

# Chapter 7

## Juries

Minority participation on juries, we found, is really made up of three issues. The first involves getting minority jurors to the courthouse. The second concerns how minorities participate on juries. The third concerns racial bias during jury deliberations.

### Underrepresentation of Minorities on Jury Pools

#### Findings

The task force heard repeated testimony that jury pools in Oregon do not adequately represent the racial and ethnic diversity of courts' districts. The survey sought "opinions based on actual experience." When respondents without an opinion are eliminated, close to 60 percent of all respondents (and almost 75 percent of minority respondents) declared jury pools unrepresentative. The percentages increase slightly for both groups when the question is whether minorities are proportionally represented on juries rather than jury pools.

These perceptions were confirmed by an August 1993 study conducted by the Multnomah Bar Association. The report concluded:

"Comparison of characteristics of those who served jury duty with census data for Multnomah County for 1990 shows overrepresentation in the jury pool for those with some college or college degrees, married people, home owners, those aged 35–74, and whites. It thus appears that the master list from which those to be subpoenaed are selected (created from voter registration and DMV records) is not including certain groups in proportion to their representation in the County: those under 35 and over 75, never married people, renters, and Black and Asian citizens." Report at 22.

The task force believes that similar results would be obtained if the same study were conducted in other areas of the state. The task force, therefore, agrees with the Multnomah Bar Association Report's conclusion that attention could—and should—be directed "toward improving the master list constructed by the Office of the State Court Administrator to include a broader range of citizens." *Id.* at 22.

The extent to which minorities have been underrepresented in juries has been the subject of considerable research. A consensus exists that “American jury systems tend to over represent white, middle-aged, suburban, middle-class people and under represent other groups.” National Jury Project, *Jurywork: Systematic Techniques* § 5.01, at 5-2 (2d ed 1987), quoted in Developments, *Race and the Criminal Process*, 101 Harv L Rev 1472, 1558 n 4 (1988). The failure of juries fairly to represent their communities is largely a function of the selection process. Drawing jury pools from voter registration lists tends systematically to underrepresent a number of different groups of people. National census data, for example, reveals that 73 percent of whites are registered to vote, but only 65 percent of African Americans and 44 percent of Hispanics are registered. Jury pools drawn from such lists necessarily exclude minorities even before subpoenas go out.

In other states, efforts have been made to draw from additional sources to capture a larger percentage of the eligible juror population. Connecticut is examining the possibility of using welfare lists. Illinois includes those with state-disabled-person identification cards. Minnesota uses a list of holders of a state identification card. Washington currently is considering the same practice. Iowa has used city directories and phone company lists. New York uses state income tax rolls.

In Oregon, the State Court Administrator prepares “master lists” from which counties select their jury pools. The master lists are the product of the merging of lists of registered voters and persons with drivers’ licenses or Department of Motor Vehicle identification cards. When a county notifies the State Court Administrator that it needs a particular number of jurors, a randomly selected list of jurors from a county’s combined list is generated. From that list, courts draw their own lists of persons to subpoena for jury service. Subpoenas are sent by mail. A large percentage of those who are sent the subpoenas (more than half in Multnomah County, for example) receive a deferral or an excuse from serving. These excuses are based on medical reasons, financial hardship, the need to care for small children, business hardship or other reasons. Some of those sent subpoenas do not respond at all. A relatively small percentage of those summoned (13 percent in Multnomah County) actually appear for service. Those that do show up are asked to serve jury terms of up to 30 days, although frequently their actual days of service may be much fewer.

The Multnomah Bar Report also concluded that “one is five times as likely to encounter a person of Hispanic origin in the group that was subpoenaed, but did not serve, as one is to encounter a person of Hispanic origin in the group that served in the jury pool.”

In addition to the fact that subpoenas are not enforced, other problems contribute to the disparity between those who are subpoenaed and those who actually serve. Some potential jurors seek to be excused—and are excused—from jury duty because it is too onerous for them. Jurors are too readily excused for reasons that are not legitimate, a point made several times by witnesses before the task force.

The service period in many counties is too lengthy and disruptive. Nationally, the trend is toward the one-day/one-trial system, described in detail in the Multnomah Bar Report

at 23–26. We note this recommendation by the Oregon Trial Lawyers Association (*Trial Lawyer*, November 1993, page 2):

*“Make jury service rewarding, by pushing for a one trial/one day rule... [and] by raising the per diem, lunch, parking and mileage allowance.”* (Emphasis in original.)

In addition, juror compensation is inadequate. (Jurors currently receive \$10 per day, plus mileage at eight cents per mile. ORS 10.060, 10.065.) Many jurors are not used efficiently during their service, too often waiting in master jury rooms with nothing to do. This causes frustration and dissatisfaction (which no doubt is communicated to other potential jurors in the community).

## **Recommendations**

### ***Recommendation Number 7-1***

**Pursuant to authority granted by ORS 10.215(1), the Chief Justice should increase the number of minorities on the source list of persons called to serve on juries and implement changes permissible under existing law. Such changes might include the use of public utility customer lists, city directories, tribal rolls and income tax lists.**

Estimated date for implementation to be completed: January 1, 1995.

Estimated cost of implementation: Minimal.

### ***Recommendation Number 7-2***

**The 1995 Legislative Assembly should consider legislation to change the method of selecting persons to be included in the “source list” for possible jury service in order to include more minorities in the jury pool.**

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

### ***Recommendation Number 7-3***

**The Chief Justice, presiding judges, State Court Administrator and trial court administrators should shorten jury terms and implement one-day/one-trial practices wherever practicable.**

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Unknown.

### ***Recommendation Number 7-4***

**ORS 10.060 should be amended to increase juror compensation. This change has also been proposed by the Multnomah Bar Report. In view of the financial exigencies faced by the state, such legislation would be more likely to receive legislative approval if combined with other procedural changes (such as the one-trial/one-day system), if it can be demonstrated that more efficient use of jurors would minimize the total cost of an increase in juror compensation.**

Estimated date for implementation to be complete: July 1, 1995.

Estimated cost of implementation: Modest.

### ***Recommendation Number 7-5***

**The Judicial Department (either the Chief Justice or presiding judges) should promulgate guidelines for stricter enforcement of excuse and deferral rules. The task force believes that excuses should be the exception, not the rule, and that service should be deferred rather than excused altogether.**

Estimated date for implementation to be complete: January 1, 1995.

Estimated cost of implementation: Minimal.

Note: With stricter policies for excusing and deferring juror service, fewer jurors could be summoned, with resultant reduction in cost.

### ***Recommendation Number 7-6***

**The State Court Administrator or trial court administrators should implement a follow-up procedure to contact jurors who do not respond to the subpoena.**

Estimated date for implementation to be complete: January 1, 1995.

Estimated cost of implementation: Minimal.

### ***Recommendation Number 7-7***

**The Oregon State Bar, with the cooperation of the Office of the State Court Administrator and the Judicial Department, should be asked to lead an intensive public relations and education effort across the state, appropriate for all media, regarding the importance and significance of jury service, the critical importance of each individual juror, and the role juries play in our judicial system. In addition to such general themes, an effort should be made to communicate specific information, including the length of required service, the amount of compensation, and the fact that an employer may not retaliate when absence from the job is attributable to jury service. Local television and radio stations may be able to assist with the development of public service announcements or short programs. Other professional organizations (such as the Oregon Trial Lawyers Association, the Oregon Association of Defense Counsel, the Oregon District Attorneys Association, the Oregon Criminal Defense Lawyers Association and the Oregon Minority Lawyers Association) may be interested in providing volunteer participants, if not financial assistance.**

**By itself, such a public relations effort cannot succeed in increasing the diversity of jury panels. In combination with the other changes proposed above, however, such a program could play an important role in improving public perceptions and attitudes about jury service and the justice system. The program likely will encourage participation, which increases diversity (socioeconomic as well as racial and ethnic) on jury panels.**

Estimated date for implementation to be complete: July 1, 1995.

Estimated cost of implementation: Modest.

## **Selection of the Jury Panel and Perceived Bias**

# During Deliberations

## Findings

The Supreme Court of the United States has observed:

“When any large identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may be of unsuspected importance in any case that may be presented.” *Peters v. Kiff*, 407 US 493, 503–04 (1972).

In ORS 10.030(1), this state has already declared its public policy:

“[T]he opportunity for jury service shall not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation or any other factor that discriminates against a cognizable group in this state.”

One African-American witness said, in speaking of a criminal case, that it would have made him feel better if he could have seen a black person on the jury. That sentiment applies equally to civil actions. Another witness observed that people must be able to look at a jury and feel they are going to get a fair trial. The perception of fairness can be critical, and it is difficult to achieve that without racial or ethnic diversity among the jurors who are deciding a case, particularly when one of the litigants is a member of a racial or ethnic minority. Therefore, it is hard to overstate the significance of the lack of diversity on jury panels or the need for effective change.

In part, that change can come about through the mechanisms suggested above for ensuring better representation in the jury pools. In part, however, changes must be made in the selection process.

When asked for opinions based on their actual experience, two-thirds of the survey respondents having an opinion on the issue agreed that peremptory challenges are used to eliminate minorities from the jury based solely on the juror’s race or ethnicity. Approximately one-third of all respondents (and half of those who had an opinion on the issue) believed that peremptory challenges are used to remove a nonminority based solely on race or ethnicity. Among minority respondents, 87 percent of those who had an opinion believed that lawyers use peremptory challenges to remove minorities. More than half of those who had an opinion believed that peremptory challenges are used to remove nonminorities based solely on race or ethnicity. Thus, while discriminatory challenges may be used to eliminate nonminorities, they are perceived to be more frequently used to remove minorities from the jury. Exercising peremptory

challenges solely on the basis of race, whether the juror is a minority or a nonminority, should not be permitted.

The task force is also aware that more than 40 percent of all respondents (55 percent of minority respondents) believe that a minority litigant is less likely to win a personal injury suit. Almost 45 percent of all respondents (almost 60 percent of minority respondents) agree that a minority litigant who does win is likely to receive less compensation from a jury than a nonminority litigant would. The task force believes that these perceptions could be modified if jury panels were more representational and diverse. Steps should, therefore, be taken to modify jury selection procedures in order to reduce discriminatory challenges and achieve this objective.

In *Batson v. Kentucky*, 476 US 79 (1986), the Supreme Court of the United States held that the Equal Protection Clause of the Fourteenth Amendment forbids prosecutors from challenging prospective jurors solely on account of their race. In *Edmonson v. Leesville Concrete Co.*, 111 S Ct 2077 (1991), the Court extended that principle to civil cases. Pointing out that a jury “is a quintessential governmental body, having no attributes of a private actor,” the court held that “courts must entertain a challenge to a private litigant’s racially discriminatory use of peremptory challenges in a civil trial.” To summarize the *Batson* process: a party who feels that an opponent’s challenge is racially-based must establish a *prima facie* case of purposeful discrimination—which the party can do by showing that he or she is a member of a cognizable racial or ethnic group and that the opponent has exercised a peremptory challenge to remove from the jury panel a member of that same group. The burden then shifts to the opponent to provide a neutral explanation for the challenge. Although the burden of coming forward with an explanation shifts to the opponent, ultimately the burden of proving purposeful discrimination continues to lie with the party who objects to the exercise of the challenge. See the summary of the rule set forth by the Oregon Supreme Court in *State v. Henderson*, 315 Or 1, 843 P2d 859 (1992).

The *Batson/Edmonson* rule is no panacea. Proving purposeful discrimination may be as difficult as it is easy for the opponent to articulate a nondiscriminatory rationale for the challenge. The task force believes that the *Batson* procedure might be a more powerful tool for avoiding discriminatory challenges if the burden shifted to the proponent of the challenge once a preliminary showing of discrimination has been made.

Some suggest that the answer to the problem posed by discriminatory peremptory challenges lies in the elimination of peremptory challenges altogether. See, e.g., the concurrence of Justice Thurgood Marshall in *Batson*, *supra*, 476 US at 100–08. The task force suggests two alternative approaches: (1) an amendment to ORCP 57D to permit a challenge of a juror for cause for the possible existence of bias against a racial or ethnic minority, where that bias may affect the juror’s determination on a relevant issue, and where the challenging party can point to specific facts (from the juror’s background or in answer to questions on *voir dire*) that indicate such a possibility; and (2) to reduce peremptory challenges based on race, a legislative codification of the *Batson* principle, with certain differences designed to make the rule more effective.

The task force heard anecdotal reports of racial and ethnic bias playing a determinative role during jury deliberation, and of jurors who felt intimidated and discouraged from reporting that fact to the court after the verdict or who believed that nothing would be done if they did report it to the court. The procedures for dealing with evidence of misconduct during jury deliberation appear to be limited in this state, and present particular problems.

First of all, it may be impossible to ascertain whether bias has played a part in the deliberative process. Under Oregon law, a lawyer may have no contact with a juror unless the lawyer can demonstrate to the court a reasonable ground for believing that a juror or the jury has engaged in fraud or misconduct that would be sufficient to justify setting aside the verdict. Once such a showing is made, contact with a juror can only occur in the presence of the court and the opposing party. Uniform Trial Court Rules (UTCRC) 3.120(2)(b). UTCRC 3.120(2)(b) codifies a long-standing proposition in Oregon law. It represents a public policy decision that the risk of interference with a juror's independence and privacy, and the finality which should be accorded to a verdict, are not outweighed by a risk of misconduct in a jury room that will continue undiscovered unless questioning is permitted. The task force believes that the rule represents a reasonable compromise between these interests, and that questioning of jurors should continue to occur in the presence of the court and only after the court is presented with reasonable grounds for conducting the questioning.

More problematic under this model is the procedure after questioning of the jurors has elicited persuasive evidence of bias that tainted the deliberative process. In *Erstgaard v Beard*, 310 Or 486, 800 P2d 759 (1990), the Oregon Supreme Court held that a juror's statements during deliberation cannot, without more evidence, be the basis for setting aside the resulting verdict. The court said:

“The posture a juror takes for or against a party during deliberations can always be attacked as bias; no verdict would ever be safe if such a meaningless label could justify a new trial...In the relatively few cases in which this court has either permitted or required a new trial for juror misconduct that occurred during the deliberating process, we have found none in which the misconduct consisted solely of juror argument. All the cases have involved specific acts by jurors designed...by the particular offending jurors to give them special knowledge concerning one of the disputed facts in the case then under consideration...[This juror's] actions were different. She did not obtain new information relating to [defendant]. She simply disclosed the basis of her pre-existing bias.” 310 Or at 497–98.

The task force heard troubling tales from dismayed jurors that other jurors had argued—successfully—that a particular factual determination be made solely because the party was a member of a racial or ethnic minority. *Erstgaard v Beard* would appear to foreclose any remedy for such conduct, even if it is disclosed to the court and the court finds that in fact it happened. The task force, therefore, proposes legislation that

would make it easier to challenge jurors who give responses suggestive of racial or ethnic bias.

The main task force survey asked a series of questions comparing the fairness of juries to that of judges in the treatment of minorities. Question 10(k) asked respondents whether they agreed, disagreed, or had no opinion concerning the following statement: “A criminal jury trial is more ‘winnable’ by prosecutors if the defendant is a minority.” Table 7-1 shows the responses.

Table 7-1

**Respondents who agree that “a criminal jury trial is more ‘winnable’ by prosecutors if the defendant is a minority.”**

<b>Respondents</b>	<b>Percentage who agree</b>
All Respondents	30%
Minority respondents	44
Nonminority respondents	29
Judges	27
Minority lawyers	58
Nonminority lawyers	43
Prosecutors	25
All lawyers	44
Criminal defense lawyers	74
Court personnel	13

Question 10(l) then asked respondents to comment on whether “A criminal trial WITHOUT A JURY is more ‘winnable’ by prosecutors if the defendant is a minority.”

Table 7-2

**Respondents who agree that “a criminal trial without a jury is more ‘winnable’ by prosecutors if the defendant is a minority.”**

<b>Respondents</b>	<b>Percentage who agree</b>
All respondents	18%
Minority respondents	33
Nonminority respondents	17
Judges	11
Minority lawyers	41
Nonminority lawyers	26
All Lawyers	27
Prosecutors	10
Criminal defense lawyers	46
Court personnel	8

These questions asked for responses “based on your ACTUAL experience.” The responses indicated in Tables 7-1 and 7-2 suggest that juries are more biased against minority defendants than are judges. Forty-four percent of all lawyers and 30 percent of all respondents believed a criminal jury trial is more winnable by prosecutors if the defendant is a minority, while over one quarter (27 percent) of all lawyers and 18 percent of all respondents believed a criminal trial *before a judge* is more winnable by prosecutors if the defendant is a minority. (These are substantial percentages, in regard to trials of minorities by both juries and judges.) Question 10(g) of the main survey asked for a response to the statement: “A criminal jury trial is more ‘winnable’ by the defense if the defendant is a nonminority.”

Table 7-3

**Respondents who agree that “a criminal jury trial is more ‘winnable’ by the defense if the defendant is a nonminority.”**

<b>Respondents</b>	<b>Percentage who agree</b>
All respondents	35%
Minority respondents	52
Nonminority respondents	34
Judges	28
Minority lawyers	67

Nonminority lawyers	49
All Lawyers	51
Prosecutors	34
Criminal defense lawyers	80
Court personnel	18

Eighty percent of criminal defense lawyers agreed. A substantial percentage of prosecutors also agreed.

Question 10(h) then asked whether “A criminal trial WITHOUT A JURY is more ‘winnable’ by the defense if the defendant is a nonminority.”

Table 7-4

**Respondents who agree that “a criminal trial without a jury is more ‘winnable’ by the defense if the defendant is a nonminority.”**

<b>Respondents</b>	<b>Percentage Who Agree</b>
All respondents	20%
Minority respondents	36
Nonminority respondents	18
Judges	10
Minority lawyers	44
Nonminority lawyers	28
Prosecutors	9
Criminal defense lawyers	50
Court personnel	10

In every category of respondents, the perception is that, to the extent a criminal trial is biased, juries are more biased in favor of nonminority defendants than are judges. Even so, half of all criminal defense lawyers, 44 percent of minority lawyers, 36 percent of all minority respondents and 29 percent of all lawyers perceived bias by judges.

## **Recommendations**

### ***Recommendation Number 7-8***

**Every potential juror should receive an orientation (perhaps by videotape) that not only describes the jury process, but that also includes a succinct statement of the reasons why it is essential for every potential juror to disclose any predisposition to judge a party or assess a witness based solely on racial or ethnic grounds.**

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Less than \$25,000.

### ***Recommendation Number 7-9***

**The oath given to potential jurors should include specific reference to the obligation to disclose to the court, during the jury selection process, their own bias against a racial or ethnic minority (including a specific group if appropriate), and the obligation to decide the case free from ethnic or racial bias.**

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

### ***Recommendation Number 7-10***

**Prior to the *voir dire* examination, when requested by a party or when a court believes it is appropriate, a trial court should conduct an initial *voir dire* of potential jurors designed to elicit any evidence of bias against a racial or ethnic minority that may affect the juror's deliberations.**

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

### ***Recommendation Number 7-11***

**The Council on Court Procedures and the legislature should amend ORCP 57D, adding the following as grounds for a challenge for cause: any evidence which would reasonably suggest that the juror may possibly reach a decision based in whole or in part on racial or ethnic bias against a party or a potential witness.**

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Comment: Unlike the other grounds for challenges for cause, this proposed basis is phrased in terms of a "possibility" rather than a proven fact. The task force believes that this addition is required to preserve the integrity of the jury process by avoiding even the perception of juror bias.

### ***Recommendation Number 7-12***

**The Judicial Department should seek the following proposed legislation (codifying *Batson/Edmundson*):**

***Section 1:* Section 2 of this Act is added to and made a part of ORS chapter 10 or ORCP 57:**

***Section 2:* (1) A party in a civil or criminal trial may not exercise peremptory challenges primarily on the basis that jurors to be challenged belong to a particular cognizable group with respect to race or ethnicity. A rebuttable presumption exists that peremptory challenges do not violate this subsection.**

**(2) If a party believes the adverse party has exercised peremptory challenges on a basis prohibited under subsection (1) of this section, the party so believing may move for a mistrial before the jury is sworn and outside of the presence of potential jurors. The moving party has the burden of establishing:**

**(a) That the prospective jurors excluded belong to a cognizable group with respect to race or color; and**

**(b) That there is a likelihood that the adverse party has challenged the potential jurors primarily on the basis that they belong to the cognizable group.**

**(3) If the court finds that the circumstances as presented by the moving party create a likelihood that the adverse party is challenging prospective jurors primarily on the basis that they belong to the cognizable group, the burden shifts to the adverse party to show that the peremptory challenges in question were not exercised primarily on the basis of membership by the prospective juror in a cognizable group. If the adverse party fails to meet the burden of justification as to the questioned challenges, the presumption that the challenges do not violate subsection (1) of this section is rebutted.**

Note: This is a modified version of a bill that was introduced in the 1993 legislative session; it was referred to the House Judiciary Committee, where it died.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

### ***Recommendation Number 7-14***

**The Oregon State Bar and Oregon Supreme Court should promulgate disciplinary rules that the use of a peremptory challenge to excuse a juror solely on the basis of race or ethnicity is unethical.**

Estimated date for implementation to be completed: January 1, 1995.

Estimated cost of implementation: Minimal.

Suggestions for implementation: Changes in the Disciplinary Rules require concurrence of the Oregon State Bar and the Supreme Court. ORS 9.490.

### ***Recommendation Number 7-15***

**The Oregon State Bar should draft a rule of professional responsibility concerning the status of persons. Such a rule could be patterned after the ABA Code of Judicial Conduct 3B(6):**

**“Lawyers in proceedings before the court shall refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, or socio-economic status, against parties, witnesses, counsel or others. This section, however, shall not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socio-economic status, or other similar factors, are issues in the proceedings.”**

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

Persons responsible: Oregon State Bar and Oregon Supreme Court.