



Voir dire in the time of COVID-19

Litigation Alert

COVID-19 Alert

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Many trial lawyers and legal scholars view *voir dire*, or jury selection, as one of the most significant aspects of a jury trial. But the rights of a lawyer to conduct the process are not absolute. The Federal Rules of Civil Procedure authorize courts to conduct *voir dire* without the ability for attorneys to ask questions, and some states have similar rules.

The coronavirus 2019 (COVID-19) pandemic will only further increase limitations on *voir dire* that may prove detrimental to parties' ability to vet jurors. If the process is conducted in person, it must be done in a way that ensures jurors' safety, including the use of face masks. At least one defendant in *Wilgenbusch v. American Biltrite, Inc. et al.*, an asbestos case that was set for trial in California Superior Court on July 9, attempted to protest the use of face masks during jury selection, arguing that the masks hide the appearance, demeanor and reactions of prospective jurors, which directly undermines the sole purpose of *voir dire* – to assess whether jurors can be fair and impartial. While the California Supreme Court was unpersuaded and summarily denied the defendant's writ of mandate, the issue will undoubtedly be tested again as jury trials resume across the country.

One solution to the problem of being unable to see jurors' faces is to conduct virtual *voir dire*s. However, virtual jury selection may present additional layers of complexity and other concerns for litigants, including garnering a less diverse jury pool because of the lack of access to reliable technology, or the inability to ensure that jurors are

not conducting internet searches about the case and litigants during the process.

While there is no perfect solution for conducting *voir dire* during a pandemic like COVID-19, parties are encouraged to be aware and prepare to advocate for one that best preserves the purpose of the *voir dire* process. Over the next several months, arguments similar to those made by the defendant in *Wilgenbusch* will likely arise. Time will tell whether the courts will be more persuaded in the future.

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