

# **PEREMPTORY CHALLENGES: DOES *BATSON* APPLY TO LGBT JURORS?**

**Lavender Law**  
**Sunday, October 19, 2003, 1:30 p.m. to 2:45**

Moderator:

*Hon. Michael R. Sonberg*, New York State Supreme Court, New York,  
New York

Panelists:

*Matt Coles*, Director, ACLU Lesbian & Gay Rights and AIDS Projects,  
New York, New York

*Hon. Mark King Leban*, Miami-Dade County Court, Miami, Florida

## **CANON 3B(5)**

**A JUDGE SHALL PERFORM JUDICIAL DUTIES WITHOUT BIAS OR PREJUDICE. A JUDGE SHALL NOT, IN THE PERFORMANCE OF JUDICIAL DUTIES, BY WORDS OR CONDUCT MANIFEST BIAS OR PREJUDICE, INCLUDING BUT NOT LIMITED TO BIAS OR PREJUDICE BASED UPON RACE, SEX, RELIGION, NATIONAL ORIGIN, DISABILITY, AGE, SEXUAL ORIENTATION, OR SOCIOECONOMIC STATUS, AND SHALL NOT PERMIT STAFF, COURT OFFICIALS, AND OTHERS SUBJECT TO THE JUDGE'S DIRECTION AND CONTROL TO DO SO. THIS SECTION DOES NOT PRECLUDE THE CONSIDERATION OF RACE, SEX, RELIGION, NATIONAL ORIGIN, DISABILITY, AGE, SEXUAL ORIENTATION, SOCIOECONOMIC STATUS, OR OTHER SIMILAR FACTORS WHEN THEY ARE ISSUES IN THE PROCEEDING.**

## **CANON 3B(6)**

**A JUDGE SHALL REQUIRE LAWYERS IN PROCEEDINGS BEFORE THE JUDGE TO REFRAIN FROM MANIFESTING, BY WORDS, GESTURES, OR OTHER CONDUCT, BIAS OR PREJUDICE BASED UPON RACE, SEX, RELIGION, NATIONAL ORIGIN, DISABILITY, AGE, SEXUAL ORIENTATION, OR SOCIOECONOMIC STATUS, AGAINST PARTIES, WITNESSES, COUNSEL, OR OTHERS. THIS SECTION 3B(6) DOES NOT PRECLUDE LEGITIMATE ADVOCACY WHEN RACE, SEX, RELIGION, NATIONAL ORIGIN, DISABILITY, AGE, SEXUAL ORIENTATION, SOCIOECONOMIC STATUS, OR OTHER SIMILAR FACTORS ARE ISSUES IN THE PROCEEDING.**

## **“Straight Juries, Gay Cases: Voir Dire and Practical Litigation Skills”**

Judge Mark King Leban  
Miami-Dade County

Case Citations: J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419 (1994) People v. Garcia, 77 Cal.App. 4th 1269 (2000) People v. Viggiani, 431 N.Y.S.2d 979 (City of N.Y. Crim. Ct. 1980) People v. Baker, 621 N.Y.S.2d 615 (A.D. 1 Dept. 1995) Johnson V. Campbell, 92 F.3d 951 (9th Cir. 1996) Jennifer Gerardo Brown, Sweeping Reform From Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny, 85 Minn. L. Rev. 363 (Dec. 2000)

**THE COURT: STATE, ANY BACK STRIKES?**

**MR. JONES: MR. DOMINGUEZ.**

**MR. DIAZ: OBJECTION. MR. DOMINGUEZ IS A MEMBER OF A PROTECTED CLASS. I BELIEVE HE'S HISPANIC, AS WELL AS HIS GENDER PREFERENCE; LIFE STYLE. CLASS, AS WELL. HE STATED ON THE RECORD HE'S GAY AND WE WOULD ASK FOR A RACE AND SEXUAL ORIENTATION NEUTRAL REASON.**

**THE COURT: THE DEFENDANT DID STATE ON THE RECORD HE'S GAY, WHICH MAKES HIM A MEMBER OF A PROTECTED CLASS, AS WELL AS BEING HISPANIC. AT THIS TIME I WOULD ASK THE STATE TO GIVE ME A RACE AND SEXUAL ORIENTATION NEUTRAL REASON WHY YOU ARE SEEKING TO STRIKE MR. DOMINGUEZ.**

**MR. JONES: HE WAS ARRESTED IN DADE COUNTY, MIAMI BEACH, FOR WHAT HE TELLS US WAS LEWD AND LASCIVIOUS AND SENT TO PRETRIAL DIVERSION, WHICH THAT IS A SORT OF A PROSECUTION BY THE STATE ATTORNEY'S OFFICE. THAT IS WHY WE'RE STRIKING HIM, HE WAS PROSECUTED BY THIS OFFICE.**

**THE COURT: THAT DOES APPEAR TO BE A GENDER, RACE NEUTRAL AND SEXUAL ORIENTATION NEUTRAL REASON. AT THIS TIME, I DO ACCEPT YOUR EXPLANATION AS GENUINE AND NOT PRETEXTUAL AND ALLOW YOUR PEREMPTORY CHALLENGE. MR. DOMINGUEZ IS YOUR FIRST CHALLENGE.**

**THE COURT: JIMMY TAYLOR, DEFENSE.**

**DEFENSE COUNSEL: NO PROBLEM.**

**THE COURT: JIMMY TAYLOR, STATE.**

**THE STATE: ACCEPT, FOR NOW.**

**THE COURT: STATE, ANY BACK STRIKES, WE HAVE A PANEL?**

**THE STATE: SECOND ON MR. TAYLOR.**

**DEFENSE COUNSEL: SEXUAL ORIENTATION.**

**THE COURT: STATE, GENDER, NEUTRAL REASON.**

**DEFENSE COUNSEL: I WANT A SEXUAL ORIENTATION NEUTRAL REASON; HE'S GAY.**

**THE COURT: HOW DO YOU KNOW?**

**DEFENSE COUNSEL: HE'S OBVIOUSLY GAY.**

**THE COURT: IF THERE'S SOMETHING THAT MAKES SOMEONE OBVIOUSLY GAY PUT IT ON THE RECORD. WHAT MAKES SOMEONE OBVIOUSLY GAY?**

**DEFENSE COUNSEL: DEMEANOR, LANGUAGE, THE WAY THEY SPEAK.**

**THE COURT: YOU WANT TO CALL MR. TAYLOR IN AND ASK IF HE'S GAY? DO YOU WANT TO CALL HIM?**

**DEFENSE COUNSEL: I THINK IT WOULD PREJUDICE THE JUROR IF WE DO THAT.**

**THE COURT: LET THE RECORD REFLECT THE COURT NEVER OBSERVED ANY CHARACTERISTICS FROM MR. TAYLOR THAT WOULD, IN FACT, SUGGEST THAT HE IS GAY, NOR ANYTHING THAT HE SAID INDICATES HE HAD A SEXUAL PREFERENCE, NOR DID ANY OF HIS ANSWERS INDICATE A SEXUAL PREFERENCE. THE COURT FINDS ANY COMMENTS BY COUNSEL THAT SOMEONE LOOKS OBVIOUSLY GAY OR TALKS OBVIOUSLY GAY IS OFFENSIVE TO THIS COURT.**

**DEFENSE COUNSEL: OBVIOUSLY, YOU HAVE NO GAY FRIENDS.**

**THE COURT: I FIND THAT EVEN MORE OFFENSIVE. AT THIS POINT I'M NOT EVEN GOING TO INQUIRE. STATE DO YOU WISH TO EXERCISE A PEREMPTORY?**

**THE STATE: WE ALREADY HAD. THAT WAS OUR SECOND.**

**DEFENSE COUNSEL: CAN I ASK WHAT THE REASONS ARE?**

**THE COURT: DEFENSE COUNSEL, THEY'RE EXERCISING A PEREMPTORY CHALLENGE, AND THERE'S NOTHING ON THE RECORD TO INDICATE SUCH A THING AS SEXUAL ORIENTATION.**