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Why the Advisory Committee on Evidence Rules Tabled a Proposed Racial Bias Exception to the ‘No-Impeachment Rule’ in FRE 606(b)

During its May 2026 public meeting, the Judicial Advisory Committee on Evidence Rules tabled a proposal to add a new racial bias exception to Federal Rule of Evidence 606(b), which generally prohibits jurors from testifying in post-verdict inquiries into the jury’s deliberations.

While the Committee recognized that the Supreme Court created a narrow racial bias exception in *Peña-Rodriguez v. Colorado*,¹ the Committee’s public discussion evinced a consensus that courts are properly applying the *Peña-Rodriguez* ruling and that both of the proposed versions of the racial bias amendment risked unintended consequences. This article explains why the Committee’s decision to table the proposed amendment should not deter defense counsel from developing the scope of *Peña-Rodriguez* by asserting the racial bias exception where appropriate to challenge adverse jury verdicts.

The No-Impeachment Rule

Federal Rule of Evidence 606(b)(1) provides:

During an inquiry into the validity of a verdict or indictment, a juror may not testify about

any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.

Commonly referred to as the “no-impeachment rule,” this prohibition is intended to protect verdict finality, encourage free and frank juror communication during jury deliberations, and prevent post-verdict juror harassment.²

Balanced against those policy interests, Rule 606(b)(2) identifies three exceptions to the no-impeachment rule, permitting juror testimony about whether (1) “extraneous prejudicial information was improperly brought to the jury’s attention”; (2) “an outside influence was improperly brought to bear on any juror”; or (3) “a mistake was made in entering the verdict on the verdict form.”

The states have adopted their own versions of the no-impeachment rule, some of which include broader exceptions than those included in federal Rule 606(b).³

Peña-Rodriguez v. Colorado

In its 2017 decision in *Peña-Rodriguez v. Colorado*, the Supreme Court held that a criminal defendant’s Sixth Amendment right to a fair and impartial jury requires admission of post-verdict juror testimony regarding clear juror statements demonstrating reliance on racial stereotypes or animus to convict.

That case involved an appeal from the conviction

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of a Mexican-American man for sexually assaulting two teenage sisters in the bathroom of a Colorado horse-racing facility.⁴ After the jury was discharged, two jurors submitted affidavits concerning another juror's anti-Hispanic bias toward the defendant and his alibi witness. The affidavits claimed the juror said things like, "I think he did it because he's Mexican and Mexican men take whatever they want."⁵

The Supreme Court held that the no-impeachment rule must "give way" where there is "a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict."⁶ Those statements "must tend to show that racial animus was a significant motivating factor in the juror's vote to convict."⁷

The Court explained that the question of whether the requisite threshold showing of juror racial bias has been met "is a matter committed to the substantial discretion of the trial court in light of all the circumstances."⁸ "[T]he experience of the courts going forward," the Court noted, "will inform the proper exercise of trial judge discretion in these and related matters."⁹

The Court took comfort that, in the 17 jurisdictions that had already recognized a racial-bias exception to their versions of the no-impeachment rule, there were "no signs of an increase in juror harassment or a loss of juror willingness to engage in searching and candid deliberations."¹⁰

Evidence Advisory Committee Consideration

At meetings in 2017 and 2018, the Evidence Advisory Committee considered the possibility of amending Rule 606(b) to reflect the *Peña-Rodriguez* racial bias exception to the no-impeachment rule but decided to table the idea to "allow more time for case law to develop."¹¹

With the benefit of several years of case law development, the Committee took this issue up again at its spring meeting this May. It considered two proposed amendments.

One proposed amendment would have permitted a juror to testify that another juror's vote was motivated by racial bias. Committee members expressed concern that any such amendment could risk unintentionally expanding the narrow holding of *Peña-Rodriguez* or require serial amendments as the con-

tours of the racial bias exception develop through case law over time. For example, the proposed amendment could risk suggesting that bias based on ethnicity is a distinct category from bias based on race that is or is not covered by the exception — a question adverted to, but not decided, in *Peña-Rodriguez*.¹² The proposed amendment also could risk suggesting that the racial bias exception to the no-impeachment rule applies not only in criminal cases but in civil jury trials as well.¹³

The alternative proposed amendment would have taken the more general approach of permitting impeaching juror testimony when constitutionally required. However, Committee members identified similar risk of unintended consequences to the extent a general rule could be interpreted to allow juror testimony about *any* violation of a party's constitutional rights during deliberations, such as a juror treating a defendant's choice not to testify as evidence of guilt.

The Committee considered those risks alongside a large body of case law applying *Peña-Rodriguez*, a small sample of which illustrates both that practitioners readily rely on it despite the absence of a racial bias exception in the text of Rule 606(b) and that courts have interpreted and applied its holding narrowly.

For example, in *United States v. Nucera*, the Third Circuit affirmed the conviction of a white police officer for a hate crime against a Black victim, holding that the *Peña-Rodriguez* exception was not triggered by heated racial discord during jury deliberations that led four jurors to submit affidavits stating that they believed the defendant was innocent but voted to convict to avoid being painted as racist.¹⁴ The court explained that none of the evidence showed that any juror voted to convict because of the *defendant's* race.¹⁵

In *Rumph v. State*, the Alaska Court of Appeals held that a juror affidavit alleging "statements made and attitudes of certain jurors during deliberations" showing that "the jury's verdict was the result of racism and prejudice" did not meet *Peña-Rodriguez's* "clear statement" threshold in the absence of "objective information about what was said during deliberations."¹⁶

In *United States v. Brown*, the Eleventh Circuit rejected the defendant's attempt to expand the *Peña-Rodriguez* exception to encompass juror

testimony alleging anti-police and gender bias on the jury.¹⁷

A divided panel of the Sixth Circuit adopted a more expansive interpretation of *Peña-Rodriguez* in *Harden v. Hillman*.¹⁸ The court held that juror statements about suspected drug and alcohol use by the defendant and his romantic partner, who were Black, combined with a reference to the Black defense team as the "Cosby Show," fell within the *Peña-Rodriguez* exception even though those statements "require an inference to conclude they are about race."¹⁹ Still, the court stressed that its holding was an application, not an extension, of *Peña-Rodriguez*.²⁰

Against this backdrop, the Committee decided to table consideration of an amendment to Rule 606(b), reasoning that the risks of unintended consequences outweighed the limited benefit

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of conforming the rule text to *Peña-Rodriguez* in light of case law suggesting that practitioners and courts are well aware of the narrow racial bias exception to the no-impeachment rule. The Committee also recognized that a rule may not be required because other ways exist to alert practitioners about the viability of *Peña-Rodriguez* notwithstanding the absence of a racial-bias exception in the text of Rule 606(b), including having articles published on the subject. Moreover, unlike most rules that are applied in the heat of a trial, the no-impeachment rule only arises retrospectively, after the parties have had time to digest the verdict, consider their arguments, and conduct legal research.

Racial Bias Exception Remains Available to Defense Counsel

The Committee discussion balancing the risks and benefits of amending Rule 606(b) underscores that practitioners should not be deterred from asserting the right to challenge a jury verdict that was based on racial bias, even though the Evidence Rules Committee declined to codify in rule text the Supreme Court's decision in *Peña-Rodriguez*.

ETHICS AND TECH

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25. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 512, at 6 (2024). "Before lawyers input information relating to the representation of a client into a GAI tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm."

26. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (1) & (4) ("(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; and (4) each affected client gives informed consent, confirmed in writing.").

27. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 8 ("The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment and foreclose courses of action that reasonably should be pursued on behalf of the client.").

28. *Id.*

29. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451, at 3 (2008).

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Notes

1. 580 U.S. 206 (2017).
2. See *Tanner v. United States*, 483 U.S. 107, 120–21 (1987).
3. See *Peña-Rodriguez*, 580 U.S. at 218–19 (surveying state no-impeachment rules).
4. *Peña-Rodriguez*, 580 U.S. at 212.
5. *Id.* at 213 (internal quotation marks omitted).
6. *Id.* at 225.
7. *Id.* at 225–26.
8. *Id.* at 226.
9. *Id.* at 228.
10. *Id.* at 227.
11. See Minutes of Evidence Rules Advisory Committee Meeting (April 2018), at 19, available at https://www.uscourts.gov/sites/default/files/2018-10-evidence-agenda-book_0.pdf.
12. See *Peña-Rodriguez*, 580 U.S. at 214 (noting that Hispanic identity can be referred to in terms of "ethnicity" or "race" but saying only that "[t]his opinion refers to the nature of the bias as racial in keeping with the primary terminology employed by the parties and used in our precedents").
13. *Peña-Rodriguez* grounded its holding in the Sixth Amendment, which

30. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 8.

31. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 512, at 7–8 (2024) ("Lawyers must be alert to potential conflicts of interest that may arise from the use of a particular GAI tool. For example, if the GAI provider's data-handling practices or its commercial interests could adversely affect a client's interests, the lawyer must address the conflict before using the tool.") (Conflict of Interest: Rule 1.7).

32. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 5–6 (2017) ("[In selecting a technology vendor,] the lawyer should consider ... what the provider's policies are for data retrieval and loss.") (Competence: Rule 1.1; Supervision: Rule 5.3).

33. *Id.* ("The lawyer must undertake reasonable efforts to ensure that the provider's conduct is compatible with the professional obligations of the lawyer," including evaluating "how the provider stores and secures data" and "what the provider's policies are for data retrieval and loss.") (Competence: Rule 1.1; Supervision: Rule 5.3).

34. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 & R. 5.3(b) (2024) ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of ... the benefits and

applies only to criminal prosecutions. However, the Sixth Circuit has held that the Constitution also requires a racial bias exception in the civil context, explaining that the Court's "reasoning and precedent demonstrate that the holding applies equally to civil cases." See *Harden v. Hillman*, 993 F.3d 465, 479 (6th Cir. 2021). The Supreme Court has not conclusively resolved the question.

14. 67 F.4th 146, 157–58 (3d Cir. 2023), *cert. denied* 144 S. Ct. 366 (2023).

15. See *id.* at 168; *accord* *United States v. Robinson*, 872 F.3d 760, 768–69 (6th Cir. 2017) (holding white foreperson's accusation during deliberations that two Black jurors refused to convict because they felt they "owed something to their Black brothers" did not fall within the *Peña-Rodriguez* exception because, while foreperson "did impugn [the Black jurors'] integrity based on their shared race with the defendants, she never said anything stereotyping the defendants based on their race" (internal quotation marks omitted)).

16. No. A-13952, 2026 WL 707862, at *12 (Alaska Ct. App. Mar. 13, 2026).

17. 934 F.3d 1278, 1303 (11th Cir. 2019), *cert. denied* 590 U.S. 970 (2020).

18. 993 F.3d 465 (6th Cir. 2021).

19. *Id.* at 483.

20. See *id.* at 484–85. ■

risks associated with relevant technology.") ("A lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure that [their] conduct is compatible with the professional obligations of the lawyer.") (A lawyer must evaluate vendor reliability and continuity of service; contracts allowing unilateral termination or retaliation for litigation challenges undermine competence and supervisory duties.)

35. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498, at 2 (2021) ("Contractors ... and third-party vendors for outsourcing ... are 'nonlawyer assistants' or 'agents' within the meaning of Model Rule 5.3.") (Supervision: Rule 5.3).

36. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498, at 2 (2021) ("A lawyer who uses nonlawyer assistance ... remains responsible for proper supervision of the nonlawyer ... to ensure that they act in a manner compatible with the professional obligations of the lawyer.") (Supervision: Rule 5.3).

37. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 6 (2017) (requiring lawyers to ensure, by contract, that the vendor adheres to confidentiality and security obligations commensurate with the lawyer's own duties under the Model Rules) (Supervision: Rule 5.3). ■