

# Jury Managers' Toolbox

## *Best Practices for Effective Juror Utilization*

### Overview

The single biggest complaint that people have about jury service is the seemingly interminable waiting – waiting for everyone to arrive in the morning so juror orientation can begin, waiting for the judges to begin requesting jury panels, and waiting in the hallways outside the courtroom for the judges and lawyers to finish last-minute motions before voir dire. Most jurors recognize the importance of jury service, but understandably resent the apparent lack of consideration for their time, the disruption to their daily schedules, and their unreimbursed expenses (lost income, childcare, transportation) related to jury service. What court officials too often fail to recognize is that poor juror utilization is at least as much of a problem for court management as it is for jurors. Every person who reports for jury service, but is ultimately not needed to impanel a jury, represents a number of “hidden” administrative costs beyond the juror fee and mileage reimbursement. Poor juror utilization inflates these costs unnecessarily. In many instances, improvements in juror utilization would pay for themselves entirely and could possibly generate additional savings that could be put to use in other areas of court operations.

### How many jurors are really needed?

In an ideal world, courts would be able to anticipate the exact number of jurors needed on any given day and would summon and

qualify jurors accordingly. The NCSC recommends that courts summon only enough jurors to ensure that 90% are sent to a courtroom for voir dire, and that 90% of jurors sent to a courtroom are actually “used” (sworn as a trial juror or alternate, excused for cause or hardship, or removed by peremptory challenge) during jury selection. This standard provides for an overall utilization rate of 81%, ensuring enough “extra” jurors to accommodate most unanticipated circumstances, but not so many that substantial numbers of jurors are unused during voir dire or, worse, left waiting in the Jury Assembly each day.

A useful way to calculate the number of jurors to summon and qualify is to start with the jurors needed for any given trial and work backward.<sup>1</sup> Take, for example, a routine, non-violent felony trial in a jurisdiction that requires a 12-person jury and provides each side with 6 peremptory challenges. A jury panel for that type of trial would need the following: 12 jurors, 1 to 2 alternates, 4 to 6 prospective jurors removed for cause or hardship, 12 prospective jurors removed by peremptory challenge, and a few more (just in case). See Table 1.

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<sup>1</sup> G. Thomas Munsterman, *Jury System Management* 101-109 (1996).

<b>Reason persons needed</b>	<b>Number</b>
Jurors	12
Alternates	2 (roughly)
Prospective jurors removed for cause or hardship	6 (roughly)
Prospective jurors removed by peremptory challenge	12
Extras for other reasons not accounted for	3 (roughly)
<b>Total persons needed</b>	<b>35</b>

Added together, most courts should be able to impanel a jury with alternates from a panel of 35 prospective jurors. Lengthy or high-profile trials will normally require a larger panel as more jurors are excused for cause or hardship. In those cases, a panel of 40 to 45 prospective jurors might be more appropriate. Similarly, trials involving difficult or controversial evidence (e.g., sexual assault, crimes against children) may also require larger panels. In most instances, the trial judge will be sufficiently familiar with the case to predict when a larger panel is needed.

Courts with good juror utilization rates often have strictly enforced panel sizes for different types of cases (e.g., felony, misdemeanor, civil) based on information about the number of jurors needed to impanel juries for those cases. Judges who want a larger panel must submit a written request explaining the need for a larger panel to the chief judge or court administrator (not the jury manager, who rarely has sufficient authority to deny a judge’s request with impunity).

Once the court has determined the appropriate panel size for different case types, it is possible

to calculate the number of jurors needed to report to the courthouse each day based on the number of trials scheduled. For example, if three felony trials requiring panels of 35 jurors each and one civil trial requiring a panel of 45 jurors is scheduled for a given day, the court will need 165 to 170 jurors to report for service that day (150 jurors for panels plus a few extra, just in case). Courts typically summons jurors three to six weeks before the reporting date – well before the court has finalized its trial calendar. Consequently, they typically summons many more jurors than is needed to report, even after accounting for the expected jury yield.<sup>2</sup> To secure optimal juror utilization, it is necessary for the court to have a mechanism such as a telephone call-in system to cancel or “waive off” summonsed jurors or to place them on standby. This prevents the court from having more jurors report than is necessary to fill jury panels.

### **Fiscal and Other Impacts of Poor Juror Utilization**

Juror utilization often receives less attention than other court performance measures due to the pervasive belief that the costs of poor juror utilization are relatively inexpensive, particularly in light of the costs of keeping busy judges, lawyers, and other trial participants waiting in the event of a shortage of jurors. To the extent that costs of poor juror utilization include only the juror fees and mileage reimbursements paid to jurors, regardless of whether they are used or not, the pervasiveness of this belief is understandable. Nationally, juror fees average less than \$25 per

<sup>2</sup> Jury yield is a basic measure of efficiency in jury operations that describes the proportion of citizens who are qualified and available for jury service.

day (25% of daily per capita income) and only half of courts reimburse jurors for transportation expenses.<sup>3</sup> Many jurisdictions, especially those employing one day/one trial terms of service, have adopted a graduated juror fee system in which jurors are paid a minimal fee or nothing for a limited period of time (typically 1 to 5 days) and only pay the full graduated fee to impaneled jurors or jurors returning for extended periods of time.<sup>4</sup> In most courts, however, juror fees and mileage are only the tip of the iceberg. Courts rarely take into account the staff and physical resources expended to summons, qualify, and bring those jurors to the courthouse in the first place. Although precise figures are unknown, anecdotal reports suggest that these “upstream” administrative costs of jury management range from \$20 to \$25 per juror reporting for service in reasonably efficient courts. Administrative costs in excess of \$100 per juror reporting have been found in less efficient courts. Few courts take these administrative costs into account when assessing the fiscal impact of poor juror utilization.<sup>5</sup>

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<sup>3</sup> Gregory E. Mize, Paula L. Hannaford-Agor & Nicole L. Waters, *State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report 11-13* (April 2007).

<sup>4</sup> The median introductory and graduated juror fees for courts using a graduated fee program are \$10 and \$35, respectively. Based on unpublished data from the *State-of-the-States Survey of Jury System Improvements*, *supra* note 10.

<sup>5</sup> Munsterman first estimated that typical administrative costs per juror ranged from \$5 to \$20 in 1975. *A Guide to Jury System Management* 4-12 (1975). The \$20 to \$100 administrative costs discussed above reflect inflation-adjusted values and are consistent with more recent NCSC observations from technical assistance projects with state and local trial courts.

The limited focus on costs incurred directly by the courts, however, ignores the reality that jury service is heavily subsidized by in-kind contributions of jurors, their employers, their families, and their communities. Because these costs rarely, if ever, appear in court budgets, court policymakers often underestimate their magnitude. But the fiscal impact on individual jurors, their employers, and their communities is very real and often substantial. The daily per capita income in the United States is \$100.68.<sup>6</sup> For jurors, this is the average lost income they incur as a result of jury service or, if they are fortunate enough to work for employers that continue compensation for employees during jury service, the wages/salaries paid by those employers.<sup>7</sup> In addition, employers lose the value of their employees’ productivity for a day, which according to the US Department of Labor was \$1,350 in 2008.<sup>8</sup> As a practical matter, most employers will not lose the full value of an employee’s productivity as other employees will be engaged to compensate for the absent employee or that employee will make up for some or all of the lost productivity on their return to work. Nonetheless, a conservative estimate is half the Department of Labor estimate – \$675 in lost productivity – for each day that an employee reports for jury service but is not ultimately needed to impanel juries.

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<sup>6</sup> US Census Bureau, Table B19301, *Per Capita Income in the Past 12 Months (In 2007 Inflation-Adjusted Dollars), 2005-2007 American Community Survey 3-Year Estimates*.

<sup>7</sup> This figure does not include non-income compensation such as benefits (e.g., pension, health insurance, workman’s compensation, disability insurance, vacation/sick day accruals) that are also incurred by employers.

<sup>8</sup> US Dept. of Labor, Bureau of Labor Statistics, News Release, Table 1. *Business Sector: Productivity, Hourly Compensation, Unit Labor Costs, and Prices, Seasonally Adjusted*.

These represent the easily quantifiable costs associated with poor juror utilization. Other costs that are not as easily measured in monetary terms are the lost opportunity costs for jurors who are not employed and who would otherwise be engaged in activities other than jury service (childcare, volunteer activities, education, recreation) and the lost public trust and confidence in the courts by those individuals who did not enjoy the meaningful participation in the justice system of their peers who were impaneled, challenged or excused. Although not easily quantifiable, courts should not discount or ignore the existence of these costs. Adding these costs together, typical costs for unused jurors can range from \$800 to \$1,000 per day, the vast majority of which are absorbed by jurors, their employers and their communities; courts typically incur \$25 to \$150 per unused juror, or less than 20% of the total costs.

### **Causes and Solutions**

Studies of juror utilization have attributed poor utilization to three factors: excessive panel size; day-of-trial cancellations due to plea agreements, settlements, and continuances; and over-summonsing practices. As discussed above, the solution to excessive panel sizes is simply to establish standardized panels based on historical juror usage for different types of cases. Cases that warrant larger panels generally include capital felony trials, crimes involving sex offenses, crimes against children, and lengthy civil trials. Cases that warrant smaller panels generally include non-violent felony offenses, misdemeanor offenses, and routine civil trials. The optimal panel size for each case type should be sufficient to accommodate the substantial majority of trials (e.g., 90%) but does not necessarily have to

accommodate historical juror usage for all trials provided that judges can request a larger panel for unusual cases such as high-profile or very lengthy trials.

The problem of last-minute cancellations is more difficult to address insofar that it is essentially a matter of effective pretrial management, rather than effective jury operations. Thus, the onus falls on judges to encourage litigants to engage in timely plea and settlement negotiations. It may not be possible to eliminate all day-of-trial cancellations, but many courts have adopted policies that provide substantial disincentives for late trial cancellations. One approach is simply to assess the full costs of a cancelled jury panel against the litigants. For example, if the cost per juror is \$50 (\$25 juror fee plus \$25 administrative costs per juror reporting) and 45 jurors report for a trial that is cancelled on the day of trial, the court would assess a fee of \$2,250 equally against the litigants. This amount reflects the full value of costs incurred by the court for the unused jurors. In states that permit courts to assess costs against criminal defendants who plea or are convicted at trial, these costs can be assessed against the defendant or prosecutor or both, depending on which is the more dilatory party. Of course, these costs can be waived by the judge if the litigants can provide a reasonable explanation for their inability to plea or settle the case before the day of trial.

Another approach that courts have found effective for preventing day-of-trial plea agreements is the development of a strict “plea cut-off policy.” Under such a policy, prosecutors, criminal defense attorneys, and criminal defendants are given notice that they must inform the court of their intent to enter a negotiated plea agreement by a specified date

and time (usually the day before trial). If they fail to do so, the defendant must plead to the full charge(s) filed.<sup>9</sup> This type of policy provides equal incentives for the prosecution and defense to engage in meaningful plea negotiations. Prosecutors are encouraged to assess the strength of their cases and make reasonable plea offers or face the prospect of having to prove all charges to a jury beyond a reasonable doubt, risking increased acquittal rates. Criminal defendants are encouraged to accept reasonable plea offers or risk being convicted and sentenced on more serious charges. Again, the trial judge retains the discretion to permit a late plea agreement if the parties can show good cause why they could not inform the court of the decision to plead in a timely manner. To be effective, these types of incentive policies must be consistently and uniformly applied by all of the judicial officers of the court.

Some court calendars – such as misdemeanor calendars – do not provide judges with a great deal of pretrial oversight, making it difficult to impose or enforce plea cut-off policies. In those instances, concentrating the jury selection activity into a shorter period of time (e.g., 1 to 2 days per week) can be a viable option. This approach does not increase the probability that any given case will proceed to trial, but does increase the probability that at least one case will do so. Thus, jurors who reported for service on that day will have the opportunity to experience jury selection. Reviewing the court’s historical experience with trial starts on a day-

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<sup>9</sup> See, e.g., N.J. Ct. R. Rule 3:9-3(g)(2009) (“Plea Cut Off”); “Plea Bargain Cut Off, 506th Judicial District Court [Grimes and Waller Counties, Texas]” (establishing the date of the pretrial conference, scheduled 10 days before trial, as the plea bargain cut off date).

to-day basis will reveal if there are particular weekdays that are more or less likely to result in an impaneled jury. In many courts, Thursdays and Fridays are particularly poor juror utilization days, prompting courts to discontinue scheduling jury trials on those days.

Some judges have successfully adapted this approach into a “multiple voir dire” calendar in which jury selection for all trials scheduled over a period of time (e.g., one month) is conducted on the same day. For example, if the court has 3 jury trials scheduled for the month, it will bring in a jury pool large enough to impanel all three juries.<sup>10</sup> The first jury is selected, sworn, and told to report back to the courthouse for trial on a later date; the second jury then selected, sworn, and told to report back to the courthouse on another date; and the third jury is selected, sworn, and the trial proceeds that same day. In this way, most, if not all, of the jurors reporting for service will have been “used” (e.g., questioned and sworn, challenged or excused), and only those jurors who have been impaneled will return to the courthouse on subsequent dates.

A third factor that contributes to poor juror utilization is over-summoning jurors. Unpredictable failure-to-appear rates prompt some courts to compensate by summoning more jurors than needed. For example, a court that predicts that 5% of summonsed jurors will routinely fail to appear for service will summons 105 jurors for every 100 jurors it needs to impanel juries. However, if the failure-to-appear rate is less predictable – sometimes 5%

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<sup>10</sup> Note that the jury pool does not necessarily have to be three times the size of the normal jury pool as some prospective jurors can be “recycled” – that is, considered for the second or third jury, even if they are challenged or excused from the first jury.

of jurors fail to appear, other times 15% fail to appear, and other times all jurors report – the same court will adjust its summoning practice to compensate for the highest possible FTA rate by summoning 115 jurors, rather than 105 jurors, which will normally result in as many as 15 excess jurors per day.

Finally, as many as one-third of state courts have no mechanism to tell jurors not to report for service in the event that scheduled trials are cancelled before the trial date.<sup>11</sup> Jurors simply arrive at the courthouse only to be sent home. A dedicated telephone line and answering machine that permits jurors to call and find out if they need to report as directed is a simple and effective remedy that requires very little staff time or additional resources. If the court finds that it routinely cancels substantial numbers of jurors (e.g., 10% or more of summonsed jurors), it should reduce the number of jurors summonsed, keeping only a small portion of summonsed jurors on standby.

## Conclusions

The costs of poor juror utilization are substantial – to courts, to taxpayers, and to jurors, their employers, and their communities. But most of these costs do not appear explicitly in court budgets. Rather they involve inflated “upstream” administrative costs to summons and qualify jurors who were not ultimately needed to impanel juries. These inflated administrative costs pale in comparison to the costs incurred by jurors, their employers, and their communities. In the current economic climate, courts are better served – and better serve their communities – by improving juror utilization and thus reducing the wasted resources associated with poor juror utilization.

Note: A version of this document was published as *Paula Hannaford-Agor, Saving Time and Money for Everyone: The Current Economic Crisis is an Opportunity to Get Serious About Improving Juror Utilization*, in [FUTURE TRENDS IN STATE COURTS, 2009 \(NCSC 2009\)](#).

Disclaimer: The guidelines discussed in this document have been prepared by the National Center for State Courts and are intended to reflect the best practices used by courts to maximize juror utilization.

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<sup>11</sup> Mize et al., *supra* note 3, at 18-20.