

**Getting Through the Courthouse Door:
Addressing Economic Barriers in Washington State Jury Selection**

I. Introduction

If summoned for jury duty in Washington State, many people are forced to choose between their paycheck and their civic duty. Because state law does not mandate employers pay employees their regular wage during service, people who miss work to serve on a jury lose between \$90 and \$153 per day. Counties pay jurors a daily wage, but it offers little relief. Juror compensation has not been updated since 1959 and ranges from just \$10 to \$25 per day. The cascading effects are simple: those privileged enough to not worry about choosing between jury service and a paycheck are usually better off financially and less likely to be minorities. This trend causes a self-selection process whereby otherwise qualified jurors seek excusal for economic hardship before they even get to the courthouse, creating juries that lack economic diversity, overrepresent non-minorities, and poorly reflect their communities. Economic barriers also bleed into the jury notification process, making low-income and minority people less likely to be summonsed at all. By increasing juror compensation, mandating employer-paid jury leave, and expanding source lists for summons, Washington can help combat the economic barriers that cause juries to underrepresent low-income and minority people.

II. The Current State of Jury Service in Washington

A. Source Lists and Summons

Washington currently pulls contact information for its jury source list from voter registration data and the Department of Licensing (DOL), which includes driver's licenses and identification cards. Although this list is updated annually, 40% to 50% of jury summonses in

Washington were returned as undeliverable or received no response in 2018. Focusing on deliverability specifically, a 2017 study in Pierce County found jury summons were undeliverable between 7.6% and 32.4% of the time. Notably, the study reported that areas with "transient living situations" were more likely to have undeliverable summonses than the surrounding municipality, further highlighting the need for updated addresses or alternative delivery methods in communities that have high rates of mobility.

In 2000, the Washington State Jury Commission Report recommended that the state subscribe to a National Change of Address (NCOA) service, and the Ninth Circuit recommended the same in 2004. NCOA services work with the United States Postal Service (USPS) to systematically update addresses to decrease undeliverable summonses. When users file a change of address form with USPS, "NCOALink" retains this information and makes it available to companies that have been licensed by the postal service. Using NCOA allows local governments to verify potential jurors' addresses before mailing summons.

The Washington State Supreme Court's Minority and Justice Commission 2019 Jury Diversity Task Force is silent as to using a NCOA service. By way of explanation, the DOL has stated that potential legal issues could arise from their department using addresses updated through NCOALink rather than directly with DOL. First, a representative of DOL explained that the department's current enabling statute and administrative regulations do not permit an address of record to be updated through a third party like USPS. Second, even *if* the DOL's statute and regulations permitted it to use alternate lists, the department directly relies on licensees' addresses to "effectuate legal service when suspending a license." Because the notice provided by using a third-party address service like NCOALink may be inadequate notice to survive due

process scrutiny, the DOL would likely continue to use the addresses licensees voluntarily give to the DOL rather than those received from NCOALink.

Elsewhere throughout the country, the National Center for State Courts (NCSC) reported in their 50-state survey that NCOA services have been used by other states without issue, and with great success. Indeed, the most recent publication by NCSC on best practices for undeliverable summonses recommends NCOA services, and in 2014 the NCSC actively recommended using a NCOA system through its Joint Technology Committee.

B. Compensation

Qualified and available jurors reporting for service will find that their compensation is outdated. In 1959, Washington enacted legislation to compensate jurors with \$10 per day for their service. For perspective, \$10 in 1959 would be worth \$88.74 today. Despite inflation, this compensation has remained relatively unchanged for the last 60 years. As of 2019, jurors are paid a minimum of \$10 per day, and a maximum of \$25 per day. Most counties pay \$10 per day, including King County, which has the highest cost of living in the state. By comparison, federal jurors are paid \$50 per day, with an increase of \$10 per day for serving over ten days. In Seattle, low reimbursement has a significant impact on an individual's decision whether to respond to a jury summons. Potential jurors have frequently cited childcare, transportation, parking, and meals as expenses incurred with inadequate compensation.

The American Bar Association specifies that juror compensation, at a minimum, should be sufficient to defray routine expenses associated with jury service. In Seattle, where daily parking fees alone easily exceed \$20, the current rate is far from sufficient. Childcare in Washington state is about \$14,554 annually for an infant, and \$11,051 annually for a 4 year-old—or between about \$30 to \$40 per day, depending on the age of the child. In Seattle specifically,

the annual cost in 2018 was \$23,000, or about \$61 per day. This adds up to a tremendous expense even for those with full-time employment. According to a 2017 study by the King County Women's Advisory Board, childcare cost most drastically affects women of color, women living in rural areas, and low-income women. Even at the state maximum of \$25 per day, juror compensation is less than the state minimum wage, which is \$12 an hour, or about \$96 for an eight-hour workday. Most superior court trials last between three and four days, resulting in an enormous loss of income through missing wages and additional expenses.

Juror compensation, compared to wages jurors could otherwise be earning at their jobs, is nowhere near the amount necessary to meet basic needs. In Washington, the minimum income needed for one adult to support themselves without aid from the government or community ranges from \$7.85 per hour in Lincoln County to \$15 per hour in King County. This number reflects only the income necessary to meet basic needs and increases drastically if a person has children, rising to \$22.59 per hour in Lincoln County and \$33.27 per hour in King County.

Washington law does provide employees some protections for jury service. Employers are prohibited from retaliating against employees that serve jury duty and are required to provide leave from work during service. In other words, an employee cannot be fired for missing work due to jury service. The law does not, however, require employers to pay employees while they are serving on jury duty.

C. Qualifications and Excusal

To be qualified to serve on a jury in Washington, a person must be at least 18 years old, a U.S. citizen and resident of the jurisdiction, and an English speaker. Convicted felons are not qualified, unless they have had their civil rights restored.

If qualified, no person may be excused from jury service by the court except upon a showing of undue hardship, extreme inconvenience, public necessity, or “any reason deemed sufficient by the court for a period of time the court deems necessary.” Citizens may not be excluded from jury service on account of economic status, but a juror’s economic status can directly support an excusal for undue hardship.

The following situations would likely justify a financial “undue hardship” request: (1) the juror is employed, but the employer does not compensate employees while on jury service; (2) the expected loss of income due to the anticipated length of jury service cannot be recovered after the service is complete; (3) the juror has no supplemental financial support or savings that would offset the loss of income; or (4), the juror is the primary income earner for the household.

Financial hardship is the second most common reason for excusal in Washington, just behind undeliverable summonses. Consequently, among those who are qualified and summonsed, many jurors opt out of service due to financial hardship.

D. Representation

So, when all is said and done, who shows up for jury duty? Two recent studies have demonstrated that minorities are underrepresented on juries in Washington. In King County, for instance, a recent study surveying jurors and analyzing census data found that only 3.6% of summonsed jurors who appeared were black, representing only 64% of the black population. Comparatively, the same survey found that 81.2% of summonsed jurors were white, while only 73.6% of King County residents are white.

Throughout the state, underrepresentation is an issue during jury selection. At their 2017 symposium, the Washington Supreme Court’s Minority and Justice Commission stated that with limited exception, racial and ethnic minority populations are underrepresented in most

jurisdictions. A study by Seattle University showed that Asian, African American, and Hispanic populations are all underrepresented on juries compared to their local population census data. Asian and African American people appear for jury service half as often as what would be expected based on local census data, and Hispanic people appear twenty percent less often than would be expected. White people, on the other hand, were overrepresented on juries compared to their census data in twenty out of twenty-one counties surveyed.

Washington has recently attempted to tackle minority underrepresentation on juries through the passage of General Rule (GR) 37. The rule greatly expands the protections during voir dire by prohibiting jurors from being struck if such action could be interpreted by a reasonable person as discriminatory, but the rule only addresses a portion of the problem. The rule protects people who make it through the courthouse door, but not people who were forced to seek excusal before voir dire.

Residents are concerned by this underrepresentation and have taken their concerns to court. As a recent state supreme court case illustrates, potential jurors who are summonsed find themselves up against multiple barriers to entry.

E. Recent Litigation

On April 9, 2020, the Washington State Supreme Court issued its opinion in *Rocha v. King County*. The Court ruled that RCW 2.36.080(3) did not provide a cause of action for jurors suffering economic hardship to sue for increased reimbursement or pay. In *Rocha*, two citizens that were selected for jury duty alleged that current jury selection procedures are discriminatory based on economic status. Ms. Bednarczyk, who requested economic hardship excusal and did not serve, and Ms. Selin, who served but lost income as a result of serving, claimed that the disparate impact current juror pay has on low-income people in Washington disproportionately

affected minorities and equated to economic status discrimination under state law. The appellants requested a remedy of increased juror pay, but the Court found that this remedy was inconsistent with legislative intent.

The Court ruled that allowing economic hardship excusals did not equate to systemic exclusion of jurors based on economic status because the appellants were given an *opportunity* to serve and were summonsed. Moreover, it is the individual jurors themselves who seek economic hardship excusals, so there was no discriminatory action on the part of the state or the court. The selection process in place did not overlook either Ms. Selin or Ms. Bednarczyk, so it was not discriminatory—even if the choice to serve may have been an impossible one due to the financial hardship they would suffer.

Although the Court denied the plaintiffs' requested relief, it emphasized that low juror reimbursement *has* contributed to low juror summons response rates and believed that the plaintiffs made valid points as to the impact low juror pay has on diversity and the administration of justice as a whole. When the Court held that these concerns would be "best resolved in the legislative arena," it also strongly urged the legislature to increase juror pay. In other states, various legislative reform efforts addressing employer-sponsored jury leave, juror compensation, and source list expansion have been effective at decreasing economic hardship and increasing juror participation.

III. How to Improve Washington Jury Pools

Washington should pursue a three-pronged approach to increase low-income juror participation: (1) implement employer-sponsored paid jury leave for the employed, (2) increase juror pay to at least the state minimum hourly wage equivalent for the unemployed, and (3) expand source lists and reexplore NCOA services. Alone, each prong would probably not make a

significant impact, but together, they could increase the number of potential jurors and decrease the economic barrier to entry that low wages present.

A. Employer-Sponsored Paid Leave

Considering the average trial length is one to four days, Washington should mandate that employers pay their employees regular wages for the first four days of service. This legislation could be modeled on existing employee paid sick leave legislation. Enlisting employers is necessary because raising juror pay alone will not be enough to eliminate the economic barrier faced by low-income jurors, and disjointed employment policies can skew jury pools toward those with higher incomes. As the 2008 Washington study stated, "An increase in juror pay would likely only impact juror response if it resulted in increased income." Considering that currently people lose between \$90 and \$150 per day on average when serving, even if jury pay is increased, most would probably still prefer their regular paycheck.

Eliminating the concern over lost income would greatly reduce the economic barrier faced by low-income people (and minority people as far as income correlates with race), and would provide security and certainty to prospective jurors. The burden imposed by the typical trial (one to four days) is similar to the sick leave already mandated in Washington, and is insubstantial compared to the risk of injustice through jury underrepresentation.

B. Juror Pay

For the unemployed, Washington should offer daily juror pay that reflects the minimum wage. Learning from the mistakes of the 2008 Washington Pilot Study, the state should adequately advertise this change in order to encourage participation. If implemented with mandated employer-sponsored paid leave, the burden on the state for this pay increase should be

minimal because most people serving on juries are employed and will have trials lasting four days or fewer.

To assuage concern over lengthy trials for both the state and employers, Washington could also implement a “Lengthy Trial Fund” similar to those seen in Arizona, Mississippi, and Oklahoma. These funds could help lessen the burden on business by providing additional compensation—funded by a civil filing fee—to jurors serving on longer trials who would otherwise experience financial hardship due to lost income.

C. Source List Expansion

Although Washington has no state income tax records, the state can still increase their source list through public benefits data, utilities bills, property information, and census data, among other things. Casting a wider net will mean a greater likelihood of reaching minority community members who would otherwise not be reached at all through voter and Department of Licensing data.

Using a NCOA service is also an option, but would require modifying Washington's jury source list statute. Currently, jurors may only be contacted using DOL addresses, but if the statute expanded to allow addresses collected through other means, this would circumvent the DOL's limitations. Supplementing Washington's source lists combined with systematically updating addresses could have a massive, positive impact on the number of people the state is able to reach.

IV. Conclusion

Many potential jurors are met with insurmountable barriers to entering the courthouse doors. Whether because prospective jurors did not receive a summons at all, or because they fear

losing a paycheck, these shortcomings in Washington's juror selection process create juries that do not adequately reflect communities.

The judicial system may not be able to provide the remedy for jury underrepresentation. The better solution is for the Washington State Legislature to correct this disparity through new legislation expanding juror source lists, paying jurors a fair wage, and implementing employer compensation during jury duty.