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Briefing juror challenges

If you prepare before the jury arrives, you can avoid wasting peremptory challenges.


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If you want to avoid wasting preemptory challenges, you have to take action long before the jury arrives. As this column suggested last month, you should prepare a trial brief that outlines the three categories of juror exclusion: general disqualification; implied bias (when facts disqualify the juror as a matter of law); and actual bias (when the juror's state of mind prevents impartiality). (*See* Code Civ. Proc., §225(b)(1).)

General disqualification of jurors

Although the court may handle these general disqualifications without input from counsel, you should still be familiar with California's requirements for juror eligibility. The following individuals are disqualified from jury service:

- Non-citizens;
- Minors;
- People not domiciled in California;
- People not residing in the jurisdiction;
- Jurors and grand jurors presently serving on another case;
- Conservatees;
- People with an insufficient understanding of English;
- Convicted felons; and
- The (hopefully) small group of people convicted of "malfeasance in office." (Code Civ. Proc., §203(a).
- Many categories of police – including sheriffs and deputy sheriffs, CHP officers, BART police, and port police – must be excluded before the jury panel is even sent to the courtroom. (Code Civ. Proc., §219(b)(1); Pen. Code, §§830.1(a), 830.33.)

Challenges for cause

The California State Constitution calls trial by impartial jury "an inviolate right," and California law requires jurors to act with "entire impartiality." (Cal. Const. Art. I, 816; Code Civ. Proc., §222.5(b)(1)(C).)

It is prejudicial error for a judge to deny a good challenge for cause, thereby forcing an attorney to use up a peremptory challenge. (*Liebman v. Curtis* (1955) 138 Cal.App.2d 222, 226.)

Implied bias

Someone who was once a juror or witness for a case involving one of the same parties is presumed biased for one year after the prior litigation—or permanently, if the past case involved identical parties or the same cause of action. (Code Civ. Proc., §229(c).)

The law also presumes bias when the juror has certain fiduciary, domestic or business relationships with a party or witness. These "relationships" include owning stock, business partnerships, employment and agency relationships, tenant-landlord relationships, or debtor-creditor relationships. (Code Civ. Proc., §229(b).) Bias is also presumed if the juror is related to a party or witness by blood or marriage, within four degrees of family relationship. (Code Civ. Proc., §229(a).)

Even if someone does not have one of these relationships, the juror can still be excluded for feeling "enmity against, or bias toward, either party." (Code Civ. Proc., §229(d).) For instance, a juror who knew the plaintiff and said he would prefer a verdict in his acquaintance's favor should have been excluded for cause, even though he agreed to be impartial. (*Lombardi v. California Street Cable Ry. Co.* (1899) 124 Cal. 311, 316, 317.) Likewise, a juror should be disqualified for "[h]aving an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or some of them," which could presumably lead to prejudgment of the individuals or entities involved. (Code Civ. Proc., §229(e).) Disqualification also results if the juror has an interest in the events of the action, or the main question being decided. (Code Civ. Proc., §229(d).)

Actual bias

A prospective juror who requires a party to go beyond the burden of proof is properly excluded for cause. "A litigant suffers prejudice when, over his

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protest, the court impanels a juror whose state of mind requires . . . evidence in excess of a preponderance to such an extent as will overcome antecedent prejudices of the juror." (*Liebman v. Curtis, supra*, 138 Cal.App.2d at 266.)

A number of cases illustrate actual bias. For example, where a prospective juror expresses prejudice against a certain group. (*People v. Mello* (2002) 97 Cal.App.4th 511, 516.) The prejudice does not even have to be against a traditional protected class such as race or ethnicity. In one case, the trial court improperly barred questions regarding the jurors' possible bias against ex-felons. (*People v. Chapman* (1993), 15 Cal.App.4th 136, 141.)

Long-held beliefs can be another source of bias. For example, in an action to enforce a marital agreement, a juror's long-held religious beliefs regarding divorce and remarriage were a proper basis for a challenge. (*Smith v. Smith* (1935) 7 Cal.App.2d 271, 273-274.) "While it is certain that no person shall be rendered incompetent to be a juror on account of his opinions on matters of religious belief (Const., art. I, sec. 4), yet it is equally true that because of his religious faith a prospective juror may be unable to try a certain case impartially, because of a resulting state of mind . . . " (*Ibid*.) This concept can be analogized to other situations, from the tort reform-minded juror who believes that doctors should never be sued to the pious juror who believes that suffering is dictated by God.

Another example of actual bias is where a prospective juror has a preconceived notion about a factual issue to be proved at trial. In one personal injury case, a former workers' compensation examiner was properly excluded, based upon his preconceived ideas about back injuries. (*Liebman v. Curtis, supra,* 138 Cal.App.2d at 226.)

Jurors may also be excluded because of their hostility to the claim itself, such as in a wrongful death case where it was prejudicial error to empanel two jurors who were biased against personal injury suits. (*Quill v. Southern Pacific Co.* (1903) 140 Cal. 268, 270.) In another case, a former railroad purchasing agent who believed most railroad accidents were caused by the negligence of the injured people should have been excluded because of "bias against the class of actions . . . " (*Fitts v. Southern Pacific Co.* (1906) 149 Cal. 310, 313.)

There is no rehabilitation of a biased juror

You must prevent the judge from disposing of disqualifying bias with a few rounds of "But you can be impartial, right?" A juror's reassurances that he or she can be fair despite his or her biases does not preclude a challenge for cause. "Few men will admit that they have no sufficient regard for truth and justice to act impartially in any matter, however much they may feel in regard to it, and every day's experience teaches us that no reliance is to be placed in such declarations." (*Quill, supra,* 140 Cal. at 271; see also *Lombardi, supra*.)

Help the court now and avoid problems later

Your trial brief should be organized well enough that the court can use it as a reference tool, should any conflicts arise. In your trial brief, you should create separate headings for each category of disqualification. This will enable the judge to quickly scan your brief for all of the appropriate grounds for challenging jurors. After all, you want to give the court everything it needs to decide a challenge in your favor.

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