

US Law Week

Vaccination Status Impacts Jury Pools, Case Strategy

By Eben Colby and Emily Kline

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Litigators need to consider the impact of the vaccination status of potential jurors as they face different court room scenarios and protocols due to Covid-19, say Skadden, Arps, Slate, Meagher & Flom's Eben Colby and Emily Kline. Among other things, attorneys need to consider adjusting their assumptions about time to trial and how to analyze and respond to jury pools that may be skewed.

With new Covid-19 variants and lingering vaccine hesitancy, a "return to normal" for in-person jury trials remains elusive.

Given the volume of postponed trials and pressures to avoid further delays, courts are moving forward with various forms of in-person, remote, and hybrid jury trials. Litigants are finding themselves faced with the new challenge of how juror vaccination status may affect jury pools and their overall case strategies.

Below are a number of factors that attorneys need to consider as they handle jury selection and prepare for a variety of court room scenarios.

Excluding the Unvaccinated May Be Challenged

As some federal judges have considered or instituted vaccine mandates for juries that excused unvaccinated potential jurors, litigants should consider challenging the mandate as violative of the fundamental right to jury selection from a representative cross-section of the community.

A *prima facie* fair-cross-section violation is established by showing: (1) the group alleged to be excluded is a "distinctive group" within the community; (2) the representation of the group *in venires* from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to the systematic exclusion of the group in the jury-selection process.

For example, in a multidistrict action pending in Ohio, U.S. District Judge Dan Aaron Polster ordered that any juror be vaccinated, citing safety concerns. A substantial portion of the jury pool would have been excused, as data from Ohio's Department of Health showed that only 42.6% of the state's population was fully vaccinated.

The defendants successfully challenged the order, citing demographic data suggesting that excluding unvaccinated individuals would violate the "fair cross section of the community" standard, noting key differences between the statewide vaccinated and unvaccinated populations along gender, racial, age, income, education level, geographic, and political lines.

The defendants further argued that the remaining pool of vaccinated jurors would be highly unlikely to reflect the community as a whole. Polster agreed, granting reconsideration and rescinding his vaccination requirement.

Conversely, in the California fraud trial of Theranos founder Elizabeth Holmes, U.S. District Judge Edward Davila dismissed nine members of the jury pool because they were not vaccinated against Covid-19. Both the prosecution and the defense supported the court's decision.

As courts consider excluding unvaccinated jurors, litigants should assess demographic associations with vaccination status and consider challenging such mandates.

Requests for Excusal May Lead to Underrepresentation

Litigants may also need to consider how jury trial practices in the absence of a vaccine requirement may lead to a wave of requests for excusal that could skew jury selection. For instance, to the extent that unvaccinated people wish to be excused from jury service due to their increased risk, a cross-section of the population may not be represented.

Similarly, vaccinated people (including parents of children too young for a vaccine) may ask to be excused to avoid contracting the virus from unvaccinated jurors. Both of these scenarios potentially raise the same concerns as broad court-imposed vaccine mandates.

Accommodations and Potential Representation Issues

In order to promote safety and avoid further delays, courts have begun adopting alternative measures, such as masking requirements, attempting to reconfigure courtrooms to allow distancing and remote jury trials.

Although non-jury proceedings widely have been moved to virtual platforms, virtual jury trials may implicate issues of fairness. For instance, it is not clear to what extent courts will accommodate versus excuse jurors without access to necessary home technology.

Further, jurors with adequate technology might be subject to distractions from children, lack privacy, or may resist having their camera on such that a court can monitor attentiveness. Excusing all potential jurors with these issues, however, could threaten the jury pool's representativeness of the community or otherwise skew a panel.

These issues may lead to courts choosing hybrid in-person and virtual juries. For example, the Supreme Court of Texas's remote jury proceeding questionnaire asks about familiarity with videoconferencing technology as well as access to high-speed or broadband internet, a camera, and a private place at home. The questionnaire notes that jurors may be "provided alternative methods to serve, including spaces equipped with technology or the opportunity to appear in person."

Preparing for a Variety of Scenarios

Courts are not yet returning normal courtroom procedure. Accordingly, parties must adjust their case assessments and prepare for a variety scenarios. These considerations include: adjusting assumptions about time to trial, analyzing and responding to jury pools that may be skewed, and adapting jury research and jury testing techniques.

When faced with jury vaccine requirements, local demographic data may support a challenge to the composition of the jury pool or, at least, potential adjustment of trial strategy based on the composition or location (physical or virtual) of the jury.

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