1. **Motion to Cause a Party to lose a Peremptory Challenge Should a GR 37 Objection be Sustained.**

\_\_\_\_\_\_\_\_ Granted \_\_\_\_\_\_\_\_ Denied \_\_\_\_\_\_\_ Reserved

As noted above, implicit bias factors heavily into this case and the jury selection process can help curb or curtain the worst excesses of implicit bias.  One way to effectuate this would be to provide a meaningful remedy should a GR 37 objection be raised and sustained.  Defense requests that if a party attempts to strike a person and a GR 37 objection is raised and sustained, that the striking party be penalized by losing a peremptory challenge. This would encourage both sides to be mindful of their strikes and to be sure to check any unconscious biases that could be at play.

Interestingly, it appears that the Washington Supreme Court, in promulgating GR 37, may have contemplated this remedy, although not explicitly endorsing it. The GR 37 working group unanimously agreed that there should be a GR 37 subset J – “Disallowed Challenges Preserved.” Proposed New GR 37—Jury Selection Working Group, Final Report” ([https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf](https://nam11.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.courts.wa.gov%2Fcontent%2FpublicUpload%2FSupreme%2520Court%2520Orders%2FOrderNo25700-A-1221Workgroup.pdf&data=05%7C01%7Ccindy%40defensenet.org%7C03d04a8306e94e5ea01d08dad2ef087f%7Cbe3cfa1802454c699d35d3362f0ba373%7C0%7C0%7C638054221369611555%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=o2XgQRsin4oC7VviK%2BicU0LYVa%2BEKXifZxlzNHJs8mw%3D&reserved=0)), at P. 13 (last accessed 11/29/2022 at 6:39pm). This section would have clearly noted “If a peremptory challenge is disallowed under this rule, the party exercising it retains the right to use the peremptory challenge against another potential juror.”  *Id.*  The promulgated rule, however, fails to include this section.

*In re Acron*, 122 Wn. App. 886, 95 P.3d 1272 (2004) deals with a similar issue. In *Acron*, Mr. Acron was charged with indecent liberties charged under the health care provider prong.  *Id.* at 887. He entered a plea and was sentenced as if the crime carried a seriousness level of seven. *Id.* However, when the legislature promulgated the healthcare provider prong, they did not assign a seriousness level to it. *Id.*at 888-89. The Court noted that the principle of “*expressio unius est exclusio alterius*” or “[w]here a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions.” *Id.* at 890 (*citing In re PRP of Hopkins*, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) (*quoting Queets Band of Indians v. State*, 102 Wn.2d 1, 5, 682 P.2d 909 (1984)).

In the context of Court Rules, the Supreme Court acts in a similar capacity to the legislature. “[T]his court acquires its rule-making authority from the Legislature and from its inherent power to prescribe rules of procedure and practice.” *State v. Templeton*, 148 Wn.2d 193, 212, 59 P.3d 632 (2002).

Here, this Court should similarly follow the principle of *expressio unius est exclusio alterius* and find that the omission of the proposed GR 37(j) which expressly stated that a striking party would keep its challenge on a sustained GR 37 objection was intentional. This intentionality can only mean one thing: the party exercising a proscribed strike should lose that strike. To do otherwise would gut the intent behind GR 37 and allow for racially biased strikes to continue.