

**OBJECTING TO JURORS FOR CAUSE  
DURING VOIR DIRE  
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**I. THE RIGHT TO A COMPETENT, FAIR, AND IMPARTIAL JURY.**

The parties in a civil action are generally entitled to a trial by jury under the Seventh Amendment to the United States Constitution and Article I, Section 25 of the North Carolina Constitution. In particular, Article I, Section 25 states that:

In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.

N.C. Const. Art. I, §25.

The right to a trial by jury also contains the right to a jury composed of competent, fair, and impartial individuals. *State v. Adcock*, 310 N.C. 1, 13, 310 S.E.2d 587, 595 (1984). While the trial court has the ultimate duty to enforce this right, the parties or their counsel of record are permitted to question (“*voir dire*”) the jury panel in order to determine whether grounds exist to challenge a prospective juror for cause. N.C. Gen. Stat. § 9-15(a)(2006); *In the Matter of the Will of Worrell*, 35 N.C. App. 278, 282, 241 S.E.2d 343 (1978). The primary purpose of *voir dire* is to allow the parties to both select a fair and impartial jury to hear the case. *Will of Worrell*, 35 N.C. App. at 282, 241 S.E.2d at 346 (citing *State v. Lee*, 292 N.C. 617, 234 S.E.2d 574 (1977)).

This paper will review the applicable law governing challenges for cause during *voir dire* and will help the practicing attorney identify and successfully challenge a prospective juror for cause.

**II. LAW GOVERNING A CHALLENGE FOR CAUSE DURING VOIR DIRE.**

The basic concept in jury selection is that each party has the right to present his or her case to an unbiased and impartial jury. *State v. Carey*, 285 N.C. 497, 506, 206 S.E.2d 213, 220 (1974). In order to secure a fair and impartial jury, the parties are entitled to a limited number of peremptory challenges and an unlimited number of challenges for cause, if cause is shown. *State v. Allred*, 275 N.C. 554, 559, 169 S.E.2d 833, 835 (1969); see N.C. Gen. Stat. § 9-19 (2006) (allowing a plaintiff eight peremptory challenges). The determination of whether cause has been shown is left to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Davis*, 349 N.C. 1, 16, 506 S.E.2d 455, 463 (1998).

## **A. TIMING OF A CHALLENGE FOR CAUSE AND PRESERVING THE ISSUE FOR APPELLATE REVIEW**

Ordinarily, an objection to the fitness or competency of a prospective juror must be made during *voir dire* or the objection, no matter how legitimate, is waived. *Briggs v. Byrd*, 34 N.C. 377 (1851). Once the jury has been impaneled, any further challenge to the competency of a juror is left to the sound discretion of the trial court. *State v. Harris*, 323 N.C. 112, 371 S.E.2d 689 (1988). This is true even if the incompetency of a juror is not discovered until after the trial concluded. *State v. Lambert*, 93 N.C. 618 (1885); *State v. Levy*, 187 N.C. 581, 122 S.E. 386 (1924). However, if a juror intentionally misrepresents his or her fitness or competency to serve as a juror, then the court has no discretion and must vacate the judgment and order a new trial. *State v. Tart*, 199 N.C. 699, 155 S.E. 609 (1930); *Hinton v. Hinton*, 196 N.C. 341, 145 S.E. 615 (1928); *see also Carter v. King*, 174 N.C. 549, 94 S.E. 4 (1917) (trial court's denial of a motion to set aside a judgment due to an unintentional misstatement by a juror of his qualifications is left to the sound discretion of the trial court).

A party is not entitled to appellate review of the trial court's denial of a motion to strike a juror for cause unless the party (1) uses a peremptory challenge to strike the objectionable juror, (2) exhausts the peremptory challenges allowed by statute, and (3) asserts the right to challenge peremptorily an additional juror. *State v. Allred*, 275 N.C. 554, 169 S.E.2d 833 (1969); *Oliphant v. Atlantic Coast Line R.R. Co.*, 171 N.C. 303, 88 S.E. 425 (1916) (observing that the party's motivation for exhausting his or her peremptory challenges is immaterial). Appellate review will be unavailable if the trial court recognizes its erroneous ruling during *voir dire* and grants the aggrieved party an additional peremptory challenge. *State v. Smith*, 359 N.C. 199, 607 S.E.2d 607 (2005).

## **B. GROUNDS TO CHALLENGE A PROSPECTIVE JUROR FOR CAUSE.**

North Carolina law has recognized the following grounds to be proper challenges for cause as to the fitness and competency of a prospective juror:

- Under the age of 18, not a resident of the county where the case is tried, or served as a juror during the preceding two years. N.C. Gen. Stat. § 9-3 (2006).
- Convicted felon whose citizenship rights have not been restored, or an individual who is physically or mentally incompetent to serve as a juror (including someone who has been adjudged *non compos mentis*). *Id.*
- Unable to hear and understand the English language. *Id.*
- Compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety. N.C. Gen. Stat. § 9-6(a) (2006).

- A party to a suit that is pending in the same court. N.C. Gen. Stat. § 9-15(c) (2006).
- Generally hostile toward a party for a reason unrelated to the action. *Brittain v. Allen*, 13 N.C. 120 (1829).
- Related to the party or the party's wife within the ninth degree of kinship whether by blood or marriage. *State v. Perry*, 44 N.C. 330 (1853); *State v. Potts*, 100 N.C. 457, 6 S.E. 657 (1888); see N.C. Gen. Stat. § 104A-1 (2006) ("Degrees of kinship; how computed").
- Related within the ninth degree of kinship to a material witness in the proceeding. *State v. Allred*, 275 N.C. 554, 561, 169 S.E.2d 833, 837 (1969) (a challenge for cause under this circumstance "should be rejected only if it should appear clearly that, under the circumstances of the particular case, the challenged juror would have no reason or disposition to favor his kinsman by giving added weight to his testimony or otherwise.").
- A stockholder in a corporate party or a member of an association party. *Murchison National Bank v. Dunn Oil Mills Co.*, 150 N.C. 683, 64 S.E. 883 (1909); *Peanut Growers' Exchange, Inc. v. Bobbitt*, 188 N.C. 335, 124 S.E. 625 (1924).
- An employee, master, servant, counselor, steward, attorney, tenant, or "within the distress" of a party. *State v. Levy*, 187 N.C. 581, 122 S.E. 386 (1924); *Oliphant v. Atlantic Coast Line R.R. Co.*, 171 N.C. 303, 88 S.E. 425 (1916).
- Prejudiced or biased to such an extent that he/she cannot render a fair and impartial verdict. *State v. Levy*, 187 N.C. 581, 122 S.E. 386 (1924); *State v. Davis*, 349 N.C. 1, 506 S.E.2d 455 (1998).

**C. LEGAL STANDARD TO STRIKE A BIASED JUROR FOR CAUSE.**

During the course of *voir dire*, a party will discover prospective jurors who are prejudiced or biased toward one side or the other and unable to fairly and impartially apply the law to the evidence. If the prospective juror states in substance that he or she cannot follow the law as instructed by the judge, then the court must excuse the individual for cause. *State v. Cunningham*, 333 N.C. 744, 429 S.E.2d 718 (1993) (holding that it was error for the trial court to not excuse a prospective juror for cause when the juror stated that she would expect a criminal defendant to prove his innocence in order to be not guilty).

Even if the prospective juror states that he or she can follow the law, the trial court may strike for cause an individual who is “substantially impaired” from performing his or her duty to follow the law. In *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844 (1985),<sup>1</sup> the United States Supreme Court articulated the following standard in this regard:

[W]hether the juror’s views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”

*Id.*, 469 U.S. at 424, 105 S.Ct. at 852. If “substantial impairment” exists, then the individual is unfit to serve as a juror and should be excused from service.

In articulating the “substantial impairment” standard, the U.S. Supreme Court observed that:

[T]his standard does not require that a juror’s bias be proved with “unmistakeable clarity.” This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made “unmistakably clear”; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror.

*Id.*, 469 U.S. at 424-26, 105 S.Ct. at 852-53. In the context of a “substantial impairment” challenge, the juror’s fitness or unfitness is typically arguable and therefore, the trial court’s decision will not be disturbed absent a showing of abuse of discretion. *State v. Davis*, 349 N.C. 1, 506 S.E.2d 455 (1998).

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<sup>1</sup> Although *Wainwright v. Witt* concerned the questioning of a prospective juror about capital punishment, this standard should apply equally to civil cases. *Accord*, David Ball, “Silence of the Jurors, a Voir Dire Primer.”

### III. CHALLENGING A JUROR FOR CAUSE.

In North Carolina, a party's right to inquire into the fitness or competency of the jury panel is subject to the trial court's close supervision. The regulation of the manner and the extent of the inquiry rests largely in the trial court's discretion. *State v. Bryant*, 282 N.C. 92, 191 S.E.2d 745 (1972). However, the court's discretion in supervising *voir dire* is not absolute and it is subject to appellate review. *Will of Worrell*, 35 N.C. App. 278, 241 S.E.2d 343 (1978). In particular, the trial court must permit the parties sufficient opportunity to (1) ascertain whether grounds exist to challenge prospective jurors for cause and (2) allow counsel to intelligently exercise the peremptory challenges granted by statute. *State v. Carey*, 285 N.C. 497, 206 S.E.2d 213 (1974) (holding that the trial court erred by denying the prosecutor and defense counsel the right to examine prospective jurors about their moral or religious scruples and beliefs and attitudes toward capital punishment).

In a professional negligence case, an attorney may consider questioning prospective jurors about the following areas:

- General background questions regarding county residency, educational background, employment history, major interests and activities, and similar information about the individual's spouse/significant other, children, and close relatives and friends.
- Knowledge of the parties, the witnesses, and the attorneys.
- Prior experience in the justice system of the individual and his or her close relatives or friends, including jury service and involvement as a litigant or witness.
- Prior knowledge and experience (both personally and involving close relatives/friends) in the professional field at issue, with similar injuries or results, and with regard to the pertinent facts in the case.
- Prior complaints or satisfaction with the professional field at issue.
- Opinions about attorneys, the civil justice system, monetary damages (esp. pain and suffering), criminal vs. civil burdens of proof, etc.

In the course of questioning jurors on these topics, the attorney may discover that a prospective juror has a bias or prejudice that might support a challenge for cause. Once this discovery occurs, the attorney should:

1. Ask open-ended questions in order to elicit evidence of the bias or prejudice.

Sample questions may include:

- A. Tell me about that.
  - B. What have you read/heard about it?
  - C. How do you feel about it?
  - D. Why do you think it happens so often?
2. Look the juror in the eye and not convey any judgment (whether verbal or non-verbal).
  3. Switch to close-ended or leading questions once enough testimony has been elicited.

Sample questions may include:

- A. How long have you felt this way?
  - B. Are you likely to change your mind in the next few days or weeks?
  - C. You seem to know your own mind, so I have to ask, are you likely to change your mind just because someone comes along and tells you to change it?
  - D. So if the judge says that to be a juror on this case, you'd have to leave your opinion about the topic completely aside - you could do that, but it would be very difficult, wouldn't it?
  - E. Everything that happens to us affects the way that we see things in the future. Can you put aside your prior experiences in this case? Can you limit yourself to the evidence that is presented in this courtroom?
  - F. In light of your opinions/experiences/beliefs, do you agree that it will be very difficult for you to consider the evidence and be fair and impartial to both parties in this case?
4. Consider questions that the court or opposing counsel might ask in order to rehabilitate the juror and ask them in a way that obtains a better response.

While these steps appear fairly simple, the key to success is practice and experience. During the course of *voir dire*, the attorney should adapt his or her questions to take into account the testimony that the judge wants to hear before sustaining an objection for cause. In addition, the attorney should consider researching the judge's *voir dire* preferences and practices before trial in order to maximize challenges for cause.

#### **IV. CONCLUSION.**

The right to a trial by jury is meaningless if members of the jury are neither fair nor impartial toward your client. Due to the limited number of available peremptory challenges, an attorney must master the art of challenging an incompetent or impartial juror for cause. By maximizing your challenges for cause, you will be able to increase your client's likelihood of success.