

# Asbestos

## **Asbestos Experts Discuss The Future Landscape Of Trials And Verdicts**

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# Commentary

## Asbestos Experts Discuss The Future Landscape Of Trials And Verdicts

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**Mealey's Litigation Report Asbestos** recently asked industry experts and leaders for their thoughts on how trials and verdicts might change once they resume. We would like to thank the following individuals for sharing their thoughts on this important issue.

- Patricia Henrich, Partner, Reilly McDevitt and Henrich, Cherry Hill, N.J.
- Matthew Clark, Attorney, Landry & Swarr, LLC, New Orleans
- William Swallow, Partner, Clyde & Co, Chicago
- Claire Weglarz, Senior Partner, Hawkins Parnell & Young, Los Angeles.

**Mealey's:** When asbestos trials resume, how do you see the landscape and verdicts changing?

**Henrich:** Trials during the pandemic will be fraught with challenges related to effective communication, whether live or remote. In addition, the juror demographics will be significantly altered.

Courts around the country have begun to experiment with remote and socially distanced trials. Even in live trials, the ability of a party to effectively communicate their case has been compromised. Participants have reported an inability to hear judges and witnesses as a result of masks, face shields, plexiglass dividers and social distancing. Perhaps more importantly, jurors are often unable to observe a witness' facial expressions or body language. In cases where credibility is in dispute, this limitation is particularly problematic.

The challenges are different but no less significant for remote trials. The greatest challenge will be to ensure

that the jurors are not suffering from distractions which would prevent them from focusing on the presentation of evidence. All trial attorneys have been challenged with distracted or bored jurors. It will be much more difficult to keep jurors fully engaged on the task of the trial with other electronic devices in their possession and competing household responsibilities.

Perhaps just as significant is the expected change in the jury composition. The Covid-19 virus appears to carry increased health risks for males, people of advanced age and people with other medical conditions. Therefore, we can expect jurors to skew younger, more female and healthier than prior jurors. Making the decision itself as to whether to appear for live jury duty indicates something about the viewpoint of a juror and it is likely that jurors who show up during the pandemic are less risk adverse than jurors who seek to avoid jury duty. Finally, for remote trials, it is expected that the demographic will skew toward younger, more educated and higher income jurors who have more access to and familiarity with electronic platforms.

There is no doubt that remote or socially distanced trials, or some combination of the two, are coming in the near future to all of our courtrooms. We need to understand the limitations of these trials and the effect the pandemic has had on the likely jury pools if we are to be able to effectively represent our clients.

**Clark:** Airborne transmission. It has been a ubiquitous phrase through 2020 and likely will continue to be so for our foreseeable future due to COVID-19 risk. Asbestos disease litigation describes a seemingly identical risk to juries. Much like the risk for COVID-19 transmission, a demonstrated risk for asbestos dust transmission could be greatly diminished with proper face coverings and education. These obvious connections between COVID-19 and asbestos disease can effectively be demonstrated to juries.

Through the wake of COVID-19, I see juries with an enhanced ability to understand both the science of asbestos disease risk and the concept of negligent asbestos exposure. I see juries with greater empathy for asbestos disease patients, patients with respiratory trouble. I see verdicts increasing.

**Swallow:** We can expect persistent effort from the courts to think outside the box in order to try and keep their dockets moving. Whether it is moving cases to remote counties with bigger courtrooms for trial, engaging in more extensive physical screening processes for potential jurors (and all courthouse visitors), encouraging bench trials, joint trials, and/or attempting full-on remote jury trials, courts are going to have to try what they can to make a dent in the ever-growing backlog of cases that haven't seen trial settings due to coronavirus. One on one jury trials in the pre-coronavirus style aren't likely to come back to most of the busier jurisdictions prior to mid-2021, and asbestos cases will have to compete with legions of others for scarce resources in terms of courtrooms, judges, and jurors. With respect to verdicts, don't expect much change — they are still going to be big when the plaintiffs hit. The pandemic's effect on the jury pool will likely exacerbate what we already knew about the areas we operate in.

**Weglarz:** This answer is going to be venue dependent. California is a great example. In my backyard, the Los Angeles County Superior Court's presiding judge issued a General Order on August 10, 2020, that no civil jury trials commence before January 2021. Meanwhile, up in Alameda County, asbestos jury trials have already resumed, albeit in some cases by remote participation only.

Based on this dichotomy, I anticipate a few changes to the asbestos litigation landscape: (1) plaintiffs' counsel

will use the barrage of trial settings that will result when closed counties like Los Angeles open for civil jury trials in 2021 as a way to drive up settlement numbers; (2) plaintiffs' counsel will attempt to transfer venue from closed counties to open counties as a way to secure trial dates to push forward settlements; or (3) plaintiffs' counsel will, when possible, choose to file cases in open counties.

It is inevitable that verdicts will be affected by several COVID-driven factors — I'll talk about three:

- First, the venire demographic, a significant driver of verdict outcome, will be different in non-remote trials. Based on current information, older adults and people of any age who have serious underlying medical conditions might be at higher risk for severe illness from COVID-19. We will see less jurors that fit into this risk group.
- Second, how jurors perceive information has been shaped by the pandemic and will affect verdicts. Potential jurors are now accustomed to reading about data-tracking, statistics, and risk projections because they see it daily in the news about COVID. They have also learned how these types of numbers can be manipulated to fit the politics of the community.
- Third, I anticipate that judges will mandate shorter trials. Shorter trials will necessitate a more organized presentation and preclude the "throw everything at the wall" approach we see at a lot of trials.

In sum, all of these factors have internal opposing forces that will keep verdicts stable as long as the trial attorneys have an awareness of how to navigate them. Personally, I will be recommending the use of jury consultants to clients even more emphatically now because of factors like these. ■



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*edited by Bryan Redding*

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