



## ASSESSING AND ACHIEVING JURY POOL Representativeness

By Judge William Caprathé (ret.), Paula Hannaford-Agor,  
Stephanie McCoy Loquvam, and Shari Seidman Diamond

In February 2005, the American Bar Association (ABA) adopted the *Principles for Juries and Jury Trials*, promulgated by the Commission on the American Jury, as the new standards for the jury system.<sup>1</sup> An inclusive and representative jury pool is critical to preserving the right to a fair and impartial jury. The inclusiveness and representativeness of the jury pool can be positively affected by court action. Principle 10(A) specifically addresses procedures for assembling juror source pools.

**PRINCIPLE 10—COURTS SHOULD USE OPEN, FAIR AND FLEXIBLE PROCEDURES TO SELECT A REPRESENTATIVE POOL OF PROSPECTIVE JURORS.**

A. Juror source pools should be assembled so as to assure representativeness and inclusiveness.

1. The names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction. These source lists should be updated at least annually.
2. The jury source list and the assembled jury pool should be representative and inclusive of the eligible population in the jurisdiction. The source list and the assembled jury pool are representative of the population to the extent the percentages of cognizable group members on the source list and in the assembled jury pool are reasonably proportionate to the corresponding percentages in the population.
3. The court should periodically review the jury source list and the assembled jury pool for their representativeness and inclusiveness of the eligible population in the jurisdiction.
4. Should the court determine that improvement is needed in the representativeness or inclusiveness of the jury source list or the assembled jury pool, appropriate corrective action should be taken.
5. Jury officials should determine the qualifications of the prospective jurors by questionnaire or interview, and disqualify those who fail to meet eligibility requirements.

Across the nation, civil and criminal jury members are not being drawn from a representative cross-section of the community. An inclusive and representative jury pool is fundamental to the selection of a fair and impartial jury. As the U.S. Supreme Court has made clear:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.<sup>2</sup>

Lack of representativeness is evident in the courtroom, but solutions must be pursued much earlier. The Jury Management Committee of the ABA's National Conference of State Trial Judges, with Paula Hannaford-Agor of the National Center for State Courts (NCSC), identified a series of steps judges and administrators can take to determine if the procedures used to assemble jurors result in representative jury panels and improve the representativeness of jury panels. The steps focus on (1) establishing reliable methods of measuring the demographic composition of the jury pool, (2) ensuring the inclusiveness and representativeness of the jury pool, and (3) assessing and improving the way jurors are selected for the pool.

## Reliable Methods of Measuring Demographics

### Accurately Documenting Jury Pool Demographics

U.S. Census Bureau demographic statistics offer a starting point to reveal whether the jury pool is reflective of the community. They enable a court to determine the

demographic characteristics of the adult population in a jurisdiction and estimate the jury-eligible population. To obtain the most useful data, courts should use the same definitions and basic data-collection methods as the U.S. Census Bureau uses to collect information from potential jurors. Prospective jurors should be asked to self-identify race, ethnicity, and gender using the same category responses as the Census. For example:

#### CENSUS DATA CLASSIFICATION

##### Check one:

Hispanic/Latino  
Not Hispanic/Latino

##### Check all that apply:

White/Caucasian  
Black/African-American  
Asian  
Native American/Native Alaskan  
Hawaiian/Pacific Islander  
Other Race

#### INCORRECT DATA CLASSIFICATION

##### Check one:

White/Caucasian  
Black/African-American  
Hispanic/Latino  
Arabic  
Other

The Incorrect Data Classification method (1) requires that a respondent select only one race category, eliminating the possibility of a multirace response; (2) collapses Asian, Native American/Native Alaskan, and Hawaiian/Pacific Islanders into a single race category (e.g., Other); and (3) inappropriately treats "Hispanic" and "Arabic" as race categories rather than as ethnicities. Inconsistent data classification and collection yield unreliable data and undermine the ability of courts to assess the effectiveness of the jury selection process. Improving the accuracy and reliability of the demographic information of the jury pool is the first step to ensuring the inclusiveness and representativeness of the jury pool. Sample juror surveys and tabulation tools are available in the NCSC's *Jury Managers' Toolbox*.<sup>3</sup>



**Judge William Caprathe (ret.)** has been a lawyer for 50 years and retired from the Circuit Court in Bay City, Michigan, in 2010 after 30 years as a trial court judge. He was a member of the ABA Commission on the American Jury that developed the 2005 *Principles for Juries and Jury Trials* and has been a strong proponent of jury innovations because he believes they make the jury process more effective for jurors, lawyers, judges, and litigants.

**Paula Hannaford-Agor** is director of the Center for Jury Studies at the National Center for State Courts. She regularly researches and advises state and federal courts on effective jury system management.

**Stephanie McCoy Loquvam** is a civil litigation attorney at Moyes Sellers & Hendricks in Phoenix, Arizona, and is a member of the ABA Commission on the American Jury.

**Shari Seidman Diamond** is Howard J. Trienens Professor of Law and Professor of Psychology at Northwestern University Law School and research professor at the American Bar Foundation. She helped draft the *ABA Principles for Juries and Jury Trials* adopted in 2005 and is currently a special advisor to the ABA Commission on the American Jury.

All of the authors are proud to be current or past members of, or liaisons to, the ABA Commission on the American Jury and have worked on this article in that capacity.

### **The Composition of the Jury Pool Maximizing the Inclusiveness of the Master Jury List**

Inclusiveness means the extent to which the master jury list includes a jurisdiction's entire jury-eligible population. The master jury list is the starting point of the jury process. The more inclusive the master jury list, the more representative the jury pool. NCSC recommends that the master jury list encompass at least 85 percent of the jury-eligible population in a jurisdiction. If the master jury list does not meet this threshold, supplementing with additional juror source lists such as welfare, unemployment, or state income tax rolls should be encouraged.<sup>4</sup> If the number of names on

not representative of the local population, it is unlikely to be representative of other characteristics. A court can adjust master jury lists that are not inclusive or otherwise unrepresentative.<sup>6</sup>

### **Assessing the Effectiveness of How Jurors Are Selected for the Pool Keeping the Master Jury List Current**

The master jury list should be updated at least annually to ensure the accuracy of the addresses. The average annual migration rate in the United States is 15 percent.<sup>7</sup> The U.S. Postal Service (USPS) will forward jury summonses for 12 months if a person registers a forwarding address. After the expiration of the forwarding period, or

summoned. It measures efficiency in court operations because it reflects the administrative work needed to supply enough jurors for jury selection. Nationally, jury yield averages about 50 percent—half of all jury summonses result in persons qualified and available for jury service. The process for summoning and qualifying jurors has substantial effects on jury yield. Courts that combine qualification and summoning in a single step typically experience jury yields 10 to 15 percentage points higher than courts that use a two-step process to qualify and then summon jurors.<sup>9</sup>

Low jury yields indicate that the jury summoning and qualification process



An inclusive and representative jury pool is critical to preserving the right to a fair and impartial jury.

the master jury list is substantially greater than the number of jury-eligible persons in the community, the list may contain duplicate names or individuals who are no longer eligible for jury service. Although over-inclusiveness rarely undermines representativeness, it reduces the overall efficiency of jury operations.<sup>5</sup>

### **Assessing the Representativeness of the Master Jury List**

Representativeness means the extent to which the master jury list reflects the characteristics of the community. It is important that the master jury list reflects a fair cross-section of the community. The jury pool is unlikely to become more representative in the juror summoning and qualification processes. The geographic composition of the master jury list may often serve as a proxy for demographic composition. As a result, if the geographic makeup of the master jury list is

if no forwarding address is registered, jury-related mailings will be returned marked “undeliverable as addressed.” If master jury lists are not frequently updated, people with lower socioeconomic status and minorities are particularly likely to be excluded from the jury pool because they are more likely to move than those with higher socioeconomic status and nonminorities. Failure to maintain current address information also results in unnecessary printing, postage, and processing expenses for the court. Updating the master jury list annually increases the likelihood that people at all socioeconomic levels and minorities will be included in the jury pool and increases inclusivity because the list will also include people new to the community.<sup>8</sup>

### **Improving the Average Jury Yield**

Jury yield is the term used to describe the percentage of statutorily qualified individuals available to serve on the date

may undermine the representativeness of the jury pool. Undeliverable, non-response/failure-to-appear (FTA), and excusal rates are all strongly correlated with socioeconomic and minority status. By improving jury yield, courts may improve the inclusiveness and the representativeness of jury panels.

### **The Undeliverable Rate**

Nationally, 12 percent of jury-related mailings are returned by USPS as undeliverable. Undeliverable rates that are substantially higher than the 12 percent average suggest that the master jury list has become stale, potentially excluding disproportionate numbers of minorities and people with lower socioeconomic status who are more likely to migrate.

USPS maintains the National-Change-of-Address (NCOA) database, which records forwarding addresses. USPS licenses private vendors to access the NCOA

database to update address records. Industries that rely heavily on commercial mail advertising have used these services to minimize undeliverable rates. Courts can use NCOA to update their master jury list by removing stale or incorrect addresses. While the cost of NCOA updates varies by vendor, courts report that the service pays for itself in reduced printing and postage costs.<sup>10</sup>

Using NCOA not only to update the master jury list, but also to update addresses for jury summonses and qualification questionnaires, is an effective way to minimize undeliverable rates. This technique is particularly effective in communities with high migration rates.

### **Nonresponse and FTA Rates**

Nonresponse and FTA rates contribute to underrepresentation of minorities in the jury pool. Nationally, 8 percent of all individuals summoned for jury duty fail to appear, but some courts have reported FTA rates of over 50 percent (i.e., NBC TV reported a 33 percent juror appearance rate in Washington, D.C., in 2012). In 1998, the American Judicature Society found that when socioeconomic factors were considered, race and ethnicity were not significant predictors of juror nonresponse and FTA. However, due to the strong correlation between socioeconomic and minority status, minority representation in the jury pool is impacted by the reduced appearance of lower-socioeconomic-status individuals.

A person's expectation about the consequences of failing to respond or appear is the single best predictor of appearance. People who believe that they will face consequences such as fines or arrest for failing to respond are significantly more likely to respond than people who believe that nothing will happen to them. Providing jurors with information about what is expected and the consequences of failing to comply can significantly increase response rates.<sup>11</sup> A study conducted by the Riverside County (California) Superior Court found that mailing reminder postcards to prospective jurors one week before the reporting date decreased FTA rates by at least 5 percentage points.<sup>12</sup> Postcards that specified the penalties for failure to appear reduced FTA rates by 10 percentage points.<sup>13</sup>

The NCSC has found that the most effective post-hoc strategy for minimizing nonresponse/FTA rates is a second notice/second summons program. Courts that implemented these types of programs reported nonresponse/FTA rates 24 percent to 46 percent lower than courts that had no follow-up program. The most effective follow-up programs are those that follow up within three weeks after the person's nonresponse/FTA and that are consistently administered.

Some courts use Order-to-Show-Cause proceedings and other more aggressive approaches (e.g., fines, fees, arrest warrants) to follow up on nonresponders and FTA jurors. NCSC found these approaches had only a marginal impact on nonresponse/FTA rates, possibly because they are only employed sporadically. However, these types of approaches, used strategically with appropriate, pre-arranged media coverage, can educate the public about the potential consequences of failing to appear.<sup>14</sup> Improving appearance rates will improve the inclusiveness and representativeness of the effective pool for jury selection.

### **Excusal Rate**

Because of the strong correlation between socioeconomic status and minority status, excusal rates contribute significantly to underrepresentation of minorities in the jury pool. Specifically, excusals due to financial hardship, lack of transportation, and lack of child care have a disproportionate impact on minorities. Nationally, the average excusal rate in state courts is 8 percent. This rate varies with the maximum term of service for jury duty, the compensation paid to jurors, and the court's deferral policy.

Term of service means the maximum duration that a juror must be available for service. The longer the term of service, the greater the potential burden on jurors—and the greater the likelihood that jurors will seek to be excused for hardship. Courts with a one-day or one-trial term of service have an average excusal rate of 6 percent compared to 9 percent in courts with longer terms of service.

Juror compensation is designed to reimburse jurors for reasonable out-of-pocket

expenses incurred because of jury service, but not to replace lost income. In most jurisdictions, juror compensation is established by statute, but some states permit localities to supplement the mandatory state compensation using local funding. In jurisdictions that pay jurors a flat daily fee for jury service, the average amount is \$22 per day. In jurisdictions with a graduated juror-compensation structure based on days of service, the average is \$32 per day. Juror compensation correlates with excusal rates. Courts with higher-than-average-compensation policies report excusal rates of 7 percent compared to 9 percent for courts with lower-than-average-compensation policies. Other amenities such as free and adequate parking, convenient public transportation, and child care facilities can greatly alleviate the burden associated with jury service, facilitating participation from jurors who might otherwise request excusal.

Many statutes authorizing courts to excuse jurors for medical or financial hardships include "extreme inconvenience" as one of the excusal criteria. However, jurors often ask to be excused from jury service not because jury service would pose a substantial hardship, but because preexisting commitments or a temporary hardship prevents them from serving on the date summoned. Jurors allowed to defer service to a more convenient time appreciate the accommodation and are more likely to appear for deferred service than jurors required to appear on the original date. Deferral rates and excusal rates are almost perfectly inversely related: For every 1 percentage point increase in the deferral rate, the excusal rate decreases by 0.7 percent. An effective deferral policy permits jurors to defer service one time as a matter of course to a future date within six months of the original summons date, with future requests required to be approved in writing by the court. Exploring opportunities to accommodate jurors' schedules and preexisting commitments should improve jury inclusiveness and representativeness.

### **Conclusion**

Many circumstances affect the representativeness of the jury panel. While some circumstances are beyond the control of

## Checklist for Assessing and Improving Representativeness in Jury Pools

- Step 1.** The master jury list should include at least 85 percent of the jury-eligible adults in the jurisdiction.
- Step 2.** Consider the source lists used to create the master jury list. Driver's license/state ID lists may overlap with voting lists if a state ID is required to register and/or vote. Additional juror source lists might include welfare, unemployment, and state income tax rolls.
- Step 3.** Determine the percentage of the population that is jury-eligible. Eligibility requirements can greatly affect the demographic composition and representativeness of the jury pool.
- Step 4.** Consider the demographic characteristics of the jury-eligible population.
- Step 5.** The master jury list should reflect the geographic distribution of the population.
- Step 6.** The master jury list should be updated at least annually.
- Step 7.** Improve jury yield. Tables 15 and 16 in the NCSC's *State-of-the-States Survey* provides a comparative guide for urban, suburban, and rural courts.<sup>15</sup> A unified system that combines juror summoning and qualification improves yield rates. If jury yields are too low, consider the undeliverable rate, the nonresponse/FTA rate, and the excusal rate.<sup>16</sup>
- Step 8.** An undeliverable mail rate over 12 percent indicates that the master jury list is probably stale. If local migration rates are high, master jury lists should be updated more frequently.
- Step 9.** Consider using NCOA to update addresses on the master jury list, and for summonses and questionnaires before mailing.
- Step 10.** A second notice/summons within three weeks is the most effective approach for reducing nonresponse/FTA rates. Including the possible consequences of failing to appear on the summons or reminder postcard helps reduce noncompliance rates. Punitive actions may be used strategically to educate the public and improve compliance.
- Step 11.** The excusal rate should stay below the national average of 8 percent.
- Step 12.** One-day or one-trial terms of service result in the lowest excusal rates.
- Step 13.** Compensation rates should be sufficient to cover reasonable out-of-pocket expenses. Free parking, accessible public transportation, and other amenities can facilitate juror participation and reduce the excusal rate.
- Step 14.** Deferral rates and excusal rates are inversely related. Initial deferral allowances improve response rates.

the courts, the representativeness of the jury pool can be positively affected by court action. An inclusive and representative jury pool is critical to preserving the right to a fair and impartial jury. ■

### Endnotes

1. AM. BAR ASS'N, PRINCIPLES FOR JURIES &

JURY TRIALS (2005).

2. *Peters v. Kiff*, 407 U.S. 493, 50504 (1972).

3. *Jury Managers' Toolbox*, CTR. FOR JURY STUDIES, <http://www.ncsc-jurystudies.org/Jury-Managers-Toolbox.aspx> (last visited June 2015).

4. See G.T. MUNSTERMAN & PAULA L. HANNAFORD-AGOR, NAT'L CTR. FOR STATE COURTS, THE PROMISE AND CHALLENGES OF JURY SYSTEM

TECHNOLOGY, ch. 2 (2003).

5. AM. BAR ASS'N, *supra* note 1, at 51, Principle 10(A) ("Juror source pools should be assembled so as to assure representativeness and inclusiveness.")

6. G.T. Munsterman & Paula L. Hannaford-Agor, *Building on Bedrock: The Continued Evolution of Jury Reform*, 43 JUDGES' J., no. 4, 2004, at 11–16. See also AM. BAR ASS'N, *supra* note 1, at 51, Principle 10(A).

7. U.S. CENSUS BUREAU, <http://www.census.gov>. U.S. Census data provide detailed information about state and local migration rates. U.S. CENSUS BUREAU, Table B07001 (Geographic Mobility in the Past Year by Age for Current Residents in the United States, 2009–2013 American Community Survey 5-Year Estimates).

8. AM. BAR ASS'N, *supra* note 1, at 51, Principle 10(A)(1) ("The names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction. These source lists should be updated at least annually.")

9. Paula Hannaford-Agor & Nicole L. Waters, *Tripping over Our Own Feet: Two Steps Are One Too Many in Jury Operations*, in *FUTURE TRENDS IN STATE COURTS 2010*, at 112 (Carol R. Flango et al., eds., 2010). One-step courts also experience lower printing and postage costs.

10. For a list of licensed NCOA vendors, see NCOALink® *Full Service Provider Licensees Marketing Contact Information* (Mar. 17, 2015). [http://ribbs.usps.gov/ncoalink/documents/tech\\_guides/CERTIFIED\\_LICENSEES/FULL.PDF](http://ribbs.usps.gov/ncoalink/documents/tech_guides/CERTIFIED_LICENSEES/FULL.PDF).

11. Colin F. Campbell & Bob James, *Innovations in Jury Management from a Trial Court's Perspective*, 43 JUDGES' J., no. 4, 2004, at 24.

12. Shaun Bowler et al., *Get Out the Juror*, 36 *POLIT. BEHAVIOR* 515 (2013).

13. *Id.*

14. AM. BAR ASS'N, *supra* note 1, at 53, Comment; *id.* at 61–62, Principle 10(D)(2) ("Courts should adopt specific uniform guidelines for enforcing a summons for jury service and for monitoring failure to respond to a summons. Courts should utilize appropriate sanctions in the case of persons who fail to respond to a jury summons.")

15. HON. GREGORY E. MIZE (RET.), PAULA HANNAFORD-AGOR & NICOLE L. WATERS, NAT'L CTR. FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 21–22 (Apr. 2007), available at <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx>.

16. See *Jury Managers' Toolbox*, *supra* note 3.