

**FIRST CIRCUIT
JURY PLAN COMMITTEE
RECOMMENDED BEST PRACTICES
[Annotated]**

**Adopted by the
Judicial Council of the First Circuit
April 11, 2019**

First Circuit Jury Plan Committee Members

Honorable David J. Barron, Chair
Circuit Judge
First Circuit Court of Appeals

Honorable Aida M. Delgado-Colón
District Judge
District of Puerto Rico

Honorable John J. McConnell, Jr.
District Judge
District of Rhode Island

Honorable Leo T. Sorokin
District Judge
District of Massachusetts

Honorable Donald L. Cabell
Magistrate Judge
District of Massachusetts

Honorable Daniel Lynch
Magistrate Judge/Clerk
District of New Hampshire
(commencing July 30, 2018)

Christa K. Berry
Clerk
District of Maine

Michelle Rynne
Chief Deputy Clerk
District of Massachusetts

Pamela E. Phelan
Chief Deputy Clerk
District of New Hampshire
(concluding July 27, 2018)

Tracy Uhrin
Chief Deputy Clerk
District of New Hampshire
(beginning August 2018)

Susan J. Goldberg
Circuit Executive
First Circuit Court of Appeals

INTRODUCTION

In June 2017, Chief Circuit Judge Jeffrey R. Howard appointed the First Circuit Jury Plan Committee, chaired by Circuit Judge David J. Barron, to determine potential areas for improvement in the substance of the jury plans of the districts in the First Circuit, in furtherance of the statutory goals of the Jury Selection and Service Act, as well as greater consistency between the districts' jury plans. Based on its review of the jury plans of the First Circuit district courts, jury plan initiatives nationwide, and significant research, the Committee sought to develop a document that would provide concrete recommendations for the courts in connection with their jury plans and procedures, as well as serve as a guide for the First Circuit Judicial Council in reviewing district courts' jury plans.¹ This document, which includes optimal jury plan policies and procedures to effectuate best the goals of the Jury Selection and Service Act, is the product of the Committee's efforts.

These Recommended Best Practices are not intended to mandate the inclusion of any particular language in a district's jury plan or require a court to implement any particular jury administration procedure. The Committee recognizes that variations exist among the jurisdictions within each circuit, including the First Circuit, which affect jury operations and the representativeness of district courts' jury wheels. In particular, the District of Puerto Rico, with its high population of native Spanish speakers, faces unique issues in light of the statutory requirement that jurors be able to read, write, understand, and speak English. See 28 U.S.C. § 1865(b). Nor shall this document provide the basis for a challenge to the legality of a district's jury selection procedures, generally or in any particular case. Finally, the Committee encourages the district courts to continue to update the Circuit Executive on the implementation of the Best Practices, including their effectiveness and any recommendations for improvement.

¹ Circuit judicial councils are tasked with "examin[ing each jury plan] to ascertain that it complies with the provisions" of the Jury Selection and Service Act. 28 U.S.C. § 1863(a).

Goal: Increase the inclusiveness and representativeness of the jury pool.

Background

Pursuant to the Jury Selection and Service Act (JSSA), each district must develop a written jury plan to achieve the legislative goals of ensuring that juries are "selected at random from a fair cross section of the community" and that "all citizens [] have the opportunity to be considered for service," while prohibiting exclusion from jury service based on "race, color, religion, sex, national origin, or economic status." See 28 U.S.C. §§ 1861-1863. Accordingly, the JSSA requires districts to promote the dual goals of "representativeness" and "inclusiveness" in their jury pools. The Committee recognizes that these goals are not mutually exclusive.²

"Representativeness" may be defined as the extent to which the master jury wheel and assembled jury pool are reasonably proportionate to the jury-eligible population.³ See Judge William Caprathé (ret.), et al., Assessing and Achieving Jury Pool Representativeness, The Judges' Journal, 16, 18 (March 2016); American Bar Association (ABA), Principles for Juries & Jury Trials, Principle 10, Subdivision A, cmt. (August 2005). Courts assess the representativeness of their master jury wheels in part through the AO-12 form, which is completed following the creation of each master wheel and which includes "statistical samplings of [the] jury wheel[] to determine the constituency of the wheel[] by race, ethnicity, and gender." See Guide to Judiciary Policy (Guide), Vol. 4, Ch. 3, § 355.30(a). The AO-12 form enables courts to compare the demographic data for individuals who have responded to jury mailings⁴ with citizen population data from the U.S. Census Bureau.⁵ The court must then determine "[w]hether such comparisons reveal variances large enough to warrant supplementing the wheel" with names from additional source lists.⁶ See District Clerks' Manual, Ch. 14, § 14.02(d)(2).

² See National Center for State Courts (NCSC), Jury Managers' Toolbox: Characteristics of an Effective Master Jury List, at 2 (2009) ("As a general rule, as the master jury list becomes more inclusive, it also becomes more representative. By definition, a list that is 100% inclusive of the jury-eligible population will be perfectly representative.").

³ The term "jury-eligible" refers to the population meeting the statutory qualifications for federal jury service. See 28 U.S.C. § 1865(b); see also Guide to Judiciary Policy (Guide), Vol. 4, Ch. 3, § 330.50. The approximate size of a jurisdiction's jury-eligible population may be discerned from the U.S. Census Bureau's decennial citizen population tables or from its American Community Survey (ACS) five-year estimate. This data is available on the JNet (<http://jnet.ao.dcn/court-services/district-clerks-offices/jury-management/juror-usage-and-statistics>).

⁴ In Part IV of the AO-12 form, courts may choose whether to compare census data to demographic data for qualified jurors or for individuals who have returned the jury qualification questionnaire. See AO-12 Form, Data Collection Instructions.

⁵ The AO-12 form's racial (i.e., White, Black or African-American, American Indian or Alaskan Native, Asian, Native Hawaiian or Pacific Islander, Other, Multi-Racial) and ethnic (i.e., Hispanic or Latino, Non-Hispanic or Non-Latino) categories mirror those tracked by the U.S. Census Bureau. See Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58, 782 (October 30, 1997).

⁶ With few exceptions, the Jury Selection and Service Act (JSSA) requires courts to use a voter registration list or a list of actual voters as the primary source for names of prospective jurors, but courts may use supplemental lists "where necessary to foster the policy and protect the rights secured" by the JSSA. 28 U.S.C. § 1863(b)(2). With regard to claims of underrepresentation of a particular group in a jury pool, federal precedent establishes the

"Inclusiveness" means the extent to which the jury-eligible population of a district is included in its source list(s).⁷ See Caprathe, Assessing and Achieving Jury Pool Representativeness, at 18; Principles for Juries & Jury Trials, Principle 10, Subdivision A, cmt. Although the JSSA does not set an inclusiveness target, the National Center for State Courts (NCSC), scholars, and local jurisdictions have adopted an 85% inclusiveness target. See, e.g., G. Thomas Munsterman, NCSC, Court Management Library Series: Jury System Management, at xv (1996); Supreme Court of Georgia, Jury Composition Rule, §§ 3-4 (amended June 6, 2018).

standard for demonstrating unacceptable disparity between the representation of a particular group in the jury pool in relation to the local population of that group. See United States v. Royal, 174 F.3d 1, 5-11 (1st Cir. 1999).

⁷ The inclusiveness of a court's source list(s) may be determined by dividing the total number of persons in the combined source list, by the jurisdiction's jury-eligible population, according to recent census data. See Supreme Court of Georgia, Jury Composition Rule, § 3(a) (amended June 6, 2018).

Recommendation 1: A court's source list(s), either alone or in combination, should include at least 85% of the jury-eligible population. Recommended methods to meet that target include, but are not limited to, utilization of one or more supplemental source lists (e.g., lists of licensed drivers and state identification card holders), in addition to the required voter registration list. A court should adjust its follow-up and supplemental mailing procedures to address any negative effects on the representativeness of the master jury wheel produced by the use of supplemental source lists.

Discussion

Based on review of other courts' policies and data, the Committee has determined that the NCSC's inclusiveness target of 85% of the jury-eligible population is a practicable target.⁸ The achievement of the 85% inclusiveness target will likely require use of multiple source lists, particularly in jurisdictions that rely solely on voter lists, in light of recent voter registration rates.⁹

Because the use of supplemental source lists is likely to increase inclusiveness and to enable districts to approach the 85% target, the Committee recommends that districts employ a

⁸ See, e.g., Ninth Circuit Jury Trial Improvement Committee, First Report on Goals and Recommendations, at 4 (May 2004) ("The Committee anticipates the district courts that combine voter registration along with the department of motor vehicle drivers license/identification data will be able to achieve levels that meet or exceed [] 80 percent[.]").

⁹ According to the U.S. Census Bureau, as of 2016, voter registration rates fell below 85% in the jurisdictions within the First Circuit for which data was available: Rhode Island (64.4%); Massachusetts (68.1%); New Hampshire (73.1%); and Maine (78.5%). See U.S. Census Bureau, Voting and Registration in the Election of November 2016, Table 4A (Reported Voting and Registration, for States: November 2016), available at <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>. Similar data for Puerto Rico is not available from the Census Bureau.

In the First Circuit, exceptions to the JSSA's voter list requirement apply to the Districts of Puerto Rico and Massachusetts. The JSSA allows the District of Puerto Rico to "prescribe some other source or sources of names of prospective jurors in lieu of voter lists." 28 U.S.C. § 1863(b)(2). The JSSA provides that the District of Massachusetts' plan "may require the names of prospective jurors to be selected from the resident list provided for in chapter 234A, Massachusetts General Laws, or comparable authority, rather than voter lists." Id. Under the Massachusetts statutory scheme, each municipality is required to make an annual sequentially numbered list of the names, addresses, and dates of birth of its residents over 17 years of age. See Mass. Gen. Laws ch. 234A, § 10. Upon request from the Clerk for the District of Massachusetts, the Massachusetts Jury Commissioner randomly selects names from the municipal resident lists to be placed in the District's master jury wheel for each division. See United States District Court for the District of Massachusetts, Plan for Random Selection of Jurors, at § 6(a) (eff. November 1, 2015). When Congress amended the JSSA in 1992 to include the exception for the District of Massachusetts, it stated that, "[u]niquely in the State of Massachusetts, . . . an alternative to voter lists exists that both improves the representativeness of juries and enhances administrative efficiency." H.R. Rep. 102-1006(I), at *23, 102nd Cong., 2nd Sess. 1992, 1992 U.S.C.A.N., at **3932; S. Rep. 102-342, 102nd Cong., 2nd Sess. 1992, 1992 WL 187372 (same). With regard to inclusiveness, Congress cited the fact that, as of 1988, Massachusetts' voter lists contained only 3,274,777 names, while the resident list contained 4,497,421 names (i.e., an additional 37%). Id.; see also G.T. Munsterman and Paula J. Hannaford-Agor, NCSC, The Promise and Challenges of Jury System Technology, at 17 n.41 (March 31, 2003) (describing Massachusetts' resident list as "unique" and "comprehensive" relative to other states that require multiple source lists to identify their jury-eligible population).

minimum of two source lists if their original source list falls short of the 85% inclusiveness target. For those districts using lists of both registered voters and licensed drivers as sources for the master jury wheel, the Committee recommends use of a third source list -- state identification card holders -- as a mechanism for potentially increasing representativeness while maintaining the greater inclusiveness of licensed drivers.¹⁰ In each First Circuit jurisdiction, the department of motor vehicles issues identification cards. Accordingly, a list of identification card holders is likely available from the jurisdiction's department of motor vehicles, in addition to a list of licensed drivers, at minimal additional cost and burden.¹¹

In implementing these recommendations, districts should continue to monitor inclusiveness and representativeness to the greatest extent possible. Factors to consider in adding or changing source lists include:

- The inclusiveness and representativeness of the district's existing source list(s);
- The inclusiveness and representativeness of the potential supplemental source list(s);
- The impact of the supplemental source list(s) on inclusiveness and representativeness; and
- The accuracy of the source list(s), including frequency of updates.

To evaluate inclusiveness, a court should consider the number of unique records on each source list and each supplemental source list (or potential supplemental source list) to determine the extent to which use of the additional list is likely to increase inclusiveness.

Representativeness of current source list(s) may be assessed by reviewing a district's AO-12 form or other similar data. See, supra, at 1. If possible, a district should compare representativeness as reflected in its data before and after introduction of a supplemental source list to determine the impact, if any, of the supplemental source list on representativeness.

¹⁰ Generally, the use of multiple source lists captures additional unique records of potential jurors and creates a more inclusive jury pool. However, the use of certain supplemental source lists, particularly those that may not be generally representative of the entire community (e.g., property tax rolls, which exclude constituents who do not own their residence), might negatively impact jury wheel representativeness in some jurisdictions. See, e.g., John P. Bueker, Jury Source Lists: Does Supplementation Really Work, 82 Cornell L. Rev. 390 (1997). For example, some jurisdictions reported reduced representation of African-Americans in jury pools after supplementing their jury source lists with a driver's license list. See Thomas J. Clewley, Management of the Master Jury Wheel and the Jury System in the Eastern District of Pennsylvania, NCSC, at 28-40 (April 8, 1998). More recent data suggest that the use of more than one supplemental source list (e.g., lists of licensed drivers and state identification card-holders) can ameliorate these concerns by increasing both representativeness and inclusiveness. See Nebraska Minority Justice Committee, Representative Juries: Examining the Initial and Eligible Pools of Jurors, at 19-25, 27 (December 2008); Elizabeth Neeley, Addressing Nonsystematic Factors Contributing to the Underrepresentation of Minorities as Jurors, 47 Ct. Rev. 96, 98-99, Table 2 (2011).

¹¹ See, e.g., Nebraska Minority Justice Committee, Representative Juries: Examining the Initial and Eligible Pools of Jurors, at 22 (reporting that Nebraska Department of Motor Vehicles could "quite eas[ily]" supplement licensed driver source list with state identification card source list at no additional cost).

After introducing a supplemental source list, districts should appraise the supplemental source list's effect on representativeness. To assess this effect, a court should compare the AO-12 for the previous wheel (prior to introduction of the supplemental source list in question) with the AO-12 for a later wheel (which includes the supplemental source list). If a district determines that representativeness of a jury pool decreased following the introduction of a supplemental source list, the court should consider appropriate mechanisms for ameliorating that impact (e.g., utilizing a supplemental draw procedure, sending additional follow-up communications). Further, if a district determines that the increase in inclusiveness produced by its supplemental source list is negligible and use of the list undermines representativeness, the court should consider replacing the source list with an alternative or utilizing a second supplemental source list that may improve representativeness.

Recommendation 2: In merging multiple source lists, a court should adopt measures to ensure the quality of the merged list, including, but not limited to, tailoring deduplication procedures to local circumstances.

Discussion

Based on the Committee's research, the majority of federal courts that use multiple source lists merge lists by adding unique names from a supplemental source list to an original source list, which results in a wheel consisting mostly of records from the original source list. For those districts not exempted from the JSSA's voter list requirement, this approach is consistent with the JSSA's directive that the voter list be used as the primary source list. See 28 U.S.C. § 1863(b)(2).

When courts merge multiple source lists, the removal of redundant records (i.e., deduplication) is necessary to maintain the integrity of the data and the quality of the wheel. Deduplication errors can undermine the wheel's representativeness and inclusiveness (e.g., failing to recognize duplicates, and incorrectly removing a record on the mistaken belief that it is a duplicate).¹²

Source lists include a number of data elements for each listed individual that vary by source. These data elements include, for example, first name, middle initial or name, last name, address, birth date, and social security number. If a source list does not include a highly unique identifier (e.g., a birth date or social security number), the deduplication process can be more complicated and more errors may result.¹³ Accordingly, if a jurisdiction requires state authorization for a district court to access a source list, when requesting such authorization, the

¹² See generally NCSC, Jury Managers' Toolbox: Best Practices for Duplicate Removal (2009).

¹³ See, e.g., The Pennsylvania Interbranch Comm'n for Gender, Racial, & Ethnic Fairness, Best Practices for Jury Selection and Service in Pennsylvania, at 5 n.8 (September 2016); Munsterman and Hannaford-Agor, The Promise and Challenges of Jury System Technology, at 20.

district should specify the data elements requested, including birth dates and social security numbers.¹⁴

When deduplicating a merged list, a district must determine which deduplication procedures to adopt. In doing so, a district should consider the potential impact of deduplication methods on inclusiveness and representativeness.¹⁵ Most federal courts utilizing multiple source lists compare five data fields during the deduplication process: first name, middle initial, surname, birth date, and county code.¹⁶ Possible deduplication approaches include: reviewing a few of the data elements (e.g., first and last name) and eliminating duplicate exact matches; eliminating only exact matches for all data elements; or adopting more complex algorithms for determining the likelihood that two specific entries are duplicates. In determining which potential juror address to use during deduplication, districts should consider retaining the record from the most reliable source list (i.e., lowest undeliverable rate) or the most frequently maintained source list.¹⁷ If additional data elements are included in the supplemental source lists and are not present in the primary source list (e.g., gender, race, or ethnicity), the district may wish to retain that data in the merging process.

Recommendation 3: A court should adopt measures to maintain the integrity of its master jury wheel, including, but not limited to: a) adoption of a one- or two-year period for the life of the court's master jury wheel; b) use of the U.S. Postal Service's National Change of Address System at the creation of each wheel; and c) use of other standardized mechanisms to prevent the selection of individuals who are not eligible for jury service (i.e., deceased individuals and minors).

Discussion

Duration of Master Jury Wheel

The JSSA requires each district to "provide [in its jury plan] for periodic emptying and refilling of the master jury wheel at specified times, the interval for which shall not exceed four years." 28 U.S.C. § 1863(b)(4). The nationwide average undeliverable rate for jury-related

¹⁴ While courts are authorized to utilize social security numbers during the jury selection process, including for deduplication (see 42 U.S.C. § 405(c)(2)(E); Guide, Vol. 4, Ch. 3, § 325.10.30), not all jurisdictions receive social security numbers from source list suppliers.

¹⁵ "[T]he conventional belief is that disenfranchising a potentially eligible individual is worse than leaving an unrecognized duplicate on the master jury list, [citation omitted] although the NCSC recommends that the proportion of unrecognized duplicates not exceed 5% of the total list." NCSC, Jury Manager's Toolbox: Characteristics of an Effective Master Jury List, at 2.

¹⁶ Under the JSSA, the percentage of voters in each county or similar political subdivision must align with the number of names from that county or political subdivision in the wheel after adding a supplemental source list. See 28 U.S.C. § 1863(b)(3).

¹⁷ See, e.g., G. Thomas Munsterman, NCSC, Improving Juror Response Rates in the District of Columbia, at iv (March 23, 2006) (recommending the establishment of a source list priority order for use in deduplication "based on the frequency with which each list is updated").

mailings is 12%.¹⁸ If a court's undeliverable rate exceeds this average, this may suggest that a significant portion of the addresses within the court's master jury wheel are stale. Moreover, the high undeliverable rate is likely to have a negative impact on representativeness.¹⁹ Although the maximum statutory life of a wheel is four years, research indicates that creating a new wheel on a more frequent basis may ameliorate the accuracy issues caused by a stale list and a migratory population.²⁰ Accordingly, courts should modify their jury plans to provide for the creation of a new wheel every one to two years.

National Change of Address System

The U.S. Postal Service's National Change of Address (NCOA) System is another tool for maintaining the integrity of a master jury wheel. Use of NCOA, which records changes of addresses, can reduce undeliverable rates and likely minimize postage costs and administrative burdens, while potentially improving inclusiveness and representativeness, as well as the related jury administration goals of ensuring the effectiveness of qualification and summoning procedures, the responsiveness of individual citizens to jury duty summonses, and the efficient use of jurors.²¹ Accordingly, districts should update the addresses on their master jury lists by contracting with a licensed NCOA vendor. The NCOA updates should be conducted for the entire wheel at the time it is created, and/or for the addresses of potential jurors at the time the records are selected for mailing.²²

¹⁸ See NCSC, Jury Managers' Toolbox: Best Practices to Decrease Undeliverable Rates, at 1 (2009).

¹⁹ See Judge William Caprathe (ret.), et al., Assessing and Achieving Jury Pool Representativeness, *The Judges' Journal*, 16, 18-19 (March 2016) (noting that the national annual migration rate is 15%).

²⁰ See, e.g., Ninth Circuit Jury Trial Improvement Committee, Model Jury Plan, at § 2.02, Comment (October 20, 2016) (recommending that each court "refill [its] master wheel every two years because society has become more mobile, although the statute sets an outside limit of four years"); Paula Hannaford-Agor, NCSC, Review of the Jury Selection Plan for the United States District Court, Eastern District of Michigan: Executive Summary, at iv (December 20, 2010) (recommending that the court's master jury wheel be updated on an annual basis to improve its accuracy and alleviate the effects of migration).

²¹ See, e.g., 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, 783 (2011) ("In almost every instance, the savings in printing and postage costs [associated with undeliverable mail] greatly exceed the cost of the NCOA update.").

²² The feasibility of conducting an NCOA update on an entire master jury wheel will depend on the size of the wheel, which varies considerably by district. See 28 U.S.C. § 1863(b)(4) (directing courts to place "at least one-half of 1 per centum of the total number of persons" on the source lists into the wheel; "but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in the master wheel, but in no event less than one thousand"). Ideally, NCOA updates will be run: (1) on the entire wheel at the time of its creation; and (2) for the selected recipients at the time of each mailing. See, e.g., Caprathe, Assessing and Achieving Jury Pool Representativeness, at 18-19 ("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."); Hannaford-Agor, Review of the Jury Selection Plan for the United States District Court, Eastern District of Michigan: Executive Summary, at iv ("Using NCOA to update record addresses before mailing the batch qualification questionnaires will help to maintain the accuracy of the address records between renewals of the master jury wheels.").

Exclusion of Ineligible Individuals

By minimizing the number of jury mailings sent to ineligible jurors, a court may further the jury administration goals of ensuring the effectiveness of qualification and summoning procedures and the responsiveness of individual citizens to jury duty summonses.²³ However, because of the significant risks to representativeness associated with broadly defining and improperly updating the criteria for exclusion²⁴, courts should both limit and narrowly define the ineligibility criteria, ensure that their vendor regularly updates the data, and periodically review suppression procedures. For example, courts should consider whether the categories include individuals whose status is permanent (e.g., deceased) or temporary (e.g., under 18 years old), and, in the latter case, update regularly to minimize the number of persons who are inaccurately excluded after reaching majority.²⁵ Courts should also have a clear understanding from their vendors and the producing state agencies (e.g., the office of the secretary of state, or local department of motor vehicles) of which records, if any, are filtered by the agency prior to production (e.g., individuals under the age of 18), and the agencies' schedule for updating this criteria.

Recommendation 4: A court should develop and employ a system to send follow-up communications to non-responsive potential jurors for questionnaires and/or summonses, unless a court determines, after factual inquiry, that the financial or other costs of doing so are prohibitive or that the use of such a system would not provide more than a de minimis improvement in inclusiveness or representativeness.

Discussion

Research suggests that follow-up communications are an effective tool for improving inclusiveness, representativeness, and the related jury administration goals of ensuring the effectiveness of qualification and summoning procedures, the responsiveness of individual citizens to jury duty summonses, and the efficient use of jurors. Courts that send follow-up communications report significantly reduced non-responsive/failure to appear (FTA) rates, as

²³ See Munsterman and Hannaford-Agor, The Promise and Challenges of Jury System Technology, at 20-21.

²⁴ The use of broadly defined and inaccurately monitored suppression criteria has been shown to produce "non-random errors in the jury selection process" and precipitate challenges to representativeness. For example, courts have made non-random errors when they have incorrectly used suppression files to exclude potential jurors who failed to respond or appear and persons convicted of felonies who were eligible for restoration of their civil rights. See Paula Hannaford-Agor, Jury News - Suppression Files: Valuable Tools or Traps for the Unwary?, The Court Manager, Vol 23, Issue 3, at 75-76 (2008). See also NCSC, Jury Manager's Toolbox: Characteristics of an Effective Master Jury List, at 4-5.

²⁵ See Joint Technology Committee (Conference of State Court Administrators, National Association for Court Management, and NCSC), Jury Management System Requirements Adopted Standards, at 106-107 (December 2014).

well as increased representativeness in their jury wheel.²⁶ Moreover, in general, costs of follow-up mailing are not overly burdensome.²⁷

Because of the benefits derived from follow-up communications, the Administrative Office of the United States Courts (AO) advises that, "[a]s a reasonable standard of administrative responsibility, a court should send prospective jurors at least one warning letter or a second mailing of the questionnaire with a reminder that it is a second mailing."²⁸ The Committee recommends that districts consider sending a follow-up mailing between one and three weeks after the expected return date of the initial jury mailing.²⁹ In addition, if a court initially sends a letter or postcard to prospective jurors, directing them to complete qualification questionnaires online through eJuror (rather than initially mailing paper questionnaires), the court should follow-up by mailing non-responsive jurors a paper questionnaire.³⁰

Recommendation 5: A court should implement a supplemental draw procedure for undeliverables (and potentially non-responsives), unless the court determines, after factual inquiry, that the financial or other costs of doing so are prohibitive or that the use of such a system would not provide more than a de minimis improvement in inclusiveness or representativeness.

Discussion

A supplemental draw is a mechanism by which a court sends a second questionnaire to a different potential juror in the same zip code for each jury questionnaire that is returned to the court as undeliverable (and, in some districts, for which no response is received).³¹

²⁶ See Ninth Circuit Jury Trial Improvement Committee, First Report on Goals and Recommendations, at 7 (recommending sending a second follow-up summons to non-respondents as "one of the most important things a court can do to increase response rates"); United States v. Murphy, No. 94-cr-794, 1996 WL 341444, at *1 (N.D. Ill. June 18, 1996) (finding that response rate for African-American recipients increased with each follow-up mailing); see also Judge Gregory E. Mize (ret.), Paula Hannaford-Agor, and Nicole L. Waters, NCSC, The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report, at 24-25 and Table 19 (April 2007).

²⁷ See, e.g., NCSC, Jury Managers' Toolbox: Best Practices for Jury Summons Enforcement (2009) ("Implementation of a second notice/summons program typically involves only printing, postage, and minimal staff resources.").

²⁸ District Clerks' Manual, Ch. 14, § 14.04(d)(5)(ii).

²⁹ See Hannaford-Agor, Review of the Jury Selection Plan for the United States District Court, Eastern District of Michigan: Executive Summary, at iv (recommending that the court "send a second qualification questionnaire with a strongly worded cover letter to non-respondents within a very short time after the expected return date—ideally within a week, but no later than three weeks of the expected return date for optimal effect").

³⁰ See JNet, Mailing eJuror Notification in Place of Scantron Qualification Questionnaires, available at <http://jnet.ao.dcn/court-services/court-connections/mailling-ejuror-notification-place-scantron-qualification-questionnaires> (December 19, 2018).

³¹ Whether a court employs a one-step or a two-step questionnaire/summons procedure may affect the scope of its supplemental draw. One-step courts are limited in time, as their questionnaires and summonses are sent to potential jurors in a single mailing, and individuals are summoned for a specific date within the next several weeks. As such, scheduling requirements do not allow for the court to determine whether a recipient is non-responsive and to send a

The aim of a supplemental draw is to "ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel," as required by the JSSA. See 28 U.S.C. § 1863(b)(4). Based on anecdotal data, supplemental draw procedures improve representativeness, at minimal additional administrative cost.³²

Recommendation 6: Recognizing that precedent establishes the minimum standards for representativeness, the Committee recommends that a court strive for the most representative master jury pool possible in furtherance of the goals of the JSSA. Over the course of each term, a court should monitor the representativeness of its master and qualified jury wheels across categories including, but not limited to, race, ethnicity, and gender. To assess representativeness, a court should utilize multiple statistical tools. As it implements follow-up communications and supplemental draw procedures, a court should take note of variations in the representativeness of the master and qualified jury wheels over time and subsequently adjust its procedures to address any negative effects on representativeness.

Discussion

As mentioned above, follow-up communications and supplemental draw procedures can have a positive impact on representativeness. See supra, Recommendations 4 and 5. The Committee recognizes, however, that local factors in each district are unique and that courts may experience different results after implementing these procedures.³³ Accordingly, the Committee recommends that courts monitor the impact that follow-up communications and supplemental draw procedures have on representativeness and adjust the procedures as necessary. In evaluating the impact on representativeness, courts should utilize available data and statistical methods, including, but not limited to, analyzing AO-12 form data before and after implementation of the procedures. See supra, at 1.

supplemental mailing. Accordingly, one-step courts generally utilize supplemental draw procedures for undeliverables only.

³² See, e.g., Revisions to the Jury Plan of the United States District Court for the District of Massachusetts: Notes of the Jury Plan Committee, at 10-11 (2007).

³³ See, e.g., Omotosho v. Giant Eagle, Inc., 997 F. Supp. 2d 792, 807 (N.D. Ohio 2014) ("Because the [supplemental draw] program was implemented nearly four years ago, and African-American representation in the qualified wheel remains poor, there is reason to doubt the program's effectiveness.").

Recommendation 7: A court should strive to increase civic participation in jury service through public outreach and education efforts.

Discussion

Public outreach and education efforts serve to reinforce societal confidence in the judicial system and to increase civic participation -- including participation in jury service.³⁴ The Committee's research indicates that outreach specifically aimed at jurors helps to increase the effectiveness of qualification and summoning procedures and the responsiveness of individual citizens to jury duty summonses.³⁵

The Committee recommends that districts include comprehensive and accessible jury-related information on their websites as a useful method of juror outreach and education.³⁶ These web pages should be user-friendly, with jury-related information clearly marked and organized, and should include a variety of information helpful to jurors (e.g., frequently asked questions, juror handbook, juror etiquette, information about jury selection).³⁷ Further, jury web pages should also provide instructions for jurors who are unable to serve and an explanation of the consequences for failing to comply.³⁸

³⁴ See, e.g., Report of the Supreme Court of Nevada Jury Improvement Commission, at 46 (October 2002) ("The rate of non-appearances to jury summonses can be decreased through public education.").

³⁵ For example, the American Bar Association (ABA) recommends celebration of "Juror Appreciation Week" each May, with media coverage and public events. See ABA, Juror Appreciation Kit, available at https://www.americanbar.org/content/dam/aba/administrative/american_jury/juror_appreciation_kit.authcheckdam.pdf; see also District Clerks' Manual, Ch. 14, § 14.10(f)(2) ("A court's actions in showing appreciation for jurors' time can have a positive influence on their view of the court.").

³⁶ See District Clerks' Manual, Ch. 14, § 14.05(g) ("District court websites can serve as a good source of information for jurors and potential jurors.").

³⁷ See JNet, Reaching Prospective Jurors through Court Web Sites, available at <http://jnet.ao.dcn/court-services/district-clerks-offices/jury-management/jury-operations/reaching-prospective-jurors-through-court-web-sites>.

³⁸ See Caprathe, Assessing and Achieving Jury Pool Representativeness, at 19 ("Providing jurors with information about what is expected and the consequences of failing to comply can significantly increase response rates.").

Following a jury trial, courts may require jurors to complete questionnaires. Courts can use information gathered from questionnaire responses to improve the jury experience going forward.³⁹

Recommendation 8: (a) With the exception of age and the statutorily-required categories (recent jury service and volunteer safety personnel), a court should abolish permanent excuse categories. Instead of categorically excusing other classes of potential jurors for the term of the jury wheel, courts should consider providing temporary excuses to certain categories of potential jurors on the basis of undue hardship. (b) Where possible, for a potential juror who demonstrates that jury service, as scheduled, would pose an undue hardship or extreme inconvenience, a court should defer the individual's service to specific dates, rather than return the individual's name to the qualified wheel. (c) A court should adopt an internal policy for handling requests for temporary excuses and/or deferrals, to ensure objectivity and consistency in handling such requests.

Discussion

The JSSA allows courts to provide, in their discretion, permanent, or categorical, excuses to groups of potential jurors, generally for the term of the wheel. See 28 U.S.C. § 1863(b)(5)(A) (allowing district court jury plans to identify "groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service" if the court finds that "jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof" and that excusing the category of individuals would not be inconsistent with other JSSA provisions). The JSSA further provides that a court may temporarily excuse a potential juror "upon a showing of undue hardship or extreme inconvenience"⁴⁰ and reinsert the individual's name into the qualified jury wheel, potentially re-summoning the individual during the life of the wheel. 28 U.S.C. § 1866(c). In the alternative, the court may defer a summoned juror, postponing service to a later date. Id. A court's procedures for granting excuses or deferrals can impact the representativeness and inclusiveness of the jury pool.⁴¹

³⁹ See District Clerks' Manual, Ch. 14, § 14.10(f)(1).

⁴⁰ The JSSA defines "undue hardship or extreme inconvenience" as:

great distance . . . from the place of holding court, grave illness in the family or other emergency which outweighs in immediacy and urgency the obligation to serve as a juror when summoned, or any other factor which the court determines to constitute an undue hardship or to create an extreme inconvenience to the juror; and in addition, in situations where it is anticipated that a trial or grand jury proceeding may require more than thirty days of service, the court may consider, as a further basis for temporary excuse, severe economic hardship to an employer which would result from the absence of a key employee during the period of such service[.]

28 U.S.C. § 1869(j).

⁴¹ See, e.g., American Jury Project, ABA, Principles for Juries and Jury Trials, Commentary to Principle 10(C), at 58 (2005) ("The exclusion of a substantial portion of the community from jury service through excuses or exemptions seriously alters the representativeness and inclusiveness of a jury panel.") (citing G. Thomas

Because of the potential negative effects of a large number of categorical excuses, the Judicial Conference of the United States (JCUS) and the AO recommend that district courts limit the permanent excuse categories enumerated in their jury plans.⁴² In addition, the JCUS directs courts to review, on a regular basis, their excuse categories, with the goal of "consolidat[ing] and minimiz[ing] the categories of persons who are eligible for permanent excuse from jury service."⁴³ In keeping with this guidance, the Committee recommends that courts strictly limit the permanent excuse categories to age over (70)⁴⁴ and those that are statutorily required (i.e., recent jury service and volunteer safety personnel).⁴⁵ Instead, courts should consider including traditional permanent excuse categories (e.g., based on a prospective juror's profession, or caregiving obligations) within those for which a temporary excuse for "undue hardship or extreme inconvenience" may be obtained, thus giving the individual the opportunity to serve during the life of the wheel.⁴⁶

As with permanent excuses, frequently granting temporary hardship excuses (as opposed to deferring service) - particularly on the basis of financial or medical hardship - may have negative effects on the representativeness and inclusiveness of the qualified jury wheel.⁴⁷ To

Munsterman, NCSC, Jury System Management, Elem. 6 (1996)); Ninth Circuit Jury Trial Improvement Committee, First Report on Goals and Recommendations, at 5 ("[V]ery lenient excuse policies create a danger that the jury pools will be smaller, and therefore, less representative.").

⁴² See, e.g., Guide, Vol. 4, Ch. 3, § 330.70.10(b) (citing Judicial Conference of the United States (JCUS), Report of the Proceedings of the JCUS (September 1980), at 107 (recommending that permanent excuse categories be limited to: (1) age (over 70); (2) caregivers; (3) essential employees; and (4) professional categories (e.g., doctors and lawyers)); District Clerks' Manual, § 14.04(d)(5)(iv) (recommending that permanent excuse categories be limited to age (over 70) and prior jury service within the last two years).

⁴³ See Guide, Vol. 4, Ch. 3, § 330.70.10(b) (citing JCUS, Report of the Proceedings of the JCUS (September 1980), at 107).

⁴⁴ Guidance from the JCUS and the AO instructs that courts should continue to provide a permanent excuse, upon request, for individuals over 70, based on age. See n.42, *supra*; see also Ninth Circuit Jury Trial Improvement Committee, Model Jury Plan, at § 3.04(c)(1)(A) (enumerating age (over 70) as a permanent excuse category), and Comment ("The statute does not list an age cap for jury service. Traditionally, however, most plans do have an age cap. There has been a trend in recent years for plans to increase the age cap given the vitality of the generation.").

⁴⁵ See 28 U.S.C. § 1866(e) ("In any two-year period, no person shall be required to (1) serve or attend court for prospective service as a petit juror for a total of more than thirty days, except when necessary to complete service in a particular case, or (2) serve on more than one grand jury, or (3) serve as both a grand and petit juror."); 28 U.S.C. § 1863(b)(5)(B) (requiring jury plans to "specify that volunteer safety personnel, upon individual request, shall be excused from jury service").

⁴⁶ For example, the District of Massachusetts' jury plan defines "undue hardship or extreme inconvenience" to include "illness of the juror or a member of the juror's household; the active care and custody of a child under ten years of age; the active full-time care of an aged or infirm person; or business or recreational travel plans established before the receipt of the summons for jury service." United States District Court for the District of Massachusetts, Plan for Random Selection of Jurors, § 9(c). Under this provision, an individual who is summoned for jury service may request a temporary excuse or a deferral based on one of these temporary excuse categories.

⁴⁷ See Caprathe, Assessing and Achieving Jury Pool Representativeness, at 19 ("Because of the strong correlation between socioeconomic status and minority status, excusal rates contribute significantly to underrepresentation of

avoid these negative effects, the Committee recommends that, where possible, courts defer jurors to specific dates, rather than temporarily excuse them from service and return their names to the qualified wheel.⁴⁸

Objectivity and consistency may be difficult to achieve when considering requests for temporary excuses and/or deferrals, particularly where more than one staff member handles jury requests. Further, problems can arise when a court does not develop clear guidelines and applicable standards.⁴⁹ Accordingly, the Committee further recommends that courts adopt a consistent internal policy for handling requests for temporary excuses and deferrals, including criteria for granting such requests, as well as specific deferral procedures, and revisit the adequacy of these procedures on a regular basis.⁵⁰

Recommendation 9: A court should develop and apply consistent standards and procedures to review potential jurors' disclosures of prior criminal convictions. To the extent possible, court staff should question each potential juror disclosing a prior conviction to determine the nature of the offense and potential penalty, the convicting jurisdiction, and any additional information concerning the restoration of the individual's civil rights. Without sufficient information for court staff to disqualify the juror, the question of eligibility to serve as a juror should be referred to the judicial officer.

Discussion

Under the JSSA, an individual who "has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable

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."); 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. at 787 ("[E]xcusing jurors due to hardship, especially for financial reasons, can dramatically affect the demographic composition of the jury pool.").

⁴⁸ See Ninth Circuit Jury Trial Improvement Committee, Model Jury Plan, Committee Cmt., at 16 ("Deferrals or postponements of jury service should be offered to persons who present a circumstance that otherwise may suggest a hardship excuse from service during the particular month or other period summoned for service, allowing jurors to fulfill their duties to serve while at the same time reducing dissatisfaction of persons who[] have an excuse of inconvenience denied."); see also NCSC, Jury Managers' Toolbox: Best Practices for Excusal Policies, at 1-2 (2009) (recommending "[a] liberal deferral policy [as] preferable to outright excusal"); American Jury Project, ABA, Principles for Juries and Jury Trials, Principle 10(C)(3), at 12 ("Deferrals should be preferred to excusals whenever possible.").

⁴⁹ See, e.g., Ninth Circuit Jury Trial Improvement Committee, First Report on Goals and Recommendations, at 6.

⁵⁰ See, e.g., The Pennsylvania Interbranch Comm'n for Gender, Racial, & Ethnic Fairness, Best Practices for Jury Selection and Service in Pennsylvania, at 14 (recommending establishment of "a written excusal and postponement policy that articulates clear, objective criteria that jurors must show to demonstrate 'undue hardship or extreme inconvenience,'" including "a non-exclusive list of types of 'undue hardship or extreme inconvenience'"); Jury Managers' Toolbox: Best Practices for Excusal Policies, at 2 (recommending that courts "[e]stablish a written excusal policy that articulates clear, objective criteria that jurors must show to demonstrate financial or medical hardship").

by imprisonment for more than one year and [whose] civil rights have not been restored" is not qualified to serve on a jury. 28 U.S.C. § 1865(b)(5).

Restoration of civil rights (including the right to serve on a jury) following a criminal conviction punishable by more than one year is governed by the law of the convicting jurisdiction.⁵¹ For example, in some jurisdictions, an individual's civil rights may be restored automatically upon completion of the sentence; in other jurisdictions, civil rights may not be restored without an affirmative act (e.g., pardon).⁵²

To be qualified for service following such a conviction, a potential juror must demonstrate restoration of civil rights under applicable law "to the court's satisfaction."⁵³ To identify potential jurors who are disqualified pursuant to this provision, the standard juror qualification questionnaire asks the following questions:

- Are any charges now pending against you for a violation of state or federal law punishable by imprisonment for more than one year?
- Have you ever been convicted, either by your guilty or nolo contendere plea or by a court or jury trial, of a state or federal crime for which punishment could have been more than one year in prison?
- If yes, were your civil rights restored?

The questionnaire form also asks the potential juror who has indicated restoration of civil rights to provide a written explanation.

Although the AO suggests that a court may find a potential juror to be ineligible for jury service "without further inquiry," where the disclosure of a prior criminal conviction is "not supported by unequivocally clear documentation of civil rights restoration, or by readily verifiable reasons" that the offense was not a punishable by more than one year⁵⁴, this system is susceptible to error. According to the AO:

Frequently, in responding to the criminal records questions, the individual fails to provide the additional facts required or sometimes the additional information is incomplete, inapplicable, or lacks credibility. Often persons with criminal convictions or pending charges may not know whether the statutory maximum punishment for their offense is more than one year in prison. Also, persons with

⁵¹ Guide, Vol. 4, Ch. 3, § 330.50.20(a) (citing Beecham v. United States, 511 U.S. 368, 372 (1994)).

⁵² Id. § 330.50.20(b).

⁵³ Id. § 330.50.20(c).

⁵⁴ JNet, Evaluating Jury Questionnaire, available at <http://jnet.ao.dcn/court-services/district-clerks-offices/jury-management/jury-operations/evaluating-juror-questionnaire>.

conviction records may have mistaken notions that their civil rights have been restored [], when this may not truly be the case in the technical legal sense.⁵⁵

In addition to the practical difficulties of enforcing the disqualification, scholars and others in the legal community have warned that its enforcement may negatively affect the representativeness and inclusiveness of the jury pool.⁵⁶ Finally, inconsistent standards and procedures to assess the restoration of rights issue - either within a single court or between courts - may further undermine these goals.

Because it can be difficult for potential jurors to navigate the restoration of civil rights issues without assistance, and because of the negative impact that over-exclusion can have on representativeness and inclusiveness, the Committee recommends that districts apply clear standards and procedures during the qualification phase, with an understanding of the relevant law on the restoration of civil rights in the convicting jurisdictions, to assess whether a potential juror's civil right to serve on a jury has been restored. Accordingly, when a potential juror identifies a prior criminal conviction on a jury questionnaire but does not produce enough information to determine eligibility for jury service, court staff should request additional information from the potential juror, including, but not limited to, the jurisdiction and date of the conviction, the nature of the criminal charges, the sentence imposed (including probation and/or supervised release, if any), and any required documentation.⁵⁷ This additional information may provide sufficient basis for staff to determine eligibility.⁵⁸ Without sufficient information to disqualify, the question of eligibility to serve as a juror should be referred to the judicial officer.

⁵⁵ Id.; see also Brian C. Kalt, The Exclusion of Felons from Jury Service, 53 Am. U. L. Rev. 65, 111-12 (October 2003) (describing the self-identification process as "inadequate" because potential jurors "may misunderstand the felony/misdemeanor distinction or fail to remember their records in detail . . . [,] may misunderstand clemency . . . [,] or] may simply lie, for a variety of reasons").

⁵⁶ See, e.g., James M. Binnall, Jury News, National Association for Court Management, The Exclusion of Convicted Felons from Jury Service: What do we Know?, Court Manager, Vol. 31, Issue 1, at 26 (2016) ("Today, an estimated 19.8 million people, roughly 8.6 percent of the adult population and one third of the African-American male adult population, have been convicted of a felony. Importantly, in many jurisdictions, these citizens are forever barred from serving as jurors. Thus, as America imprisons, our jury system loses countless prospective jurors and the unique life experiences that would assuredly diversify any deliberation room.") (internal citations omitted); Kalt, The Exclusion of Felons from Jury Service, 53 Am. U. L. Rev., at 99 (October 2003) (concluding that the felony disqualification "produces juries that are less representative and much more white").

⁵⁷ If a potential juror provides the jurisdiction and date of the conviction, and it is clear under the relevant jurisdiction's law that the individual's civil rights have not been restored, the individual should be considered ineligible for jury service, and further inquiry by the court is unnecessary.

⁵⁸ "The office of the attorney general of the state where a prospective juror was convicted is a good reference to which the court may refer the juror with regard to the applicable law on whether and when a convicted felon's rights are restored." Guide, Vol. 4, Ch. 3, § 330.50.20(d). Courts may also utilize the website for the Restoration of Rights Project, available at <http://restoration.ccresourcecenter.org>, a helpful resource on the laws of civil right restoration by jurisdiction, and/or contact colleagues in a federal court located in the convicting jurisdiction for additional information about the relevant law on restoration.