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# The Jury EXPERT

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## On the Obstacles to Jury Diversity<sup>1</sup>

By Samuel R. Sommers

This year I've been asked to serve as an expert witness in two different capital cases in which the defense was concerned that the defendant would stand trial by an all-White (or nearly all-White) jury. In both cases, the defendant was a Black man and his attorneys were concerned that the mostly White demographics of the jurisdiction would increase the chance of a guilty verdict and death sentence. Moreover, they were worried that the courthouse venire would wind up being even less diverse than the surrounding population, and that jury selection would seal the deal by stacking the deck against their minority client.

How justified are such concerns? What, specifically, are the obstacles that stand in the way of racially diverse juries? How influential is a jury's racial composition on its final verdict anyway? And what strategies might attorneys and their consultants pursue in cases when they have reason to believe that a diverse jury is in their best interest? This article will offer some preliminary answers to these questions by drawing on empirical research concerning race, jury selection, and jury composition.

<sup>1</sup> Portions of this article are adapted from Sommers, S. R. (2008), Determinants and consequences of jury racial diversity: Empirical findings, implications, and directions for future research, *Social Issues and Policy Review*, 2, 65-102.

## Case Studies

Consider the following two hypothetical case studies, starting with “County A.” According to a recent census, County A has 16,000 jury eligible citizens, just over one-fourth of whom are African-American. But of the individuals reporting to jury duty at the local courthouse in the preceding decade, only 10-15% have been Black. Even more striking is the fact that over the previous 15 years, *not a single* Black juror was actually chosen to serve on a jury. That’s right, despite the fact that there are more than 4,100 jury-eligible African Americans in County A, not one jury has included even a single Black juror for more than a decade.

Now consider “County B.” Like A, County B has a sizeable number of African-American citizens—in this case, 23% of the general population. In the previous two decades, County B has seen 18 murder trials that ended with a conviction and a sentence of death. Of the 18 juries that decided these cases, 7 had but a single Black juror and 10 had no Black jurors at all. Only 1 jury had as many as 2 Black jurors. This means, of course, that not a single one of these juries had 3 Black jurors, the number out of 12 that would indicate a jury composition representative of the more general racial demographics of County B.



While there are clear differences between these two counties—the outlook for jury diversity is not quite as desperately bleak in the latter example as in the former—these case studies provide converging examples of the historical tendency for many American jurisdictions to regularly (and, at times, spectacularly) fail to empanel diverse, representative juries. And as the skeptical reader may have already intuited, these examples are not mere hypotheticals. County A is Talladega County, Alabama, circa 1965 (see *Swain v. Alabama*). One could mitigate the contemporary implications of these data, given that they are more than four-decades old and come from a state that has had, by even a generous assessment, a checkered past in race relations. On the other hand, these data are *only four decades old*. Here you have a systematic and complete exclusion of African-American citizens from a local jury process, and it’s no example taken from Civil War Reconstruction or the early 20<sup>th</sup> Century—rather, it comes from an era still accessible in the memories of many readers of this publication.

Have such race-based disparities improved or even vanished over time? Well, the facts for County B describe Jefferson Parish, Louisiana, just prior to Hurricane Katrina in 2005 (see Liptak, 2007). Of course, these data, too, amount to little more than a snapshot of a specific jurisdiction during a specific period of time. But the numbers are contemporary and provide at least one persuasive illustration that the jury racial composition problems evident in Talladega County in 1965 have not disappeared in modern America. Furthermore, cross-cultural analyses indicate that such lack of racial representation on juries is by no means an exclusively American problem.

### *System Obstacles to Jury Diversity*

Why is the empanelling of representative juries often an elusive goal? It is no small endeavor to translate a community's population into 12-person juries. The first step is compiling a master list of citizens eligible for jury service. In the wake of Congress' 1968 Jury Selection and Service Act, the most common technique for creating such a list of prospective jurors in the United States has become drawing from voter registration records (Vidmar & Hans, 2007). Though specific procedures vary by jurisdiction, in many states these voter lists are supplemented by other public records, such as those related to driver's licenses, taxes, and public utilities.

Anecdotal observation and empirical research suggests that reliance on voter rolls and other public records is not without serious limitations when it comes to creating a diverse jury pool. For instance, lower-income individuals and racial minority groups tend to be underrepresented on such lists (Diamond & Rose, 2005). This helps explain some of the egregious problems with source list representativeness described by Abramson (2000), such as a district in North Dakota in which only 17% of eligible Native Americans living on reservations voted in an election, leading to only one such individual being summoned for jury duty that entire year. Further problems with representativeness occur when these source lists are not updated frequently; in such instances, people who move often, such as renters, are often omitted.

Once a source list is created, the next step in producing a jury pool is to select a subset of individuals to call to jury duty. Typically, this selection is done at random with the caveat that individuals can only be chosen once during the course of a particular time period. In some instances, however, the selection process is not as random as intended. For example, Hans and Vidmar (1986) detail an almost comical list of problems regarding an old computer selection process used Atlantic County, New Jersey. First, because of a failure to properly merge voter and driver's license lists by eliminating duplicate names, a full 40% of the individuals on the source list were twice as likely as other citizens to be selected for jury duty. Moreover, the use of a fifth-letter alphabetization scheme—intended to facilitate random selection—instead led to overrepresentation in some panels of Jewish names (e.g., Feldbaum, Goldberg, Weisberg) or Italian names (e.g., Albertini, Dinardo, Ferarro).

But even assuming a truly random selection, obstacles remain to the effort to bring to the courthouse for jury duty a representative venire. Jury summonses are typically accompanied or preceded by a jury eligibility questionnaire. There are a variety of responses on this questionnaire that may disqualify a citizen from jury duty, including lack of English proficiency, a felony criminal history, transportation difficulties, and financial hardship; many of these characteristics are more common among low-income individuals and particular minority groups. Furthermore, increased geographic mobility among racial minorities means that a higher proportion of jury summonses sent to non-White Americans are returned to the court as undeliverable. And even when summonses successfully make their way to the individuals selected, many go unanswered. Boatright (1998) reported that in some urban jurisdictions, as many as 80% of individuals fail to report to jury duty.

In sum, despite improvements in procedures for creating source lists, the groups of citizens who report to jury duty in many jurisdictions often fail to achieve a racially diverse, representative cross-section of the communities from which they are drawn. Factors contributing to such discrepancies include the underrepresentation of particular groups from the public records on which source lists are based, increased geographic mobility and other obstacles that prevent summonses from being delivered to individuals of particular demographics, and disproportionately high rate of disqualifying characteristics found among low-income and racial minority individuals. But as detailed below, even were all of these system-related problems remedied and venire everywhere suddenly more racially diverse, obstacles would persist in the effort to achieve representative juries.

### *Jury Selection and Jury Diversity*



In spite of all the effort and resources put into the recruitment of representative jury pools, many if not most of the individuals who report for jury duty complete their service without being empanelled on a jury. And notably, whereas the 6<sup>th</sup> Amendment of the U.S. Constitution mandates that juries be selected from a venire representing a fair cross-section of the community (*Taylor v. Louisiana*, 1975), there is no requirement that individual juries, once empanelled, actually reflect the demographics of their community (*Strauder v. West Virginia*, 1879; *Swain v. Alabama*, 1965). Indeed, both anecdotal and empirical evidence demonstrates quite clearly that juror race is a factor that frequently influences attorneys' jury selection judgments and tendencies.

Perusal of jury selection guides and training manuals reveals a wide range of “juror folklore” used by attorneys in their effort to empanel a sympathetic jury: *defense attorneys should look for female jurors unless the defendant is an attractive woman; poor*

*jurors are good for the defense in a civil case because they are uncomfortable with large amounts of money; civil plaintiffs should avoid jurors who are bank tellers, accountants, or hold other occupations based on precision* (see Fulero & Penrod, 1990). Not surprisingly, similar stereotypes exist for juror race. Perhaps the most notoriously illustrative example comes in the form of a 1986 attorney training video created by Philadelphia prosecutor Jack McMahan. As described by Baldus and colleagues (2001), on this tape McMahan argues the “best” jurors for the prosecution are conservative, middle-class individuals. McMahan urges prosecutors to avoid “Blacks from low income areas” because of their “resentment” of law enforcement and tendency to resist authority. In fact, McMahan breaks down even further his stereotypes of Black jurors, suggesting that young Black female jurors and other Blacks who are “real educated” pose problems for the prosecution, as do older Black women who may sympathize with Black male defendants out of “maternal instinct.” Black men—particularly older Black men—are described as less problematic.

The McMahan tape may be among the most explicit evidence that attorneys harbor—and are encouraged to act on—race-based juror stereotypes in selecting a jury, but it is by no means the only such

evidence. In the recent U.S. Supreme Court ruling in *Miller-El v. Dretke* (2005), Justice Breyer's concurring opinion describes a jury selection guide that advises attorneys to assign numerical points for characteristics such as age, gender, and race. Breyer also cites a Maryland Bar journal article that recommends that attorneys consider prospective jurors' demographics and then, based on these characteristics, identify by intuition their enemies and allies. The opinion goes on to review materials from a legal convention articulating explicit stereotypes by juror race, as well as advertisements from consultants who claim to be able to determine, for any given case, the exact demographics of the jurors who should be struck via peremptory challenge.

In short, there is little reason to believe that race is an exception to the tendency of attorneys to rely on stereotypes during jury selection. Of course, the accuracy of these expectations regarding juror demographics and verdict tendencies is an important empirical question. But even if there is a kernel of truth to many juror stereotypes, and even if the limited nature of most voir dices makes it easy to understand why attorneys would be seduced into relying on such stereotypes, relying on sweeping generalizations based on juror race is a risky proposition. As a case in point, in another recent trial I served as an expert witness in a post-conviction hearing regarding racially biased statements allegedly made during deliberations in the murder trial of a Black defendant in Massachusetts. The most egregious statements were allegedly made by a dark-skinned juror of Cape Verdean descent, for whom the defense attorney had lobbied vigorously during jury selection out of the concern that "we don't have any other jurors of color in the pool." The attorney's assumption that this juror would be sympathetic to his Black client was an intuitive one, but it was ultimately mistaken: the juror in question proved to be a vocal proponent of a guilty verdict and apparently had a long personal history of making racially disparaging remarks about Blacks.

Empirical analyses provide further support for the conclusion that the race of prospective jurors predicts peremptory use. For example, Turner, Lovell, Young, and Denny (1986) examined prosecutorial and defense peremptory challenges from 121 real cases. Across this sample, prosecutors were more likely than defense attorneys to challenge Black prospective jurors, whereas the defense was more likely to challenge White individuals. The authors concluded that both prosecuting and defense attorneys tend to presume that Black jurors are prone to move a jury toward a not guilty verdict. More recently, Rose (1999) observed jury selection for 13 trials in North Carolina, all but one of which involved a Black defendant. Race had different effects on prosecuting and defense attorneys: whereas 71% of the challenges of Black prospective jurors were made by prosecutors, 81% of White juror challenges were made by the defense. Similar patterns exist in other jurisdictions.

This influence of race on jury selection has not gone ignored by the U.S. Supreme Court. In fact, the Court struck down local statutes that excluded members of particular racial groups from jury duty as far back as the 19<sup>th</sup> Century (*Strauder v. West Virginia*, 1879). In *Swain v. Alabama* (1965), the Court addressed directly the issue of race-based peremptory challenges, ruling that systematic exclusion of a racial group from jury service across several trials would constitute a violation of the Equal Protection Clause. That said, successfully proving such a pattern of bias remained practically impossible given the *Swain* precedent, in which the Court majority was unconvinced that the Talladega County, Alabama data introduced in the opening of this article—in which not a single Black juror had been empanelled for more than a decade—qualified as evidence of discriminatory peremptory use. Two decades later in *Batson v. Kentucky* (1986), the Court lowered the burden of proof necessary for defendants to successfully make the case that the prosecution's peremptory use was biased by race.

In the aftermath of *Batson*, attorneys could be—for the first time—forced to justify their peremptory use; less than a decade later, the prohibition on peremptory challenges was extended to gender (*J. E. B. v.*

*Alabama*, 1994). Has the *Batson* ruling successfully ended race-based peremptory use? Archival and experimental analysis indicate that it has not. Baldus and colleagues (2001) examined jury selection from 317 capital murder trials in Philadelphia from 1981 to 1997, allowing for assessment of the relationship between juror race and peremptory use both before and after *Batson*. Across the entire sample, prosecutors disproportionately targeted Black prospective jurors with peremptories, especially when the defendant was Black. With regard to *Batson*, “time series data suggest that *Batson* had no effect whatever on prosecutorial strikes against black venire members” (p. 73). Attorneys remain capable of generating a wide array of race-neutral justifications for race-based peremptory challenges, leaving judges with little choice but to accept their explanations in most instances (see Sommers & Norton, 2008).

### *Does Jury Diversity Matter?*



Having reviewed obstacles to the creation of racially representative juries, the next question is to ask is what are the implications of achieving (or failing to achieve) jury diversity? Clearly, the representativeness of juries is important from a Constitutional standpoint, both in terms of the rights of defendants and of citizens of all races to serve as jurors. And representativeness has obvious implications for local citizens' perceptions of the legitimacy of the legal system. But what about the potential for a

jury's racial composition to affect its actual decision-making process and final verdict? After all, it is the very assumption that jurors of different races—and therefore juries of varied racial compositions—have different verdict predispositions that seems to underlie the influence of race on attorneys' jury selection judgments. This intuition is spelled out clearly in the following opinion from Justice Thurgood Marshall in 1972: “When any large and 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 its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented” (*Peters v. Kiff*, pp. 503-504).

Multiple studies suggest that Justice Marshall was right to assume that a jury's composition has the potential to affect trial outcomes. The investigation of Baldus et al. (2001) into capital juries in Philadelphia indicated that racial composition was a reliable predictor of jury verdicts. Other analyses have yielded similar conclusions, namely that the greater the proportion of Whites to Blacks on a capital jury, the more likely a Black

defendant is to be sentenced to death, especially when the victim was White (see Bowers, Steiner, & Standys, 2001). Such patterns are not confined to the White/Black dichotomy: Daudistel, Hosch, Holmes, and Graves (1999) examined 317 nonfelony juries in Texas comprised of Whites and Latinos, and determined that majority-White juries were harsher in their judgments of Latino defendants than were majority-Latino juries. Mock jury experiments have produced similar conclusions.

Sommers (2006) has suggested at least three different explanations for the relationship between jury composition and verdict outcomes. First is a simple *demographic* explanation. That is, to the extent that Black jurors are indeed more acquittal-prone than White jurors in certain cases, then the Whiter the jury is, the more guilty votes it will have heading into deliberations. Of course, the more guilty votes before deliberations, the better the odds of a conviction.

But the nature and content of deliberations can actually vary by a jury's racial composition as well. Indeed, in advocating for diverse juries in *Peters v. Kiff* (1972), Justice Marshall was quick to point out that the potentially beneficial effects of heterogeneous juries transcend matters of simple vote split, as he emphasized the ability of diverse juries to inject into deliberations a range of "qualities of human nature and varieties of human experience." In other words, jurors of different backgrounds are presumed to bring different perspectives to the table during deliberations, comprising an *informational* explanation for the effects of jury racial composition. Few empirical studies have actually examined this issue, and observational studies in real courtrooms are next-to-impossible to conduct. Sommers (2006) did find evidence of such informational effects in one study, in which the key comparison was between the deliberation content of racially diverse and all-White 6-person mock juries in a simulation study run at a Michigan courthouse using actual jury pool members. Results indicated that diverse mock juries—defined as those with 4 White and 2 Black jurors—deliberated longer and discussed a wider range of evidence from an assault trial involving a Black defendant than did all-White juries.

Yet a third, not mutually exclusive, explanation for the link between jury racial composition and trial outcomes involves *motivational*, or non-informational processes. More precisely, individuals experience very different motivations and concerns when in diverse versus homogeneous groups. Hans and Vidmar (1986) discussed this possibility decades ago, writing that the presence of minority jurors "may inhibit majority group members from expressing prejudice, especially if the defendant is from the same group as the minority group jurors" (p. 42). Anecdotal evidence also suggests that juror prejudice, when voiced during deliberation, elicits a different response on diverse versus homogeneous juries. For example, the biased statements allegedly made during deliberations in the Massachusetts murder trial described above may never have come to the attention of the defense attorney—or led to a post-trial hearing—were it not for the immediate and forceful response of the sole African-American on that jury. Empirically speaking, the Sommers (2006) mock jury study referenced above found that White mock jurors were more vocal and factually accurate in discussing the facts of the case when deliberating in diverse versus all-White juries, indicating that White jurors interact and even think differently in diverse settings.

In sum, as important as are the Constitutional ideals underlying the pursuit of diverse, representative juries, empirical research indicates that jury racial composition also has more observable, quantifiable effects. Data indicate that a jury's racial composition has the potential to influence the nature and quality of its deliberation processes. There does seem to be evidence to support the intuition of attorneys that their minority client will face better odds the more diverse the empanelled jury is. And this conclusion is not simply the result of tipping the balance of the predeliberation vote split—the performance of White jurors themselves can vary dramatically depending on the racial composition of those in the jury room with them.

## *So What's a Lawyer to Do?*

Returning to the defense attorneys I alluded to at the start of this piece, it would seem that they had good reason to be concerned about the likelihood of an all-White jury sitting in judgment of their client. What could they do about these concerns? What can any attorney or consultant who believes her client would be well-served by a diverse jury do about a potential lack of diversity? There are no easy answers to these questions, but the present review of the obstacles to racially diverse juries does identify some of the specific bottlenecks in the system that one might seek to clear in the pursuit of a diverse jury.

First, at the level of assembling a venire, there is a wide range of potential remedies that could, in theory, help alleviate the underrepresentation of certain groups in the jury pool: more frequent updates of a jurisdiction's source lists so as to better include those segments of the population that move more often and are frequently summonsed using outdated addresses; increased compensation for jury duty (including transportation costs) to reduce the number of claims of financial hardships that, in many communities, come disproportionately from particular racial groups; efforts to oversample particular segments of the population for jury duty, in order to balance out the higher rate of undeliverable summonses and lower response rates among those parts of the community. Are judges likely to go for any of these requests? Of course not. They're unlikely to grant that change of venue motion either, but that doesn't stop it from being a worthwhile gambit. Perhaps attorney requests like these to better balance the venire will lay the groundwork for a future appeal. Or maybe their refusal will help sway the judge later on when it comes to...

...jury selection remedies. Well-supported concerns about not empanelling a diverse jury might be one way to convince the judge to permit an expanded voir dire (in jurisdictions where that's even a possibility to begin with). Given all that we know, both anecdotally and empirically, about the lack of teeth shown by the *Batson* prohibitions on race-based peremptories, putting the judge on alert that you're concerned about such challenges in the case in question can't hurt. Empirical investigations indicate that "only a small percentage of the neutral explanations for peremptory strikes" are ultimately rejected by judges (Raphael & Ungvarsky, 1993). Any assistance at all in climbing this uphill battle of winning a *Batson* claim is no small accomplishment.

Moreover, many a wise attorney learned long ago that voir dire is about more than fact-finding and exposing juror biases, it is also an opportunity to begin making one's case, and to be perfectly blunt, jury indoctrination. Another finding of the Sommers (2006) study reviewed above was that mock juries that were asked general voir dire questions about race and racial biases were less likely to see a Black assault defendant as guilty before deliberations began. So while voir dire questions such as "do you have any racial prejudices that would prevent you from being an impartial juror in this case" are unlikely to yield answers more helpful than "no" or "I'd like to think not," the very experience of thinking about such issues can be enough to put many White jurors on guard against bias in judging the case at hand. By no means do such questions preclude the possibility that jurors will be biased against a minority defendant, but again, every last bit helps when representing a minority client in front of a non-diverse jury.

And for those ready to throw a Hail Mary pass, there does exist precedent for the use of affirmative procedures to ensure minority representation on empanelled juries. Into the 19<sup>th</sup> Century in the U.S. as well as England, defendants from racial or ethnic groups at high risk for juror prejudice were sometimes tried by special "split juries," on which at least half of the jurors were guaranteed to be from the same minority group as the defendant. As recently as the 1990's, grand juries in Hennepin County, Minnesota were created so as to be proportionally representative of their surrounding community (for details see Sommers & Norton, 2008).

The bottom line is that there is no magic bullet for ensuring a racially diverse jury. There are too many leaks in the pipeline from community to jury room to effectively plug every last one. But research does help us identify what these specific obstacles are, and empirical data can be used in the effort to convince a trial or appellate judge that the procedures in place in a given jurisdiction, though perhaps race-neutral on their face, decrease in real terms the likelihood of venire and jury representativeness. This is an argument that is difficult, but not impossible to win (see *Miller-El v. Dretke*, 2005; *Snyder v. Louisiana*, 2008). And it's an exceedingly important one in several respects, as the implications of jury diversity can be seen not only in terms of Constitutionality and perceived legitimacy of the system, but also in the very performance of jurors and the ultimate outcomes of trials.

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ASTC's Pro Bono Program



We asked three experienced trial consultants to react to Professor Sommers' article on jury diversity. Andrew Sheldon, Pat McEvoy, and George Kich offer their reactions to this article on maintaining jury diversity.

### George Kich responds:

#### About Sommers' "On the Obstacles to Jury Diversity"

George Kitahara Kich, Ph.D. ([george@bonoradandrea.com](mailto:george@bonoradandrea.com)) is a trial consultant and partner at Bonora D'Andrea LLC in San Francisco. He consults on civil and white-collar criminal cases nationwide.

Trial consultants and attorneys want to know what attributes or characteristics of a jury influence the final verdict. We weigh juror race, ethnicity, gender, occupations, education, and age, among other descriptive information, with juror experiences, judgments, opinions and attitudes. Although we often say that demographics alone are not predictive of outcome, juror opinions and attitudes by themselves are out of context and insufficient as well.

Samuel Sommers' research (2006, 2008) on racial diversity within the jury adds important information about both juror discussion and deliberation outcome. His finding that a diverse jury deliberated longer and discussed more evidence than a White jury could be useful depending on the case and on the evidence. These results confirm my past experiences in conducting diversity trainings, cross-cultural psychology classes and multiracial discussion groups where participants of all races and ethnicities "could interact and think differently" as Sommers notes about his own research. His finding that White jurors in a racially-mixed deliberation were more vocal and factually accurate when they discussed the evidence and the facts of the case led me to wonder what the "non-White" jurors did differently, if anything. It makes sense that the White jurors were more able to set aside their biases and shared assumptions, to look at different experiences or opinions about the case facts, when in a racially-different setting. I wondered also if this was more probable in a large racially-diverse city rather than in a smaller, less-diverse and more rural venue.

Sommers details the many systemic and institutional "bottlenecks" to getting a racially-diverse and representative cross-section of the population within the venue into the courtroom. His research on the benefits of a

diverse jury might be useful in supporting motions to expand the venire, to increase time for voir dire and to use racial experience and attitude questions during jury selection. His work supports arguments that a jury that represents a true cross-section of the community can actually prevent bias, can enhance jury deliberations and can limit actual and perceived discrimination at trial.

Some other pointers that result from his work:

1. Sommers made several statements about how attorneys often use folklore and stereotypes about race or gender as the basis for peremptory challenges. It is my experience that the greater the need by attorneys to have jurors decide the case itself on stereotypes rather than on the evidence or the case issues, the greater the reliance on stereotypes in jury selection. On the other hand, stereotypes are useful in reducing complexity. They have been useful over the decades because they appear to work. But, Sommers' example of the Cape Verdean juror that was presumed to fit an American Black stereotype should give a strong caution to use voir dire to get the right information.
2. Talking about race and experiences with people who are racially or ethnically different during voir dire does seem to result in a more impartial jury, at least as far as race is concerned. Even if social desirability kicks in and jurors answer less than truthfully, normalizing race and differentness as a topic for discussion can bring important case themes into shared consciousness. For instance, in a case where Asian businessmen were on trial for intellectual property theft and related patent infringement, questions about the wide range of juror experiences and attitudes about foreign business practices and their effect on the U.S. economy helped to defuse some of the strong negative stereotypes associated with foreign-owned businesses. On the plaintiff's side in a tobacco products liability case, questions to a panel about their feelings about *African American smokers* injured by their smoking addiction brought out important feelings about race and personal choice that would have been hidden if the focus were simply about smokers in general.
3. In California, jury panels include large populations of Asians, South Asians, Central Europeans and Latinos as well as African Americans. The diversity of experiences and attitudes within each of these groups transcends any typical stereotypes that attorneys often use in jury selection. Increased attention has to be paid on the specific subgroup's attitudes and experiences. For example, degree of acculturation and distance from the immigrant experience is an important discriminator that must be questioned. A stereotype about Asian American jurors (conservative, bad on damages for plaintiff personal injury, strong personal responsibility) were turned upside down when further questioning discovered that an Asian American juror was a union shop steward, was interracial-married and had filed grievances himself.

My reading of Samuel Sommers' article has been very stimulating and thought-provoking. His more extensive journal articles on jury diversity research are rich with interesting observations and well worth reading.

### **Pat McEvoy responds: On the Obstacles to Jury Diversity, Sommers**

**Patricia McEvoy, Ph.D. [[pmcevoy@zmf.com](mailto:pmcevoy@zmf.com)] is a founding partner in the litigation consulting firm Zagnoli McEvoy Foley LLC (ZMF) and has been providing practical solutions to trial teams for more than 21 years. In addition to her research expertise, she specializes in witness preparation, jury selection, supplemental juror questionnaire design and the effective composition and delivery of opening statements and closing arguments.**

As Sommers points out, the issue of jury diversity is an important big picture issue as well as a critical case-specific issue. The big picture includes, as Sommers notes, "too many leaks in the pipeline from

community to jury room.” The reasons juries aren’t more diverse is not a simple problem to solve. To make it more difficult, courts don’t keep demographic information about the venire or individual panels. That makes it difficult to determine whether a particular panel is representative of the venue. While court personnel claim that the process is fair, most of us who are in courtrooms regularly see that Caucasian jurors are often overrepresented. Juries are not more diverse for procedural economic reasons, as Sommers points out.



Over the years many courts have tried to improve the way juror lists are formed; for example, when lists are pulled more frequently, the population that’s more likely to move will be more likely to get the jury summons. Adding source lists from utilities was another move in that direction, although it doesn’t work for those rentals where the landlord gets the bill. Raising juror pay would also help those who literally can’t afford to miss a day’s paycheck.

While there are a million good arguments for providing a diverse jury pool, in my mind one reason trumps them all; it’s the right thing to do. It is especially the right thing to do in a criminal case where the defendant is an African American.

But, let’s face it; asking the courts to do more in the current economic climate is not realistic. There is one, new bright spot on the horizon. The recent Presidential election saw record turnouts from those who don’t usually vote. So it is possible that we will see an increase in the number of African Americans summoned to serve on a jury.

On the case level, the issues are complex, too. In civil cases I have been on both sides of a Batson challenge. I have been in courtrooms where the other side strikes everyone of color regardless of age, gender, education or experience.

In an employment defense case where my client was being sued by an African American man for being fired, we exercised a peremptory strike on an African American man who was unemployed, had been fired and was angry about it.

For trial consultants the question has to be is there a valid reason for wanting to strike a particular juror, or is it based on a stereotype or bias? If it is based on experience or attitudes expressed during voir dire, one can articulate a truthful race-neutral reason regardless of the jurors’ race, which is often irrelevant.

There are cases where race shows up on the juror profile. In many cases race does not show up on a juror profile. Simply assuming that the color of someone’s skin is the significant variable is missing the point. I

can't afford to assume what anyone thinks by the color of his or her skin. I can't afford to waste a peremptory strike based on a stereotype and miss someone else that is worse for the case.

As a competent trial consultant, I have a responsibility to make sure my client is making the best use of peremptory challenges, and includes making sure the strike is for valid reason.



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## Andrew Sheldon responds: On the Obstacles to Jury Diversity

**Andrew Sheldon, JD, PhD [[Andy@SheldonSinrich.com](mailto:Andy@SheldonSinrich.com)] began trial consulting in 1984 after careers as a lawyer and as a psychotherapist. His involvement in the retrials of 7 civil rights murder trials led to his continued study of racial issues in litigation of all kinds.**

“Data indicate that a jury’s racial composition has the potential to influence the nature and quality of its deliberation processes.”

Here we have it in a nutshell: race matters. According to Professor Sommers, it’s all about racial diversity. Racially homogenous American juries not only are not representative of America and Americans, but monochromatic juries also create outcomes that are different than the outcomes (verdicts) of racially diverse juries. Citing his own experience as an expert witness and recent studies that support the relationship between racial composition and verdict, Sommers writes with clarity about practices that have perpetuated uni-racial jury composition over the centuries and calls the practice wrong. He’s right.

His answer is a not-so-surprising goal reversal. Instead of excluding jurors based on race, Sommers recommends that we specifically include racially diverse jurors. Why? Because they think differently and decide differently. But wait! Isn’t that more stereotyping? Yet the research he presents seems to support, for example, that the “minority client will face better odds the more diverse the empanelled jury is” and “the performance of White jurors themselves can vary dramatically depending on the racial composition of those in the jury room with them.”

If we follow Sommers’ thinking to the logical (and practical, and democratic) end, we should be including people of various races on our juries precisely because a jury’s composite dynamic thinking process will be altered.

And yes, it is a form of stereotyping if done that way. The key to accepting this form of stereotyping however is that it represents a move forward to greater inclusivity and to a more perfect Union.

There is a tendency (not just in the Deep South where my office sits) for our clients to view racial issues in Black and White, literally. The issue, as we all know, is extravagantly more complex than that and involves people of all sorts of unfamiliar ethnic and religious heritages. Once we begin educating ourselves in the fundamental attitudes about justice and fairness that, say, first generation Americans from Guinean or Somalian

## Happy New Year!

For *The Jury Expert*, it's especially good to turn the calendar year. In 2008, *TJE* went digital. We debuted in May, 2008 on the web in the form of downloadable PDF files. Now, especially for 2009, you can read *The Jury Expert* entirely on-line. You can still download and forward and print--everything you could do before. But now, you can read articles on-line in addition to downloading AND you can easily comment on what you're reading.

When we revamped this publication to be entirely on the web, our hope was to have your comments on articles published along-side the articles so that a dialogue could develop between litigators, consultants, academics, and other subscribers that would inform, challenge and stimulate us all. But first, we had to see if you liked where the [American Society of Trial Consultants](#) was going with this publication. (And you like us, you really like us!)

*The Jury Expert* is truly unique in legal publications--both in content and in our now interactive website. We owe a tremendous debt of gratitude to our web designer/developer, [Marc Lazo](#) who took our original ideas and made them into a reality on the web. Now, much like *TJE* articles strive to turn research and theory into practice, Marc and his associates have refined and expanded the website for *The Jury Expert* from our non-technical dreams to a reality meant to work for you with an intuitive ease. We also want to thank ASTC's [David Fish](#) for designing the sample ads you see throughout the print version and on the web. We'll start advertising in *The Jury Expert* this year to help ASTC defray costs of the publication.

So. Look around. Speak up! Comment. Interact. Tell us what you like and don't like. Even though it goes without saying--keep your comments professional and courteous even when/if you disagree. Happy 2009. Read on. Write in. And keep requesting article topics (we're hitting another requested topic this issue).

-- [Rita R. Handrich, PhD](#)



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