

WINNING BEFORE IT BEGINS:

The Science & Art of Jury De-Selection and The Power of Cause Challenges in California Civil Trials

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Jury selection is a delicate and pivotal task, often deciding the trial's outcome before it even begins. As Clarence Darrow aptly remarked, "Never forget, almost every case has been won or lost when the jury is sworn." Given the profound impact a jury will have on the verdict, it is essential for any trial lawyer to understand and effectively utilize the tools at their disposal to draw out and eliminate unsuitable jurors without compromising their case or their credibility.

This article examines the basic dynamics and strategic techniques involved in uncovering, developing, and pursuing a challenge for cause at trial. Using examples from several of our cases where the court granted over 30 cause challenges, this article also aims to provide insight into how to intelligently exercise peremptory challenges and develop a rapport with the prospective jurors to ensure that you get the best possible jury for your case.

Overview of Challenges for Cause

California Code of Civil Procedure section 225 outlines the grounds

for challenging a prospective juror in a civil case. The statute delineates three primary categories of bias or disqualification: general disqualification, implied bias, and actual bias. Understanding these concepts is crucial for attorneys during the jury selection process, as they provide the legal basis for excluding certain jurors from serving on a trial.

Practice pointer: Before jury selection, file a pocket brief with the court outlining the relevant law regarding cause challenges. This will not only serve as a helpful refresher for the court but also allow you to have all pertinent statutes and cases

readily accessible when arguing cause challenges. Your pocket brief should primarily focus on actual bias and the grounds for proper cause challenges, as defined by C.C.P. § 225(b)(1)(C), while also including a discussion of implied bias.

General Disqualification

General disqualification refers to the statutory reasons that automatically disqualify a person from serving on a jury. These are broad, objective criteria that, if met, make the person ineligible to be a juror regardless of any specific bias they may hold. Examples of general disqualification under C.C.P. § 225 include:

- Not being a U.S. citizen.
- Being under the age of 18.
- Not residing in the jurisdiction where the trial is being held.
- Having a felony conviction unless civil rights have been restored.
- Being mentally incompetent.

These criteria are designed to ensure that only those who meet the basic legal requirements can serve as jurors.

Implied Bias

Implied bias involves situations where the law presumes bias due to the prospective juror's circumstances or relationships and thus disqualified to serve. Unlike actual bias, implied bias does not require proof that the juror has a prejudiced state of mind; instead, it is based on the assumption that certain conditions inherently affect the juror's impartiality. Grounds for implied bias include:

- A relationship to any party or witness involved in the trial (such as being related by blood or marriage). C.C.P. § 229(a).
- A financial interest in the outcome of the case or other interest apart from his or her interest as a member of the community. C.C.P. § 229(d).
- A prior relationship or interaction with the case (such as having served on a jury for a previous trial involving the same parties or facts). C.C.P. § 229(c).
- A prior attorney-client relationship with either party or with the attorney for either party within 1 year of the filing of the complaint. C.C.P. § 229(b).

Implied bias is based on the principle that certain situations are likely to influence a juror's ability to remain neutral, even if they claim otherwise.

Actual Bias

A challenge for cause to an individual prospective juror may be taken for actual bias, which is defined as the existence of a state of mind on the part of the prospective 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. (Civ. Proc. Code, § 225, subd. (b)(1)(C).) Thus, in particular, a party may challenge a prospective juror for actual bias if the prospective juror has a state of mind that would prevent that person from acting impartially and without prejudice to the substantial rights of any party. (People v. Kelly (2007) 42 Cal.4th 763.)

What constitutes a juror's "actual bias" varies depending on the circumstances of the case. (People v. Henderson (2021) 68 Cal.App.5th 709, 723.) It requires a consideration of the duties of a juror, which include the duty to set aside personal feelings and opinions and decide the case based solely on the evidence and the judge's instructions. This requires an assessment of the juror's true state of mind. (Id. at p. 724).

The following are examples of cases in which challenges for actual bias have been upheld:

Bias against a class of persons. Where the juror expresses a prejudice against persons of a particular ethnic, political or economic group, the juror is biased and is properly excluded for cause. A judge has a duty to inquire and/or to permit

attorneys for the parties to inquire into the prejudices of prospective jurors. (People v. Mello (2002) 97 Cal. App.4th 511, 516.)

For instance, jurors were properly disqualified for actual bias where they had general bias against law enforcement officers, believing that they generally lie. (In re Manriquez (2018) 5 Cal.5th 785, 812.)

Juror hostile towards claim; party starts at disadvantage. A prospective juror who entertains a fixed general or abstract prejudice against certain types of actions may be disqualified to serve, especially where they would require more evidence than a mere preponderance in order to render a verdict supporting such claim. (Liebman v. Curtis (1955) 138 Cal.App.2d 222, 226.) For example, in a personal-injury action against a railroad, a prospective juror was disqualified for actual bias after he stated that he had worked for the railroad and believed that many lawsuits against the railroad involving individuals who sustained personal injuries were the injured party's own fault; that he was prejudiced in favor of the railroad; and he could only render a verdict for plaintiff if the proof was strong enough, but that it would require "strong and positive testimony" in order to induce him so to do. (Fitts v. Southern Pac. Co. (1906) 149 Cal. 310, 313.)

Long-held belief. Where the prospective juror holds a belief that makes it difficult for the juror to perform their duty and apply the law impartially, the juror is properly excluded for cause. This same concept applies to any jurors who have particular beliefs regarding personal injury that are contrary to the law. For example, an individual may believe that personal injury

law requires further tort reform. Such prospective jurors show a bias that would make it difficult for them to apply the law as stated by the judge in the case and should be excluded. In action to enforce property settlement agreement, a prospective juror's beliefs regarding divorce and remarriage were proper subject of inquiry to show bias. (Smith v. Smith (1935) 7 Cal.App.2d 271, 273-274.)

Juror's religious views. A prospective juror's religious views might support an excusal for cause, e.g., when personal beliefs would prevent performing the duties of a juror, which include deciding the case impartially and, ultimately, sitting in judgment. (People v. Rountree (2013) 56 Cal.4th 823, 847-848—juror's religious views supported excusal for cause ["The Bible tells us not to judge"].)

Friendship with one of the parties or one of their relatives. Actual bias may be shown by a prospective juror's admitted friendship with one of the parties. This holds true even if the juror asserts that they can set aside their bias and act fairly. (Lombardi v. California Street Cable Ry. Co. (1899) 124 Cal. 311, 314.) For example, a judge should have removed a juror for cause who had been a high school teacher of one of the victims; the judge failed to look beyond the juror's statement that she did not think her favorable teacher-student relationship with the victim would affect how she perceived the evidence and participated in deliberations. (People v. Romero (2017) 14 Cal.App.5th 774, 780-783.)

Belief or preconception not easily set aside. Where a prospective juror holds a belief or preconception regarding a factual issue to be proved during trial and is unable to set their preconceptions aside to

impartially weigh the evidence, the juror should be excused.

Enmity and bias. Where a prospective juror confirms that he or she will not follow the jury instructions if the law goes against their conscience, the juror is properly excluded for cause. (People v. Merced (2001) 94 Cal. App.4th 1024, 1027-1028.)

Actual bias is typically identified during voir dire through the prospective juror's answers to questions about their opinions, experiences, and feelings related to the case or the parties involved. To successfully challenge a juror for actual bias, an attorney must demonstrate that the juror's state of mind is such that they cannot be fair and impartial. This requires a thorough examination of the juror's potential prejudices and an articulation of how these biases could affect their judgment.

Plaintiff's Oral Voir Dire

Oral voir dire is a critical phase where the plaintiff's attorney has the opportunity to de-select unfavorable jurors by uncovering any biases, prejudices, or preconceptions that prospective jurors may have that could influence their judgment.

The California Code of Civil Procedure provides the statutory framework guiding voir dire. Specifically, C.C.P. § 222.5(b)(1) provides that "[u]pon completion of the trial judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause."

C.C.P. § 222.5(b)(2) provides "The trial judge shall not impose specific

unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire." (C.C.P. § 222.5, subd. (b)(2).)

Challenging Prospective Jurors For Cause – Procedure

There is no limit on the number of jurors who may be challenged for cause, nor on the number of grounds for challenge that may be raised against a particular juror. For example, a single juror may be challenged on all three grounds: general disqualification, implied bias, and actual bias (C.C.P. § 227). Challenges for cause are waived unless timely raised, and all challenges for cause must be exercised before any peremptory challenge may be exercised. (C.C.P. § 226(c).)

Challenges for cause are exercised in the following order: Defendants must exercise all challenges for cause to individual jurors before plaintiffs exercise theirs. (C.C.P. § 226(d).)

Challenges for cause to individual jurors need not be made all at once; however, when made separately, they must be made in the following order (and all challenges of the same type made at the same time): (1) challenges for general disqualification; (2) challenges for implied bias; and (3) challenges for actual bias. (C.C.P. § 227).

Local rules in some courts require that challenges be made outside the hearing of the jury (see, e.g., L.A. Sup.Ct. Rule 3.74). However, even where such rules are not in effect, it is advisable to request that any challenge for cause be made outside the jury's presence. This is because the challenged juror or other jurors may feel resentment toward you or your client for making

the challenge. Therefore, strive to make the challenges away from the prospective jurors, either at sidebar or during a recess, but always ensure that it is on the record.

Developing Cause Challenges Based on Impartiality

During voir dire, your primary focus should be on uncovering any biases related to the specific facts of the case. Again, questions should be designed to elicit honest responses about the jurors' ability to remain impartial.

Here are a few examples from the wrongful death trial mentioned above applying these tactics:

PROSPECTIVE JUROR #1: My religious beliefs would be based on forgiveness and not judging other people, so I don't feel like I can, with my religious conviction, judge somebody else.

PLAINTIFF'S COUNSEL: You cannot be entirely impartial and sit on this jury, correct?

PROSPECTIVE JUROR #1: Yeah.

PROSPECTIVE JUROR #2: The intangible of paying for that life lost is what I struggle with, putting a price tag on that.

PLAINTIFF'S COUNSEL: So, the intangible compensation for the value of the relationship, that's not something you believe should be compensated for?

PROSPECTIVE JUROR #2: Correct.

PLAINTIFF'S COUNSEL: And that you cannot be entirely impartial in this case?

PROSPECTIVE JUROR #2: Correct.

PLAINTIFF'S COUNSEL: Then another issue is forgiveness and the belief in forgiveness, you would not bring a lawsuit on your own behalf seeking this type of compensation because of your belief system?

PROSPECTIVE JUROR #3: That's correct.

PLAINTIFF'S COUNSEL: Knowing that that's the only thing that is happening in this case, do you believe that you cannot be entirely

impartial on this case right here?

PROSPECTIVE JUROR #3: I do not believe I could.

PLAINTIFF'S COUNSEL: And that puts my client at a disadvantage?

PROSPECTIVE JUROR #3: Yes.

PLAINTIFF'S COUNSEL: And your beliefs, those are strong and long-held?

PROSPECTIVE JUROR #3: Yes.

PLAINTIFF'S COUNSEL: But is there a cap on the amount of compensation before you start worrying about the impact to the defendant?

PROSPECTIVE JUROR #4: Well, from what little I can gather of the defendants, I would put it on maybe their gross income of maybe ten years, twenty years. They have to have a life too. It was an accident, this was not deliberate. Life goes on, you know?

PLAINTIFF'S COUNSEL: And that's important for you that in compensating my client, it's kind of correlating it to the ability of the defendant to pay?

PROSPECTIVE JUROR #4: Yes.

PLAINTIFF'S COUNSEL: And that's a strong belief that you have?

PROSPECTIVE JUROR #4: Very strong.

PLAINTIFF'S COUNSEL: And anything over two million dollars, you could not be an entirely impartial juror in this case?

PROSPECTIVE JUROR #4: True.

PLAINTIFF'S COUNSEL: And that puts my client at a disadvantage?

PROSPECTIVE JUROR #4: Yes, and I'm sorry.

The questioning above includes textbook examples of situations where a prospective juror has an actual bias and should be disqualified. Each of these jurors was removed following the court's granting of a cause challenge from



Plaintiff's counsel. If a prospective juror admits to a disqualifying bias, they cannot simply rehabilitate themselves by stating that they "can be fair" or "will follow the law." Given that few people will openly admit they cannot be fair, a juror's reassurance that they can be impartial despite admitted bias should not be relied upon (*Quill v. Southern Pac. Co.* (1903) 140 Cal. 268, 270; *People v. Riggins* (1910) 159 Cal. 113).

In such cases, the court has considerable discretion and may

reject a challenge for cause (*People v. Kipp* (1998) 18 Cal.4th 349, 366; *Graybill v. De Young* (1905) 146 Cal. 421, 422-424). The trial judge is the ultimate arbiter of whether a juror will act fairly when there are indications both ways or other ambiguities (*People v. Thornton* (2007) 41 Cal.4th 391, 414). Therefore, it is crucial to ask various questions designed to reveal the extent of a juror's feelings about the issue, which can support your argument that they should be disqualified.

Solidify the Cause Challenge – Making the Record

Use specific follow-up questions to delve deeper into their initial answers.

- The bias will always impact how they see the evidence
- "This belief will always in the back of your mind"
- "You will see it through the lens of"
- "This wouldn't be the right case for you?"

Use language to show the prospective juror's opinion is not something they can put aside:

- "Long-held belief" / "deeply-held belief"
 - "Core value"
- Use language demonstrating that the prospective juror would be a disadvantage to the plaintiff
- "You will not be able to be entirely impartial"
 - "Not a level playing field"

Protecting Your Good Jurors

One of the most difficult important skills to utilize is protecting jurors that are good for your case and knowing how to anticipate and combat defense challenges for cause.

Pre-habilitation is a valuable technique for personal injury plaintiff lawyers during jury selection. By proactively addressing potential biases and affirming jurors' ability to be fair and impartial, attorneys can reduce the likelihood of successful challenges for cause by the defense. This strategy helps retain favorable jurors, shapes the narrative of impartiality, and builds a positive rapport with the jury, ultimately enhancing the chances of a favorable verdict.



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PUBLISHED IN THE SUMMER 2024 OCTLA GAVEL MAGAZINE

