Challenges for Cause: What You Don't Know Can Hurt You

By John F. Denove

Even attorneys experienced in voir dire have difficulty understanding how trial judges apply the law concerning challenges for cause. This article will cover both the statutory and case law on the subject as well as suggesting how to convince a prospective juror to admit bias. Perhaps, more importantly, it will also suggest ways to convince the trial judge to sustain the challenge.

The Law

Code of Civil Procedure section 225 allows a challenge for cause for one of the following reasons:

(A) General Disqualification -that the juror is disqualified from serving in the action on trial;
(B) Implied Bias when the existence of the facts as ascertained, in judgment of law disqualifies the juror;
(C) Actual Bias -the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

General Disqualification

Code of Civil Procedure section 203 sets forth the criteria that disqualify a person from serving as a juror. Persons disqualified are persons who are:

(l) Non citizens;
(2) Less than 18 years of age;
(3) Not domiciliaries of the State of California;
(4) Not residents of the jurisdiction where summoned to serve;
(5) Ex-felons, or those convicted of malfeasance in office, and whose civil rights have not been restored;
(6) Insufficient knowledge of the English language;
(7) Persons who are serving as grand or trial jurors in any court of California;
(8) Persons who are the subject of conservator ship.

Of the eight criteria that disqualify a person from serving, the one that most frequently presents itself is a prospective juror who may lack sufficient knowledge of the English language. Often, the trial judge will inquire of the prospective juror as to whether he or she has understood what has been discussed. The prospective juror may indicate that he or she does understand. Understanding English, however, is not the only criteria. One must also be able to communicate in English so they can fully participate in deliberations. The court in *People v. Elam* (2001) 91 Cal.App.4th 298, 316, 110 Cal.Rptr.2d 185, held "insufficient command of the English language to allow full understanding of the words employed in instructions *and full participation in deliberations* clearly would render a juror unable to perform his duty within the meaning of Penal Code section 1089." (Emphasis added.)

Implied Bias

Code of Civil Procedure section 229 specifies when a challenge for implied bias may be taken. This includes "consanguinity," i.e. a blood relationship, and "affinity," i.e. a relationship by marriage within the fourth degree, to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case. A challenge for implied bias may also be taken based upon a prospective juror's relationship to a party or officer of a corporate party. These relationships include family members, business partners, master and servant, principal and agent, debtor and creditor, landlord and tenant. If one of the criteria is met, it is irrelevant that the prospective juror has no actual bias. To learn more about this and other challenges for implied bias, one should read and re-read *C.C.P.* section 229.

Actual Bias

Actual bias is defined in *Code of Civil Procedure* section 225 as, "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." It is interesting to note, however, that *C.C.P.* section 229, subsection (e) states that implied bias also includes "having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them." Subsection (f) states that implied bias is "the existence of a state of mind in the juror evincing enmity against, or bias towards, either party."

How to Exercise a Challenge for Cause

Many trial judges ask the plaintiffs attorney after the conclusion of his or her voir dire if the plaintiff passes for cause. *Code of Civil Procedure* section 226, subdivision (d) states that, "all challenges to an individual juror, except a peremptory challenge, shall be taken, first by the defendants, and then by the people or plaintiffs." A minority of judges interpret this code section to require the defense attorney to conduct his or her voir dire before the plaintiff attorney.

If the trial judge asks the plaintiffs attorney if he or she passes for cause before asking the defense attorney, the plaintiffs attorney should request to approach the bench and refer the court to *C.C.P.* section 226.

When exercising a challenge for cause, always do it outside of the hearing of the jury. When you approach sidebar, be prepared to explain the legal basis for the challenge, and, whenever possible, use the specific words that the prospective juror used. Citing the specific code section upon which you are relying and using the words in the code will support your credibility when arguing your point. Be judicious in the number of prospective jurors you challenge for cause. Pick your battles wisely. Arguing challenges that do not stand a reasonable chance of being granted will only hinder your chance of having the court sustain subsequent challenges.

How to Convince the Juror to Admit to Bias

Nobody wants to see themselves as being biased or prejudiced. This is especially true in front of a judge and a group of strangers.

It is important that you advise the prospective jurors that everyone has certain biases and certain prejudices. Explain to the prospective jurors at the outset that you yourself have biases and prejudices. I have used the following example: I tell jurors, "I am biased against beets. I don't like them raw, pickled, sautéed, steamed, on salads or in soups. I know, without ever tasting a dish that has beets in it, that J will not like it. That is my bias. That is my prejudice. I just can't be impartial when it comes to beets. I know before I ever taste them that I won't like them." I then advise prospective jurors that some of them may have biases and prejudices against people suing for money damages, or people asking for compensation for pain and suffering, or people bringing lawsuits for a particular claim. I advise them that these biases and prejudices are fine, it just means that they would not be the best jurors for this type of case. I then ask the prospective jurors if they have such a bias or prejudice. If one of them volunteers that they are biased or prejudiced, I thank them and tell them that this is the type of honesty that makes the system work. You may find that using a similar example will make it palatable for the prospective jurors to admit that they have a bias for, or prejudice against, your client or your client's action.

It is not enough, however, to convince a juror to admit that he or she is biased or prejudiced. You need to lock the juror in so that neither the judge nor opposing counsel can turn the juror around by having the prospective juror say that despite his or her biases, he or she will follow the court's instructions. *In Leibman v, Curtis (1955)* 138 Cal.App.2d 222, 291 P.2d *542,* the prospective juror administered worker's compensation insurance. He stated that he was sure he couldn't help but have some preconceived ideas so far as back disability was concerned. The following are the questions asked by the plaintiffs attorney in that case, and the answers given by the prospective juror, which demonstrate how one can effectively lock the juror in:

"Q. Under those circumstances, do you believe that you could be a fair and impartial juror in this case involving injury?

"A. I am sure I couldn't be. * * *

"Q. This is a fixed idea that you have that it would take some evidence on one side or the other to overcome before you could come to any opinion?

"A. Yes. In handling the workmen's compensation insurance, why, I have been administering for the company and at all times for the defendant, and particularly in back injuries, why, I am sure that I have formed opinions that would be used in my decision before the Court.

"Q. Before a plaintiff would have a fair trial in a case of that kind, he would have to introduce some evidence that would overcome those notions that you already have?

"A. That is true.

"Q. If you were a party to this action who wanted a fair jury in this particular kind of a case only, do you feel that you would be the kind of a person you would want to select?

"A. No; I wouldn't."

Although the trial court denied the challenge for cause, the appellate court held that the challenge for cause should have been granted.

How to Convince the Court to Sustain a Challenge for Cause

With "One Day, One Trial," judges are loathe to lose prospective jurors. As your client's advocate, you must impress upon the court that allowing a biased or prejudiced juror to sit on a case is not only bad for the parties and the system of justice, but that it is unfair to the other jurors who are trying to do their job.

In *Smith v. Covell* (1980) 100 Cal.App.3d 947, *955,* 161 Cal.Rptr. 377, the court stated that, "the right to a trial by jury in a personal injury action is 'jurisdictional." Quoting *Dewardv. Clough* (1966) *245* Cal.App.2d 439, 54 Cal.Rptr. 68, the court wrote, "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury. Impress upon the court that allowing a biased or prejudiced juror to sit with impartial jurors will only foster distrust of the judicial system. A one page bench brief before voir dire commences may remind the court how important it is to excuse jurors who cannot be impartial.

The Trial Court's Discretion

Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial judge. People v. Farnarn (2002) 28 Cal.4th 107, 121 Cal.Rptr.2d 106, This broad discretion is seldom disturbed on appeal. People v. Holt (1997) 15 Cal.4th 619, 656, 63 Cal.Rptr.2d 782. The question of whether a prospective juror has a prejudiced state of mind amounting to actual bias is ordinarily an issue of fact left to the sound discretion of the trial judge. People v. Jimenez (1992) 11 Cal.App.4th 1611, 15Cal.Rptr.2d268.

The following examples illustrate the broad discretion the appellate court gives to the trial judge. In *People v. Kaurish* (1990)52 Cal.3d 648, 675, 276 Cal.Rptr. 788, the Supreme Court held that the trial court did not abuse its discretion in denying defendant's challenge for cause when a prospective juror gave conflicting testimony as to her ability to be unbiased. On the one hand, she stated that she had several relatives employed as police officers and might tend to give greater credence to the testimony of such officers. On the other, she stated her intention to, "try to be an impartial juror." The court ruled "when, as here, a juror gives conflicting testimony as to her capacity for impartiality, the determination of the trial court on substantial evidence is binding on the appellate court."

In *Kimbley v. Kaiser Foundation Hospitals* (1985) 164 Cal.App.3d 1166, 1171, 211 Cal.Rptr. 148, the Court, citing to *Scott v. McPheeters* (1942) 52 Cal.App.2d 61, 125 P.2d 868, states that even when a juror has had a patient-physician relationship with a doctor defendant, that by itself will not justify disqualification of a, juror.

In *People v. Hilihouse* (2002) 27 Cal.4th 469, 488-489, 117 Cal.Rptr.2d 45, the defendant's challenge for cause was to a juror who had read about the case in the newspapers and believed, "the defendant is guilty, it's a matter only of first and second degree." He also was friends with the prosecution's investigator in the case. The Supreme Court, however, noted that in other responses, the prospective juror made clear that he understood that he had to base his decision on the evidence at trial, rather than what he read in newspapers, and he had stated, "he would

try to be impartial." He also said that if asked today, he would say the defendant was guilty, but he would listen to conflicting information that was provided. The California Supreme Court declined to interfere with the trial court's finding that the juror was impartial.

In *People v. Ervin* (2000) 22 Cal.4th 48, 91 CaLRptr.2d 623, three prospective jurors preliminarily stated that they distrusted defendants who elected not to testify. They eventually affirmed their ability to follow the law and give the defendant a fair trial. The Supreme Court stated that it would defer to the trial court's findings that the jurors were impartial.

Appellate Remedy

Unless there is an extreme abuse of discretion, the appellate court will probably defer to the trial court. Even if there is an extreme abuse of discretion, the appellate court will not interfere with the verdict on the grounds that a challenge for cause should have been granted, unless the party making the challenge before or thereafter exhausts all of his or her peremptory challenges. Kimbley v. Kaiser Foundation Hospitals, supra, 164 Cal.App.3datll69.

If one considers the appellate standard hard on the party whose challenge for cause was denied, it is even worse when the trial court improperly grants numerous challenges for cause. If the court erroneously grants a challenge for cause, there is no appellate remedy. The rationale is that a party is not entitled to a jury composed of any particular jurors, provided there is finally selected a jury composed of qualified and competent persons. *Dragovich v. Slosson* (1952) 110 Cal.App.2d 370, 242 P.2d 945.

Conclusion

You cannot rely upon the appellate court to overturn an adverse verdict based upon the trial court's erroneous denial of a challenge for cause. Your only real hope is to have the prospective juror state that he or she cannot be impartial in this, particular case and then convince the trial court that everybody wins when the court sustains your challenge for cause.

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For Additional reading: Juries Aren't Just Emotional Pushovers

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