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# Asbestos

## Does “No” Mean “No”?

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# Commentary

## Does “No” Mean “No”?

By  
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When a prospective juror unequivocally states, under oath, at the conclusion of all voir dire, that he or she cannot be fair and impartial, may a trial judge deny a cause challenge absent at least some subsequent rehabilitation? This was the question presented in a recent Bay Area civil trial as to not one, or two, but three prospective jurors. In all three instances, the court denied cause challenges, resulting in a trial where 25% of the impaneled jurors (33% of the jurors required for a verdict) had declared under oath that they could not be fair and impartial. Apart from the obvious problem of permitting admittedly biased jurors to serve, there is an additional concern. Even if one assumes that “no” does not mean “no” when a juror is asked if he or she can be fair and impartial, such jurors should still be excused. If “no” really meant “yes,” then the prospective jurors committed perjury, thereby mandating their excusal.

### **The Denial of Cause Challenges as to Biased or Untruthful Potential Jurors Violates the Constitutional Right to Trial by Jury**

The primary purpose of selecting a panel of jurors is to select individuals that are fair and impartial. (Code Civ. Proc. § 222.5; Cal. Rules of Court, Rule 3.1540(b).) “The right to unbiased and unprejudiced

jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.” (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 (quoting *People v. Galloway* (1927) 202 Cal. 81, 92); *Smith v. Covell* (1980) 100 Cal. App.3d 947, 955 (the right to twelve unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury).)

Prospective jurors should be disqualified from a trial if they cannot act with “entire impartiality, and without prejudice to the substantial rights of any party.” (Code Civ. Proc. § 225(b)(1)(C).) Where a prospective juror holds a belief or precondition regarding a factual issue to be proved during trial and is not able to set his or her preconceptions aside to impartially weigh the evidence presented, the juror should be excused for cause. This includes jurors who have a pre-conceived idea about the medical issues involved in a case. (*See Liebman v. Curtis* (1955) 138 Cal.App.2d 222, 226 [prospective juror’s pre-conceived ideas regarding the plaintiff’s injuries were sufficient to exclude the prospective juror for cause].)

Once a prospective juror has admitted bias, that prospective juror cannot rehabilitate himself or herself simply by stating, “I can be fair,” or “I will follow the law.” Since few people will admit they cannot be fair, a juror’s assurance that he or she will follow the law should not be relied upon:

Notwithstanding the positive declaration of the juror [citation], this court has

felt compelled to reverse the ruling of the trial judge, because, upon consideration of the whole testimony, it has seemed manifest that the juror could not do that which he so positively declared his ability to do; for, as we said [citation], "Few men will admit that they have no sufficient regard for truth and justice to act impartially in any manner, 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 v. Southern Pacific Co.* (1903) 140 Cal. 268, 271 (citing *People v. Gehr* (1857) 8 Cal. 359).)

In our trial, three jurors stated that they could not be fair and impartial. These three jurors shall be referred to as Jurors A, B, and C. Beginning with Juror A, when asked to confirm that he could not be fair and impartial in this cancer case based on the history of cancer in his family, he replied succinctly, unequivocally, and unhesitatingly, "Correct." As to Juror B, he stated on no fewer than three occasions that he could not be fair and impartial. This juror explained that his mom died of cancer and so he was uncomfortable sitting as a juror in a cancer case. Lastly, when Juror C was asked to confirm that she could not be impartial based on her distrust/bias against corporations, she responded, "Yes, that is correct."

None of these jurors was rehabilitated by the trial court or counsel after each conceded that he or she could not be fair and impartial in a case where plaintiffs were seeking tens of millions of dollars. Despite this, the trial court declined to grant cause challenges as to Jurors A, B, and C, and, given that the defense had exhausted its peremptory challenges, these three jurors were impaneled. The three challenged jurors' words were clear. "No" means "no" and these jurors should have been excused for cause.

### **If a Juror Is Not Truthful When Declaring that He or She *Cannot* be Fair and Impartial, the Juror Should Still Be Excused**

If Jurors A, B, and C meant "yes" (they could be fair and impartial) even though they said "no", they still should have been excused for failure to tell the truth under oath. "A juror who conceals relevant facts or

gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." (*In re Hitchings* (1993) 6 Cal.4th 97, 111.) As explained in *Hitchings*, "[w]ithout truthful answers on *voir dire*, the unquestioned right to challenge a prospective juror for cause is rendered "nugatory" and "false answers or concealment on *voir dire* also eviscerate a party's statutory right to exercise a peremptory challenge." (*In re Hitchings, supra*, 6 Cal.4th at pp. 110-112.)

As the California Supreme Court noted in *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (*Weathers, supra*, 5 Cal.3d at p. 110.) Voir dire examination of potential jurors by counsel for the parties plays a "critical function" in assuring that an impartial jury will be selected. (*In re Hitchings, supra*, 6 Cal.4th at p. 110.) If potential jurors do not respond candidly during voir dire, the jury selection process is rendered meaningless.

Where the voir dire questioning is sufficiently specific to elicit the information which is not disclosed, or as to which a false answer is later shown to have been given, the questioning party has established a prima facie case of concealment or deception. (*People v. Blackwell* (1987) 191 Cal.App.3d 925, 929; see also *Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 742.)

Juror misconduct creates a presumption of prejudice. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 416-417.) This presumption can be rebutted in only one of two ways: (1) the opposing party must affirmatively prove that prejudice does not exist; or (2) the court, after reviewing the entire record, must determine that there is not a reasonable probability of actual harm to the complaining party resulting from the misconduct.

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All parties have a fundamental right to a fair and impartial jury. When a juror indicates he or she cannot be fair and impartial, the juror must be excused. "No" means "no" and a juror who answers "no" to whether he or she can fulfill his duties must be excused, even if it extends the jury selection process. ■

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