

# Jury News

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## NEW YORK'S 82 PERCENT COMMITTEE: WHAT WOULD YOU CALL YOUR COMMITTEE?

Chief Judge Judith Kaye of the New York Court of Appeals has established a new committee to look at the problem of the underutilization of jurors in the state. It is called "The 82 percent Committee" based on the fact that, on average, 82 percent of the people called in for jury service are excused and finished with their service at the end of the day. The other 18 percent become sworn jurors and hear the case. Is this statistic good or bad? What is the figure for your court? Can we improve the situation?

I recall a statement from a judge in another state several years ago that 95 percent of the people who report for jury service are done with their jury service after one day. Only 5 percent of the citizens reporting become sworn jurors. He was so proud of this fact and told the employers in the community that their

losses were at a minimum since most workers were back at work the next day, and they could be proud that they were supporting this noble function of citizenship. Convincing him that this was not good and that they were obviously calling in far too many people was difficult. In fact, he argued that citizens were relieved to be able to fulfill their duty, and it was short and painless. The ugly truth is that most should not have been there in the first place. Citizen surveys are mixed on this outcome. Many want to serve, perhaps not for a great lengthy trial, but do want to really participate. Recall the article a few issues ago on the short trial programs in Las Vegas and Phoenix. Jurors loved it, especially if they had been on a longer trial previously.

Another way of looking at this 5 percent figure is that 1 in 20 people become a juror in the process of selecting a jury of 12; we need to bring in, on average, 240 people. Need I say more? New York's 18 percent translates to 67 people brought in per jury selected. What does this mean?

Let's get back to the 82 percent idea and examine this single statistic. Assume a simple case and a one-judge court. The jury is to be 12 citizens, no alternates (to keep the arithmetic simple), and the court calls in 36 people. The selection goes forward, and the jury is selected and sworn.<sup>1</sup> The 24 not selected go home after the first day since the selection lasted less than one day. We have 68 percent "not selected." I almost said 68 percent "not used," but many people would argue that proper jury selection includes the "use of people" for challenges, and being excused for other reasons is very much in the fairness of the process. If that case had settled or a plea was entered after the jurors reported, we have 0 percent selected and 100 percent not selected or, as some call it, a "Zero Day."<sup>2</sup>

If we combine two days in our statistics, one such zero day and one day when we complete selection, we get 83 percent not selected for those two days. If a judge or two judges could select two juries of 12 each from the same 36 prospective jurors, we have 33 percent not selected. When this is done by a single judge, it is called "multiple voir dire" and is a process used in many courts, particularly those with only one or few judges.<sup>3</sup>

The beauty of the "not selected" figure is that it combines the two major problems in juror use into a single figure. The first problem is the non-use of panels due to settlements and pleas, and the second problem is panels that are much larger than needed for the selection of the jury. If the not selected figure is high, we are not sure which problem is the primary reason, but we do know we should be doing better. If the miles per gallon of an automobile drops, we know there is a problem. It then remains for us to diagnose the problem and implement some solution. This easy-to-calculate not selected figure gives us an easy ongoing monitoring tool by which we can easily communicate the state of our jury system.

I also like the not selected figure because it is easy to visualize. I can imagine a large group of citizens arriving in the morning and then, later in the day, a few staying to be jurors while the vast majority goes home after the selection process is completed.

We should be able to calculate the portions of the “not selected” due to the various causes. In some cases it might be a bit complex, and we would need to make some assumptions, such as when a prospective juror attends several selections. This would happen if multiple voir dire is used as described above or if a court used a pool arrangement. In a pooling court, each person not selected could be in one of three categories:

1. Used under a challenge or excused from the selection
2. Attended a selection but not needed; the panel was too large
3. Did not attend a selection and remained in the assembly room until dismissed, as too many prospective jurors were called in

Should we expect the “not selected” to break evenly across these three categories? If a person was selected for a jury and the case settled or a plea was reached, we can either break this figure out or, if it is small, we can neglect this. However, if the beauty of the not selected figure is simplicity, we should avoid a lot of ground rules. Automated jury systems should be able to break these figures out for us and calculate “not selected” value.

The federal courts use a figure called “not selected sworn or challenged.” In 2002, the percent not selected or challenged across all the federal district courts was 39 percent.<sup>4</sup> The percentage not selected or challenged has been increasing slowly with the figure at 33 percent in 1997. On the first day of service, 24 percent were selected, so the number not selected was 76 percent. In 2002, the federal district courts selected 6,967 juries.

What is this “not selected” figure for your court? I have been able to come up with a few figures to compare to New York’s 82 percent. In the federal courts it is 76 percent, and the figure for each federal district court is available online. Los Angeles is running about 80 percent across all its 37 court locations. In future columns, I will publish more of these figures.

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Recent items have included:

- How New York coped with the blackout and communicated with jurors.
- Improved jury instructions
- Press coverage of jury representation problems in Pittsburgh
- Nevada’s jury innovation project
- Civil grand juries in California

#### NOTES

1. Please notice that I have not used the term “voir dire.” This is not because of any anti-French sentiment, but why not just call it jury selection, a perfectly good phrase in current use. The French no longer use the term “voir dire.” So Res ipsa loquitur!

2. See Jury System Management available from the NCSC via [www.ncsconline.org](http://www.ncsconline.org) and select publications.

3. See Jury System Management page 127

4. [www.uscourts.gov](http://www.uscourts.gov) Under District Courts select Statistical Reports, select either Federal Courts Management Statistics or Judicial Business of the U.S. Courts 2002, and select table S-2.