Chapter 22
Duties and Conduct of Presiding Judge

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This chapter addresses the duties of the judge presiding at trial and the restrictions on his or her conduct in the presence of the jury. Specifically, this chapter covers the trial judge's duty of impartiality, disqualification of the trial judge when his or her impartiality might reasonably be questioned, control of the proceedings, and maintaining order and security in the courtroom (including closure of the courtroom and the restraint and removal of the defendant, witnesses, and spectators).

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).

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.

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.

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.*

22.2 Recusal of Trial Judge

A. Applicable Law

Due process requires the trial judge to be absolutely impartial. *See Williams v. Pennsylvania*, ___ U.S. ___, 136 S. Ct. 1899, 1909 (2016) ("Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself."); *Caperton v. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'") (citation omitted); *Hope v. Charlotte-Mecklenburg Bd. of Educ.*, 110 N.C. App. 599, 602 (1993) ("One of the essential elements of due process is a fair hearing by a fair tribunal. In order to provide a fair hearing, due process demands an impartial decision maker."); *see also supra* § 22.1A, Impartiality: In General (discussing general obligation of impartiality). G.S. 15A-1223 and Canon 3 of the N.C. Code of Judicial Conduct both address the disqualification of a judge presiding over a criminal trial when a claim of partiality is raised.

Under G.S. 15A-1223(a), a judge may disqualify him or herself on his or her own motion. On motion of the State, or on the motion of the defendant, recusal is mandatory in a criminal case if the judge is:

- prejudiced against the moving party or in favor of the adverse party;
- closely related to the defendant by blood or marriage;
- for any other reason unable to perform the duties required of him or her in an impartial manner; or
- a witness for or against one of the parties in the case.

G.S. 15A-1223(b), (e).

Canon 3(C)(1)(a) of the N.C. Code of Judicial Conduct provides that on the motion of any party, a judge should disqualify himself or herself in a proceeding in which his or her impartiality may reasonably be questioned, including but not limited to instances where he or she has a personal bias or prejudice concerning a party. For other instances requiring disqualification, such as kinship or financial interest in the matter in controversy, see Canon 3(C)(1)(b)–(d).

B. Procedural Requirements

The motion to disqualify "must be in writing and must be accompanied by one or more affidavits setting forth facts relied upon to show the grounds for disqualification." G.S. 15A-1223(c). The motion must be filed no less than five days before the time the case is called for trial unless good cause is shown for failure to file within that time period. G.S. 15A-1223(d).

C. Burden on Moving Party

When a party moves for recusal, that party has the burden "'to demonstrate objectively that grounds for disqualification actually exist.'" *State v. Scott*, 343 N.C. 313, 325 (1996) (citations omitted). A mere allegation of bias or prejudice is not enough to compel recusal. *State v. Moffitt*, 185 N.C. App. 308 (2007). The party must show that substantial evidence exists that the judge has such a personal bias, prejudice, or interest that he or she would be unable to rule impartially. *Scott*, 343 N.C. 325. "The bias, prejudice, or interest which requires a trial judge to be recused from a trial has reference to the personal disposition or mental attitude of the trial judge, either favorable or unfavorable, toward a party to the action before him." *State v. Kennedy*, 110 N.C. App. 302, 305 (1993). If a reasonable person knowing all of the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner, then the judge should either recuse himself or herself or refer the matter to another judge to consider the motion. *State v. Poole*, 305 N.C. 308, 320 (1982). If the allegations in the motion to recuse are such that findings of fact are required, the trial judge should not rule on the motion but should refer the matter to another judge for hearing. *N.C. Nat'l Bank v. Gillespie*, 291 N.C. 303 (1976) (citing *Ponder v. Davis*, 233 N.C. 699 (1951)).

D. Additional Resources

For a collection of cases and further discussion of this topic, including a discussion of actual vs. perceived partiality on the part of the trial judge, see Michael Crowell, *Recusal*,

ADMINISTRATION OF JUSTICE BULLETIN No. 2015/05 (UNC School of Government, Nov. 2015). For case summaries addressing recusal motions, see JOHN RUBIN & ALYSON A. GRINE, 1 NORTH CAROLINA DEFENDER MANUAL § 13.4C (Motion to Recuse Trial Judge) (2d ed. 2013).

22.3 Control of Proceedings

A. In General

It is the duty of the trial judge to regulate the conduct and the course of business during trial. *State v. Spaulding*, 288 N.C. 397 (1975), *vacated in part on other grounds*, 428 U.S. 904 (1976). "Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his [or her] discretion." *State v. Rhodes*, 290 N.C. 16, 23 (1976). Judges may take whatever legitimate steps are necessary to maintain proper decorum and an appropriate atmosphere in the courtroom during a trial. *State v. Dickerson*, 9 N.C. App. 387 (1970).

For a collection of cases addressing the measures taken by trial judges to preserve proper decorum in the courtroom, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 168, at 626 n.551 (8th ed. 2018).

B. Control of Examination of Witnesses

The trial judge has the power and duty to control the examination and cross-examination of the witnesses both for the purpose of conserving the time of the court and protecting the witness from prolonged, needless, or abusive examination. *See State v. Fleming*, 350 N.C. 109 (1999); *State v. Arnold*, 284 N.C. 41 (1973). He or she may ban unduly repetitious and argumentative questions as well as inquiry into matters of tenuous relevance. *State v. Satterfield*, 300 N.C. 621 (1980); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 168, at 623–25 (8th ed. 2018) (discussing method of examination and order in the courtroom).

C. Control of Examination of Potential Jurors

The trial judge has the power to regulate and supervise jury selection so that the defendant and the State receive the benefit of a trial by a fair and impartial jury. *See State v. Brady*, 299 N.C. 547 (1980). Regulation of the manner and extent of the questions of a potential juror regarding his or her fitness rests in the trial judge's discretion and that decision will not be disturbed on appeal in the absence of a showing of an abuse of discretion and prejudice to the defendant. *State v. Johnston*, 344 N.C. 596 (1996); *State v. Hunt*, 37 N.C. App. 315 (1978). For a further discussion of jury selection, see *infra* Ch. 25, Selection of Jury.

D. Control of Witnesses and Spectators

A trial judge has the power and duty to control the conduct of witnesses and spectators in the courtroom. *See State v. Maness*, 363 N.C. 261, 282 (2009) (no abuse of discretion by trial judge in denying defendant's motion for mistrial based on the "troubling" conduct of three uniformed law enforcement officers who approached the jury box and stood very close to jurors when autopsy photographs of the victim, a slain officer, were passed to the jury); *State v. Braxton*, 344 N.C. 702 (1996) (trial judge properly denied motion for mistrial based on the spectators wearing buttons allegedly depicting a victim where defendant failed to show sufficient facts, including whether the jury even noticed the buttons); *State v. Higginbottom*, 312 N.C. 760 (1985) (judge did not improperly express opinion when, outside the presence of the jury, he admonished defendant's witnesses and warned them that their actions could result in their being jailed).

For a discussion of the trial judge's authority to remove witnesses or spectators from the courtroom, see *infra* § 22.4D, Removal of Disruptive Witnesses or Spectators. For a discussion of the constitutional implications of spectator conduct, focusing particularly on the wearing of buttons at criminal trials, see Scott Kitner, Note, *The Need and Means to Restrict Spectators From Wearing Buttons at Courtroom Trials*, 27 REV. LITIG. 733 (2008).

E. Control of Attire

For a discussion of a trial judge's authority to regulate courtroom attire, see Michael Crowell, *Inherent Authority*, N.C. SUPERIOR COURT JUDGES' BENCHBOOK (Jan. 2015); Jeff Welty, *Limits on Defendants' Courtroom Attire*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 16, 2015); Jeff Welty, *What Not to Wear . . . If You're a Juror*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 16, 2014); Shea Denning, *The Way These Women Dress Is Criminal*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (March 25, 2014).

22.4 Maintaining Order and Security in the Courtroom

A. Controlling Access to/Closure of the Courtroom

Generally. Article I, section 18 of the N.C. Constitution requires that "[a]ll courts shall be open," and section 24 provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." Additionally, the Sixth Amendment to the U.S. Constitution mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." This right extends to the states through the Fourteenth Amendment. *See Presley v. Georgia*, 558 U.S. 209 (2010) (defendant's right to a public trial encompasses the jury selection phase). "The trial and disposition of criminal cases is the public's business and ought to be conducted in public in open court." *In re Edens*, 290 N.C. 299, 306 (1976).

In discussing public trials, the U.S. Supreme Court has stated:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . . In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Waller v. Georgia, 467 U.S. 39, 46 (1984) (citations and internal quotation marks omitted). A violation of the right to a public trial constitutes structural error and as such, is not subject to a harmless error analysis. *See State v. Rollins*, 221 N.C. App. 572 (2012) (finding structural error but remanding case for a hearing on the propriety of the closure of the courtroom; trial judge had failed to make findings of fact pursuant to *Waller* before closing courtroom during the alleged rape victim's testimony).

"Although the right of access to criminal trials is of constitutional stature, it is not absolute." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). A trial judge may, "in the interest of the fair administration of justice, impose reasonable limitations on access to a trial." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980) (recognizing that the press and the public have an implicit right under the First Amendment to attend trials in criminal cases). Under certain circumstances, a "reasonable limitation" may include closure of the courtroom to the public. *See Waller*, 467 U.S. 39 (setting out a four-part test that trial judge must use in balancing the State's interest against the defendant's constitutional right to a public trial). "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Id.* at 45. Reasons that have been found to justify closure include threats to participants and observers and attempts by the defendant to escape. *See State v. Murray*, 154 N.C. App. 631 (2002).

Procedural requirements for closing a courtroom. Before closing a courtroom to the public in a criminal case, the trial judge must:

- determine whether the party seeking closure has advanced an overriding interest that is likely to be prejudiced;
- order closure no broader than necessary to protect that interest;
- consider reasonable alternatives to closing the proceeding; and
- make findings adequate to support the closure.

State v. Jenkins, 115 N.C. App. 520, 525 (1994) (citing *Waller v. Georgia*, 467 U.S. 39, 48 (1984)). The State has the burden of presenting sufficient evidence, either in its case-in-chief or by voir dire, to permit the trial judge to satisfy the four-part *Waller* test. *State v. Rollins*, 231 N.C. App. 451 (2013). The trial judge's findings of fact need not be exhaustive but must be sufficient for an appellate court to review the propriety of his or her decision to close the proceedings. *State v. Rollins*, 221 N.C. App. 572 (2012).

The trial judge should take care not to unduly restrict access to the courtroom. *Compare State v. Moctezuma*, 141 N.C. App. 90 (2000) (new trial awarded where trial judge made no findings of fact before closing the courtroom not only to the general public, but to defendant and defense counsel as well), *with State v. Godley*, 234 N.C. App. 562 (2014) (closure of the courtroom upheld where it was limited to the examination of the alleged victim and did not apply to essential court personnel, members of defendant's family, or witnesses), *and State v. Comeaux*, 224 N.C. App. 595 (2012) (closure of the courtroom was no broader than necessary where less than eight spectators were excluded, only one of whom was favorable to defendant and was already subject to sequestration order). The trial judge may order the courtroom closed for the entire trial or for only a portion of the proceedings. *See, e.g., State v. Clark*, 324 N.C. 146 (1989) (no impropriety found where trial judge limited public egress from the courtroom during closing arguments so as not to distract the jury).

Statutory authority for limiting access. Under G.S. 15A-1034(a), a judge "may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present." G.S. 15-166 specifically provides that the trial judge may exclude bystanders in rape or sex offense trials during the taking of the testimony of the prosecutrix. *See State v. Register*, 206 N.C. App. 629 (2010) (no abuse of discretion by trial judge in child sex offense case in excluding, pursuant to G.S. 15A-166 and G.S. 15A-1034, all spectators from the courtroom during the alleged victim's testimony except for the alleged victim's mother and stepfather, an investigator for each side, and a high school class that was observing court proceedings). The four-part *Waller* test must be applied in ruling on a request to close the courtroom made pursuant to G.S. 15-166. *See State v. Rollins*, 221 N.C. App. 572 (2012) (while G.S. 15-166 allows the closure of the courtroom during a rape victim's testimony, the trial judge must balance the interests of the prosecutor with defendant's constitutional right to a public trial).

Statutory authority for ordering search of persons in courtroom. G.S. 15A-1034(b) authorizes a trial judge to "order that all persons entering or any person present and choosing to remain in the courtroom be searched for weapons or devices that could be used to disrupt or impede the proceedings." The judge may also "require that belongings carried by persons entering the courtroom be inspected." If the judge orders a search pursuant to this subsection, he or she must enter it on the record.

Practice note: Although the denial of the right to a public trial is considered structural error generally necessitating a new trial, counsel must lodge a timely objection based on state and federal *constitutional* grounds to preserve the issue on appeal. *See generally State v. Rollins*, 221 N.C. App. 572 (2012) (acknowledging that the denial of the right to a public trial amounts to structural error); *see also State v. Sheets*, 239 N.C. App. 574 (2015) (unpublished) (refusing to review the merits of defendant's argument that his constitutional right to a public trial was violated where defendant failed to object when the State moved to exclude bystanders during the prosecuting witness' testimony). Counsel should also object on statutory grounds, if applicable, to any restriction of access to the courtroom.

B. Controlling Access to Other Areas

In especially unusual circumstances, the trial judge may restrict activities not only in the courtroom itself, but also in areas around the courthouse. *See, e.g., State v. Grant*, 19 N.C. App. 401, 414 (1973) (trial judge's prohibition of picketing, parading, and congregating in and around courthouse and requirement that spectators submit to a search for weapons before entering courtroom were proper where the case was "of a nature which would attract public attention" and "[i]t was necessary for the court to maintain discipline and decorum in the courtroom and its environs").

C. Removal of Disruptive Defendant

All criminal defendants have a constitutional right to be present at every stage of trial. This right can be waived by a non-capital defendant either expressly or by his or her disruptive behavior. When a defendant becomes disruptive, the trial judge has the authority to remove him or her from the courtroom, but strict procedures must be followed before doing so. For a detailed discussion of the defendant's right to be present, and the procedures that must be followed in order to remove a disruptive defendant, see *supra* § 21.1F, Removal of Disruptive Defendant (describing personal rights of defendant).

D. Removal of Disruptive Witnesses or Spectators

G.S. 15A-1033 authorizes a trial judge, in his or her discretion, to order any person other than a defendant removed from a courtroom when his or her actions disrupt the conduct of the trial. *See also State v. Dawson*, 281 N.C. 645, 656 (1972) (no prejudicial error by trial judge in ejecting two disruptive spectators from the courtroom "until they decided to behave themselves" because the action was necessary in order for the trial to continue "under circumstances of judicial decorum and fairness to all concerned"); *State v. Dean*, 196 N.C. App. 180 (2009) (no abuse of discretion by trial judge in removing four spectators from the courtroom during defendant's trial for an allegedly gang-related murder where one spectator was a co-defendant, jurors had expressed concerns for their safety as had jurors in defendant's first trial, and the spectators had violated pretrial orders concerning decorum in the courtroom). The judge is not required to make findings of fact to support his or her removal of disruptive spectators from the courtroom. *Dean*, 196 N.C. App. 180, 189 (while a trial judge is required by G.S. 15A-1032 to enter in the record the reasons for removing a disruptive defendant from the courtroom, G.S. 15A-1033 "imposes no such requirement").

E. Restraint of Defendant and Witnesses During Trial

Restraint of defendant allowed only under extraordinary circumstances. The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the use of physical restraints visible to the jury unless the trial court has determined, in its discretion, that the restraints are justified by an essential state interest specific to a particular trial. *Deck v. Missouri*, 544 U.S. 622 (2005); *see also State v. Tolley*, 290 N.C. 349 (1976) (the Due Process

Clause of the U.S. Constitution and article I, section 19 of the N.C. Constitution require the defendant to be tried free of all bonds or shackles except in extraordinary instances). G.S. 15A-1031 provides that a defendant may be physically restrained during his or her trial "when the judge finds the restraint is reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons." For a detailed discussion of the defendant's right to appear at trial free from physical restraints and the procedures that must be followed before a defendant may be restrained, see *supra* § 21.6, Right to Appear Free of Physical Restraints (describing personal rights of defendant).

Restraint of witnesses during trial. In addition to allowing a defendant to be restrained under certain circumstances, G.S. 15A-1031 grants the trial judge the authority to restrain witnesses. The procedures applicable to the restraint of the defendant, described *supra* in § 21.6, Right to Appear Free of Physical Restraints, are also applicable to the restraint of witnesses. Whether to restrain a witness is a discretionary decision and will not be disturbed absent an abuse of discretion. *See State v. Abraham*, 338 N.C. 315 (1994) (no abuse of discretion or expression of opinion on credibility shown where trial judge permitted incarcerated prosecuting witness to appear without shackles but required three incarcerated defense witnesses to be restrained while testifying).

Necessity for objection. Appellate review is waived if counsel fails to object to the trial judge's order of restraint. *See State v. Tolley*, 290 N.C. 349 (1976); *State v. Thomas*, 134 N.C. App. 560 (1999). Counsel must specifically assert a constitutional and statutory basis for the objection to preserve the issue on both grounds on appeal. *See State v. Holmes*, 355 N.C. 719 (2002) (where defendant failed to object on constitutional grounds, review of the trial judge's decision to restrain was limited to statutory error pursuant to the abuse of discretion standard). To preserve a challenge to the trial judge's failure to comply with the statutory requirements of G.S. 15A-1031, a defendant must object and specify the grounds on which the objection is based. *See State v. Paige*, 316 N.C. 630 (1986) (appellate review of the trial judge's failure to give instruction required by G.S. 15A-1031(3) was waived because defendant made no objection at trial).

Practice note: If the trial judge, over objection, orders the defendant or a defense witness to be physically restrained during trial, counsel should request that the jury's view of the restraints be obstructed and that the defendant or witness walk to and from the witness chair outside the presence of the jury. *See, e.g., State v. Wilson*, 354 N.C. 493 (2001) (defendant's leg braces were hidden underneath his clothing); *State v. Atkins*, 349 N.C. 62 (1998) (cloth was draped over defense table to conceal defendant's leg restraints from jury); *State v. Wright*, 82 N.C. App. 450 (1986) (oversized briefcase placed by defendant's chair to obstruct jurors' view of his shackles). If the restraints are not visible to the jury, the risk is reduced that the restraints will create prejudice in the minds of the jurors. *See State v. Holmes*, 355 N.C. 719 (2002). However, the restraints may still impede the person's thought processes and ease of communication.

When a defendant or a defense witness is restrained, counsel also should consider whether an instruction to the jury regarding the restraints would be helpful or whether it would draw negative attention to the trial judge's determination to restrain that person

during trial. If you do not want an instruction, you must object; otherwise, the trial judge is required by G.S. 15A-1031(3) to instruct the jurors "that the restraint is not to be considered in weighing evidence or determining the issue of guilt."

F. Conspicuous Use of Security Personnel

Occasionally a trial judge may order or allow the conspicuous deployment of security personnel in the courtroom during trial. *See, e.g., State v. Spaulding*, 288 N.C. 397 (1975), *vacated in part on other grounds*, 428 U.S. 904 (1976) (no abuse of discretion by trial judge in allowing use of armed prison guards and officers in and around the courthouse where three defendants were being tried for first degree murder of fellow prison inmate and many of the witnesses were convicts); *State v. Jackson*, 235 N.C. App. 384 (2014) (no abuse of discretion or violation of defendant's constitutional rights to a fair trial or due process where trial judge ordered additional security personnel, including one bailiff standing within arm's reach of defendant, after defendant had slipped out of his leg shackles and escaped from the courtroom during the lunch break on the first day of testimony at his trial for first degree murder). "[I]t is within the judge's discretion, when necessary, to order armed guards stationed in and about the courtroom and courthouse to preserve order and for the protection of the defendant and other participants in the trial." *State v. Tolley*, 290 N.C. 349, 363 (1976).

Unlike the courtroom practices of shackling or requiring the defendant to appear in prison garb, the use of noticeably identifiable security officers in the courtroom has not been found to be the sort of inherently prejudicial practice that should be permitted only when justified by an essential state interest specific to each trial. *See Holbrook v. Flynn*, 475 U.S. 560 (1986) (finding no violation of respondent's Sixth Amendment right to a fair trial where four uniformed state troopers were brought in to cover for overextended courtroom security personnel; troopers sat in the front row of the spectator section not far behind the respondent and five co-defendants who were being tried for armed robbery). In *Holbrook*, the U.S. Supreme Court reasoned that allowing the noticeable deployment of security personnel differs from the inherently prejudicial courtroom practices of shackling and forced appearance in prison garb because there is a wider range of inferences that the jury might draw from the officers' presence. Shackling and prison clothes unmistakably indicate that the defendant needs to be separated from the community at large while the presence of guards in a courtroom may likely be taken for granted by the jury "so long as their numbers or weaponry do not suggest particular official concern or alarm." *Id.* at 569. Under the circumstances presented in *Holbrook*, the Court believed that the four officers sitting quietly in the front row were unlikely to be taken by the jury as a sign of anything other than a normal concern for the safety and order of the proceedings. Although the Court found no constitutional violation in *Holbrook*, it was careful to note that it did not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chance of receiving a fair trial. *See id.* at 570–71.

Practice note: If the trial judge orders or permits additional or conspicuous security personnel to be in the courtroom during trial such that the jury may be influenced

negatively, counsel should object based on a violation of the client's constitutional rights to a fair trial and due process. Cite the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and article I, §§ 19, 23, and 24 of the N.C. Constitution. If the objection is overruled, counsel should ensure that the record contains a detailed description of the security measures that were the basis for the objection.

Counsel may also want to consider whether to request (or object to) a cautionary instruction addressing the amount of security in the courtroom. As with jury instructions regarding clients who are restrained, counsel should consider whether it would be helpful or whether it would draw negative attention to the trial judge's determination that additional security was necessary in the case. *See State v. Jackson*, 235 N.C. App. 384 (2014) (finding no error in trial judge's failure to explicitly instruct the jury regarding the use of additional security measures because it would have drawn the jury's attention to those measures and alerted the jury to the fact that the measures specifically related to defendant's trial).

G. Contempt Powers and Inherent Authority

In addition to the use of the powers set out above, a presiding judge is authorized by G.S. 15A-1035 to maintain courtroom order through the use of his or her contempt powers as provided in G.S. Ch. 5A, Contempt, and through the use of other inherent powers of the court.

H. Additional Resources

For further discussion of courtroom closure and a trial judge's inherent authority to control the courtroom, see Michael Crowell, *Inherent Authority*, N.C. SUPERIOR COURT JUDGES' BENCHBOOK (Jan. 2015), and Michael Crowell, *Closing Court Proceedings*, N.C. SUPERIOR COURT JUDGES' BENCHBOOK (Nov. 2012).