

## 6.6 Beyond Litigation: Efforts to Ensure Representative Juries

Fair and representative jury pools protect not only the rights of criminal defendants, but also the entitlement of all North Carolinians to participate in the jury system. Because of their shared interests, defense attorneys may find many partners—including community members, civil attorneys, and other court actors such as prosecutors and judges—when seeking to ensure the representativeness of North Carolina jury pools.

Policy changes that have been suggested to improve jury representativeness include: increasing the number of reliable, representative source lists; increasing the renewal frequency of the master list; addressing non-responsive jurors through effective enforcement; minimizing the length of time jurors serve; and increasing compensation. See Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 *DRAKE L. REV.* 761, 779–87 (2011). New York, for example, has adopted what has been referred to as “the gold standard for achieving representativeness, including use of five source lists, multiple follow-up mailings to reduce non-response, higher jury pay than that of other states, a one-day one-trial policy, and allowing summoned jurors an automatic postponement to a convenient date.” *NEW YORK STATE UNIFIED COURT SYSTEM OFFICE OF COURT RESEARCH, JURY REPRESENTATIVENESS: A DEMOGRAPHIC STUDY OF JUROR QUALIFICATION AND SUMMONING IN MONROE COUNTY, NEW YORK* (2011).

Raising underrepresentation challenges may spur initiatives to address systemic problems in the jury formation process. For example, in 2008, defense attorneys in a capital case tried in downtown San Diego presented evidence that Latinos were underrepresented by 50% in the jury pool for the city’s downtown courts. Evidence suggested that a flaw in the juror summons process was responsible for producing this disparity. Specifically, under the existing procedures, fewer juror summons were sent to judicial districts with large populations of jury-eligible Latino residents. The San Diego District Attorney wrote to the court to request immediate action to cure the defect in the juror summons process. Although the defendant’s constitutional challenge was denied, the issue prompted procedural changes and drew attention to the underrepresentation of Latinos on juries. See *ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS* 36 (2008).

Similarly, evidence presented by defendants in Colorado in support of a fair cross-section claim prompted corrective action by the court. While the claim in the individual case was ultimately unsuccessful, the court nevertheless recommended changes to practices used to assemble juries:

[T]he underrepresentation of African–Americans and Hispanics on jury panels in Arapahoe County at the time of the defendants’ trials was statistically significant. For this reason, we disapprove of the practice of giving double credit to prospective jurors for service in

Aurora municipal court, and we direct that this practice be stopped immediately.

However, our review of all the statistical evidence presented by Washington leads us to conclude that the underrepresentation of African-Americans and Hispanics on jury panels in Arapahoe County was not unfair or unreasonable.

*Washington v. People*, 186 P.3d 594, 605–06 (Colo. 2008).

In Massachusetts, a federal court found that the higher undeliverable and failure-to-appear rates from potential jurors living in predominantly minority neighborhoods produced unrepresentative juries, and ordered the court to re-mail undeliverable summons to different addresses within the same zip code as a possible remedy. While this order was overturned as beyond the scope of the court's authority, the United States District Court for the District of Massachusetts eventually changed its jury plan to respond to undeliverable summonses in the manner proposed by the district court. See Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 778 n.99 (2011) (discussing *United States v. Green*, 389 F. Supp. 2d 29, 38 (D. Mass. 2005)).

Any irregularities in the jury composition process, as well as disparities in the jury pool, should be brought to the attention of the court. See AMERICAN BAR ASSOCIATION, AMERICAN JURY PROJECT, [PRINCIPLES FOR JURIES AND JURY TRIALS](#) (2005) (“It is the duty of the courts to enforce and protect the rights to jury trial and jury service[.]”). Any concerns also can be presented to standing committees examining diversity issues in criminal justice system administration. Attorneys should determine whether their judicial district has such a committee and, if not, consider (1) starting such a committee; (2) bringing concerns to the attention of the county's jury commission; (3) contacting the North Carolina Advocates for Justice Racial and Ethnic Bias in the Criminal Justice System Task Force; and/or; (4) contacting the North Carolina Commission on Racial Disparities in the Criminal Justice System. Information about both the Task Force and the Commission can be found at [http://www.ncaj.com/index.cfm?pg=NC\\_Racial\\_Justice](http://www.ncaj.com/index.cfm?pg=NC_Racial_Justice). One reform that could be explored is the adoption of a local rule that all panel members report their race on the record as a standard procedure.

**Case study: Jury Formation Process in Judicial District 15B.** In North Carolina Judicial District 15B, comprised of Orange and Chatham counties, court actors have expressed concern about the possible underrepresentation of racial minorities in jury pools. See, e.g., James Williams Letter to Representative Hackney in the Race Materials Bank at [www.ncids.org](http://www.ncids.org) (select “Training and Resources”). Recently, the Judicial District Executive Council, which includes local leaders such as the resident Superior Court judge, the Chief District Court judge, the Chief Public Defender, the elected District Attorney, and the elected Clerk of Court, decided to undertake a study to determine whether anecdotal observations about underrepresentation are correct and, if so, to try to

identify where in the process the racial disparities are produced. With the support of faculty and students in the UNC School of Government's Masters in Public Administration program, a process of gathering and analyzing data regarding jury pools and examining jury formation procedures in Orange and Chatham Counties is underway. Below, Allen Baddour, Resident Superior Court Judge for North Carolina Judicial District 15B, reflects on this process.

Over the years, questions have arisen as to whether the jury pool adequately represents a fair cross section of the community. No one has ever claimed actual bias, or discrimination, to my knowledge. But regularly, the question has arisen: does the jury pool reflect too few persons of color? This is an incredibly difficult question to deal with as a trial judge. We are used to accepting at face value that those brought before us as the jury pool came there randomly, and are as diverse as the county they come from, based on geography, race, ethnicity, gender, and age. And even more difficult to handle as a part of any given case: if there was some sort of discrepancy, what is the solution? Do we dismiss the pool, and call another? Do we throw out the master list (from which this week's names were pulled)?

It finally occurred to me that the best way to resolve these questions, and plenty of others, was to systematically collect data. I have never seen anyone act in a discriminatory way in jury selection, or in the creation of the jury pool. I have traveled the state and seen pools in dozens of counties. Inevitably, some jury pools contain a greater percentage of minorities than others. Do differences in the jury pool track the population of a county as a whole? It is hard to say. I also know that I cannot "tell" someone's race just by looking at them.

Another difficulty in sorting out whether a disparity exists is in the difference between who we ask to join us (by summons) as compared to who actually shows up. Some counties approach a 100% response rate (meaning that all jurors summonsed actually appear), and others are much closer to 50%. Orange County's population is notoriously transient, as many students make it onto the jury list, only to be long gone once they are actually summoned. I have always felt that many people who didn't show up for jury duty were doing the best they could with a very real dilemma: the choice of an hourly wage earner or one who stays home with children giving up that pay or risking putting the children in an unsafe or unstable situation, as compared to risking ignoring a court order. I have tried issuing show cause orders to have those who fail to show for jury duty, but that involves deputy time (to serve the orders), court time (to hear the case), and ultimately, the sanction (\$50 fine) really isn't worth it.

I have some concern and empathy for those who don't show up for jury duty when their reasons are economic. I am not sure if there is any correlation between those most affected economically in Orange and Chatham and race.

But I am getting a little bit ahead of myself. Before we can take measures to ensure we consistently have the most representative jury pools possible, before we can decide how representative is "enough," and before we can balance - if at all - the rights of defendants accused of crimes with the circumstances of jurors (and is the defendant most helped by a willing juror or a recalcitrant, distracted, or hostile juror?) . . . before all that, we must understand the data.

And so, District 15B, with great assistance from the School of Government, is undertaking an examination of our jury system. We are analyzing everything: how does the master jury list get created? Who shows up for jury service? Who gets deferred? Who fails to show up? Along the way, we'll examine the decision points - what decisions are made by court officials that may have

unintended consequences for who stays in the jury pool? What can we do to improve the response rate for jury summonses? What should we do?

I approach this process with an open mind. I do not have any preconceived notions about what the numbers suggest, other than to believe that no one is intentionally behaving in a discriminatory fashion. It is my hope that with good, reliable data, we can first make a determination about whether anything is to be done, and then, if so, what we should do. This process is just beginning, and it may be awhile before we can meaningfully assess the situation. But the effort must begin somewhere, and so . . . onward!

Defense attorneys interested in reading more about best practices in jury composition should consult the following resources:

- GREGORY E. MIZE ET AL., NATIONAL CENTER FOR STATE COURTS, [THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT](#) 13 (2007).
- National Center for State Courts, [Jury Managers Toolbox: Characteristics of an Effective Master Jury List](#), NCSC CENTER FOR JURY STUDIES (2009).
- AMERICAN BAR ASSOCIATION, AMERICAN JURY PROJECT, [PRINCIPLES FOR JURIES AND JURY TRIALS](#) (2005).