

Minority and Justice Commission Jury Diversity Task Force 2019 Interim Report

BACKGROUND

On May 24, 2017, the Washington State Minority and Justice Commission (“MJC”) and Washington Appleseed co-hosted the annual Supreme Court Symposium (“Symposium”) on the topic of jury diversity. Following the Symposium, Chief Justice Mary Fairhurst requested, on behalf of the Court, that MJC further explore the recommendations put forward at the Symposium. MJC created the Jury Diversity Task Force (“Task Force”) as a Commission subcommittee and appointed Judge Steve Rosen as chair. The Task Force consisted of the following individuals representing the identified groups:

Ms. Aimee Sutton	Latino/a Bar Association of Washington President; The Marshall Defense Firm
Ms. Angeline Thomas	Washington Appleseed
Ms. Anita Khandelwal	King County Department of Public Defense
Ms. Barbara Serrano	Washington Women Lawyers
Ms. Blanca Rodriguez	Northwest Justice Project
Mr. Chris Gaddis	Pierce County Superior Court Administrator; AWSCA
Mr. Darrell Cochran	Washington State Association for Justice (Civil Plaintiff's Bar)
Mr. David Morales	Northwest Justice Project
Ms. Heidi Percy	Judicial Operations Mngr. Snohomish County Clerk's Office
Ms. Jennifer Creighton	Court Administrator, Thurston County District Court
Judge Linda Coburn	Edmonds Municipal Court; DMCJA; Washington State Minority & Justice Commission
Judge Steve Rosen (Chair)	King County Superior Court
Mr. Justin Bingham	Spokane City Prosecutor
Mr. Michael E. Chait	Washington Defense Trial Lawyers (Civil Defense Bar)
Mr. Morgann Halencak	Jury Manager, Clallam County Superior Court
Ms. Pam Loginsky	Washington Association of Prosecuting Attorneys
Mr. Peter Collins	Seattle University
Representative Javier Valdez	Washington State Legislature
Mr. Sean McAvoy	District Court Executive/Clerk of the Court US. District Court Eastern District of Washington
Senator Manka Dhingra	Washington State Legislature
Mr. Tim Johnson	King County Department of Public Defense
Mr. Todd Bowers	Attorney General's Office
Mr. Tom McBride	Washington Association of Prosecuting Attorneys
Mr. Travis Stearns	Washington Appellate Project
Ms. Vonda Sargent	American Civil Liberties Union

TASK FORCE OBJECTIVE

Examine a range of policy proposals that might have the effect of increasing minority representation on Washington State juries, and make recommendations to MJC about which approaches, if any, to pursue.

TASK FORCE PROCESS

The first full Task Force meeting was held on January 31, 2018. Prior to that meeting, Washington Appleseed circulated a detailed policy memorandum entitled *Tactics to Increase Jury Diversity* (“WA Appleseed memo,” attached as Exhibit A). The WA Appleseed memo identified six major factors that resulted in minority underrepresentation on juries:

- **Factor 1—Source Lists:** Whether minorities receive a summons depends on what source lists are used and how frequently those lists are updated.
- **Factor 2—Economic Hardship:** Given the correlation between race and poverty, minorities are disproportionately likely to seek economic hardship excusals and few jurisdictions have programs to alleviate this burden.
- **Factor 3—Eligibility:** Minorities may not meet eligibility requirements to serve.
- **Factor 4—Felon Disenfranchisement:** Felon disenfranchisement disproportionately affects minority jurors.
- **Factor 5—Summons Processes:** Inefficiencies in the summons process could be having a negative effect on minority representation.
- **Factor 6—Data Collection:** Though data collection does not have a direct impact on whether diverse jurors make it through courthouse doors, it is crucial that we are able to monitor the nature and extent of the problem in order to determine which solutions have the most promise.

At the meeting, Task Force members were divided into three working groups to explore the issues identified under each factor:

- **Summons** (Factors 1, 5, and 6)
- **Economic Hardships** (Factor 2)
- **Jury Service Eligibility** (Factors 3 and 4)

During the spring and summer, the three working groups met independently to discuss their assigned factors and prepare recommendations for the Task Force. At meetings on August 22, 2018, and October 24, 2018, the Task Force heard final reports and recommendations from all of the working groups and voted on whether each proposed recommendation should be considered high, medium, or low priority. The list of recommendations receiving at least 50% high-priority votes is presented below. The next step is for the Minority and Justice Commission to decide which recommendations will move forward to the Board for Judicial Administration (BJA) for approval or other further action.

TASK FORCE RECOMMENDATIONS—HIGH PRIORITY

These recommendations were voted **high priority** by Task Force members in attendance at the meetings where votes were casted.

1. Source List Expansion and Frequency (Factor 1)

Expanding source lists beyond the traditional “motor/voter” list is expected to result in more minority and low income populations being summoned for jury duty. According to a research project conducted by Washington Appleseed at the Task Force’s request, a few other states have expanded source lists beyond the traditional lists. These other states include property owners, social service recipients, and information from tax rolls. However, none of those states track juror diversity or demographics, so it is impossible to tell how these changes have affected juror diversity, or exactly how they will change Washington’s juror diversity if enacted.

Currently, Washington court jurisdictions receive updated source lists annually. Approximately 10-15% of the US population moves annually,¹ change of address databases are not always updated, and approximately 40-50% of summons are returned as undeliverable or never receive a response. Data shows that the most mobile populations are minority groups,² and the committee believes that updating source lists more often is likely to be effective in increasing minority juror turnout.

Task Force Recommendations:

- a. Increase the number of source lists in Washington beyond lists of registered voters and driver’s license & state ID card holders. (High=11, Medium=4, Low=1)³
 - i. Determine resources needed to expand source lists.
 - ii. Analyze and research any obstacles to including additional source list information (e.g. privacy statutes, multiple addresses for utilities).
- b. Update source lists more often than annually. (High=8, Medium=5, Low=3)
 - i. Research costs (state and local) of creating source list two or four times per year.

2. Ensuring Adequate Juror Compensation and Job Security (Factor 2)

The Task Force recognized that juror compensation in Washington is inadequate. Data shows that financial hardship is the second highest reason to excuse a potential juror, behind undeliverable summonses. The Task Force believes that lower income and minority populations are disproportionately affected by the financial hardships of jury service. There was a robust discussion within the Task Force

¹ <https://www.census.gov/newsroom/blogs/random-samplings/2017/01/mover-rate.html>

² For example, “The highest mover rates by race were for the black or African-American alone population...”
<https://www.census.gov/newsroom/press-releases/2016/cb16-189.html>

³ The reader of this paper may note that there were 17 voting members of the committee, but that the total number of votes for many of the recommendations do not equal 17. This is due to absences and abstentions.

about initiating a pilot project, in select jurisdictions, to study the effect of increasing juror compensation, provided that potential jurors are made aware of the increase. However, the idea of instituting a pilot project was almost unanimously rejected by the Task Force. Instead, the Task Force recommended pursuing a statewide juror pay increase, as well as exploring the feasibility of tax credits or deductions for jury service.

Task Force Recommendations:

- a. Increase juror compensation statewide. (High=unanimous)
- b. Research the feasibility of tax credits or deductions for jury service. (High=unanimous)

3. Providing Childcare for Potential Jurors (Factor 2)

Ensuring adequate childcare for jurors, and making that information known to potential jurors, was identified as a high priority. Providing childcare would alleviate economic burdens and barriers to juror participation, particularly for minority and low income populations. The working group noted that King County currently offers childcare at the Regional Justice Center in Kent, although it was not known whether juror summonses let potential jurors know about the existence of this service.

Task Force Recommendations:

- a. The Task Force supported the concept of all courts providing childcare for jurors. However, it recommended first looking into how childcare is set up at the King County Regional Justice Center (i.e. operational costs and where the funding comes from), and determine whether it is a model that other courts across Washington could implement. Also look into whether jurors receive notice that childcare is available at the time they receive their summons. (High=13, Medium=1, Low=0)

4. Felon Disenfranchisement (Factor 4)

The Task Force recognized that minority populations, specifically African American males, were more likely than any other group to have a felony conviction. RCW 2.36.070 states that a person is eligible for jury service unless they are a felon and have not had their “civil rights restored.” This phrase is not defined, but the Washington Association of Prosecuting Attorneys and caselaw strongly suggest that it refers to voting rights. In their juror qualification questionnaires, many courts ask whether a potential juror is a felon and has had his/her civil rights restored. This question, while legally accurate, has created a lot of confusion for individuals who have felony convictions, as many do not know if their civil rights were restored, if they are eligible to vote, or if they have a certificate of discharge from their felony case. Adding to the confusion, RCW 2.36.070 is not clear that an individual with a felony conviction who may still have outstanding legal financial obligations (LFOs), but who is not under DOC supervision, is eligible for jury service.⁴

⁴ All Task Force members agreed that the statute allows felons who are not actively being supervised to be jurors regardless of outstanding LFO obligations. However, the Task Force strongly believes that this section, and the lack

Task Force Recommendations:

- a. Pursue a statutory amendment to define the phrase “civil rights restored” in RCW 2.36.070. (High = unanimous). The statutory change has already been drafted, and Sen. Dhingra has introduced the change as SB 5162. The bill adds a new section 13 to RCW 2.36.010 which states, “(13) "Civil rights restored" means a person's right to vote has been provisionally or permanently restored prior to reporting for jury service.”
- b. Regardless of whether this statute passes, the AOC or Minority and Justice Commission should pursue an educational campaign to courts asking them to change the wording of their juror qualification questionnaire to make it clear that individuals who have felony convictions can serve as jurors, unless they are still under DOC supervision. For example, the question could be worded as, “Do you have a felony conviction and are currently being supervised by the DOC? (If your only obligation is monetary, you should answer NO.) ___ Yes ___ No” (High=unanimous)

5. Summons Streamlining and Follow-up (Factor 5)

Currently, there are different practices around the state for juror summoning, how jurors are qualified, and what type of procedure is used when a juror fails to appear. Each court drafts its own summons, and these forms vary dramatically from court to court. Some courts qualify jurors in one step (where a summons and questionnaire are sent together), and other courts summon in two steps (where the court first sends out questionnaires, and then, if the juror is qualified, later sends a summons). When a summoned juror does not appear for service, some courts do nothing, others send a second summons, and others send a notice to appear in front of a judge to explain the absence.

The Task Force ultimately determined that the best practice would be a one step process and using follow up mailings to non-responders to encourage a response. The Task Force believes that these steps are likely to increase responses in general, and particularly among minority populations.

In Washington, all summons must be sent via US mail or personal service. RCW 2.36.095. The Task Force considered whether summoning could be done via other means. Many business and service providers provide notices via email, through mobile device applications, and text message based notifications, reminders, bills, and even payments. The Task Force discussed using automated messaging (text, email, phone calls)⁵ to remind jurors of their service and increase response rates. We know that Asian and African American populations appear for jury service at approximately 50% of what would be expected

of a definition of “civil rights restored,” is creating unnecessary confusion that disproportionately affects communities of color.

⁵ Many doctors and dentists use reminder services: <https://simpletexting.com/industry-guide/text-appointment-reminders-for-doctors-and-dental-offices/>, and courts are starting to adopt these reminders and are finding that they save money: <http://www.spokesman.com/stories/2018/sep/14/with-automated-warning-system-public-defenders-off/>

based on census data.⁶ So, increasing juror response rates through reminders or more effective summoning is likely to increase the participation rates for minority jurors more than any other group.

Task Force Recommendations:

- a. Recommend courts use a one step process, which is now a national best practice. (High=16, Low=1)
- b. Create a system for reminder calls, texts and emails for jurors. (High=14, Medium=1, Low=2)
- c. Research whether statutes should be changed to allow summons via methods other than paper. (High=11, Medium=5, Low=1)
- d. Task appropriate AOC staff with working with local courts and court associations to develop statewide summoning best practices, provide education to the courts on best practices, assist courts with data collection, and act as a subject matter expert on juror issues. (High=7, Medium=2, Low=3)

6. Data Collection (Factor 6)

The Task Force unanimously agreed on the importance of collecting jury demographic data and recommends the permanent statewide implementation of a system to collect juror demographics.⁷ The Minority and Justice Commission conducted the juror demographic survey in 2016-17, and could provide assistance in helping to develop a more streamlined process for data collection. Continuing to track demographics will help the state monitor whether and to what extent each proposed change affects minority juror participation.

The Task Force also believes that tracking the demographics of each juror at each phase of jury selection (sent to courtrooms for voir dire, excusals for hardships, challenges for cause, and peremptory challenges) will provide never before seen transparency in the demographics of how jurors are empaneled. Race based discrepancies in challenges for cause, hardship, and peremptory challenges are well documented and should be tracked.⁸ Such transparency may increase minority juror participation due to a renewed belief that the justice system is fair.

Task Force Recommendations:

- a. Begin collecting juror demographic data on a permanent, statewide basis. (High=unanimous)

⁶ See, <https://q13fox.com/2017/05/24/jury-of-your-peers-not-if-youre-a-minority-in-washington-study-shows/>

⁷ The Task Force is aware of only one state, New York that currently collects juror demographic information. See New York Judiciary Law Sec. 528: <https://codes.findlaw.com/ny/judiciary-law/jud-sect-528.html>

⁸ See part IV and VI, as well as the full law review article at: <https://illinoislawreview.org/print/vol-2018-no-4/the-jury-sunshine-project/>

- b. Begin collecting all juror demographic information at each stage of the jury selection process, tracking all hardships, challenges for cause, and peremptory challenges by demographic factor. (High=unanimous)

TASK FORCE IDEAS — NOT RANKED AS HIGH PRIORITY

The Task Force considered a number of ideas for which it did not recommend any action. The following ideas were considered but did not receive a majority of high priority votes:

1. Creating a mechanism (legal and actual) for citizens who are not on the source list to volunteer to be on the master jury list. (High=8, Medium=5, Low=3)
2. Target summons to zip codes with low return rates⁹. (High=7, Medium=8, Low=2)
3. Increase public outreach to minority communities (No one moved this to a vote after discussion – the committee believed other organizations were working on outreach).
4. Improve the movement of juror data between different state agencies and private contractors (No one moved this to a vote after discussion).
5. Improve the readability of summons statewide (No one moved this to a vote after discussion).
6. Allow the use of a modified trial schedule, such as trials from 8 am – 1 pm, to ease the burden on working jurors (No one moved this to a vote after discussion).
7. Move to a one day/on trial system statewide (No one moved this to a vote after discussion).
8. Change state law so that once a person reports for jury service anywhere in Washington, they will not be re-summoned for a set period of time, such as five years (No one moved this to a vote after discussion).
9. Clarify the statutory requirement of being able to communicate in English to be more inclusive or use interpreters. The committee considered a proposed statutory change requiring an in-person review of a juror's English proficiency as it related to the requirements of a specific case. The proposal would have requested AOC to run a pilot project in 4 jurisdictions for 1 year. (High=7, Medium=5, Low=3)
10. Production of a best practices bench card explaining how to interpret and apply current law relating to English proficiency (No one moved this to a vote after discussion).
11. Ask MJC or AOC to create educational materials for court administrators on best practices and practical options relating to English proficiency. (High=2, Medium=4, Low=7)
12. Change state law to allow summonses in multiple languages (No one moved this to a vote after discussion).
13. Production of a bench card and educational materials discussing best practices for following up with non-responders. (High=6, Medium=6, Low=1)

⁹ The committee had a robust discussion related to the legality of this proposal. Proponents of this option supported their position with fair cross section and affirmative action cases. Opponents of this option supported their position with equal protection/equal opportunity cases and Washington Constitution article I, section 21. The MJC and the reader should be aware of this debate as this interim report is considered.

TASK FORCE IDEAS STILL UNDER CONSIDERATION

The Task Force also considered one issue and one idea that are still under consideration but could not be ready in time for this report.

1. Washington's two largest counties, King and Pierce, have both discovered that the number of people on the source list appears to be significantly higher than the number of adults living in each jurisdiction. The overages are between 10-15%. It is unknown why this overage exists, or how it affects minority or any specific demographics' representation. When more information is available, the committee will supplement this report.
2. The committee considered a proposal to change the way jurors are sent to courtrooms so that they are more geographically representative of the jurisdiction. At the committee's request, a University of Washington School of Law professor, as well as a research assistant, are currently reviewing past summoning and distribution patterns to see if and how this idea would change things. This research is in its infancy, and when more information is available, the committee will supplement this report.