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LITIGATION

Fair Cross-Section Concerns Potentially Impacting Pandemic Jury Trials

BY ROBERT G. DEVINE
AND DOUGLAS M. WECK

Special to the Legal

As courts locally and nationwide cautiously begin to resume jury trials either in person, hybrid remote jury selection/live trial witnesses or full remote—all in the midst of a now worsening pandemic—litigants and commentators have raised the issue of whether the pandemic combined with necessary coronavirus mitigation court procedures may unfairly impact the demographic composition of venirees and juries. Juries are meant to be reasonably “representative” and as trial lawyers would readily agree—the sum is greater than the individual part. Although “fair cross section” challenges will need to be addressed, jury trials, whether remote, hybrid or in person, should be able to proceed constitutionally during the pandemic so long as they can be done safely.

In both criminal and civil matters, individuals have a



DEVINE

ROBERT G. DEVINE is a senior trial attorney at White and Williams and has tried over 40 cases to verdict throughout the United States. He is the chair of the firm's litigation department. Contact him at deviner@whiteandwilliams.com or 856-317-3647.



WECK

DOUGLAS M. WECK is an associate in the Philadelphia and Cherry Hill, New Jersey, offices of the firm, practicing in the catastrophic loss and excess liability practice group.

constitutional right to trial by a jury of their peers. That right is immortalized in our federal and state constitutions, in addition to federal and state statutory law. What that means is that jury pools must be selected at random and constitute a representative cross section of the local community. There are important reasons for the “fair cross section” requirement. First, it promotes impartiality and thoughtfulness in juries, as deliberations can

tap into a wide and fair range of experiences and backgrounds. Second, it guards against discrimination. Finally, though perhaps less important to litigants, every able member of the community should have a fair opportunity to participate as a juror in

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our judicial process. Jury service is a crucial element of our democracy and ultimately a great level-set as a citizen selected for jury service becomes a part of jury ultimate arbiter of fact.

Although much of this is pure but necessary speculation, many have worried that the pandemic and the increased reliance on technological in the judicial process

may magnify or distort existing community inequalities, resulting in juries that do not represent a fair cross section of the community. Will juries trend younger because older individuals will opt out of jury service due to coronavirus fears? Will individuals from lower economic strata be selected out of jury pools because of unequal access to remote technology now being used in the process? Will juries be more conservative because of political differences in perception of COVID-19 risk? Will fewer “essential workers” be on the jury?

These are important issues of practical and perhaps constitutional magnitude that will need to be resolved. But, our courts have firmly and rightly rejected the assumption that a juror’s membership in any particular group will have any bearing on how they will deliberate and decide. Properly instructed jurors should still be expected to serve responsibly even during a pandemic. And, we should not assume that jury representation issues will exist or be unresolvable without actually resuming jury trials and working out any kinks in the process. Trials in some Pennsylvania counties have been conducted with heightened safeguarding such as distancing, masking, Plexiglas shields, daily temperature readings and questionnaires where multiple panels of prospective jurors were called separately and qualified with a jury ultimately seated.

We are starting to see decisions from courts addressing these and related issues, primarily in criminal cases in which there has been more of an impetus to proceed despite the pandemic. Recently, in the first New Jersey matter to proceed to trial under the state’s new pandemic hybrid jury selection procedures, *State v. Dangcil* (19-08-01020-1), a Bergen County criminal defendant sought to postpone his trial based on an argument that the pandemic and new court procedures improperly skewed the demographic composition of the jury pool. To safely proceed with jury trials, the New Jersey judiciary has mandated that jury selection proceed virtually and has permitted prospective jurors to be excused where they are in categories of high risk for severe COVID-19 illness (e.g., 65 years or older, underlying medical condition, etc.). Although the defendant did not present any evidence, he claimed that the jury pool was not random and did not represent a fair cross section of the community. New Jersey statutory law also guarantees an impartial jury by requiring that judicial selection of jury panels be “public and random,” N.J. Stat. Section 2B:20-4(d). The defendant lost his argument before the trial court and on appeal. There simply was no evidence, at least as the record stood, indicating that the jury selection process was nonrandom or that

any constitutionally distinctive group had been excluded. It was highlighted that the pandemic jury pool was not that different from the average pool prior to the pandemic, which is a good sign for our ability to move forward.

Similarly, in *United States v. Trimarco*, No. 17-CR-583 (JMA), 2020 U.S. Dist. LEXIS 159180 (E.D.N.Y. Sep. 1, 2020), the federal district court rejected a defendant’s unsupported fair cross-section challenge. Potential jurors had not even responded to summonses yet, so there was no basis for the challenge. Another district court in *United States v. Fortson*, No. 2:18-cr-416-WKW [WO], 2020 U.S. Dist. LEXIS 127148 (M.D. Ala. July 20, 2020), rejected the argument that a jury could not be drawn from a fair cross section of the community during the pandemic, noting that the jury did not need to be a perfect representation of the community and that a robust voir dire process could dispel any constitutional concerns. The court nonetheless granted a joint continuance request because of coronavirus safety concerns.

Nonetheless, some courts are proceeding more guardedly. For example, the district court in *United States v. Sheikh*, No. 2:18-cr-00119 WBS, 2020 U.S. Dist. LEXIS 188189, at *6 (E.D. Cal. Oct. 9, 2020), declined to proceed to a criminal jury trial in part because it doubted that permitting coronavirus-based excuses would

produce a jury that fairly represented the community. However, the court was apparently acting more out of caution rather than a concrete belief that a fair jury could not be empaneled.

While the pandemic is certainly new and unprecedented in modern times, inequality and hardship in the community jury pool existed in many forms before the pandemic and will continue to exist after the pandemic. Prospective jurors routinely decline jury service based on hardship, illness and lack of resources, among other reasons, as they have been permitted to do within our pre-pandemic legal framework. Moreover, the concept of the “essential worker” who can be excused from jury service also existed well before the pandemic. Courts routinely excuse health care workers, teachers and those in difficult financial circumstances, in addition to a number of other categories, from jury service. Often, prospective jurors simply do not show. Yet, we have still met the call to satisfy the right to a fair jury trial. There is no legal right to a jury or jury pool of any particular, let alone ideal, composition. Just a fair slice of the community is all that is due.

There certainly may be cases where the pandemic and new protocols generate a jury pool or a jury that is not a fair cross section of the community. Judicial districts are not uniform and the coronavirus is not a static phenomenon. Some judicial districts

may very well see dramatic changes in their jury pools at any given time. For example, districts with more dramatic socio-economic divides may find that unequal access to technology and resources in fact unfairly skews the composition of the jury pool. This can be combated with increased engagement by court staff with potential jurors to address juror concerns and provision of technology.

We obviously need to be hyper-vigilant in ensuring the integrity of the jury process. Transparency in the jury selection process can go a long way. Judicial staff who manage the jury summons and selection process should be documenting the process and maintaining relevant data. Courts and litigants may consider requests for process and demographic information so that fair cross section challenges can be fairly and decisively addressed in real time. For example, in *United States v. Holmes*, No. 18-cr-00258-EJD-1, 2020 U.S. Dist. LEXIS 164683, at *23 (N.D. Cal. Sep. 9, 2020), the district court broadly granted defendants’ requests for grand jury selection information so that the defendants could determine whether the grand jury that returned their indictments was a fair representation of the community. Personal identifying information was not disclosed. Similar information should be available with petit juries. With readily available information, we will be able to monitor whether the pandemic is

having disproportionate effects on the need to have juries be fully representative of the community and resolve them promptly if so.

Ultimately, any impact the pandemic might have on the representativeness of the jury should be manageable if potential jurors are safe and comfortable participating in the process. People will reasonably be reticent to participate fully in jury service, and attorneys will not want those people on the jury anyway, if they are uncomfortable or plain scared. Physical distancing, masks, hygiene, regular cleaning and enhanced ventilation in courthouses are paramount. Here the local bench and bar are taking safety in the courthouse seriously and will continue to do so.

As the pandemic continues the backlog of cases awaiting trial grows. The jury system is a phenomenal means of addressing disputes and will continue to be well after this pandemic. In the meantime, technology and safeguarding measures to be implemented should permit for a representative jury to be seated if we all work together, allow the extra time, follow the protocols and recognize the jury system is sacred and to be preserved. •