THE RIGHT TO MAKE INQUIRIES DURING VOIR DIRE REGARDING POTENTIAL JURORS' RELATIONSHIPS WITH THE DEFENDING INSURANCE COMPANY

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Despite longstanding authority to the contrary, some trial courts still refuse to allow an inquiry during voir dire about prospective jurors' relationships with the particular insurance company representing the defendant. Part of this refusal undoubtedly stems from concerns about the potential prejudice which might result if juries know that the defendant is covered by liability insurance. As Judge Miller observes, however, the foundation which originally gave rise to many of these concerns has been significantly eroded in modern society:

> These concerns have been questioned. First, modern jurors may well presume that the parties are insured in the absence of evidence to the contrary.[1] For example, proof of insurance or its equivalent is required to obtain a driver's license or motor vehicle registration in many states, including Indiana.[2] This suggests that if the defendant is insured, the law strives mightily to protect jurors from proof of that which they already presume; if the defendant is uninsured, exclusion of that lack of insurance may lead the jury to act upon a false assumption.

12 Robert L. Miller, Jr., Indiana Practice, § 411.101, p.533 (2nd Ed. 1995). Judge Miller further notes that "the jurors' suspicions probably will be confirmed by other evidence or by the questioning during voir dire, when it is proper to inquire into the prospective jurors' relationships with insurers." 12 Miller § 411.101, pp. 533-34. One jurist has gone so far to say that "Any juror who doesn't know there is insurance in the case by this time should probably be excused by virtue of the fact that he or she is an idiot." 12 Miller § 411.101, p. 534 n.11 (quoting Young v. Carter, 121 Ga.App. 191, 173 S.E.2d 259, 261 (1970) (Hall, P.J., concurring)).

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[1] 12 Miller § 411.101, p.533 n.1 (quoting 1 McCormick § 201, at 856-857 (4th ed. 1992): "When the rule originated, insurance coverage of individuals was exceptional. In the absence of references to insurance at trial, a juror most probably would not have thought that a defendant was insured. Today, compulsory insurance laws for motorists are ubiquitous, and liability insurance for homeowners and businesses has become the norm. Most jurors probably assume that defendants are insured.").

[2] 12 Miller § 411.101, p.533 n.2 (citing Ind.Code 9-18-2-11).

In the case of Rust v. Watson, 215 N.E.2d 42 (Ind.Ct.App. 1966), the Court of Appeals similarly questioned the continuing apprehension about reference to insurance:

> The justification for limiting the plaintiff in his examination of the jurors to their interests and connections with insurance companies is due to presumed prejudice that probably will be created in the minds of jurors if they realize the defendant is insured. However, certain anomalies are present. It should be noted that such presumption arose via the case law in the late 19th and early 20th centuries. The continued recognition of such presumed prejudice can be seriously questioned today. Even if the prejudice has not decreased, it can be questioned whether the good faith limitation of such inquiries has any pragmatic effect in concealing from the jury the fact that the defendant is insured. Two considerations are relevant.
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> First, the jurors in the majority of negligence cases enter the court room with the preconceived idea that the defendant carries insurance. The rational of this proposition is expounded in Causey v. Cornelius (1958), 164 Cal.App.2d 269, 330 P.2d 468, where the court stated at pp. 472-73:
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> > "It is time for a reappraisal of this insurance bugaboo . . . This insurance rule, built upon the theory of prejudice against corporations and especially insurance corporations, has largely outlived its purpose and justification . . .
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> > The only justification for the rule excluding (with limitations) evidence of the existence of insurance is the supposition that jurors will be led into excessive verdicts if they become aware of defendant's insurance coverage. Today this is naive conceit (sic) . . . insurance . . . has become so common that jurors naturally assume as they enter the jury box that defendant is insured against liability."
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> The second consideration relates to the latitude of inquiries allowed to counsel. It has been exemplified that the case law in Indiana goes so far as to permit counsel to inquire into the relationship of a juror to a specific insurance company involved. It is conceivable that more pertinent questions might be permitted where the resultant inferences would be even more evident. See King v. Ransburg, supra. Certainly via these inquiries the jurors will probably become aware that a defendant is insured.
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> By reason of the scope of allotted freedom as to the inquiries into a prospective

> juror's connection with a financially interested insurance company, it is quite evident that the jury will probably acquire knowledge that the defendant is insured. When this is considered with the fact that the jurors probably have a preconceived idea that the defendant is insured, there can be little doubt remaining that jurors in the great majority of cases know or believe that a defendant is insured.

Rust, 215 N.E.2d at 53-54.

Perhaps, as the Rust Court suggested thirty-five years ago, it is indeed time to rethink "this insurance bugaboo," especially in light of Indiana's compulsory automobile insurance requirements and the prevalence of liability insurance in our society. But rather than retreating from this seemingly antiquated rule, there have been increasingly strident efforts in recent years to eliminate or severely restrict inquiry during voir dire about prospective jurors' relationships with the particular insurance company representing the defendant. The recent and heightened discordance on this issue may be attributable to the Indiana Supreme Court decision in Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151 (Ind. 1999), wherein the Court held that the use by insurance companies of in-house or "captive" law firms does not necessarily constitute the unauthorized practice of law by the insurance company." Id. at 165. However, the Court simultaneously held that such captive firms must clearly and conspicuously identify (on letterhead, advertising, etc.) their affiliation with their insurance company employers so as to not run afoul of Professional Conduct Rule 7.2. Id.

In this context, the case of Stone v. Stakes, 749 N.E.2d 1277 (Ind.Ct.App. 2001) recently addressed whether a motion for a mistrial was properly denied after Stakes' counsel identified the firm representing Stone as the "Litigation Section of Warrior Insurance Group, Inc."[3] Id. at 1279.

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[3] On the morning of trial, Mr. Marc Lloyd filed an appearance on behalf of the defendant, Stone, which gave his address as "Conover & Foos Litigation Section of Warrior Insurance

Stone's counsel then objected, and the objection was overruled. Thereafter, Stakes' counsel asked if any of the prospective jurors knew opposing counsel, any members of his firm, or if they had "any interest in or affiliation with [Gallant] Insurance Company or the Warrior Insurance Group." Id. at 1279.

After Stakes' counsel concluded his portion of voir dire, Stone's counsel asked for a sidebar conference and moved for a mistrial because of opposing counsel's reference to insurance. The motion for a mistrial was denied, and the trial proceeded on the issue of damages. The jury returned a verdict in favor of Stakes in the amount of $ 25,000. Id.

On appeal, the Court of Appeals noted the longstanding rule that "evidence that a defendant has insurance is not allowed in a personal injury action and that its admission is prejudicial." Id. (citing Rausch v. Reinhold, 716 N.E.2d 993, 1002 (Ind.Ct.App. 1999);Pickett v. Kalb, 250 Ind. 449, 237 N.E.2d 105, 107 (1968); and Martin v. Lilly, 188 Ind. 139, 121 N.E. 443, 445 (1919)). The Court noted that "the rationale for not allowing evidence regarding insurance is that if the jury becomes aware of the fact that the defendant carries liability insurance and will not bear the brunt of any judgment, the jury may be prejudiced in favor of an excessive verdict." Id. (citing Rust v. Watson, 141 Ind. App. 59, 76, 215 N.E.2d 42, 51 (1966)). On the other hand, the Court also observed the corollary concern that "if the jury becomes aware of the fact that the defendant does not have insurance and will bear the entire burden of any judgment, the jury may be prejudiced in favor of a minimal verdict." Id. (citing Strand v. Pedersen Bros. Co., 140 Ind. App. 621, 623, 224 N.E.2d 689, 690 (1967)).

Group, Inc." Stone, 749 N.E.2d at 1279.

In passing upon the propriety of Stakes' counsel's references to insurance, the Court of Appeals found that the timing of the reference, i.e., during voir dire, was of considerable importance:

> It is important to note at this juncture the precise timing of the reference. The reference was made during voir dire, while the parties were questioning the prospective jurors, and not made during the trial itself. The trial court is afforded broad discretion in regulating the form and substance of voir dire examination. Antcliff v. Datzman, 436 N.E.2d 114, 121 (Ind.Ct.App. 1982). The purpose of allowing voir dire examination of prospective jurors is to permit the rational exercise of the rights of challenge, peremptory and for cause. FMC Corp. v. Brown, 551 N.E.2d 444, 447 (Ind. 1990). The motion in limine filed by Stone in this case with respect to insurance was granted with the specific exception of voir dire.

Stone, 749 N.E.2d at 1280-81. Stone did not contend on appeal that there was any error in allowing Stakes' counsel to question the prospective jurors about any interest they might have had in Warrior Insurance Group or Gallant Insurance Company. Rather, Stone's allegation of error was premised solely upon Stakes' identification of Stone's attorneys as members of the Conover and Foos Litigation Section of the Warrior Insurance Group during voir dire. Stone argued that the identification "immediately [implied] to the jury that the Defendant was covered by liability insurance," which was not relevant to the issues in this case and was prejudicial. Id. at 1281.

The Court of Appeals noted that while Ind.Evidence Rule 411 states that "evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully," the Rule also "does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as . . . ownership, or control, or bias or prejudice of a witness." Id.; Evid. R. 411. The Court further

held:

> Although Rule 411 is an evidentiary rule not strictly applicable to voir dire, it provides some guidance in this area regarding what categories of inquiry are acceptable. Rule 411 does not limit the allowable evidence regarding insurance only to financial interest, but also allows evidence going to bias or prejudice. Thus, a question regarding a juror's relationship, financial or otherwise, with a specific insurance company on voir dire examination is not error if the question is asked in good faith.

Id. (citing Rust, 215 N.E.2d at 52-53). Nonetheless, Stone argued that Stakes' counsel's reference to the full name of the firm representing Stone was a deliberate attempt to interject insurance into the case. Id. In rejecting this contention, the Court of Appeals held as follows:

> That Stakes' counsel referred to the attorney representing Stone as a member of the "Litigation Section of Warrior Insurance Group" does not tie Stone any more directly to insurance than the admittedly proper questioning of the jurors about a financial interest in Warrior or Gallant. Any prejudice due to the reference is entirely too speculative to require reversal in this case. There may have been equally effective ways to find out if prospective jurors have had any dealings with Stone's attorney or attorneys in his office. However, we do not believe that Stakes' counsel, reading from an appearance form handed to him that morning which, for the first time, identified Stone's counsel as a member of a captive law firm of Warrior Insurance, was deliberately attempting to inform the jury that Stone was covered by liability insurance and prejudice the venire in favor of a verdict for his client. If this were a case which involved two independent law firms, rather than an independent law firm and a captive law firm, there is no question that it would have been appropriate for Stakes' counsel to have asked the venire if any of them knew, had been represented by, or had dealings with not only the attorney present in court, but any other member of his or her firm, naming that firm. It is entirely conceivable, especially in this day of increasingly common lateral moves from firm to firm, that a prospective juror would not know any of the current attorneys in a firm, but would have known attorneys previously associated with that firm. There could be prejudice for or against not only individual members of a firm but also a firm itself. In this particular instance, it just so happens that the "firm" is actually an insurance company. Moreover, counsel for Stone acknowledged at oral argument that if he were in-house counsel for an insurance company, rather than a member of a captive law firm, it would have been appropriate for Stakes' counsel to identify him as in-house counsel for that insurance company. We believe that the difference between in-house counsel and members of a captive law firm is a

> difference without a distinction. In both situations, counsel is employed by an insurance company and represents the interests of that company. Thus, if it would be appropriate to identify in-house counsel by his or her affiliation with a company, it is equally appropriate to identify a member of a captive law firm in such a way.

Id. at 1282.

Rehearing on Stone v. Stakes was sought by Stakes and granted by the Court of Appeals. On September 13, 2001, the Court issued its rehearing opinion. Stone v. Stakes, 755 N.E.2d 220 (Ind.Ct.App. 2001), trans. denied. Although the Court reaffirmed its decision in all respects, it granted a rehearing "for the sole purpose of addressing a point raised by Stone in his petition regarding our duty to balance case law and rule." Id. at 221.

On rehearing, Stone alleged that the "real issue" in this case was how to balance the Indiana Supreme Court's holding in Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151 (Ind. 1999), with the "legislative intent" of Rule of Evidence 411. The Court of Appeals observed the requirement in Wills that captive law firms "must not be named so as to imply an independence from the insurance company that does not in fact exist." Nonetheless, the Court of Appeals held that there was no conflict between Evid.R. 411 and the requirement of Wills:

> We note first that Rule 411 is not a statute, and was not enacted by the legislature. The Indiana Supreme Court adopted the Indiana Rules of Evidence on August 24, 1993, to become effective on January 1, 1994. See Graham v. State, 736 N.E.2d 822, 824 (Ind. Ct. App. 2000). Therefore, Stone's argument that Rule 411's prohibition against the mention of insurance should take precedence over the supreme court's holding in Wills, relying as it does on statutory construction and our duty to give deference to the legislative intent, is not well-taken. It is also important to note that Rule 411's prohibition is not a total prohibition of the mention of insurance, but has limitations in its restrictions.
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> We must assume that the supreme court's pronouncements in Rule 411 and Wills can be reconciled. Requiring captive law firms to indicate their association with an insurance company as part of their name and allowing opposing counsel to

> identify the firm by name to prospective jurors does not impinge upon Rule 411's decree that liability insurance is not admissible "upon the issue whether the person acted negligently or otherwise wrongfully" where, as here, the reference is brief, occurs during voir dire, and is not demonstrably calculated to unduly prejudice the jury.
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> We agree with Stone's assertion, and so stated in our opinion, that there may be other, equally effective ways to uncover juror bias or interest in an insurance company than directly stating the name of the captive law firm. However, the mere fact that it is possible does not mean that when counsel discloses the name of the firm, he or she is necessarily attempting to deliberately interject the issue of insurance into the trial. Even assuming Rule 411 is relevant to voir dire, the rule clearly allows the interjection of a reference to insurance for such other purposes as ownership, control, bias, or prejudice. The issue does not turn on whether the mention of a captive law firm's name was deliberate or inadvertent, but rather on whether the mention was deliberately done in a manner to suggest the defendant acted negligently.
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> We stand by our original holding that Stone has failed to demonstrate that Stakes' counsel was attempting to deliberately prejudice the jury by his brief reference to the name of Stone's counsel's firm during voir dire.

Stone v. Stakes, 755 N.E.2d at 221-22.

Although Stone v. Stakes is the most recent pronouncement on this issue, because similar disputes will continue to occur at the trial court level, it is worthwhile to repeat the well-settled law concerning the right to make inquiries during voir dire about whether potential jurors have any relationship or interest with the particular insurance company involved in the case.

Examination of Ind.Evidence Rule 411 is a good starting point. As noted above, although Evid.R. 411 states that "Evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully," the rule further provides that:

> This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control,

or bias or prejudice of a witness.

As noted by the Court of Appeals in Stone, the question of whether Evid.R. 411 even applies to voir dire examinations is in dispute. Stone, 749 N.E.2d at 1281. But regardless of the application of Evid.R. 411 to voir dire, commentators agree that Rule 411 did not change preexisting Indiana case law. See: Commentary to Burns I.R.E. 411; 12 Robert L. Miller, Jr., Indiana Practice, § 411.101 et. seq. (2nd Ed. 1995); J. Alexander Tanford, Indiana Trial Evidence Manual, p. 101 (3rd Ed. 1993). As such, the second sentence of Evid.R. 411 is wholly consistent with earlier Indiana authorities which have long permitted inquiries during voir dire about whether a prospective juror or his family (1) owns stock or has an ownership interest in a particular insurance company; (2) is an agent or employee of, or holds office in, a particular insurance company; or (3) is insured by, or otherwise has any interest or relationship with, a particular insurance company. As noted by the Indiana Court of Appeals in Beyer v. Safron, 151 N.E. 620 (Ind.Ct.App. 1926):

> Litigants are entitled to a trial by a thoroughly impartial jury, and to that end have a right to make such preliminary inquiries of the jurors as may seem reasonably necessary to show them to be impartial and disinterested. It is a matter of common knowledge that there are numerous companies engaged in such insurance, and that many of the citizens of the state are stockholders in one or more of them. Such citizens may be called as jurors, and if at such time they are such stockholders, or otherwise interested in any of such companies, their pecuniary interest might disqualify them to sit as jurors.

Id. at 621. Based upon the foregoing analysis, the Court in Beyer upheld the right of plaintiff's counsel to question prospective jurors "as to their relations with any insurance company issuing policies to indemnify defendants in damages cases, [such as] whether such jurors were employed as the agents of such companies, whether they were insured in such companies, whether any

members of their family were acting as agents of such companies, whether they were stockholders in such companies, etc." Id. See also: Gerlot v. Swartz, 7 N.E.2d 960, 966 (Ind. 1937); and Rust v. Watson, 215 N.E.2d 42, 51-52 (Ind.Ct.App. 1966). As noted above, this proposition was most recently reaffirmed in Stone v. Stakes decision, wherein the Court of Appeals observed that "a question regarding a juror's relationship, financial or otherwise, with a specific insurance company on voir dire examination is not error if the question is asked in good faith." Stone, 749 N.E.2d at 1281.

The importance of questioning the jury pool about any relationship with a particular insurance company is of vital importance today, not only because of the prevalence of insurance in our society, but also because of the large numbers of individuals who are stockholders, agents, employees, or mutual owners of insurance companies.[4] Indeed, the mere act of being insured by a mutual insurance company creates both an ownership and a pecuniary interest on the part of the insured. In order to ensure a trial by a thoroughly impartial jury, it is necessary to inquire of potential jurors whether they have any relationship or interest in the particular insurance company involved in the case. And where such a relationship or interest is discovered during voir dire, a motion should be made to strike the prospective juror for cause.

A biased juror must be removed. Threats v. State, 582 N.E.2d 396, 398-99 (Ind.Ct.App.

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[4] Black's Law Dictionary defines a "mutual insurance company" as: "Type of insurance company in which there is no capital stock and in which the policy holders are the sole owners." Black's Law Dictionary, 6th Edition (1990), p. 1021. For example, State Farm is a mutual insurance company. One in every five automobiles in the United States is insured by State Farm, making it the leading insurer of automobiles in the country. State Farm is also the leading insurer of homes in the United States. Additionally, 79,300 State Farm employees work across the United States and Canada, and more than 16,200 agents sell State Farm insurance products nationwide. Source: Official State Farm Web Site, www.statefarm.com.

1991). A juror's bias may be actual or implied. Id. Implied bias is presumed from the juror's relationship with one of the parties. Id. Implied bias is attributed to a juror upon a finding of a certain relationship, regardless of actual partiality. Id. Actual bias can arise, in the absence of a juror's admission of partiality, by inference from some connection of the juror to the case, where the nexus is insufficient to create implied bias. Id. Removal of a biased juror is proper regardless of which way the bias cuts. Id.

Where a pecuniary relationship exists between a party and a potential juror, it has been repeatedly held that such a relationship constitutes grounds to challenge the potential juror for cause, even if the relationship is remote or trivial. Indeed, where a lawsuit is brought against a city, the Indiana Supreme Court has held that any citizens or taxpayers of the city should be struck for cause:

> The trial by jury is as old as the common law . . . and during all the period of its history, there has been no time when interest in the suit did not disqualify a juror.
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> The object of the law is to procure impartial, unbiased persons for jurors. They must be *omni exceptione majus* ("free from every objection, and wholly disinterested"). They must have no interest in the subject-matter of the litigation. In this case, a verdict against the city would impose additional burdens upon all the tax-paying residents thereof. Hence such residents are, at common law, incompetent to serve as jurors in a case to which the city is a party, or in which the city is directly interested.

Hearn v. City of Greensburgh, 51 Ind. 119, 120-21 (1875); City of Goshen v. England, 119 Ind. 368, 21 N.E. 777, 978 (1889). The same considerations requiring disqualification of a taxpayer in a lawsuit against a city apply equally to a situation where a potential juror has a relationship with the particular insurance company that is involved in the case. As the Indiana Court of

Appeals held in the case of Goff v. Kokomo Brass Works, 43 Ind.App. 642, 88 N.E. 312, 313-14 (1909):

> Parties litigating in cases of this class are entitled to a trial by a thoroughly impartial jury, and have a right to make such preliminary inquiries of the jurors as may seem reasonably necessary to show their impartiality and disinterestedness.
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> * * * * *
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> For, in case the insurance company was pecuniarily interested in the litigation, a person in its employ or otherwise interested in it, naturally would be more liable to be unduly influenced to grant an advantage on the side of his employer or in the protection of a private interest than one having a single purpose--returning a verdict according to the law and the evidence. In Spoonick v. Backus-Brooks Co. (1903), 89 Minn. 354, 358, 94 N.W. 1079, it is said: "That either litigant has the right to challenge for implied bias must, of course, be admitted, and we think it would be impossible to say, or for the court to hold in the exercise of its proper discretion, that any person connected with the indemnifying company as a stockholder or otherwise could be a proper person to sit as a juror in a case the result of which might be of pecuniary interest to such company. If the proposed juror was a stockholder or otherwise interested in such a company, his disqualification would seem to follow as a matter of law. If this be so, it is difficult to see upon what ground the court could refuse to permit counsel to ascertain the facts while impaneling the jury. It is no answer to this to say that the insurance company is not named as a party to the action, for the bias of the juror is not to be determined by this fact. Nor is it an answer to say that counsel may protect his client by using a peremptory challenge. It is his right first to learn the facts, and he must do so to exercise intelligently his right to challenge peremptorily. The authorities all go to show that a very insignificant interest in the result of an action, and frequently a very trifling relationship to one of the parties, is sufficient to disqualify a person from sitting as a juror. In order to secure to litigants unbiased and unprejudiced jurors, we are compelled to hold that plaintiff's counsel had a right to ascertain whether there was such a relationship between the persons called as jurors and the insurance company, a corporation vitally interested in the result, which would disqualify these persons, because, by implication, they would be biased and prejudiced." And see Block v. State (1885), 100 Ind. 357; Burtnett v. Burlington, etc., R. Co. (1884), 16 Neb. 332, 20 N.W. 280; Ensign v. Harney (1883), 15 Neb. 330, 18 N.W. 73, 48 Am. Rep. 344; Martins v. Farmers', etc., Ins. Co. (1905), 139 Mich. 148, 102 N.W. 656; Hearn v. City of Greensburgh (1875), 51 Ind. 119; Terre Haute Electric Co. v. Watson (1904), 33 Ind. App. 124, 70 N.E. 993; Johnson v. Tyler (1891), 1 Ind. App. 387, 27 N.E. 643; 2 Elliott, Gen. Prac., §§ 507, 514, 515; Beall v. Clark (1883), 71 Ga.

818.

In summary, it is wholly proper during voir dire to inquire whether a prospective juror or his family (1) owns stock or has an ownership interest in a particular insurance company; (2) is an agent or employee of, or holds office in, a particular insurance company; or (3) is insured by, or otherwise has any interest or relationship with, a particular insurance company. Beyer, 151 N.E. at 621; Gerlot, 7 N.E.2d at 966; Rust, 215 N.E.2d at 51-52; and Stone, 749 N.E.2d at 1281. More importantly, if a relationship between the insurance company and the potential juror is discovered during voir dire, the existence of such a relationship is sufficient grounds to strike the juror for cause.