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THE USE OF CAUSE CHALLENGES IN THE AGE OF PANDEMIC VIRUSES:
IS A “CONCERN” OF GETTING SICK WHILE SERVING AS A JUROR
ENOUGH REASON FOR A JUROR TO BE STRUCK FOR CAUSE?

*Marc Consalo**

I. INTRODUCTION

The Coronavirus (Covid-19) has changed the way we practice law and every aspect of our lives. Terms such as social distancing, remote learning, and virtual hearings are becoming the norm instead of pilot programs to show off technology in different circuits. While like all things, this too will pass, it is inescapable that 2020 has left an indelible mark on the practice of law; this is not only true for contractual lawyers but litigators as well. As such, this article focuses on the impact that the Coronavirus may have on how attorneys select juries, specifically, the use of cause challenges on potential jurors who fear getting sick as a byproduct of jury service.

At the start, it is crucial to create a distinction between those jurors who are truly ill and those who have a concern that they will become ill. Obviously, if an individual is sick, most judges and litigants can agree on the individual's dismissal for both their safety and the well-being of others. However, before Spring 2020, if a juror feared catching a disease in a courthouse, they might have been looked upon as trying to avoid jury service more than a sincere concern for their health and well-being. Yet with fears of pandemics and illness now a reality instead of the stuff of science fiction novels, fears of becoming ill through juror service may be a valid concern for many populations. The goal of this article is to focus on this latter population.

It is also vital to understand that with the arrival of Covid-19 being a unique situation, at the time of writing this article, little if any case law exists on the use of cause challenges against jurors who simply fear getting sick through service. Indeed, the complete closure of courthouses grinding our judicial system to a halt is unprecedented. There are no standards for

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plagues and pandemics as an excuse. As such, this article will extrapolate from other instances where cause challenges were and were not granted to predict how judges will react to future concerns of getting sick.

This article will review both federal and state laws regarding the use of cause challenges. This review will include perspectives from both criminal and civil statutes as well as rules of procedures. Next, a comparison of cases where courts have dealt with jurors who have “concerns” about their ability to serve will be provided. This review will be key, as the population the article focuses on are those who have a “concern” they will become ill, not those who actually exhibit symptoms. Based on this review of case law, predictions will be made regarding how judges will handle cause challenges against potential jurors fearing for their health. Finally, suggestions will be offered to address this question, such as changes in juror questionnaires, modifications to current laws permitting automatic excusal, and even thoughts on pragmatic steps to take to keep everyone safe while visiting courthouses.

I. CONSTITUTIONAL FOUNDATIONS OF CAUSE CHALLENGES

A. *The Right to A Jury Trial*

Before one can begin to determine the legitimacy of cause challenges in our legal system, one must first understand the fundamental nature of the right to trial. The importance of being tried by a jury of one’s peers can be seen as far back as the drafting of the United States Constitution.¹ Article III Section 2 of the federal constitution requires all criminal cases be decided by a jury.² Additionally, the Sixth Amendment to the United States’ Constitution grants those accused of crimes the right to be judged by “an impartial jury.”³ Some believe that the right is so embedded in American Jurisprudence that it originates in the Magna Carta.⁴ The right was further expanded in the Fourteenth Amendment under the due process clause applying the obligation to state governments and the federal government.⁵

At the time of its drafting, the Seventh Amendment saw the expansion of a jury trial to certain civil cases in federal court.⁶ These cases were significantly limited in scope and applicability.⁷ Yet we see now in

1. U.S. CONST. art. III, § 2, cl. 3.

2. *Id.*

3. U.S. CONST. amend. VI.

4. *Duncan v. Louisiana*, 391 U.S 145, 151 (1968).

5. U.S. CONST. amend. XIV, § 1.

6. U.S. CONST. amend. VII.

7. *Id.*

practice that many civil matters are restricted to bench trials either by statutory practice or preference of the litigants. In either event, the significance of a jury trial is an overt right revered by our forefathers cannot be underscored.

Capitalizing on this importance, several state constitutions also guarantee a right to a jury trial. For instance, in civil cases, forty-eight out of the fifty state constitutions specifically provide for the right to a jury deciding the outcome of a matter.⁸ The two states that do not provide a constitutional right to a jury trial in civil cases are Louisiana and Colorado.⁹ However, Louisiana does provide for the right in its rules of civil procedure except under a few conditions.¹⁰ In Colorado, the right to a jury trial in civil cases exists under Rule 38 of Colorado Civil Procedure.¹¹

It is not surprising that all fifty state constitutions expressly provide the right for a jury trial in criminal matters.¹² While the language of each individual jurisdiction varies, the issue centers more on what constitutes a serious offense under *Duncan* case law providing the right for only those offenses punishable by more than six months incarceration.¹³ For instance, in Alabama, the right to a jury trial for a criminal defendant applies for “all prosecutions by indictment.”¹⁴ While in Alaska, the right extends to all criminal prosecutions.¹⁵ Many states (thirty-three) choose to qualify the right by using the term “inviolate” specifically stating that the right to trial by jury in a criminal matter “shall be inviolate.”¹⁶ Black’s Law Dictionary defines the term inviolate as “Free from violation; not broken, infringed, or impaired.”¹⁷

8. Moses, Margaret L., *What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence*, 68 GEO WASH. L. REV. 183, 185 (2000).

9. *Id.* n. 10.

10. LA. CODE CIV. PROC. ANN. arts. 1731, 1732, *amended by* Civil Justice Reform Act of 2020, 2020 La. Sess. Law Serv. 1st Extraordinary. Sess. Act 37 (H.B. 57) (West).

11. COLO. R. CIV. P. 38.

12. David L. Hemond, *Brief Review of Right in 49 States to Jury Trial for Minor Crimes*, CONN. GEN. ASSEMBLY, (Sept. 28, 1998), <https://www.cga.ct.gov/lrc/recommendations/1999%20recommendations/JuryTrial49StatesRpt.htm>.

13. *Duncan*, 391 U.S. at 159.

14. ALA. CONST. art. I, § 6.

15. ALA. CONST. art. I, § 11.

16. Hemond, *supra* note 13.

17. *Inviolate*, Black's Law Dictionary (11th ed. 2019).

B. The Need for Full Attention

Understanding an entitlement to a jury trial is just the first prerequisite in fully appreciating the importance of cause challenges. The next step is to focus on what the jury should look like. For this, one must dive deeper into statutes and rules of procedure. Many states focus on the term “impartial” to avoid bias in a jury pool's composition.¹⁸ For instance, in Florida, Rule 3.251 of Criminal Procedure requires that the defendant be tried by an “impartial jury” from the county where the crime was alleged to be committed in criminal cases.¹⁹ In Alabama, the term “disinterested” is utilized when talking about jurors in cases involving guardianship.

Further, in Pennsylvania, a civil rule of procedure permits a change in the venue when an “impartial trial” cannot occur in the proper location.²⁰ But one must understand that in defining the term impartial, a court is looking beyond just bias. Indeed, ensuring that a potential juror is free from any sort of predisposition is important, but securing individuals who can also give the trial their full and undivided consideration is just as fundamental. As such, the need for individuals who can sit in judgment of a legal issue focusing their full attention on the case, is paramount to our judicial system's successful operation.²¹

This concern is evident throughout the rules and procedures governing juries. For instance, in Federal law, a specific admonishment exists for jurors who may be so focused on note-taking during a trial that they fail to pay attention to the evidence presented during it.²² A cautionary instruction exists to be read by judges before the start of the lawyers' presentation admonishing failure to utilize one-hundred percent focus on the goings-on during the case.²³ “In a jurisdiction authorizing note-taking by jurors, even in the absence of a full instruction by the trial court that the notes taken by the jurors were not to be considered as evidence and that the jurors should pay full attention to the evidence as it was being delivered in court, [...]”²⁴

Another example of the importance in Federal Law of the idea of a juror giving their full attention to a case can be found antidotally out of the United States Second Circuit Court of Appeals.²⁵ In *United States v. Hui*,

18. FLA. R. CRIM. P. 3.251.

19. *Id.*

20. PA. R. C. P. 1006.

21. *See Aldridge v. State*, 222 Ga. App. 437, 437, 475 S.E.2d 195, 196 (Ga. Ct. App. 1996).

22. 89 C.J.S. *Trial* § 935 (1955).

23. *Id.*

24. *Id.*

25. *United States v. Hui*, 64 F. App'x 264, 265 (2d Cir. 2003).

a female defendant was convicted of trafficking over two million dollars in food stamps.²⁶

During the trial, the judge admonished a potential juror for his failure to stay awake but did not remove him.²⁷ “(T)he Court told the juror to give his full attention to the trial and warned that the juror would be excused if he could not stay awake.”²⁸ In ultimately deciding that the trial judge made no error by not dismissing the juror, the appellate court acknowledged that the appropriate actions were taken to ensure the juror focused on the trial.²⁹ The appellate court noted that a trial court has broad discretion in determining when a juror should and should not be dismissed.³⁰

Similar case law regarding the need for jurors to provide their full attention can be found among state courts as well. For instance, in *Allen v. State*, the Wisconsin Court of Appeals addressed a defendant’s concern when he raised an issue on appeal regarding his jury being distracted by a peripheral incident preventing them from giving his case one hundred percent of their attention.³¹ Upon questioning, the court asked if anyone could no longer give the trial their full attention because of the peripheral events.³² No juror felt that the incident would draw their attention away from the trial, and the matter proceeded forward.³³ On appeal, the reviewing court found that the trial judge adequately addressed the concern, ensuring that the jurors’ full attention remained on the trial.³⁴

Yet, the importance of juror’s focus has not just been a source of contention in criminal courts. There have also been civil cases centered on a juror’s or jurors’ inability to concentrate on a trial.³⁵ For instance, the Supreme Court of California addressed the topic in the case of *Hasson v. Ford Motor Company*.³⁶ In that case, a nineteen-year-old college student sued Ford Motor Company in a product’s liability action for injuries he sustained when the brakes in his father’s 1966 Lincoln Continental failed, resulting in a horrific traffic accident.³⁷ During an appeal, Ford Motor

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Allen v. State*, 300 N.W.2d 82 (Ct. App. 1980).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 411, 650 P.2d 1171, 1185 (1982).

36. *Id.*

37. *Id.* at 1176.

Company claimed several errors, including juror misconduct for individuals failing to pay attention to the case in chief.³⁸

In its opinion, the California Supreme Court clearly equates juror inattentiveness to misconduct.³⁹ The court wrote, “We agree with the basic premise that a jury’s failure to pay attention to the evidence presented at trial is a form of misconduct which will justify the granting of a new trial if shown to be prejudicial to the losing party.”⁴⁰ In this particular case, the assertion was that a juror was reading a book while witnesses were testifying.⁴¹ There were also allegations made by jurors against other jurors that some did crossword puzzles during the presentation of evidence.⁴² The accused jurors all signed declarations stating that they were paying attention during the presentation of the case.⁴³ Interestingly, the declarations did not deny the distracting behavior. They simply affirmed that the behavior did not affect their ability to pay attention.⁴⁴

In rejecting Ford’s argument, the appellate court conceded that while there has been a universal acceptance that inattentiveness is misconduct, courts are extremely hesitant to overturn verdicts for such behavior.⁴⁵ The appellate court listed cases of jurors who were intoxicated, reading newspapers, and even sleeping during the trial as examples of misconduct but where an appellate court did not overturn a verdict.⁴⁶ However, in the instant case, the California Supreme Court found that the statements made by the accused jurors were inadmissible under precedent and could not be considered by the trial court.⁴⁷ Despite this conclusion, the appellate court still rejected Ford’s argument as it could not demonstrate that the distracting behavior actually prejudiced the Appellant.⁴⁸

In ruling in this fashion, the California Supreme Court reaffirmed two important concepts. The first was that a juror’s failure to focus on a trial was misconduct. However, that being said, the misconduct only mattered where the movant could establish that the behavior resulted in prejudice. In part, it seemed where the distracting behavior that occurred in the trial’s progresses mattered as much if not more than whether it happened to begin with. As the California court wrote in *Ford*, “It was not

38. *Id.* at 1183.

39. *Id.* at 1185.

40. *Id.*

41. *Id.* at 1184-1185.

42. *Id.* at 1185.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 1185-1186.

47. *Id.* at 1186-1187.

48. *Id.* at 1189.

clear what type of evidence was being presented while the misconduct occurred, or even which side's case was being presented.”⁴⁹

Therefore, while sacred, the right to a jury trial does still reside within the confines of accepted law. The right does mean all parties are entitled to an impartial jury made up of individuals who will give their attention to the matter at hand. As such, it falls on the attorneys in the case to ensure that the jury which sits in judgment of a specific matter is composed of individuals who can abide by this fundamental tenement. In ensuring that such a scenario exists to protect their clients, the attorneys must utilize cause challenges and preemptory strikes to whittle the pool of possible down to the proper candidates. But with preemptory challenges limited in number, cause challenges are vital in protecting this right.

A connection to the roots of the current pandemic seems evident at this juncture. If jurors must provide their full attention to a case for them to qualify as impartial, which serves as a prerequisite to fulfilling the promise of a trial by jury, any individual who cannot focus on the trial for fear of getting sick should be removed. The question remains as to what the best tool is to delete these individuals from the mix. Must litigators use their preemptory strikes to eliminate this fear? Or is a cause challenge the correct and just method to secure a parties' constitutional rights.

II. CAUSE CHALLENGES

A. Pragmatic Use

In a nutshell, a cause challenge is a request to the court to remove a juror for a specific reason that prevents the individual from being unbiased to one of the parties in a case.⁵⁰ There are many reasons that can justify a cause challenge, including bias, prior knowledge, or inability to serve due to outside influences.⁵¹ This is, of course, different than a preemptory strike. The latter refers to removing a jury without providing a justification.⁵² Preemptory strikes are usually unquestioned unless race can be argued as a factor.⁵³

In our federal system, challenges for cause exist at both the civil level and in criminal matters. Chapter 28 Section 1870 of the United States

49. *Id.* at 1189.

50. *Challenge for Cause*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/challenge_for_cause.

51. *Id.*

52. *Peremptory Challenge*, THE FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/Peremptory+strike>.

53. *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).

Code governs cause challenges in civil cases.⁵⁴ The selection process is further expanded upon by Federal Rules of Civil Procedure Rule 47.⁵⁵ While on the criminal side, Federal Rule of Criminal Procedure Rule 24 controls the process for selecting jurors in criminal proceedings.⁵⁶

At the heart of the ability to exercise cause challenges is the idea of questioning the jury.⁵⁷ Indeed, the federal rule of criminal procedure starts off by empowering the trial court to “examine prospective jurors” or permit the attorneys to do the same.⁵⁸ But while the use of preemptory challenges is typically limited in number, even the United States Supreme Court has recognized that no limit is put on the use of cause challenges numerically.⁵⁹ Instead, the limitation is in scope.⁶⁰ Specifically, federal courts have stated that cause challenges are used in those scenarios where jurors disclose the existence of actual bias or implied bias.⁶¹ This was announced in the case of *Jones v. Cooper* before the United States Court of Appeals, Fourth Circuit.⁶²

In *Cooper*, a North Carolina death inmate appealed his denial of a Writ of Habeas Corpus.⁶³ At the trial level, the proposed error focused on a juror who allegedly lied on her questionnaire and during voir dire.⁶⁴ In rejecting the defendant’s argument, the Fourth Circuit specifically stated that the applicability of cause challenges is limited to instances of actual bias or implied bias.⁶⁵

In defining these terms, the United States Supreme Court has described the term actual bias as “that act to be ‘the existence of a state of mind, on the part of a juror, which leads to a just inference in reference to the case that he will not act with entire impartiality.’”⁶⁶ While an implied bias has been characterized as “a bias attributable in law to the prospective juror regardless of actual partiality.”⁶⁷

54. 28 U.S.C.A § 1870 (West 2019).

55. FED. R. CIV. P. 47.

56. FED. R. CRIM. P. 24.

57. *Id.*

58. *Id.*

59. *Gray v. Mississippi*, 481 U.S. 648, 653 (1987).

60. *Jones v. Cooper*, 311 F.3d 306, 312 (4th Cir. 2002).

61. *Id.*

62. *Id.*

63. *Id.* at 308.

64. *Id.*

65. *Id.* at 312.

66. *Hopt v. People*, 120 U.S. 430, 432 (1887).

67. *United States v. Wood*, 299 U.S. 123, 134 (1936).

B. The Good Cause Standard

States have also gone to great lengths in providing guidance on the use of cause challenges. For instance, in Washington State, Rule 4.44.150 explains cause challenges in civil cases.⁶⁸ The rule is somewhat straightforward classifying a cause challenge as simply “an objection to a juror.”⁶⁹ Yet further guidance is also provided in Rule 4.44.190 of Civil Procedure, which provides a cause challenge for actual bias expressed by a juror.⁷⁰

In New Mexico, the legislature has created a statute regulating the selection of jurors in all trials.⁷¹ Here a distinction is made between preemptory challenges and challenges for “good cause.”⁷² While the statute itself does not define what “good cause” is, courts within that jurisdiction seem to provide some guidance on the subject.⁷³ For example, in the case of *State v. Baca*, the Appeals Court of New Mexico, provided assistance on the term good cause when it affirmed a trial court’s decision to excuse some jurors who had been victims of past crime and keep others.⁷⁴

In *Baca*, a jury convicted a defendant of committing armed robbery and other offenses with a firearm after trial.⁷⁵ During jury selection, several jurors indicated that they had been victims of previous theft crimes.⁷⁶ One juror called “Eloise K.” described being the victim of a robbery twenty years prior.⁷⁷ A second juror called “John K.” explained that he attacked at gunpoint twice in his lifetime and felt that law enforcement handled the matters poorly.⁷⁸ Finally, a juror referred to as “Julie D” recounted being robbed in her childhood home when she was much younger.⁷⁹ All three of these jurors were ultimately challenged for good cause, but the trial court only excused “John K.”⁸⁰

On appeal, the defendant argued that it was error not to at least also excuse “Eloise K.” from service as her prior experience as a victim of a crime qualified as good cause that she could not be impartial in the case.⁸¹

68. WASH. REV. CODE § 4.44.150 (West 2019).

69. *Id.*

70. WASH. REV. CODE § 4.44.190 (West 2019).

71. N.M. STAT. ANN. § 38-5-14 (2019).

72. *Id.*

73. *State v. Baca*, 804 P.2d 1089, 1093 (N.M. Ct. App. 1990).

74. *Id.*

75. *Id.* at 1091.

76. *Id.* at 1092.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1093.

In making this assertion, the defendant pointed out that on the record the juror initially said that she was inclined to favor the state.⁸² However, in ultimately denying the issue on appeal, the appellate court also noted that after a few moments to reflect, the juror stated, “she could make a decision based on the evidence heard in court.”⁸³

The New Mexico Court of Appeals explained that indeed “good cause” as contemplated by the statute could be met in a situation where a juror’s comments on voir dire could imply that they possess a bias against one of the parties.⁸⁴ However, the possession of a bias alone is not enough if a juror can set aside his or her predisposition and render a fair verdict.⁸⁵ In these scenarios, good cause does not exist.⁸⁶

C. A Stricter Approach

While many states choose to use broad and, at times, overreaching terms to define a cause challenge, other jurisdictions take a much different approach by trying to specifically delineate an exhaustive list of specific instances where a cause challenge is proper.⁸⁷ One such jurisdiction is the state of Idaho where Rule 47 of Civil Procedure lists seven rather specific instances where a cause challenge must be granted.⁸⁸ Granted, the sixth and final example provided in the rule is somewhat a catchall phrase for the court to metaphorically hedge their bets and provide wiggle room for a trial judge to excuse jurors when they do not pass a proverbial smell test.⁸⁹ Yet, the five delineated examples leading up to the catchall are quite specific.⁹⁰ They include lack of competency on the part of the juror; familial relation to a party within the fourth degree; having a financial relationship with a party in the case; previous jury service involving the litigants; or possessing a pecuniary interest in the outcome of the case.⁹¹

The danger with jurisdictions that take this approach is a tendency to use their legislation as a sword rather than a shield to prevent cause challenges from occurring. Meaning that courts should err on the side of excusing jurors who may be biased as opposed to keeping jurors on when a doubt exists. This is a concern that the Supreme Court of Utah recognized

82. *Id.* at 1092.

83. *Id.*

84. *Id.* at 1093.

85. *Id.*

86. *Id.*

87. I.R.C.P. 47

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

in the case of *State v. Carter*.⁹² In *Carter*, the defendant was convicted of first-degree murder with a firearm and sentenced to death.⁹³ After a second jury returned a verdict in favor of death because of an issue with an erroneous jury instruction read to the first panel, the defendant raised several issues on appeal, including the trial court's failure to excuse three jurors for cause.⁹⁴ Ultimately, Carter's conviction was affirmed, as was the sentence of death.⁹⁵

During the penalty phase of his case, the defendant requested that three jurors be excused for cause.⁹⁶ Those requests were denied, and he was forced to use preemptory challenges to remove them.⁹⁷ He argued that these denials were improper and that the exhaustion of his preemptory challenges prejudiced him in the penalty phase.⁹⁸ Ultimately, the Utah Supreme Court found that the defendant did not meet his burden on the issue and sustained his conviction and sentence.⁹⁹ Despite this conclusion, the court took the opportunity to admonish trial judges about the purpose of cause challenges.¹⁰⁰ In writing their opinion, the judges for the Utah Supreme Court stated, "(w)hile the abuse-of-discretion standard of review affords trial courts wide latitude in making their for-cause determinations, we are troubled by their tendency to "push the edge of the envelope, [...]"¹⁰¹

The court focused heavily on death penalty cases in its analysis.¹⁰² However, its words were quite forceful and provided guidance on the ultimate purpose of challenges for cause.¹⁰³ Clearly, the highest court Utah was sounding an alarm that if sincere apprehension regarding bias about jurors exists, proper protocol is to remove them at once so as not to even risk their bias from tainting the ultimate outcome from a case.¹⁰⁴ "If a party raises legitimate questions as to a potential juror's beliefs, biases, or physical ability to serve, the potential juror should be struck for cause, even where it would not be legally erroneous to refuse."¹⁰⁵

92. *State v. Carter*, 888 P.2d 629, 650 (Utah 1995) (while it is important to note that this case was superseded by statute by *Archuleta v. Galetka*, 67 P.3d 232 (Utah 2011) the case is still sound for the principle it is being cited for in this article).

93. *Id.* at 633.

94. *Id.*

95. *Id.*

96. *Id.* at 649.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 650.

103. *Id.*

104. *Id.*

105. *Id.*

So important is this concept that it can also be seen in language included in the Utah’s advisory committee notes for the rule itself.¹⁰⁶ The committee reminds judges that it is their job to find the correct “balance” in a jury panel absent concerns of time or efficiency.¹⁰⁷ Nor should the judge take it upon him or herself to inquire of a potential only to get the answer needed to justify their presence on the case.¹⁰⁸ It is not a trial judge’s job to rehabilitate jurors who expressed bias either for or against a part.¹⁰⁹ Rather the judge is the referee ensuring that both sides have a meaningful opportunity to question prospective jurors to truly obtain an impartial jury of one’s peers.¹¹⁰

D. Middle of the Road

There are a few states that take a more middle of the road approach, trying to explain cause challenges while at the same time leaving broad discretion for the trial judge. A perfect example of this scenario can be found in Texas, specifically, Texas Rule of Civil Procedure 228.¹¹¹ It defines cause challenges as an objection to a juror based upon a belief grounded in the law that “disqualifies” a juror.¹¹² Yet the belief must be sustained by the trial judge with a determination that it renders the juror unfit to serve in that specific case.¹¹³ Ultimately, the judge’s decision is not limited based only on what the juror says but on all evidence presented on the issue of bias.¹¹⁴ However, like most standards broad discretion is placed in the hands of the trial judge.¹¹⁵

Many cases in Texas have established this concept as precedent for handling cause challenges. For instance, in the case of *Gant v. Dumat Glass and Mirror, Inc.*, a Court of Appeals from Amarillo, Texas restated this principle when affirming a lower court’s decision not to strike a juror for cause.¹¹⁶ Here the appellate had sued the defendant when one of its business trucks rear-ended Gant while stopped at a traffic light.¹¹⁷

106. UTAH R. CIV. P. 47 (advisory committee notes paragraph 6f).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. TX. R. C. P. R. 228.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W.2d 202, 207 (Tex. App. 1996).

116. *Id.* at 204.

117. *Id.* at 205.

Ultimately, Gant succeeded at trial being awarded a little over \$75,000.00 in compensatory damages.¹¹⁸

Unhappy with the amount of the award, Gant appealed on several grounds including an error in jury selection.¹¹⁹ He asserted that three jurors who expressed bias against decisions for mental anguish served over his demand for cause challenges against them.¹²⁰ He also argued that a fourth juror should have been removed for cause because of a friendship he had with the driver of the defendant's vehicle.¹²¹

In rendering its opinion, the appellate court pointed out a laundry list of automatic reasons for disqualification found within Texas Statute Section 61.05.¹²² This includes such items as being a witness in the case or being related to a party.¹²³ However, the court further explained that while this list was provided as guidance, it was by no means exhaustive.¹²⁴ The trial court still could find the existence of bias in a juror adequate enough to warrant removal for cause.¹²⁵ Clearly, Texas had reserved ultimate authority and responsibility for an impartial jury to the trial judge.¹²⁶

The appellate court recognized implicit in rules regarding preemptory challenges was the understanding that all people carry with them preconceived notions and bias into a courtroom.¹²⁷ However, just because this is the case does not mean those individuals cannot sit and hear a specific matter.¹²⁸ Indeed, if that were true, no one could ever serve as a juror, and our justice system would fall to pieces. In citing the case of *Connie v. Hampton* the Texas court noted, "(t)he usual meaning of 'bias' is an inclination toward one side of an issue rather than the other; but, as used in relation to disqualification of a prospective juror, it must appear that the state of mind of the panelist leads to the natural inference that he or she will not or did not act with impartiality."¹²⁹ Therefore, it is incumbent upon the questioning attorney to ask pointed questions to find this inability to act impartially.¹³⁰

In *Gant*, the opinion focuses in some detail on trial counsel's inability to probe the jury properly to determine the existence of bias as it

118. *Id.*

119. *Id.* at 204.

120. *Id.* at 205.

121. *Id.*

122. *Id.*

123. TEX. GOV'T CODE ANN. § 62.105 (West 1996).

124. *Gant*, 935 S.W. at 207.

125. *Id.*

126. *Id.*

127. *Id.* at 207.

128. *Id.*

129. *Id.*

130. *Id.*

came to their beliefs on awards for mental anguish.¹³¹ The court found that the attorney’s “vague” and “legally insufficient” definition of the term ultimately resulted in answers from potential jury members that did not provide the appellate grounds for reversing the trial court’s decision on cause challenges.¹³² An inability to adequately ask the correct question will not uncover actual or implied bias.¹³³ Because of this error on the part of trial counsel, ultimately, the trial judge properly denied the appellant’s contention regarding error in the instant case.¹³⁴

Regarding the juror who expressed friendship with the employee of the defendant, the appellate court found that trial counsel did properly inquire regarding potential bias because of the relationship.¹³⁵ On voir dire, the juror explained that he rented a house from the employee approximately eight years before.¹³⁶ He characterized their affiliation as “just friends,” noting that they would waive to each other on the street.¹³⁷ Yet when pressed if the potential juror could be objective to both sides, he responded in the affirmative indicating, “I think I could be fair to both parties.”¹³⁸ Based on this response, the trial judge denied Gant’s cause challenge.¹³⁹

The appellate court again concluded that the cause decision was proper.¹⁴⁰ In doing so, a comparison between the questions asked of jurors over mental anguish versus friendship was drawn.¹⁴¹ While the court concludes that this time, trial counsel asked the right questions, it was the juror’s response that he could be fair that was determinable.¹⁴² Again, citing the deference provided to the trial judge who can observe and critic the demeanor of the individual when providing the answer, the appellate court believed the juror’s response demonstrated fairness and an ability to follow the law.¹⁴³

Returning to the idea of questioning because of concerns focused around a pandemic, the specific approach taken by a state could play a crucial role in whether a cause challenge would be granted. Whether a judge looks at the reasoning behind the request through a narrow lens or one much wider such as “good cause” could ultimately decide whether a

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 210.

135. *Id.* at 209.

136. *Id.* at 208.

137. *Id.*

138. *Id.* at 208-209.

139. *Id.* at 209.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

juror leaves or remains in the pool. Yet, a universal takeaway is that no matter the jurisdiction's approach, it falls on the attorneys conducting the voir dire to ask the right questions.

III. DEALING WITH THE JUROR'S CONCERN

A. *The Judge's Role*

With a clear understanding of the right to an impartial jury and the use of cause challenges to achieve that goal stated, the focus now shifts to instances where the grounds for bias are less clear. As stated previously, the crux of this paper is not on those jurors who are ill but those jurors who have a concern regarding becoming ill. Therefore, understanding case law where jurors have expressed concern over impartiality, although the concern may not be rational or scientifically based, is crucial.

One consistent type of case that focuses on juror's concern over more concrete forms of bias can be found in death penalty cases.¹⁴⁴ This is seen frequently in attempting to sit jurors who are open to imposing the death penalty. It falls to the attorneys trying the case to create a panel of individuals who will make a determination of life versus death based upon the evidence presented. Yet during voir dire, trial judges are often presented with jurors who have concerns or are unsure that they can impose the death penalty. In these instances, it falls to the trial courts to determine the legitimacy of these concerns on a case-by-case basis.

For instance, in *U.S. v. Sampson*, the United States Appeal's Court for the First Circuit reviewed this exact scenario.¹⁴⁵ Decided in 2007, *Sampson* was noted as a landmark case in that it provided the First Circuit the unusual opportunity to review a death sentence imposed by the federal government.¹⁴⁶

On appeal, several grounds were raised.¹⁴⁷ Of these, one focused on the dismissal of six potential jurors for cause sustained by the trial judge.¹⁴⁸ All six individuals vocalized concerns about imposing the death penalty.¹⁴⁹ The appellate court began by stating the abuse of discretion standard it would use to determine if the trial judge correctly removed the potential jurors.¹⁵⁰ It then cited the standard used to determine bias in

144. *United States v. Sampson*, 486 F.3d 13, 40 (1st Cir. 2007).

145. *Id.*

146. *Id.* at 17.

147. *Id.* at 17.

148. *Id.* at 39.

149. *Id.*

150. *Id.*

federal court.¹⁵¹ Citing *Adam v. Texas*, the First Circuit concluded that in those instances where a person's thoughts on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," dismissal was appropriate.¹⁵²

In *Sampson*, varying statements were made by the six struck jurors regarding their thoughts on the death penalty.¹⁵³ While most of the attacked challenges appeared self-evident on the record (four jurors answered on questionnaires that they were strongly opposed to the death penalty and could not impose it), two jurors seemed to waffle on their responses.¹⁵⁴ Juror 14 made comments that "she did not know" and "she was very concerned" that she could not impose death as a sentence.¹⁵⁵ While Juror 28 remarked during voir dire that she "did not think" she could impose death for someone who was mentally ill.¹⁵⁶

In affirming the trial court's decision to strike Juror 14 and Juror 28, the First Circuit reflected on the fact that every time a trial judge strikes a juror for cause, he or she is exercising a degree of discretion.¹⁵⁷ It lamented that in instances where potential jurors are not positive over their concerns to serve there is no magic formula to use nor crystal ball to employ.¹⁵⁸ As the appellate court remarked, when an individual is "near the margins, on-the-spot judgment plays an important part in screening out those whose ability to serve may be compromised."¹⁵⁹ With Juror 14 and Juror 28, the trial judge did not abuse his discretion in granting the request to strike even though the objections to imposing death were less concrete than that of clear bias.¹⁶⁰

B. *The Juror's Words*

Yet this litmus test is neither limited to the federal courts nor criminal cases. In *Bell v. Vanlandingham*, the Alabama Supreme Court encountered a similar issue in reviewing a medical malpractice case where a physician was the defendant.¹⁶¹ The appeal was based on a judge's failure

151. *Id.*

152. *Id.*

153. *Id.* at 40.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 41.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Bell v. Vanlandingham*, 633 So. 2d 454, 455 (Ala. 1994).

to permit cause challenges on three potential jurors who expressed concerns about the ability to be fair.¹⁶²

The first juror, Wood, was a pastor in the local community.¹⁶³ He was neither a patient of the physician in the past or present.¹⁶⁴ However, he did express concerns about being impartial because other members of his congregation were patients.¹⁶⁵ He would minister to them at the hospital where the doctor worked.¹⁶⁶ This made him feel “a little uncomfortable” sitting on the jury.¹⁶⁷

The second juror, Turk, while not a current patient of the doctor had been a patient previously.¹⁶⁸ Yet he had also hunted with the plaintiff in the case in the past as well. As such, he had contact with both sides of the lawsuit.¹⁶⁹ Yet unlike Wood, Turk unequivocally indicated that he could be impartial in the case.¹⁷⁰

The third and final juror was Kornegay.¹⁷¹ She explained during voir dire that Dr. Vanlandingham served as the physician for her family.¹⁷² Because of this relationship, she did not want to sit on the jury.¹⁷³ Specifically, she stated that she felt “awkward” hearing the case and finding a verdict.¹⁷⁴

In rendering its decision, the Alabama Supreme Court again reiterated the robust discretion that the trial judge who observes the potential jurors has in these instances.¹⁷⁵ Citing previous precedent found in *Roberts v. Hutchins*, the court wrote, “that a trial judge is given broad discretion in regard to sustaining or denying a challenge for cause, and [that] his decision is therefore entitled to great weight and will not be interfered with unless it is clearly erroneous and equivalent to an abuse of discretion.”¹⁷⁶ While under Alabama case law a doctor-patient relationship is prima facie evidence of bias, the ultimate decision still resides in the trial judge to see if that presumption can be surmounted by the juror.¹⁷⁷

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

In the *Vanlandingham* case, juror Turk clearly made statements that the relationship he had with both parties would play no role in his decision process.¹⁷⁸ Therefore, the appellate court quickly concluded that it was not error to deny a cause challenge on him.¹⁷⁹ However, jurors Wood and Kornegay posed greater distress.¹⁸⁰ In focusing on Wood, the exact wording of how his concern was voiced played a decisive role in the Alabama Supreme Court finding that there was no error to deny the cause challenged against him.¹⁸¹ Wood said he would feel “a little uncomfortable” if he had to sit on the panel.¹⁸² In the court’s view, a slight discomfort did not rise to the level of overturning the trial judge’s decision not to strike the juror for cause remembering the broad discretion trial judge’s had on these decisions.¹⁸³

However, the Alabama Supreme Court did find juror Kornegay’s hesitation in serving was expressed in a fashion that warranted a reversal of the trial court’s decision.¹⁸⁴ In finding that it was error to deny the cause challenge against her, the appellate judges narrowed in on her use of the term “awkward.”¹⁸⁵ Such terminology had been found in a previous case to warrant a cause challenge when a juror responded that she “would feel ‘awkward’ returning to her doctor for treatment if she served on the jury in a medical malpractice action against him.”¹⁸⁶ Therefore, while precedent did not recognize the term “uncomfortable” as justification for juror removal, it did believe the term “awkward” warranted exclusion.¹⁸⁷

As such, it is clear that a juror’s concern is enough to warrant a cause challenge in some instances. However, the way that the concern is expressed plays an important role in the ultimate determination of whether the cause challenge will be sustained or denied. Time after time the clear message appellate courts are sending is the authority of the trial judge to make a decision on the veracity and authenticity of the concern is paramount and will only be disturbed in the rarest of circumstances.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Wright v. Holy Name of Jesus Medical Center*, 628 So.2d 510, 512 (Ala.1993).

187. *Vanlandingham*, 633 So. 2d at 455.

IV. LEGITIMACY OF WORRY

A. *Lack of Rationality of Concern*

Yet until recently many would consider falling ill because of exposure to others during jury service an illegitimate concern no matter how it was phrased. As stated previously, the issue of whether catching the Coronavirus while serving as a juror had not been reported on before. Yet potential guidance can be found in past cases dealing with jurors who may have expressed hesitation in serving on panels when that hesitation was potentially lacking merit.

One interesting federal case on the legitimacy of a juror's concern can be found out of the Western District of Oklahoma in the decision of *Morris v. Workman*.¹⁸⁸

During the case, one of the jurors, Myers, noticed that the Petitioner was taking copious notes of all the going's-on that were occurring.¹⁸⁹ Myers became nervous because he thought that during voir dire he would be forced to reveal personal information about himself such as his address.¹⁹⁰ Because he additionally believed that the Petitioner was charged with criminal activity that was gang related, he became fearful that if his address was disclosed there would be potential retaliation against he and/or his family by someone in the Petitioner's gang.¹⁹¹ While there was absolutely no evidence to suggest such a conclusion, the juror shared his concerns with the bailiff, who promptly reported the matter to the trial judge.¹⁹²

In speaking with Myers, the trial judge took great pains to not only determine if these concerns would affect the juror's ability to be fair but if for any reason if these concerns had been shared with others in the venire infecting them as well.¹⁹³ Fortunately, during the inquiry, Myers denied both concerns.¹⁹⁴ He emphatically responded to his duty of being impartial by stating, "that's what I am going to do."¹⁹⁵ Because of the judge's thorough job in exploring potential bias affecting the trial, the magistrate's report and recommendation was affirmed.¹⁹⁶

188. *Morris v. Workman*, No. CIV-09-81-R, 2009 WL 3260600, at *1 (W.D. Okla. Oct. 8, 2009).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

Interestingly, in ruling in this fashion the Oklahoma Federal District Court cited the United States Supreme Court case of *U.S. v. Gagnon*.¹⁹⁷ Here the concern that had been expressed was that a juror thought that a defendant in a drug trafficking trial had been drawing pictures of the jurors during the proceedings.¹⁹⁸ When asked by the court outside the presence of the jury if Gagnon had been engaging in such conduct, he reported he had as he was an artist and this was how he calmed himself.¹⁹⁹ Nonetheless, the judge ordered him to cease the behavior immediately.²⁰⁰ While no intimidation motive was found, one of the attorneys asked the judge to inquire if the juror could no longer be impartial.²⁰¹

The court decided to have the conversation with the individual juror outside the presence of the parties in his chambers.²⁰² While questioning the juror about his concern, the juror stated, "... I just thought that perhaps because of the seriousness of the trial, and because of-whichever way the deliberations go, it kind of-it upset me, because of what could happen afterward."²⁰³ Based on this statement, the judge further pressed if the juror could remain on the case and be impartial.²⁰⁴ Satisfied with his answers, the judge permitted the juror to continue on the panel.²⁰⁵ In ruling against Gagnon, the United Supreme Court qualified the entire encounter as "a minor occurrence."²⁰⁶

Remote and unusual juror concerns do not only exist at the federal level. For instance, the State Supreme Court of Montana reviewed a case where an individual juror expressed a concern that if he ruled against the county government, his taxes could go up, thus making him hesitant to serve in the case of *Eklund v. Wheatland County*.²⁰⁷

In *Eklund*, a citizen was injured while a juvenile tried to escape from a detention facility.²⁰⁸ The individual was injured when during a police chase the juvenile lost control of his getaway car slamming into Eklund.²⁰⁹ During the initial trial, summary verdict was granted for one of the defendants, Wheatland County.²¹⁰ Ultimately, reversed and remanded for a

197. *Id.*

198. *U.S. v. Gagnon*, 470 U.S. 522 (1985).

199. *Id.* at 523, 524.

200. *Id.* at 523.

201. *Id.*

202. *Id.*

203. *Id.* at 524.

204. *Id.*

205. *Id.*

206. *Id.* at 527.

207. *Eklund v. Wheatland Cty.*, 212 P.3d 297, 303 (Mo. 2009).

208. *Eklund v. Trost*, 151 P.3d 870, 873 (Mo. 2006).

209. *Id.*

210. *Id.*

second trial, Wheatland County was found not liable by a jury and Eklund appealed again.²¹¹

On appeal, Eklund argued that one of the jurors, Butts, expressed a concern that he was unable to be impartial in the case.²¹² Butts was a landowner in Wheatland County, and he articulated an unease that if he ruled against the government his taxes could be increased to pay the judgment.²¹³ Based on this response, Eklund moved to strike the juror for cause.²¹⁴ However, Wheatland objected.²¹⁵ Both counsels questioned the juror further ultimately resulting in the judge denying the cause challenge.²¹⁶ In an abundance of caution, Eklund utilized a preemptory challenge and had Butts removed.²¹⁷

In evaluating the degree of Butts' consternation, the trial court closely examined how his anxiety about increased taxes was expressed.²¹⁸ The court characterized these statements as a "hesitance" focused on the size of jury award more than an inability to remain impartial and unbiased.²¹⁹ Additionally, the trial judge seized upon Butt's statements that he "would follow the law and the instructions given to him."²²⁰ The trial judge remarked that at no point did the potential juror say that he would be unfair.²²¹

The Montana Supreme Court found that the trial judge's decision to deny the cause challenge was proper.²²² In supporting the decision, the appellate court adhered to the principle that great weight must be given to the trial judge's decision as he observes the demeanor and nonverbal cues of the jurors in making a decision.²²³ It should be unusual for an appellate court to disturb that assessment based solely on a record on appeal.²²⁴ As the Montana Supreme Court wrote, "(t)he trial judge stood in the best position to detect whether juror Butts demonstrated actual bias against Eklund."²²⁵

211. *Wheatland Cty*, 212 P.3d at 299.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 303.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

B. Lack of Sincerity of Concern

Yet, one profound reality exists regarding jury service that must be mentioned in this article. As many judges and litigators agree, one commonality amongst juries throughout the country is a lack of desire for some to serve. Whether service is considered an inconvenience or an overt repugnance, the bottom line is that people will lie to get out of the commitment. In evaluating the veracity of an individual's juror's distress, it is not simple enough to explore the possibility of an issue but the genuineness of the individual juror in expressing the concern to begin with.

In *People v. Wilson*, the Colorado Appeals Court reviewed a case where the issue of a juror being truthful about his concerns to be impartial arose.²²⁶ In *Wilson*, a defendant appealed his conviction for several offenses including driving under the influence and reckless driving.²²⁷ In the case, a gas station attendant reported Wilson for appearing to drive while intoxicated.²²⁸ Once police responded to the attendant's call, Wilson was seen illegally completing a U-turn in their presence.²²⁹ A traffic stop was then initiated.²³⁰ Wilson appeared to be drunk during the encounter and refused to perform field sobriety exercises.²³¹ He was arrested and ultimately found guilty at trial.²³²

On appeal, Wilson questioned the trial judge's refusal to grant a cause challenge against a specific juror.²³³ The juror initially wrote on his questionnaire prior to his arrival at the courthouse that he did not want to serve because of financial reasons.²³⁴ This juror had responded in writing that he felt he could not be fair and impartial because "he was the sole supporter of his household, stating, 'If I don't work I don't bring in any money.'"²³⁵ This concern was later followed by an exchange with the judge during the voir dire process where he again expressed a desire not to serve for financial reasons.²³⁶ The court asked if there was anyone who could not serve because of "substantial personal, business, or other hardship" to

226. *People v. Wilson*, 114 P.3d 19, 24 (Colo. App. 2004).

227. *Id.* at 21.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 22.

235. *Id.*

236. *Id.*

which the juror answered, “...being self-employed...if I don’t work I don’t get paid.”²³⁷

When the judge still did not remove him from the jury panel, the potential juror seized upon an inquiry made by one of the attorneys regarding feelings about alcohol use.²³⁸ Wilson’s attorney poised the following question,

Some of you have indicated there are circumstances in your background, family members who abused alcohol and things of that sort. I guess because time is limited, I guess I’m just going to ask it this way. Is there anyone who feels those kinds of past experiences would affect them in sitting as jurors so that they could not be fair, knowing what the charges are? Anybody who’s concerned about that as an issue?²³⁹

The juror’s corresponding answer was as follows:

I’d say my daughter’s mother who’s no longer alive due to this could account for every one of the counts you’ve got there in your particular client. You can’t count that high. You don’t have enough fingers and toes.... I have too many other outside responsibilities plus what I know on a background basis as I said, somebody I was close to at one time in my life all those counts you’ve got on your client unfortunately she’d have it on [her], so in other words, it would kind of like get me on a narrow-minded basis.... I would say he’s [your client] got a strike against him because I’ve been around enough of it. I’ve been around too much of it.²⁴⁰

After the exchange, the defense counsel immediately moved to remove the juror for cause.²⁴¹ A bench conference soon followed where the trial judge denied the request.²⁴² As justification for refusing to remove the juror, the judge explained that he believed the individual was lying simply to be permitted to return to work.²⁴³ The prosecution added that the answers regarding his feelings about alcohol should have also been indicated on the questionnaire if they were valid.²⁴⁴ While the defense attorney did not technically disagree with the court’s and prosecution’s

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 23.

242. *Id.*

243. *Id.*

244. *Id.*

statements, he did note that the juror had expressed a clear bias against his client.²⁴⁵

In ruling that the trial judge incorrectly denied the cause challenge, the appellate court understood that the sincerity of the juror's statements was lacking.²⁴⁶ Yet, the trial judge was found at fault for not exploring the issue further to see if the juror could set aside his concerns and be impartial.²⁴⁷ In reaching this decision, the appellate court conceded that a juror's independent motives for providing the answers he or she provides are germane to the question of whether they can serve on a case.²⁴⁸ Yet doubting a person's truthfulness does not absolve a court of its responsibility to explore the matter ensuring that a party receives a fair trial.²⁴⁹ In writing its opinion, the Colorado Court of Appeals announced, "a trial court may not deny a defendant's challenge for cause to a prospective juror who has expressed bias based solely upon its belief that the prospective juror is merely seeking to avoid jury service."²⁵⁰

Prior to 2020, most litigators encountering potential jurors claiming to fear jury service because of falling ill would believe these individuals were either bad liars wanting to avoid jury service or people suffering from severe hypochondria. In either scenario, a cause challenge may have been a valid response. But in a post Covid-10 society, a third option has become apparent. Jurors who are either in high-risk categories or live with family in high-risk categories have a legitimate concern of contracting the disease while in public. To these individuals, it falls on court system throughout the country to come up with pragmatic solutions to address their concerns. Whether a court doubts the rationality or the sincerity of the fear is no longer an issue. Instead, the focus shifts to how to accommodate these individuals.

V. PRAGMATIC SUGGESTIONS

Therefore, with this information in hand, it is time to look at the specific case of those individuals who fear jury service because of the potential of becoming ill by exposure to other individuals. Even when a vaccine has been developed for Covid-19, the next disease may be around the corner. Our justice system demands change for these changing times.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 24.

There are a few pragmatic suggestions to consider that lesson or potentially eliminate the fear of contracting a disease to begin with.

While at the time of writing this article, approximately ninety-five percent of United States' citizens are under lockdown, at some point everyone recognizes that these restrictions will be lifted.²⁵¹ One idea that has been floated by many is the notion of having individuals have their temperatures taken before entering buildings.²⁵² Indeed, the happiest place on earth, Walt Disney World, has indicated the possibility of taking people's temperatures before permitting entry to their parks.²⁵³ Any individual having a temperature of 100.4 degrees or higher would be denied access.²⁵⁴ Similar health checkpoints could be placed at entrances to courthouses. Only those individuals who are free from fever would be granted access.

A second suggestion is the altering of courtrooms themselves. Many jurisdictions only require a six-person jury for most cases but provide seating for those rare instances where a twelve-person jury is necessary. For those occasions, jurors can sit one seat apart to practice social distancing. Another idea is reorienting the presentation of the case to the public seating area which many courtrooms provide in the back of the courtroom. In this scenario, instead of presenting the case to the judge, the attorneys would present the case to where the jurors sit. Coupled with efforts at increased cleaning, this could significantly reduce the odds of the virus spreading.

A final idea focuses on better review procedures before potential jurors even arrive at the courthouse using more thorough questionnaires. For instance, many jurisdictions already permit individuals of a certain age automatic excusal of jury service.²⁵⁵ The range is as low as sixty-five in such states as Mississippi and South Carolina or as high as eighty in Hawaii and South Dakota.²⁵⁶ This age excusal could be lowered to automatically exclude those citizens who are in high-risk groups for complications

251. Holly Secon, *An Interactive Map of the US Cities and States Under Lockdown – And Those That are Reopening*, BUSINESS INSIDER (June 3, 2020, 11:48 PM), <https://www.businessinsider.com/us-map-stay-at-home-orders-lockdowns-2020-3>.

252. *Coronavirus: Disney May Take Your Temperature Once Parks Reopen*, CLICK ORLANDO (Apr. 8, 2020, 9:20 AM), <https://www.clickorlando.com/news/local/2020/04/08/coronavirus-disney-may-take-your-temperature-once-parks-reopen/>.

253. *Id.*

254. *Id.*

255. *Called for Jury Duty? You May Be Excused Based on Your Age*, ELDER LAW ANSWERS (Mar. 12, 2020), <https://www.elderlawanswers.com/called-for-jury-duty-you-may-be-excused-based-on-your-age-15650>.

256. *Id.*

associated with the virus.²⁵⁷ Furthermore, the virus appears to be more dangerous to those individuals who suffer from preexisting medical conditions.²⁵⁸ Diagnoses such as asthma or diabetes could also become grounds for automatic excusal from service for those who are concerned about their health.

Yet, despite these suggestions, the reality is that at some point lawyers and judges will inevitably be faced with a potential juror who expresses an inability to focus on a case because of a fear of contracting an illness. In those instances, case law does provide us a framework to operate to ensure that the parties have a fair trial heard by an impartial jury. First, we know that even if the court believes that there are alternative motives behind the statement, such as avoiding jury service, an inquiry must occur.²⁵⁹ Precedent also dictates that the wording of the juror's fear plays a vital role in how the judge and attorneys handle the matter.²⁶⁰ In granting or rejecting a cause challenge, the language of the juror's anxiety must be clear and unwavering. It must clearly establish an inability to focus on the matter at hand because the fear of becoming ill is so significant and cannot be pushed aside.

Ultimately, the decision to grant a cause challenge is determined on a case-by-case basis. While precedent is indeed helpful, an appellate court must pay particular care to the questions, answers, and actions of the juror, the judge, and the attorneys. This is why the one universal we can pull from both federal and state case is the weight that the trial court's discretions must have in these situations.²⁶¹ While the law seems clear that an inquiry must occur when a fear is raised to service, the law is equally clear that the trial's judge's decision will not be disturbed unless clear abuse is found. Therefore, it is imperative that all the players in the case ensure that no matter how frivolous or farfetched a juror's anxiety about catching a disease appears, the same process is followed for a healthy twenty-one-year-old with no preexisting health conditions as it is for a seventy-year-old individual who is in a high-risk category for contracting the disease. Like so many issues in the law the process must be adhered to no matter the peripheral circumstances.

257. *How Does COVID-19 Affect Different Age Groups?*, NATIONAL WOMENS HEALTH NETWORK, <https://www.nwhn.org/how-does-covid-19-affect-different-age-groups/> (last visited Oct. 17, 2020).

258. James Myhre and Dennis Sifris, *COVID-10 and Pre-Existing Conditions: Understanding Your Risk*, VERY WELL HEALTH, <https://www.verywellhealth.com/covid-19-pre-existing-conditions-4801962> (last updated Sep. 18, 2020).

259. *Wilson*, 114 P.3d at 23.

260. *Vanlandingham*, 633 So. 2d at 455.

261. *Hui*, 64 F. App'x at 265.

VI. CONCLUSION

Ultimately, while the immediate impact of the Coronavirus is self-evident by closures of court across the country, the lasting impact of how attorneys practice law will be felt long after shelter at home orders are lifted. With the law being an essential service, monthly moratoriums on court hearings are not a long-term solution for a world where the next pandemic may pop up in a month's time. The focus must always remain on the litigants' rights, ensuring that no matter what is happening outside the courtroom, jurors are giving their full attention to the issues before them.

Therefore, as 2020 becomes history and we as a society move beyond mandatory stay at home orders, anticipating how we handle the fallout from Covid-19 should be a priority for courts across our country. Inevitably, concerns about illness and sanitation will spill into courtrooms. Judges must be ready to address these fears in efficient but appropriate means. Ultimately, ensuring that all parties get a fair trial rests on the trial courts and their discretionary review of potential jurors who appear before them. Whether it be legitimate alarm for one's health or fabricated attempts at avoiding jury service, the phrase, "I don't want to catch something," will no doubt infect our voir dire process for the near future.

