Jury News

G. THOMAS MUNSTERMAN

PRINTER
TO PLACE
G. THOMAS
MUNSTERMAN

¿NO SE HABLA JURY DUTY? ENGLISH PROFICIENCY AND HISPANIC REPRESENTATION ISSUES

I recently received an e-mail from Sherry Spears, the juror and public services manager in Fresno County, California, asking who within the court system screens jurors for proficiency in English and how do they do it. My quick answer broadened the issue to the question of how we screen for other qualifications (and I use that term generally), including who does the screening and whether the answers are independently verified or whether we just trust the potential juror (as sooner or later we must). This discussion eventually brought in Tamara Beard, executive officer in Fresno; Sherry Dorfman, the assistant executive officer in Contra Costa County, California, who has experienced several challenges and lives to help the rest of the courts with these challenges; and my colleague at the National Center for State Courts, Paula Hannaford-Agor.

A number of recent articles and cases have caught my attention on the broader topic of representation of Hispanics in the jury pool, which is really the issue here. An article in the Sunday, November 16, 2003, *New York Times* pointed out that half of all Hispanics counted in the 2000 Census classified themselves as "other" when giving their race. The Census uses "Hispanic or Latino" as the ethnicity classification, and I will use Hispanic for brevity. Strictly demographically speaking, we all have a race and an ethnicity. In the 2000 Census, we were even given the chance to be multi-racial and multi-ethnic. Juror questionnaires that ask the demographic classifying question will usually first ask for race and then ask "Are you Hispanic?" But half of those in the 2000 Census who identified themselves as Hispanic choose a race of "other" rather than Black, White, Asian, or Pacific Islander.

This trend reflects support for using the term "Hispanic" as a racial, rather than ethnic, identification by that community. It does, however, make the demographic analyses associated with jury challenges more difficult for several reasons. First is a lack of consensus about whether fair cross section should be measured by the demographics of the total population or only by the jury-eligible population — that is, those with U.S. citizenship, local residency, age 18 or older, without a felony conviction, and fluent in English. A second, related issue is whether courts should factor undelivered summonses, hardship excuses, and failure-to-appear rates into their calculations. Finally, there is the question of how courts identify Hispanics on the master jury list — by surname, by self-identification, or by some other method. We have seen a number of courts struggle with these issues in recent years.

For example, in October 2002, the Georgia Supreme Court decided *Smith v. State*, a case originating in Hall County, located in northern Georgia, where large numbers of Hispanic workers eventually became residents and citizens. According to the 1990 Census, Hispanics comprised 17.1 percent of the county population, but only 2.6 percent of the names on the juror source list were Hispanic. The Georgia Supreme Court reversed the trial court's decision that the jury challenge was valid on grounds that neither of the parties introduced reliable evidence about the proportion of Hispanics qualified for jury service, which is necessary to test for violations of the fair cross section requirement. The term "qualified" is crucial in that the qualifications of both citizenship and English proficiency must be considered. Similarly, the federal Ninth Circuit Court of Appeals ruled in *U.S. v. Esquival* that the jury-eligible population of Hispanics is the proper starting place for fair cross section analysis.

In contrast, in a jury challenge alleging under-representation of Hispanics in Canyon County, Idaho, the Idaho Supreme Court recognized the actual proportion of Hispanics in the community as the starting point. It found that, although the initial source list of prospective juror names did not under-represent Hispanics, the master jury list, which excluded the names of persons for whom the summonses were returned undeliverable and the names of persons disqualified from jury service (non-citizen and inability to speak English), did violate fair cross section requirements.

In Santa Barbara, California, the [Court] upheld a challenge to the jury pool because the trial court failed to follow up on individuals who failed to respond to their jury qualification questionnaire. Using Hispanic surname identification methods (a process that needs real scrutiny), the court concluded that persons with Hispanic surnames failed to respond at a greater rate than persons with non-Hispanic surnames, resulting in an under-representation of Hispanics in the jury pool.

Now, back to the original question about screening for English proficiency. All states except New Mexico include this criterion as a qualification for jury service. It is the most subjective of all of the jury service qualifications. The others — U.S. citizenship, residency, age, and felony conviction status — are well-defined. Prospective jurors mark either "yes" or "no" on the qualification questionnaire and perhaps provide some documentation if claiming disqualification. But there is no common standard for evaluating English proficiency, which is not a requirement for U.S. citizenship, and the methods vary greatly from court to court. Some courts assume that a person who completes the qualification questionnaire understands English sufficiently for qualification purposes.

Other courts require the staff to verify the lack of English proficiency. I recall attending several in-person interviews in San Francisco for persons claiming disqualification based on lack of English proficiency. To verify the claim, the jury administrator asked prospective jurors about the language used at home or work as well as the number of years that a person had been a United States citizen. These interviews were routinely conducted on Fridays, and prospective jurors were required to appear before the disqualification was approved. In Fresno County, the jury staff screens for English proficiency by asking prospective jurors if they understand the qualification statements, which are projected on slides in several languages during orientation. In Contra Costa County, persons who claim language as reason for excuse are asked to call the jury office, regardless of whether they have signed under penalty of perjury. If jury staff are able to communicate with them by phone, they usually ask them to report for service. One jury clerk speaks Spanish and assists as needed. In Los Angeles all reporting persons complete a questionnaire containing only three questions. Two on transportation and one on language used at home. Persons who have trouble completing the questionnaire and request assistance are questioned to determine their proficiency in English.

Ironically, having the jury staff prescreen prospective jurors for language proficiency can result in two mutually exclusive, but equally problematic, situations once the panel of qualified jurors is sent to the courtroom. If the language screening process is over-inclusive — that is, it is designed to include prospective jurors whose English proficiency is only marginal — judges often find that they must screen the jury panel again in the courtroom, usually excusing many individuals who were not disqualified by the jury staff. Judges may be able to screen more realistically because the expected level of trial complexity is generally better known at voir dire than at jury qualification. The risk of a juror having difficulty in understanding the testimony in the middle of a trial prompts judges to err on the side of increased proficiency. However, in anticipation of this additional screening, requested panel sizes from which to select jurors tends to be larger, resulting in less-efficient juror utilization.

On the other hand, if the screening process is designed to disqualify Spanish-speaking (or other non-English-speaking) persons unless they are extremely fluent in English, then the panel appears to be less representative of the Hispanic population in the community than actually exists

I have taken the liberty of editing Sherry Dorfman's response, which goes to the heart of my concerns about measuring jury pool representativeness against Census data, especially in California, where the Hispanic population is strong, even more so where the non-citizen Hispanic population is high. Both citizenship and language factors are uncontrolled in the Census figures, which masks the population distribution of those who are eligible to serve.

> The 2000 Census (sampling survey, not 100 percent data) includes measures of citizenship, foreign born status/year, and English language skills through a variety of questions, which is a vast improvement over the 1990 Census.) I have done some work with this data, endeavoring to better gauge the jury eligible population distribution. In one challenge to the Contra Costa jury pool, a defense expert tried to use the 1990 Census data regarding language skills against us — and failed.
>
> Using this data is not as precise as it could be, since we are adapting the available data to our needs. And, of course, it falls short regarding certain eligibility factors that likely make a difference in racial/ethnic representation (e.g., prior felony convictions). Factoring in citizenship alone makes me nervous about

the Hispanic population, because under-representation is potentially more significant with this group than with any other. Much of this shortfall may be mitigated if English proficiency is taken into account, but the Census data isn't a very good gauge on language. The Census Bureau response categories — speaks English "very well", "well", "not well", and "not at all" — are not necessarily valid measures of language adequacy for jury service. The qualification on language is subjective and probably varies from person to person and situation to situation. For example, a prospective juror may assess his or her language skill as limited but be fully capable of carrying on a telephone conversation (e.g., respond to questions, ask questions, etc.) with a jury clerk who finds the juror qualified. But a judge might find the juror's accent too difficult to understand and thinks others might feel the same, and further believes the complexity of the technical language likely to be used in the complex litigation case will be overly taxing, so he will excuse the juror. Another judge with a DUI case and an Hispanic defendant may see this differently and will not excuse the juror (but maybe the DA will). It can play out a variety of different ways.

It seems the best jury commissioners can do is apply consistent practices regarding screening and granting excuses. Fresno has endeavored to do this with respect to language. I agree we need to verify information provided across all excuse categories — not just selective categories like language. In Contra Costa, we require verification for all excuse categories. I know judges do not always like this practice, because it results in more excuse requests in the courtroom. In turn, this leads to growth in panel sizes as Tom mentioned — judges insisting that they need more because more want to be excused. This happened in Contra Costa some years back when we converted to one-day/one-trial and implemented a more rigorous excuse policy with verification requirements. Gradually the panel sizes grew. It took years (and a budget crisis) to reverse this trend

I would strongly resist efforts to accept the sworn statement alone as enough to excuse prospective jurors, but not because I believe they're taking their best shot at getting out of jury duty, though undoubtedly that is true for some. I believe that many, maybe even most, whose second language is English, truly believe that they are not qualified. They are convinced their language skills aren't "good enough" — their knowledge and vocabulary about the legal world is limited, they don't read and write English as well as "other people," their pronunciation is imperfect if not heavily accented, they are intimidated by the "American" courtroom and all that might be expected of them there; and they don't want to fail or embarrass themselves by not knowing what they think everyone else knows. Note that these are all the same feelings prospective jurors have in general, but perhaps are more exaggerated for those who speak English as a second language.

So here's the nutshell answer to Sherry Spear's original question: "Do you agree that if we automatically excuse for language that we may be getting ourselves in trouble eventually?" YES, without a doubt if you're in Contra Costa County. Even if you don't create an immediate problem, you may establish a practice that emerges as one. The likelihood of this depends a lot on the community, the temperament of the defense bar, and the general political sensitivity or consciousness with respect to minority issues. The more sensitive the community is to the issues, the more likely the problem will emerge.

California is linguistically diverse. Many citizens today speak English as a second language — even more so in certain parts of the state. Certainly the Census data documents that. If we (jury commissioners) too readily excuse non-native speakers who are otherwise eligible, we sacrifice representation in our jury pool. Nonetheless, the system pulls us in this direction in the interest of efficiency. We can't afford to give in on this. The excuse policy makes a difference here. It determines who's in and who isn't *in the juror pool*. I support a rigorous policy with verification in all areas — even recognizing that verification itself isn't perfect and requires application of judgment at times. BUT — doing it is better than not doing it. I have hours of testimony to support that conclusion.

Subscribe to "Jur-E Bulletin." The National Center for State Courts' Community of Practice on Juries has available a weekly online newsletter on jury matters. To subscribe, go to www.ncsconline.org and select newsletters, then sign up. The only obligation on your part is to send us materials on juries that would be of interest to others and preferably items which can be accessed via a link from the bulletin. The issue of November 21, 2003, was devoted entirely to the subject of sequestration of jurors. Several judges have told me that this newsletter is becoming more of a reference than a weekly digest. The issue on sequestration is a good example. CM