origin, or religious affiliation. The court need not find purposeful discrimination to deny the peremptory challenge; unconscious bias is sufficient. The court should explain its ruling on the record.

(D) **Review.** If challenged on appeal, the court's determination is subject to review for abuse of discretion.

Explanation

I prefer this alternative version for several reasons:

1. It addresses a broader range of impermissible biases. (That change is made possible by eliminating the list of presumptively impermissible justifications.)
2. The fictional “objective observer” is replaced by the trial court. That formulation more clearly allows the judge to consider both demeanor evidence and the judge’s own knowledge of the lawyers and the community.
3. The original proposal invites speculation by asking whether the objective observer “could view race or ethnicity as a factor.” The alternative version reduces the risk of speculation by focusing on whether the challenge “was based, even in part” on one of the enumerated biases.
4. The original proposal invites de novo review on appeal. The alternative version expressly identifies abuse of discretion as the standard of review, thus reducing the likelihood of reversal on appeal.
5. The list of “circumstances considered” has been removed in favor of a general totality-of-circumstances test. This change does not limit the range of relevant circumstances that the trial court can consider. But it does reduce the risk that a given determination will be reversed on appeal for the court’s failure to expressly consider any one of the listed circumstances, even though that circumstance may not have been highlighted by the parties’ arguments.
6. The list of presumptively invalid justifications has been eliminated. Although the proposed rule is purportedly aimed at eliminating conscious and unconscious racial bias, it’s far from clear that the list actually advances that purpose. Consider, for example, a prosecutor who challenges a prospective juror on the ground that the juror is “expressing a distrust of law enforcement.” In practice,

that challenge may well be — indeed, is highly likely to be — motivated by a sincere desire to limit the risk of bias against prosecution witnesses. But instead of accommodating that legitimate aim, the rule treats “distrust of law enforcement” as a categorical pretext for “race.” That’s both unrealistic and unfair. And it’s unclear how the presumption of invalidity would be overcome in practice. (Allow the challenge if the prospective juror is white and disallow it if the prospective juror is a person of color?)