

Considering the Juror Pandemic Lens – Seating a Jury

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Experienced trial attorneys know that jurors are not interchangeable empty vessels. Each juror enters the jury box with a wide range of experiences, beliefs and attitudes, and may be more or less inclined toward reaching a fair and favorable outcome for clients. Jury consultants have coalesced around the view that the COVID-19 pandemic will certainly impact juror decision making. But, how so? Trial attorneys must consider COVID-19's impact when making strategic decisions with their clients about whether to go to trial, whether to pass on a juror during jury selection and whether to pursue certain strategies and tactics during trial. Much has been written about social inflation and technology shaping juror viewpoints. Now, with the advent of the remote trial experience, separate and above, the pandemic is influencing relevant attitudes which may impact a remote juror's predilections.

COVID-19 will most assuredly impact or magnify juror attitudes toward risk. Immediately after the pandemic subsides and courthouses reopen, jurors who are willing to step out of their homes and into the jury box alongside other people will likely be more risk tolerant. Such jurors may be more defense friendly, for example, where they are called on to assess whether a defendant's actions were unreasonable in a personal injury matter. Potential jurors who are more cautious and risk averse about returning might seek to avoid serving, further reducing these potential plaintiff-friendly jurors. In contrast, jury pools may skew younger than normal, as older jurors who are more susceptible to COVID-19 complications self-select out of jury service. However, this may be less of a consideration if remote jury trials become a reality and jurors are not required to venture outside their homes. In fact, the remote trial may mute some of these attitudes, as jurors who report to a courthouse undoubtedly will have constant cues about managing risk simply by entering a controlled courtroom.

A counterpoint could be that jurors who are more cautious about the pandemic are nonetheless individuals who are more likely to rely on expertise and to understand and accept scientific information. This can be a good thing in complex cases, where the case theory or defense relies on a scientific or technical expert opinion testimony. Ultimately, the particulars of each case and each potential juror need to drive the favorability of individual jurors in light of the pandemic.

The pandemic will unquestionably yield a prospective jury pool, and ultimately, a selected jury consisting of individuals who have had, or currently still are experiencing, a great deal of anxiety and stress due to personal and family health concerns, economic hardship and/or substantial disruption of their daily lives. Such jurors may not be pleased about having to serve on a jury, or may have their minds focused on things other than the trial. The pandemic has demanded a lot from our citizens, and they may feel like that they have no more to give. They may even be inclined to take out their anxiety and frustration on a client depending on the circumstances of the case.

Courts are beginning to crystallize juror selection plans, including how juror general attitudes about COVID-19 will be handled. Recognizing a non-specific fear of COVID-19 infection could not only greatly reduce, but potentially skew, the ultimate attitude mix of remaining jurors. It is expected that many courts will not simply be excused without the prospective juror concern being more fully understood and developed to a "true" impediment to service.

As courts develop protocols and practices to protect against the transmission of COVID-19, including social distancing, sanitizer stations, providing masks, pre-screening to remove those with symptoms and providing notification procedures if they were exposed to one testing positive during trial court, approved general *voir dire* is also being formulated in some states and districts. Some courts are

requiring judges presiding over jury selection to remind jurors of court-instituted protections and to advise prospective jurors that general fears or anxieties over transmission is not alone a ground for dismissal. Individual *voir dire* inquiry would then perhaps follow to determine whether a concern over COVID-19 transmission would rise to the level where the juror's ability to serve would be compromised. Stated differently, courts are developing approaches which will determine if more than a generalized fear is being expressed.

Trial attorneys and clients will also need to be mindful about the particular court's *voir dire* procedure, specific to COVID-19 juror attitudes, as well as regional differences. The COVID-19 pandemic is not a single outbreak, but rather multiple regional outbreaks that have been mitigated and lived through in a variety of different ways. So, jurors in hard hit areas may have very different attitudes when compared to those at locations with less substantial outbreaks.

Another question is how jurors will view business defendants more generally and after the pandemic subsides. The COVID-19 pandemic is not like the Great Recession, during and after which business entities are often cast as villains. Many businesses have stepped up to support their employees, their families and their communities during this difficult time. Jurors may also view businesses more favorably, after witnessing the pandemic causing important businesses to shutter and friends and family to lose their jobs. Jurors may also be less inclined to think that businesses have the proverbial deep pockets and may question whether a defendant business can withstand a substantial verdict. Similarly, businesses known to violate pandemic guidelines and who do not "do their part" in the pandemic response may be more critically judged.

Because of COVID-19, jury selection, whether for an in-person or remote jury trial, will not be business as usual. Trial attorneys will need to identify how COVID-19 has impacted potential jurors personally and will need to use that information to make good strategic decisions to protect their client.

White and Williams lawyers have substantial jury trial experience and often work closely with experienced jury consulting to get exceptional results at trial. We are ready to assist our clients with decision making regarding COVID-19's impact on jury trials. If you have any questions, please contact Bob Devine (deviner@whiteandwilliams.com; 856.317.3647), Andy Susko (suskoa@whiteandwilliams.com; 215.864.6228) or another member of the Litigation Group.

As we continue to monitor COVID-19, White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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