

## A New Paradigm For Challenges For Cause In Pa.



*Law360, New York (March 27, 2014, 3:39 PM ET)* -- On March 12, 2014, the Pennsylvania Superior Court, sitting en banc, found the participation of three jurors in a medical malpractice death case was error, vacated a defense verdict rendered in the trial court and remanded the case, ostensibly for a new trial. The jurors' empanelment was the sole issue on this appeal, and the Superior Court, in three decisions, has provided Pennsylvania litigants and their counsel with new guidelines on certain presumptively prejudicial conflicts of interest in the selection of juries.

Despite denying the creation of any bright-line rules, the court has now provided that certain indirect relationships between a juror candidate and participants in a case are sufficient to automatically remove the juror for cause — even when the juror's relationship to case participants is not direct and even when the juror provides assurances of impartiality.

### The Trial Court Record

The facts of the case, *Cordes v. Associates of Internal Medicine, et al.*[1], are relatively straightforward. The plaintiff's decedent, consulting his primary care physician, was diagnosed by her with vertigo, not a transient ischemic attack. She directed him to discontinue a blood thinner medication he had been taking, but shortly thereafter, he suffered a massive stroke and died. The decedent's administratrix brought suit, contending that the physician, her practice group, members of its staff and the corporate owner of the practice group were negligent in the treatment of the patient-decedent. During voir dire, the trial judge denied certain challenges for cause that the plaintiff asserted against three jurors. The case proceeded to trial and resulted in a defense verdict. On appeal, the plaintiff-appellant asserted that the trial judge had abused his discretion in seating these jurors.

None of the three jurors had any direct relationship with the case parties, witnesses or counsel. Rather,

their relationships were indirect. One was the daughter of parents who were current patients of the defendant physician, although she, herself, had never met the doctor. The second juror candidate was the husband of a patient of the physician and, like the first juror, had never met the physician. The third venireperson was an employee of the parent company that owned a subsidiary entity, which in turn, owned the defendant-physician's practice group. The subsidiary entity was a named defendant in the case; however, the parent company that employed the juror was not. This venireperson, too, had never met the defendant physician. All three jurors, when questioned during voir dire, affirmed their ability to serve as impartial and unbiased jurors and to decide the case on the evidence presented at trial.

### **The Superior Court Opinions**

The court per David Wecht, vacated the defense trial verdict by a 6-2 vote. The court published three opinions – two in support of reversal and one dissent. No one opinion garnered support from a majority of the eight judges. [2]

Judge David Wecht in his opinion in support of reversal concluded that notwithstanding each juror's indirect relationship with the case's participants, and the jurors' assurances of impartiality, this did not eliminate "the prospect or appearance of partiality or bias," and that "a close situational relationship with a party may be found even when the relationship in question is indirect." In such instances, the court held, courts should err on the side of caution and exclude such candidates from the jury. Eschewing the creation of any "bright-line" rules, nevertheless, the majority highlighted the "presumptive strength" of relationships between husband and wife, parent and child and relationships arising from business interests, and found that seating each of the three jurors — under the circumstances presented and notwithstanding their claimed impartiality — "cannot erase the stain of potential bias" or "cure the taint of a potential conflict of interest."

Judge Christine Donohue, in her opinion in support of reversal, agreed with Judge Wecht that under the circumstances of the case, "there is no place for a juror's assertion of fairness because an inability to be fair is presumed." Allowing these jurors on the trial panel was "clear error," the Judge concluded, however she disagreed with what she characterized as the "breadth of the [majority's] holding" regarding the per se exclusion of jurors in all three categories at issue. While husband and wife relationships, she found, may warrant a "categorical presumption of prejudice," child and parent as well as employee and employer relationships often differ in the closeness of the relationship and its association with a litigant, witness, victim or counsel. In those situations, she wrote, the relationship itself may not be sufficient to justify a presumption of bias.

In dissent, Judge Judith Ference Olson posited that the court had indeed created a "bright-line" per se exclusionary rule, creating uncertainty and confusion among trial judges and litigants and potentially resulting in difficulties empaneling juries in less-populated counties where connections between prospective jurors and case participants are commonplace. Direct, as opposed to indirect relationships, the judge said, should form a basis for per se challenges for cause, and they should be reviewable only under an abuse of discretion standard.

### **Analysis**

With this decision, attorneys in Pennsylvania are more likely to prevail on challenges for cause as to jurors having an indirect relationship to case participants. Challenges for cause permit an attorney to remove a prospective juror without having to use finite peremptory challenges. Because Cordes expands the permissible scope of challenges for cause, attorneys may now be able to save their peremptory challenges for other potentially adverse jurors when a prospective juror has a significant and presumptively disqualifying indirect relationship to a case participant. When this connection arises from 1) a spousal relationship, 2) a

parent-child relationship or 3) a business interest, an attorney's challenge for cause now stands a greater chance of being granted.

Prior to Cordes, removals of jurors for cause, irrespective of answers on voir dire, were appropriate only when jurors had a close relationship — familial, financial or situational — with the parties, counsel, victims or witnesses, allowing the trial court to presume prejudice. Examples included a prospective juror who was the father-in-law of the defendant corporation's business representative present at trial (familial); a police officer in a case in which the crime at trial involved shooting at police officers (situational); and an employee of a defendant employer (financial).[3]

The Cordes decision now broadens the concept of a close relationship to include both direct and indirect relationships, so that a juror may be automatically stricken for cause despite being a degree or more removed from any direct relationship with the case, parties, counsel, victims or witnesses. From a public policy perspective, earlier Pennsylvania appellate decisions restricted the categories of relationships suitable for presumptive challenges for cause so as to maximize the objective of having juries composed of persons with diverse backgrounds and experiences.[4] The Cordes decision likely signals an expansion of these close relationship categories, starting with the inclusion of indirect familial and business relationships.

The keystone principle of Judge Wecht's opinion is that uncertainty surrounding a juror's relationship to the case should trigger a court to err on the side of caution in removing a juror with any potential bias. As noted above, the Superior Court was not only concerned with known facts surrounding relationships, but also with the "prospect or appearance of partiality or bias" and the prevention of "even the probability of unfairness." Although the court recognized that a juror's ability and willingness to eliminate doubt regarding his or her partiality is vital, when certain close relationships are implicated, trial courts can no longer rest on a juror's assurances of impartiality in considering challenges for cause.

### **Takeaways for Trial Counsel**

As challenges for cause need to be raised before a prospective juror is seated, attorneys should now be aware that more categories of relationships may permit such removals as a result of the Cordes decision. In jury selection, the ultimate goal is to have a jury "that appears to be free of the taint of partiality to a disinterested observer, for it is [the] disinterested observers' faith in the integrity of our judicial system that must be assured." [5] With these guiding principles in mind, attorneys and courts may now have a better understanding of when indirect relationships may qualify as close relationships for the purpose of removing jurors for cause. In seeking to establish a disqualifying relationship, or to defeat the same, attorneys may want to utilize voir dire prudently and fully. Under the Cordes rationale, it remains especially significant to ferret out all pertinent facts and create a suitable record for use in both the trial court and in any potential appeal.

—By Alan Klein and Solomon David, Duane Morris LLP

*Alan Klein is a partner in the trial practice group of Duane Morris LLP's Philadelphia office.*

*Solomon David is an associate in the trial practice group of Duane Morris LLP's Philadelphia office.*

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[1] No. 1737 WDA 2011, 2014 Pa. Super. 52, 2014 Pa. Super. LEXIS 127 (Pa. Super. Ct. Mar. 12, 2014).

[2] Former President Judge Correale Stevens did not participate in the case.

[3] See *McHugh v. Proctor & Gamble Paper Prod. Co.*, 776 A.2d 266 (Pa. Super. Ct. 2001) (examples of close familial and financial relationships); *Commonwealth v. Colon*, 299 A.2d 326 (Pa. Super. Ct. 1972) (example of close situational relationship).

[4] *Colon*, 299 A.2d at 328.

[5] *Cordes*, 2014 Pa. Super. LEXIS 127 at \*46.

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