## 22.1 Impartiality

### A. In General

Every person charged with a crime in North Carolina has a right to a fair trial before an impartial judge and an unprejudiced jury. *State v. Harris*, 308 N.C. 159 (1983); *State v. Carter*, 233 N.C. 581 (1951). The Due Process Clause of the U.S. Constitution imposes on the trial judge the duty of absolute impartiality, and he or she must supervise and control a defendant's trial to ensure fair and impartial justice for both parties. *See Tumey v. Ohio*, 273 U.S. 510 (1927); *State v. Fleming*, 350 N.C. 109 (1999); *Ponder v. Davis*, 233 N.C. 699 (1951).

### B. Expression of Opinion Prohibited

A judge may not express an opinion, either explicitly or implicitly, on any question of fact to be determined by the jury. G.S. 15A-1222 [formerly G.S. 1-180]; *State v. Crummy*, 107 N.C. App. 305 (1992). G.S. 15A-1222 does not apply to comments made outside the presence of the jury. *State v. Fleming*, 350 N.C. 109 (1999). G.S. 15A-1232 expressly prohibits a judge from expressing an opinion during the jury charge as to whether or not a fact has been proved.

The trial judge must abstain from conduct or language that tends to discredit or prejudice the defendant's case because the judge holds an exalted station and his or her opinion is greatly respected by the jury. *State v. Allen*, 353 N.C. 504 (2001). "The slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury. . . ." *Id.* at 510 (citation omitted).

***Practice note:*** Although G.S. 15A-1222 and G.S. 15A-1232 do not apply when the conduct or remarks are made outside the presence of the jury, counsel should nevertheless object and make sure that the record reflects the conduct or remarks that indicate an opinion. On appeal, those statements or actions may be used to buttress a claim that the defendant did not receive a fair trial in front of an impartial judge in violation of due process.

**What constitutes prejudicial error.** Not every indiscreet or improper remark or action by a trial judge will warrant relief. *See, e.g.*, *State v. Herrin*, 213 N.C. App. 68, 71, 74

(2011) (noting that although trial judge's outburst of laughter to State's witness comment that defendant "ran like a bitch" past his house "may have been ill-advised and did not exemplify an undisturbed 'atmosphere of judicial calm,'" any resulting error was harmless in light of the totality of the circumstances) (citation omitted). Whether the defendant was deprived of a fair trial by the trial judge's comments, questions, or actions "must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant." *State v. Faircloth*, 297 N.C. 388, 392 (1979); *see also State v. Blackstock*, 314 N.C. 232, 236 (1985) (prejudicial error occurs "when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility"). If the trial judge has expressed an improper opinion before the jury, the resulting prejudice to the defendant is "virtually impossible to cure." *State v. Clanton*, 20 N.C. App. 275, 277 (1973); *see also State v. McEachern*, 283 N.C. 57, 60 (1973) (stating that "[o]rdinarily, such expression of opinion cannot be cured by instructing the jury to disregard it"); *State v. Oakley*, 210 N.C. 206, 210 (1936) (an impermissible expression of "opinion or intimation cannot be recalled.").

**Selected examples.** Types of improper judicial remarks or actions that have been found to require relief include:

- Questions to potential jurors or witnesses that logically tend to communicate the trial judge's belief that the defendant is guilty. *See State v. McEachern*, 283 N.C. 57 (1973) (question propounded to prosecuting witness by trial judge improperly expressed an opinion because it assumed that defendant raped her); *State v. Canipe*, 240 N.C. 60 (1954) (trial judge's references to two examples of horrendous crimes when attempting to ascertain potential jurors' beliefs on capital punishment amounted to an improper expression of opinion and resulted in incurable prejudice to defendant).
- Statements intimating the defendant's guilt. *See State v. Guffey*, 39 N.C. App. 359, 361 (1979) (new trial required where trial judge stated that defendant was "pretty busy that day" since the indictment reflected two different victims); *State v. Teasley*, 31 N.C. App. 729, 731–32 (1976) (even with a curative instruction, defendant was prejudiced by trial judge's question, "What is this, another case of somebody ripping off an insurance company?" when, during a break in the trial with the jury in the jury box, another case with similar charges was called for disposition by plea).
- Remarks tending to suggest facts to be found by the jury. *See State v. Blue*, 356 N.C. 79 (2002) (trial judge's remark that the front porch, where the offense allegedly took place, was not in defendant's home denied defendant the coverage of defense of habitation and necessitated a new trial); *State v. Summey*, 228 N.C. App. 730 (2013) (trial judge's response to jury's question during deliberations regarding the age of the victim could reasonably be interpreted as an expression of opinion that defendant was properly charged with statutory rape of a child less than 13); *State v. Grogan*, 40 N.C. App. 371 (1979) (new trial granted where trial judge's explanation of his ruling denying the jury access to photographs never admitted into evidence may have led the jury reasonably to conclude that the photographs were important evidence that they

should see and that the judge would allow them to see but for defendant withholding consent).

- Comments tending to belittle or humiliate the defendant's cause or his or her counsel before the jury. *See State v. Lynch*, 279 N.C. 1 (1971) (trial judge's blanket instruction to the court reporter to overrule *any* objection made by defendant's counsel necessarily belittled both defendant's cause and his attorney in the eyes of the jury); *State v. Frazier*, 278 N.C. 458, 464 (1971) (awarding a new trial because a series of comments by the trial judge, when viewed cumulatively, portrayed such an antagonistic attitude toward the defense that they breached "the cold neutrality of the law . . . to the prejudice of this defendant"); *State v. Brinkley*, 159 N.C. App. 446, 450 (2003) (new trial ordered because the trial judge's harsh criticisms of defense counsel "may have (1) prejudiced the jury against defendant, and (2) given the jury the impression that defense counsel was not trustworthy or ethical").
- Expressions concerning the credibility of witnesses. *See State v. Gregory*, 340 N.C. 365, 408 (1995) (trial judge's question to defendant's expert witness whether he was "telling the truth now or were you telling the truth then" clearly conveyed to the jury that the trial judge did not believe that the witness was being truthful); *State v. Berry*, 235 N.C. App. 496 (2014) (Hunter, Robert C., J. dissenting in part) (new trial granted where trial judge's inadvertent but erroneous instruction to the jury bolstered the credibility of the prosecuting witness and gave undue weight to a social worker's conclusions), *rev'd per curiam for reasons stated in the dissent*, 368 N.C. 90 (2015); *State v. Hensley*, 120 N.C. App. 313, 323 (1995) (trial judge's refusal to recall a child witness because doing so would be "very traumatic" and "injurious" to the witness, amounted to an expression that the judge believed the witness).
- Conduct concerning the credibility of the defendant. *See State v. Jenkins*, 115 N.C. App. 520 (1994) (improper expression of opinion about defendant's credibility where trial judge turned his back to the jury for 45 minutes while defendant testified on direct examination).
- Warnings or admonitions to witnesses concerning the consequences of committing perjury. *See State v. Locklear*, 309 N.C. 428 (1983) (while carefully given warnings to a witness with reference to perjury are permitted outside the presence of the jury, trial judge's actions in admonishing the witness and threatening her with imprisonment and a fine invaded the province of the jury, probably caused the witness to change her testimony, and may have deprived defendant of a fair trial before an impartial judge).
- Comments, questions, or actions that go to the "heart" of the case. *See State v. Sidbury*, 64 N.C. App. 177, 179 (1983) (where the defendant's ability to use his right hand to handle a gun was hotly contested and the eyewitness testimony was not overwhelming, the trial judge's questions and comments could be seen as questioning the credibility of defendant's evidence and were prejudicial); *State v. Whitted*, 38 N.C. App. 603, 606 (1978) (granting new trial after finding that trial judge's statements that the alleged victim "must have fallen into a lawn mower" were prejudicial because they "went to the heart of the very issue for which the defendant was on trial, that is, whether he was possessed of a deadly weapon with which he cut the complaining witness."); *see also State v. Springs*, 200 N.C. App. 288 (2009) (unpublished) (trial judge's comment that defendant's boyfriend "had no involvement

in the case" went to the heart of the case because it demonstrated the judge's disbelief of the defense theory that the boyfriend brought the drugs into defendant's apartment while she was not there).
- Statements concerning sentencing. *See State v. Griffin*, 44 N.C. App. 601 (1980) (trial judge improperly expressed an opinion on defendant's guilt where, prior to the return of a verdict, the foreman asked if the jury could explain its decision and the judge made remarks about sentencing that assumed that the jury had reached a guilty verdict and left little doubt that he expected a guilty verdict).

It is not an impermissible expression of opinion for the trial judge:

- To refuse to grant a defendant's request that he or she be referred to by name and not as "the defendant." *State v. Brown*, 306 N.C. 151 (1982).
- To use the word "victim" when referring to the alleged victim of the crime in the instructions to the jury. *State v. Gaines*, 345 N.C. 647 (1997); *State v. Hill*, 331 N.C. 387 (1992). *But see State v. Walston*, 367 N.C. 721, 732 (2014) (court found no error in trial judge's use of the word "victim" to describe the complaining witness but noted circumstances where the "best practice" would be for the trial judge to modify the pattern instructions to use "alleged victim" or "prosecuting witness").
- To make ordinary rulings during the course of the trial. *State v. Weeks*, 322 N.C. 152 (1988); *State v. Welch*, 65 N.C. App. 390 (1983).
- To explain the role of the prosecutor and defense attorney to the jury. *State v. Hudson*, 54 N.C. App. 437 (1981).

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***Practice note:*** The provisions of G.S. 15A-1222 and G.S. 15A-1232 are mandatory; therefore, a defendant's failure to object to an alleged expression of opinion by the trial court in violation of those statutes generally does not result in waiver of that issue on appeal. *State v. Young*, 324 N.C. 489 (1989); *State v. Summey*, 228 N.C. App. 730 (2013). Counsel must always specifically object to an expression of opinion by the trial judge on *constitutional* due process grounds to preserve that issue on appeal. The better practice is always to lodge a timely objection to a trial judge's improper comments or actions, specifically stating all the bases for the objection.

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### C. Questioning of Witnesses Allowed, within Limits

A trial judge may direct questions to a witness in order to clarify the witness's testimony and to promote a better understanding of it. *See State v. Whittington*, 318 N.C. 114 (1986); *State v. Alston*, 38 N.C. App. 219 (1978). N.C. Rule of Evidence 614(b) specifically allows the trial judge to "interrogate witnesses, whether called by itself or by a party."

However, a trial judge may not, by his or her questions, intimate an opinion regarding the guilt of the defendant, the witness's credibility, or whether any fact essential to the State's case has been proved. *See State v. Yellorday*, 297 N.C. 574 (1979); *State v. Lowe*, 60 N.C. App. 549 (1983). A judge must conduct his or her questioning carefully and in a manner that avoids prejudice to the parties. If the judge expresses an opinion by the tenor,

frequency, or persistence of his or her questions, error has occurred in violation of G.S. 15A-1222. *State v. Rinck*, 303 N.C. 551 (1981); *State v. Currie*, 293 N.C. 523 (1977). If the expression of opinion might reasonably have had a prejudicial effect on the defendant's trial, the error will not be considered harmless and a new trial will be awarded. *See, e.g.*, *State v. McEachern*, 283 N.C. 57 (1973) (granting new trial where trial judge's question to prosecuting witness was an impermissible expression of opinion because it assumed defendant had raped her); *State v. Oakley*, 210 N.C. 206, 211 (1936) (finding prejudicial error where trial judge impermissibly expressed an opinion when he asked, "you tracked the defendant to whose house?"; remedial action taken by trial judge when he said, "I didn't mean to say the defendant" did not remove the lasting impression made by the question on the jury); *see also supra* § 22.1B, Expression of Opinion Prohibited.

As with other remarks and conduct prohibited by G.S. 15A-1222, the prohibition against the trial judge expressing an opinion when questioning a witness applies only when the jury is present. *State v. Rogers*, 316 N.C. 203 (1986).

***Practice note:*** N.C. Rule of Evidence 614(c) provides that no objection is necessary "to questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled." Counsel must still specifically object to prejudicial questioning by the trial judge on *constitutional* grounds to preserve the issue on those grounds. *See Herndon v. Herndon*, 368 N.C. 826 n.4 (2016) (noting that while Rule 614(c) operates to automatically preserve appellate review of the impropriety of a trial judge's witness interrogation, it does not preserve an argument that the judge's inquiry infringed on a litigant's constitutional rights).

### D. Absence of Trial Judge During Proceedings

Occasionally, some trial judges will absent themselves temporarily during the proceedings. To the extent this practice goes on, it occurs most often during jury selection and closing argument. *See, e.g.*, *State v. Parker*, 119 N.C. App. 328 (1995) (finding no gross impropriety in the prosecutor's closing argument even though the prosecutor made an untrue representation where defendant neither objected to the argument nor to the trial judge's absence from the courtroom during portions of closing argument); *State v. Colbert*, 65 N.C. App. 762, 769 (1984) (Becton, J., dissenting) (noting that "[i]t is not uncommon for trial judges to be inattentive, or even absent themselves from the courtroom, during jury selection"), *rev'd*, 311 N.C. 283 (1984); *State v. Soloman*, 40 N.C. App. 600, 604 (1979) (new trial granted where "not only was the judge not in the courtroom when the [prosecutor's objectionable closing] argument was made, he also refused to make an effort to ascertain [in violation of G.S. 15A-1241(c)] what had been argued so that he could fairly consider defendant's objection and motion for a mistrial").

Courts from other jurisdictions have found that the judge's absence during trial violates various constitutional rights, discussed in the practice note below. These cases also suggest a basis for finding a violation of the defendant's statutory rights under North Carolina law, also discussed in the practice note. There is a split of authority among these

courts over whether a trial judge's absence from the bench is reversible error per se or whether it is subject to harmless error analysis. *See Riley v. Deeds*, 56 F.3d 1117 (9th Cir. 1995) (so noting and collecting cases). Some courts find that the error renders the verdict a nullity while others will reverse a conviction only if the defendant shows actual prejudice resulting from the judge's absence from the proceedings. Many courts place emphasis on whether the defendant explicitly or implicitly waived the right to the judge's presence. *See id.*; *see also Peri v. State*, 426 So. 2d 1021 (Fla. Dist. Ct. App. 1983) (although a judge's absence during jury voir dire, over a defendant's objection, constitutes reversible error per se, this error can be waived); *Stirone v. United States*, 341 F.2d 253 (3d Cir. 1965) (defense counsel implicitly assented to trial judge's absence during peremptory challenges to the jury where counsel made no objection and did not mention the absence during any part of the trial).

While the N.C. Supreme Court has not definitively addressed the issue of a trial judge's absence during trial, the Court has stated in dicta that "the absence of the judge from the proceedings will not constitute reversible error unless the record shows that something occurred which would harm the defendant." *State v. Arnold*, 314 N.C. 301, 308 (1985) (defendant's argument that the trial judge left the courtroom during closing arguments was not supported by the record so the issue was not properly before the court for review; apparently neither the State nor the defendant had requested that closing arguments be recorded); *see also State v. Smith*, 162 N.C. App. 46 (2004) (quoting *Arnold* but declining to address defendant's contention that the trial judge erred by leaving the courtroom during a portion of the prosecutor's closing argument because a new trial had been granted on other grounds). Although the *Arnold* court describes the review standard as "well established," the three cases it cites were from other jurisdictions and date back to 1907, 1915, and 1950.

The N.C. Court of Appeals addressed the issue in *State v. Levya*, 181 N.C. App. 491 (2007), but in the context of whether the trial judge violated his statutory duty under G.S 15A-1211(b) to decide all "questions concerning the competency of jurors." The judge in *Levya* absented himself from jury selection and left the parties to excuse jurors for cause by stipulation. "[S]ome potential jurors" were dismissed by stipulation in his absence. *Id.* at 494. The Court of Appeals found the judge had erred in excusing himself from the courtroom during jury selection but the defendant was not entitled to relief because he failed to show that he was prejudiced by the judge's absence.

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***Practice note:*** If the judge announces his or her intention to leave the courtroom during a portion of the trial, you should object immediately. If the judge leaves the courtroom during the proceedings without advance notice, object on the record at the next opportunity. As grounds for the objection, assert that the judge's absence violates your client's right to a trial before a fair and impartial jury under the Sixth Amendment to the U.S. Constitution and under article I, section 24 of the N.C. Constitution. *See Peri v. State*, 426 So. 2d 1021, 1023 (Fla. Dist. Ct. App. 1983) ("[t]he presence of the trial judge is at the very core of [the Sixth Amendment] constitutional guarantee" to a trial by an impartial jury); *United States v. Heflin*, 125 F.2d 700, 700 (5th Cir. 1942) ("In a trial by jury the judge is an essential actor, and he should be present during all the proceedings. If

he has to leave the bench, the trial should be suspended."). You should also assert a violation of the client's right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and under article I, section 19 of the N.C. Constitution. *See Gay v. Graham*, 269 F.2d 482, 486 (10th Cir. 1959) (for a trial judge "to leave the courtroom or to be out of hearing so as to lose control of the trial so that the proceeding is, in effect, without a judge is a denial of due process").

If the judge's absence reflects adversely on the client's case—for example, he or she leaves during defense counsel's closing argument—assert in addition to the above constitutional violations that the judge, by his or her absence, violated G.S. 15A-1222 by expressing an opinion to the jury that the argument was unimportant. *See, e.g., United States v. Mortimer*, 161 F.3d 240, 242 (3d Cir. 1998) (although court did not require defendant to show prejudice since it found the absence of the judge during defendant's closing argument to be structural error, it noted that "[p]rejudice to the defendant from the jury inferring that the defense was not worth listening to may have occurred").

Preserve the record by asking the court reporter to note the times that the judge left and returned to the bench. You should always move for complete recordation of the proceedings in all cases (*see infra* Appendix B, Preserving the Record on Appeal); but, if you failed to do so, make sure that the record is reconstructed to reflect accurately and completely any irregularities that occurred during the judge's absence.

### E. Judicial Comment on the Verdict Prohibited

A trial judge is prohibited from commenting on the verdict in criminal cases in open court in the presence or hearing of any member of the jury panel. If he or she comments on the verdict, or praises or criticizes the jury on account of its verdict, any defendant whose case is calendared for that session of court is entitled to a continuance of his or her case to a time when all members of the jury panel are no longer serving. *See* G.S. 15A-1239; *see also* G.S. 1-180.1. The right to a continuance is waived by failing to move to continue before trial. *State v. Neal*, 60 N.C. App. 350 (1983). Under the provisions of G.S. 15A-1239 and G.S. 1-180.1, a continuance is the only remedy for a judicial comment on the verdict. *Id.*