

Jury Reform in Wisconsin:
Where we have been, where we are now, and
where we are going.

May 2006

Chief Judge Subcommittee on Juror Treatment and Selection
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Foreword

One summer day in 1984, while much of the rest of the nation was riveted by the Summer Olympic Games in Los Angeles, I was summoned to compete for a spot on a different kind of team. I was called for jury duty.

I was a beneficiary of the Wisconsin legislature's 1978 reform of the jury system that lifted automatic exemptions for physicians, dentists, Christian Science readers, ministers of the gospel, law and medical students, judges, and lawyers. The reforms also eliminated rules that had permitted exemptions for school administrators and instructors, officers and employees of state and county institutions, and persons over the age of 65.

With these changes, any adult citizen possessed of his or her natural faculties and not infirm, able to read and understand English, and who had not been summoned for jury service within the preceding two years could serve on a jury. The years of exclusion on the basis of my job as a justice of the Wisconsin Supreme Court had finally ended. I was elated to have the chance to serve as a juror.

My elation was tempered somewhat when I was challenged and dismissed during one case. But I was sent back to the jury pool and I ended up serving on a jury. Several years later I served on another jury. Each time, we were 12 strangers of diverse backgrounds who were chosen at random from a county of more than 400,000 people. We listened carefully in court, obeyed the judge's instructions, and, when it came time to deliberate, each of us spoke frankly. We were given an awesome responsibility, to sit in judgment of another human being. It was deeply humbling, satisfying, and educational, and I came away believing more strongly than ever that every judge and indeed every citizen should have the opportunity to see the legal system through the eyes of a juror.

I understand the sentiments of the journalist/philosopher G.K. Chesterton, who wrote, after serving on a jury:

Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. . . . [W]hen [our society] wishes anything done which is really serious, it collects twelve of the ordinary men standing round.¹

Jurors bring the views of the community—what Chesterton called “fresh thoughts from the streets”—into the legal system. Chesterton's comments on his experience reflect the immense importance of the juror in our legal system.

Jury service is, for law-abiding citizens, one of the most common ways they come in contact with the legal system. Thus, the perception of the jury system—good or bad—by those who find themselves a part of it will color the community's perception of the legal system's ability to do justice.

¹ G.K. Chesterton, *The Twelve Men*, in *Tremendous Trifles*, 86-87 (1909).

Serving on a jury is also a rare opportunity for a citizen to act directly in our government, as opposed to electing those to whom we delegate the power to act.

Although much progress has been made, jury reform is an ongoing process, and it is important that we not become complacent. The Chief Judge Subcommittee on Juror Treatment and Selection has worked diligently since its formation to address areas of concern and suggest improvements. Reports like this one, which measures Wisconsin's compliance with the ABA's 1993 jury management standards, are important tools for measuring our progress and identifying opportunities for improvement. I thank the subcommittee for its work and express my hope that together we will continue to improve the jury system, and by doing so, improve the quality of justice for all the people of the state.

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Introduction

The state courts of Wisconsin have been actively promoting jury reform and improvement for over 10 years. Culminating efforts begun four years earlier, the State's juror use and management procedures were overhauled in 1997, resulting in substantive changes to the relevant statutes and the addition of a new chapter to the Supreme Court Rules: Ch. SCR 73, Juror Use and Management.

SCR 73 implements several American Bar Association Jury Standards and is prefaced by a comment relating the premises upon which the reforms have been based. It states:

“The goal of an effective jury system is to provide the court with the jurors necessary for the resolution of disputes, without causing those summoned to suffer undue hardship or inconvenience. By employing effective jury management techniques, courts can increase the efficiency of operations, reduce costs, and improve the nature and quality of the service asked of citizens. Success in these areas will help strengthen the jury system, enhance the quality of the decision—making process and improve the attitude of the citizenry toward the court system.”

The Wisconsin Committee of Chief Judges Subcommittee on Juror Treatment and Selection has prepared this report with the intention of documenting past changes to the state's jury practices and comparing current practices to reform movements elsewhere in the nation. The report offers recommendations to the Committee of Chief Judges on where attention should next be addressed to obtain the goal set forth by SCR 73.

Jury Reform Defined

Jury reform is an umbrella term used to designate best practices and new innovations in the way jurors are summoned, utilized in trial, and handled administratively.

I. History

A. Introduction

Wisconsin has a proud history of progressive court management. The area of jury reform is no exception. In terms of research, in the mid-1980's Wisconsin played host to a well-known field experiment conducted in actual courtrooms in real cases.¹ Two psychology professors, Steven D. Penrod and Larry Heuer set out to examine the consequences of juror note-taking and juror questioning of witnesses. The data for the experiment were obtained from 29 different judges (sitting in 63 trials), 95 lawyers, and 550 jurors, all of whom participated in the same 67 Wisconsin state court trials. Juror questioning of witnesses was permitted in 33 trials. The experiments also examined the effects of preliminary instructions, written instructions, juror orientations, special verdicts, and pattern instructions. The researchers also conducted a comparison study in the federal courts. In both studies, trials were randomly assigned to experimental conditions.

Even before this large study, a pilot study was conducted in Dane County, Wisconsin.² In that field experiment, criminal trials in one courtroom were randomly assigned to question-asking versus no-question conditions. A total of 31 trials was examined in the study.

The Wisconsin experiment has led to several scholarly publications, most recently in 1997, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*.³ In terms of the practical application of reforms, trial practices and administrative procedures, Wisconsin has adopted many of the basic concepts over the last 20 years.

B. 1993 – 2000

In 1993, the American Bar Association's (ABA) Judicial Administration Division published its revised Standards Relating to Juror Use and Management. The Standards presented recommendations addressing four areas of jury management: selection of prospective jurors, selection of a particular jury, efficient jury management, and juror performance and deliberation.

At the time many, but not all, of Wisconsin's statutes were in conformity with the newest guidelines. For example, term lengths for juror service varied greatly across the state and were generally not in compliance. In response to the newly revised standards, the Director of State Courts and District Court Administrators brought their concerns to the executive committee of the Wisconsin Judicial Conference.³ The Conference then submitted a petition to the Wisconsin Supreme Court in June of 1994 asking the Court to adopt the new ABA Standards.

In November of that year, the Supreme Court requested the Judicial Council to indicate what changes in rule or statute would be required to implement the necessary changes.⁴

The Judicial Council then created a drafting committee, which drafted three petitions.⁵ The petitions were submitted to the Judicial Council, which made some modifications and then submitted the petitions to the Supreme Court.

The goal of the Judicial Conference and Council was to implement the concepts contained in the ABA Standards, which state that:

“efficient court administration and management will best guarantee preservation of the jury system and enhance the quality of the decision-making process”

The intent of the drafting committee was to:

- Streamline and update language and requirements (i.e., “tumblers,” “cards,” “talesmen”)
- Re-order sequence of some paragraphs to reflect logical sequence of events (The old statute had grown incrementally and did not always track in a manner promoting clarity.)
- End micro-management, giving courts the necessary flexibility to respond to local needs (i.e., remove specified numbers to summon)
- Clarify authority and responsibility for system

The Court adopted all three of the petitions, effective July 1, 1997.⁶ The petitions significantly re-worked Ch. 756 of the statutes and created Ch. SCR 73. The Supreme Court rules were adopted separate from changes to the statute because the Judicial Council felt the provisions contained in the rule did not lend themselves to statute and were more appropriately issued under the Court’s administrative supervision authority.

In 1998, on the recommendation of the Wisconsin Records Management Committee, the Director of State Courts presented another petition to the Supreme Court. This petition would have provided for increased confidentiality of juror personal identification information, by calling for identifying jurors by number only, and no longer permitting counsel to elicit personal identifying information from jurors during voir dire. Provision was made for parties to petition the court for personal information if needed for a motion for a new trial. At the public hearing representatives of the trial bar and media opposed the petition. It was denied, although the Court’s order did indicate a willingness to “consider alternatives to address the issues of confidentiality of personal identifying information of jurors and prospective jurors.”

In June of 1999 the Committee of Chief Judges created the Subcommittee on Juror Non-Appearance in response to on-going questions from a number of judges and clerks. This matter was being handled differently across the state and guidance was being requested. The subcommittee reported back in September 1999 with a general recommendation to “establish one statutory procedure for dealing with juror nonappearance.” Specifically, the subcommittee suggested amending 756.30 Wis. Stats to provide for the issuance of an Order to Show Cause directing the juror to appear and explain the nonappearance. Judges could assess a forfeiture of

an amount to be determined. If a juror failed to pay the forfeiture, the judge could order suspension of driving privileges or impose a jail alternative. The decision to take action or not in a specific circumstance would be within the discretion of the trial judge. No legislative action resulted from this recommendation

C. Chief Judge Subcommittee on Juror Treatment and Selection

In March 2000, a delegation from Wisconsin attended the National Association for Court Management (NACM) conference in Kansas City. The delegation returned with several jury-related topics of concern specific to Wisconsin courts, which were then presented to the Committee of Chief Judges. These included: the address errors in the list provided by the Department of Transportation (DOT), resulting in the potential for bias in the selection process, trial delays, and the potential for improving juror amenities, such as daycare services. To address these concerns, the Chief Judge Subcommittee on Juror Treatment and Selection (Subcommittee) was formed.

In June 2000, the Subcommittee presented a draft report and action plan outlining a number of initiatives that the chief judges and Court might choose to undertake. It was then agreed that the Subcommittee would present a resolution to the Judicial Conference to determine the statewide level of support for the identified reforms. The resolution was presented and approved by the Conference on September 8, 2000.

Since its inception, the Subcommittee has continued to meet regularly in an effort to implement jury reform best practices. Subcommittee members have provided judicial and court clerk educational programs and guidance in the interpretation of statutes related to the administration of juries, attended a national jury summit, updated and modified state jury forms and information, addressed Circuit Court Automation Program (CCAP) issues⁷, and conducted numerous surveys to monitor statewide jury reform efforts.

II. Wisconsin's Current Practices By ABA Areas of Jury Management

In 2005 the subcommittee noted that it had been ten years since the court system had measured its jury-related practices against the ABA Standards. It decided that a review of current practices and the degree to which reforms being adopted by other jurisdictions were being implemented in Wisconsin was timely. The following information is keyed to the ABA's 1993 Judicial Administration Division's *Standards Relating to Juror Use and Management*, outlining the current practices in Wisconsin in each of the specific management areas. Since many jury management practices in Wisconsin vary by county, much of the current information was obtained through voluntary questionnaires sent to the clerks and individual judges in Wisconsin's 72 counties during 2005. The results are based on a response rate of 78% (56 of 72) and 52% (125 of 241) respectively for the clerk and judge surveys.

A. Selection of Prospective Jurors

1. *Opportunity for Service*

No person qualified to serve as a juror may be excluded on the basis of sex, race, color, sexual orientation, disability, religion, nation origin, marital status, family status, lawful source of income, age, ancestry, or because of a physical condition. Wis. Stat. § 756.001(3).

Employers are required to grant employees leave to serve as jurors and may not discipline, discharge, or revoke seniority or time in service for the period of jury service. Employers who violate the statute may be fined up to \$200 and be required to make restitution, including reinstatement and back pay. Wis. Stat. § 756.255.

The Wisconsin statutes meet the Standard, although it does not include the additional language “any other factor that discriminates against a cognizable group in the jurisdiction”. The comments to the standard include examples such as nontheists, students and professors, and young people. *See also Brown v. State*, 58 Wis. 2d 269, 208 N.W.2d 134 (discussing exclusion of young persons, students, & teachers).

2. *Jury Source List: Representative and Inclusive, Periodically Reviewed and Modified if Needed*

Wis. Stat. § 756.04 sets forth in specific detail how juror source lists are to be compiled. The Department of Transportation annually provides a list of persons residing in the area to each clerk of circuit court. Each circuit may then either use that list or supplement it to create a master list with any of the following: 1) voter registration lists, 2) telephone and municipal directories, 3) utility company lists, 4) list of payers of real property taxes, 5) lists of high school graduates, 6) lists of persons receiving aid to families with dependent children (afdc) The clerk then compiles the list of prospective jurors for that year by randomly selecting names from the department or master list.

Members of the Subcommittee, assisted by CCAP and the Director of State Courts Office, met with the Department of Transportation in 2002 to discuss the problems the court was having with out-of-date addresses on the source lists. It was agreed that DOT would provide CCAP with the renewal dates on each record so that CCAP could screen out invalid license holders, greatly improving the chance of having an accurate address. The Department of Transportation also now receives address updates from the U.S. Postal Service change of address program, improving the rate of current addresses for the purpose of juror summoning.

Wisconsin courts generally meet this Standard, although it remains a concern in some urban areas. Courts monitor the effectiveness of the source lists as part of the annual evaluation of jury systems set forth in Supreme Court Rule. CCAP provides yield and demographic reports allowing court managers and jury clerks to measure compliance with this standard. Issues remain in some urban jurisdictions regarding under-representation of minorities and courts dealing with this concern are working to address it. While there are no statutes or rules that establish mandated levels of representation of any group, a number of jurisdictions have conducted studies

or experimented with merging source lists to improve representativeness. The alternative source lists allowed by statute have not proven to provide the missing demographics.

3. *Random Selection Procedures Shall be Used in Selecting Jurors*

Persons shall be selected at random from the population of the area served by the circuit court. Any manual or automated method of selection that provides each person with an equal probability of selection may be used. Wis. Stat. § 756.001(4).

Through the CCAP Automated Jury Application, all courts have implemented fully random procedures at every stage in the selection process.

4. *Eligibility for Jury Service*

Potential jurors must be residents of the area served by the court, 18 years of age, a U.S. citizen, and able to understand the English language. A convicted felon may not serve as a juror until his or her civil rights have been restored (automatic upon completion of entire sentence, including probation or parole). Wis. Stat. § 756.02.

A qualification form is sent to all potential jurors requesting 1) information necessary to determine if the person is qualified, 2) the prospective jurors race, 3) a declaration that all responses are true. In addition, the form may request other information the court needs to manage the jury system in an efficient manner, including information ordinarily sought during voir dire. Wis. Stat. § 756.04(6).

The jurors selected for a case must take an oath to try the issues submitted to them and to give a verdict according to the law and the evidence given in court. Wis. Stat. § 756.08

Wisconsin meets the standard for eligibility.

5. *Term of and Availability for Service*

Term of Service

Wis. Stat. § 756.28 allows local jurisdictions to determine the length of juror service, within certain guidelines. A person may not be required to be available for service for more than 31 consecutive days. Unless necessary to complete service on a particular case, no person may be required to serve or attend court for a total of more than 5 days.

Eighty-two percent of courts reported they use a “one month / 5 trial days” term of jury service. This means jurors must be available for up to 31 days, but may not be asked to report for more than 5 days within that month, unless selected for a trial that lasts longer. In many smaller jurisdictions this becomes, in effect, one day / one trial, as only one trial takes place during the month. Other formats used include “two weeks / 5 trial days,” one day / one trial, or variations of one day / one trial where, for example, all juries for the week are selected on Monday, and jurors are only required to report for, at most, two Mondays.

Frequency

Generally, jurors may only be required to be available for service once every 4 years. However, if a circuit chooses to utilize a “one trial / one day” procedure, the circuit may choose to reduce the period to no less than 2 years.

Wisconsin term limits of 31 days exceeds the Standard’s suggestion of a two week term length. The current term limits were set in 1997, reducing the period of availability from six months to one, and increasing the period of ineligibility from two years to four. The same change increased the flexibility of courts to use one day / one trial, which formerly was limited to counties of populations greater than 325,000. Notes in the statutes indicate these changes were made intending to implement Standard 5, and used the Standard’s language of “consistent with the needs of justice”.

6. *Exemption, Excuse, and Deferral*

Exemptions

The concept of exclusions and exemptions has been removed from the statutes. Wisconsin has no statutory exemptions from service for age or type of employment.

Excuse and Deferral

Excuses and deferrals are covered by Wis. Stat. § 756.03. The court may excuse a person from service if the court determines the person cannot fulfill the responsibilities of a juror. Deferrals may be granted upon request if the judge determines that service would entail undue hardship or extreme inconvenience. The responsible judge may give authorization to the circuit court to grant excuses and deferrals.

Eighty-four percent of circuits reported they automatically grant one postponement to a new term of service upon request.

Wisconsin meets the requirements of Standard 6.

B. Selection of a Particular Jury

7. *Voir Dire: Limited to Matters Relevant to the Process; Make Information Available to the Parties; Judge to Conduct Preliminary Exam; Be on the Record; Protect Juror Privacy.*

SM-20 (special materials) of the criminal jury instructions provides a very lengthy, detailed discussion of voir dire. It contains recommended procedures and questions and also contains an overview of the relevant caselaw.

Supreme Court Rule 71.04(8)(b) requires voir dire to be on the record.

The statewide Records Management Committee mandates forms for use in all courts. The jury questionnaire was modified in 2003, limiting the questions to only those needed to determine statutory eligibility. Counties may, however, issue supplemental questionnaires requesting information deemed necessary to facilitate voir dire. The Subcommittee surveyed Clerks of Court in 2004 concerning how juror's personal information was handled. Ninety-four percent of Clerks reported they use the state qualification questionnaire and do not ask supplemental questions. The majority of courts will distribute standard information to counsel prior to trial, and will retain that information in the court file, destroying it after four years, pursuant to SCR retention policies.

Courts responded as follows when asked who questions jurors (rounded to nearest 1%):

- 38% Primarily the attorneys
- 23% Primarily the judge
- 40% Both equally

Wisconsin courts generally meet the provisions of Standard 7, with some room for improvement in the area of juror privacy possible.

8. *Removal from the Jury Panel for Cause*

Wis. Stat. § 805.08(1) requires the court to examine each potential juror under oath to determine whether the juror is related to any party or attorney in the case, has a financial interest in the case, has expressed or formed any opinion, or holds any bias or prejudice in the case. If a juror is not indifferent, the juror must be excused. The parties may then supplement the court's examination and may introduce evidence in support of any objection.

Wisconsin courts meet the provisions of Standard 8.

9. *Peremptory Challenges*

Number of peremptory challenges

The number of peremptory challenges for civil cases is specified in Wis. Stat. § 805.08(3), and for criminal cases in Wis. Stat. § 972.03. The criminal jury instructions special materials also discuss peremptory challenges at Crim. J.I. SM-20(VI).

Generally, the number of challenges is as follows:

- Civil: 3 each party
- Misdemeanor: 3 each party
- Felony: 4 each party
6 each party if punishable by life imprisonment
- All cases: 1 additional per party if additional (alternate) jurors are selected
1+ additional allowed where multiple defendants with adverse interests

Exercise of challenges

The parties alternate challenges; in criminal cases the state begins and in civil cases the plaintiff begins. If any party declines a challenge the clerk shall make it by lot. Wis. Stat. §§ 805.08(3) & 972.04.

Selection method

Ninety-six percent of courts responded in the survey that they use the following method of jury selection: Prospective jurors equal to the number of jurors required for the case (6 or 12) plus alternates and peremptory challenges are seated. The entire panel is examined by the judge and/or attorneys and the judge rules on challenges for cause and hardship. Attorneys exercise peremptory challenges alternately until the final panel is selected and sworn.

The judge may allow additional peremptory challenges (standard 9(g), but only in limited circumstances. Otherwise Wisconsin meets the standards concerning the numbers and use of challenges, with negligible deviation as to (d) [Wisconsin has no death penalty], and (f) [concerning challenges to alternates].

C. Efficient Jury Management

10. *Administration of the Jury System: A Judicial Branch Responsibility Promulgated by the Supreme Court; Local Responsibility rests with a Single Administrator Supervised by the Court*

The Director of State Courts is ultimately responsible for administration of the state's circuit courts and serves under the direction of the Chief Justice of the Wisconsin Supreme Court. SCR 70.01. Supreme Court Rules, Chapter 73 set forth requirements for juror management, orientation of jurors and deliberations. The Director and Court have been active and successful in modifying statutory language to improve jury service for citizens who are summoned and to more closely comply with the ABA Standards. The CCAP automated jury application is administered by the Director's office.

Pursuant to WIS Stats 756.001(5), the presiding judge of each circuit is responsible for administering the jury system in that court. The judge may delegate the duty of selecting and managing juries to the clerk of circuit court.

Standard 10(a) states that all procedures for jury selection and service should be governed by court rules and regulation promulgated by the Supreme Court or Judicial Council. In Wisconsin, there is a combination of statutes and rules governing jury practices. Therefore, there is not strict compliance with this standard. However, as the current statutes reflect the language requested by the court system in 1996, and Judicial Council notes printed in the statutes reference the ABA Standards, the intent of the Standard is met.

11. *Notification and Summoning Procedures: Suggests One-Step System; Using First Class Mail; Explain Consequences of Failure to Comply; and Court Should Follow-up on Failures to Respond*

Summons & Qualification

Jurors may be summoned by 1st class mail (or another method) at least 12 days before the first day on which a jury is required to be present. Wis. Stat. 756.05. Prospective jurors may be sent both a juror qualification form and summons together. Wis. Stat. § 756.04(6).

All courts use first class mail to send qualification questionnaires and summons. In 2005 an internet qualification function was introduced to allow jurors to respond on-line. And as of August 2005, 86% of circuits reported they use the CCAP internet juror qualification response application. Twenty-five percent of circuits reported they use a single step process of qualifying and summoning jurors, the remainder using separate qualification and summon mailings.

Enforcement of summons

If a potential juror fails to return the qualification form to the clerk within 10 days of receipt or makes a willful misstatement, they may be required to forfeit up to \$500. Any person who is summoned to attend as a juror but fails to appear may be fined up to \$40. Wis. Stat. 756.30. CCAP reports provide clerks with information on the results of follow-up activities, permitting court managers to evaluate the cost-effectiveness of enforcement practices. The enforcement methods used include letters, phone calls, repeat mailings, orders to show cause, and assessment of financial penalties. Only 2% of courts report they undertake no follow-up activities. The advisability of increasing the penalties for non-response to a questionnaire or failure to appear when summoned continues to be debated by the Subcommittee. To date, attempts to work with the legislature on this matter have not been successful.

Wisconsin does not require courts to use one-step summoning procedures, nor is there a statewide policy for enforcing response or reporting. The Subcommittee has sponsored judicial education sessions to alert judges to the methods and benefits of enforcing juror response, and offered guides to best practices. Wisconsin compliance with this Standard is mixed

12. *Monitoring the Jury System*

Mandated monitoring of the system

Supreme Court Rule 73.01 mandates that each judicial circuit shall analyze at least annually the performance of the jury system in the circuit to determine the following five items:

- (1) If the department list or master list under section 756.04 of the statutes is representative and inclusive of the population of the circuit.
- (2) The effectiveness of the summoning and qualification procedures.
- (3) The responsiveness of prospective jurors to their summonses for jury duty.
- (4) If jurors and prospective jurors are used efficiently.
- (5) The cost—effectiveness of the jury system.

However, the rule provides for no reporting requirement and it is therefore unknown whether circuits are complying with the mandate or how successful they have been in each of the areas.

The District Court Administrators published “A Guide to Monitoring Your Jury System” in November 2000 to assist clerks and presiding judges to use the automated jury programs and reports to the fullest extent, and to provide standards and measure to apply to local data to help in the evaluation of each court’s policies and practices.

Juror exit surveys

Fifty-five percent of circuits report they always or sometimes ask jurors to complete exit surveys.

Wisconsin complies with Standard 12 through a rule mandating annual evaluations and the provision of the tools needed to perform the evaluations. The level of compliance with this rule is unknown.

13. *Juror Use: Achieve Optimum Use; Effective Calendar Management*

Determining Numbers to Summon

Clerks determine the number of jurors needed for each jury year pursuant to 756.04(9) Wis. Stats. The names needed are obtained from the Department of Transportation. Statistical yield and juror use reports are generated from CCAP to track the numbers needed to obtain a jury, to empanel, to summon and to qualify. Reports include calculations of “overcall” and “not-used” jurors to aid courts in reducing the number of citizens impacted to only that which is necessary to meet the needs of the courts. There is no statute or court rule that sets standard panel sizes; this is set at the discretion of each court. Because of the great variation in the size of Wisconsin counties, and the number of jury trials held each year, the number summoned each year ranges from 50 to 20,000 per county. There is no statewide compilation of juror use statistics. This is an area of local administrative control.

While, through educational programs, every clerk and presiding judge is aware of the goal of making optimum use of jurors and coordinating calendar management, there is no measurement of how well Wisconsin courts are meeting this standard.

Alternate jurors

Alternate jurors may be selected at the court’s discretion pursuant to Wis. Stat. § 805.08(2) and §972.04. However, “alternate” jurors are now conceptualized as “additional” jurors in an attempt to promote an attentive attitude and collegial relationship among all jurors. If the number of jurors remains more than required at the time of the final submission of the cause, the court determines by lot which jurors shall not participate in deliberations. Wis. Stat. §805.08(2) & §972.10(7). If a juror dies, becomes disabled or is discharged after deliberations have begun, an 'additional' juror may be called back and substituted into the deliberations, but only if the parties stipulate to the substitution. See *State v. Lehman* , 108 Wis. 2d 291, 321 N.W.2d 212 (1982).

14. *Jury Facilities*

Amenities

Supreme Court Rule 70.39 sets forth guidelines for court facilities. It includes provisions for deliberation rooms designed to ensure the safety and secrecy of deliberations, that deliberation rooms be at least 300 sq ft in size, with private restrooms and be located to minimize contact between jurors and the public while in transit. Jury boxes in courtrooms are to incorporate elevated tiers to enhance viewing and be sufficient distance from counsel table to avoid being overheard. The rule includes the following in the comment section: “Jurors perform a sacred role in our system of justice and it is critical that they have a private, comfortable and functional environment in which to conduct their deliberations.” As to juror areas outside court, the guidelines call for an adequately sized assembly area in any court with more than 3 jury courtrooms, and calls for an, “...area provided to prospective jurors for orientation and assembly...keeps them apart from the public and reflects their important role in the justice system...be provided a comfortable place to await being called.” In Wisconsin 17 (24%) of 72 counties have 3 or more judges.

The following is the percentage of circuits reporting they provide the following free of charge:

91%	Parking
82%	Meals / Snacks / Beverages (outside deliberation)
66%	Phone access
38%	Reading material
11%	TV / Movie viewing
5.3%	Internet access
0	Child care

Security

Only 4% of circuits reported that, based on juror feedback, jurors feel that security issues are not adequately addressed. Two percent reported an incident of jury tampering or threatened jurors in the last five years.

The degree to which the guidelines are met varies based on the nature and design of courthouses across the state. New construction undertaken since the adoption of the guidelines incorporates these concepts.

15. *Juror Compensation: Reasonable Fees, Paid Promptly; Employers May not Penalize Jurors*

Compensation

Each county sets its own compensation rate, but the statewide minimum is \$16 per day. Jurors may be compensated in half-day increments. Jurors are reimbursed for mileage at a standard state rate. Wis. Stat. § 756.25. In 2004, 7 (9.7%) counties paid the minimum amount, 40

(55.5%) paid between \$20 and \$29 per day, 16 (22.2%) paid between \$30 and \$39 per day, and 9 (12.5%) paid \$40 - \$50 per day.

Employers must grant leaves of absence for jury duty and may not use absence for jury duty to discharge or discipline an employee Wis Stats 756.255.

Four percent of circuits offer free public transportation.

Recognition of service

Judges reported they provide the following recognition to jurors for their service:

- 75% Verbal thank you from clerk or judge
- 63% Letter of thanks
- 5% Certificate of appreciation

Wisconsin does not have the two-tiered compensation plan suggested in the Standards – a nominal amount for the first day and a reasonable rate thereafter. There is no information on the speed at which jurors receive their pay; anecdotal evidence suggests this varies from same day payment to a month or more depending on staff resources in an individual county.

D. Juror Performance and Deliberation

Generally

Jurors asking questions

Juror questioning of witnesses is allowed at the discretion of the court and is addressed by Civil J.I. 57, Crim. J.I. 57 and discussed in great detail at SM-8 of the criminal jury instructions special materials. According to SM-8, there is no specific legal authority for the practice but the courts likely have an implied or inherent authority to allow it. SM-8 sets forth guidelines for courts to follow if they choose to allow questions, provides the pros and cons of the practice, and cites a number of sources discussing the topic. The Court of Appeals has held that if questions are allowed, the SM-8 procedures should be followed. State v. Darcy N. K., 218 Wis.2d 640, 581 N.W.2d 567 (Ct. App. 1998).

Note taking

Juror note taking is permitted under Wis. Stat. §§ 805.13(2)(a) & 972.10(1)(a), but the court has the authority to prohibit note taking if reasons are stated on the record. The court is to provide the necessary materials. Notes are confidential and are collected and destroyed after a verdict is rendered.

Both the civil and criminal jury instructions specifically address juror note taking: Civil J.I. 60, 61; Crim. J.I. 55, 56.

96% of judges reported they “always” or “often” allow note taking in civil cases. The number was 90% for criminal cases.

Notebooks

Juror notebooks, a relatively new concept across the country, may contain a number of items such as jury instructions, witness lists, and exhibits. Jurors would have access to the information therein and may refer to it as necessary throughout the progress of the trial.

According to the survey, 16% of judges “always” or “often” allow juror notebooks in both criminal and civil trials.

Interim commentary (argument)

Some have advocated allowing attorneys to present arguments during the evidence portion of lengthy trials. For instance, attorneys might have a short opportunity to discuss the complicated testimony just proffered by an expert witness.

Wis. Stat. §972.10, Order of trial, would appear to currently prohibit such a practice in criminal trials. Further, Wis. Stat. § 805.10, though less detailed than the criminal statute, anticipates only opening and final arguments in civil trials. Even without an absolute prohibition in the statutes, the practice of mid-trial arguments is likely prohibited under the common law.

In the survey, 99% of judges responded that they “rarely” or “never” allow interim commentary by attorneys during the evidentiary portion of a trial.

Time limits on attorneys

Courts may set time limits on attorneys’ arguments. Wis. Stat. §§ 805.10 & 972.11. “Control and content and duration of closing argument is within the discretion of the trial court.” *State v. Stawicki*, 93 Wis. 2d 63, 286 N.W.2d 612 (Ct. App. 1979).

According to the survey, 72% & 68% of judges “rarely” or “never” enforce time limits in criminal and civil trials, respectively.

Jury view

By court order, in both civil and criminal cases, a jury may be taken to view any property, matter, or thing relating to the case. Wis. Stat. §§ 805.08(4) & 972.06.

16. *Juror Orientation and Instruction*

Orientation

Sixty-one percent of circuits reported they provide jurors with an informational brochure with the summons.

Sixty-one percent of circuits reported jurors are shown the “We the People,” orientation video (produced by the Director of State Courts’ office, 1994 or the 2005DVD, “Jury Service in Wisconsin”).

Twenty-one percent of circuits reported that jurors can read local orientation materials on their court website.

The State Court Website offers extensive information for jurors, including a glossary of legal terms and the outline of a trial, and has links to a juror handbook, the DVD orientation program and a document called “Behind Closed Doors”, adapted from the American Judicature Society publication and offered as a guide to deliberation. The state website also provides links directly to each court that has created a website with specific juror information.

Preliminary instruction on “elements” of crime or claim

There is currently no requirement that jurors be informed at the beginning of trial what the actual elements of a crime or claim are that must be proven. Rather, this decision is left to the discretion of the judge.

Wis. Stat § 972.10(1)(b) states that in criminal trials the preliminary instructions *may* include the elements of any offense charged. This provision was added in 1983. However, Crim. J.I. 50, Preliminary Instruction, lists “substantive instructions—elements of the crime” as one of the recommended instructions to be given before trial. This provision was added in the committee’s 1999 revision of the instruction.

Preliminary instructions in civil trials are governed by Wis. Stat. § 805.13(2)(b), which makes no reference to the substantive elements of a claim. The statute makes it clear, however, that the court is not restricted to instructing on only those issues specifically listed. Similarly, Civil J.I. 50, Preliminary Instructions, contains no reference to substantive instructions.

According to the survey, 43% of judges “rarely” or “never” instructed jurors pretrial on the elements of the crime. In civil cases, the number of judges not instructing increases to 60%.

Plain English instructions

The Criminal Jury Instruction Committee undertook the process of systematically revising the criminal instructions beginning in 1998. The committee has addressed sections of instructions at a time and has already completed revision of volume 1 and is much of the way through volume 2. The instructions are being revised for both comprehension and clarity. To achieve this, the instructions have been reformatted with new captions, indents, spacing, and use of bold font. Also, many key terms and phrases are now defined in individual instructions

Although the civil jury instruction committee has not undertaken a complete revision of the civil instructions, it drafts sets of about 30-50 new or revised instructions each year. The committee reviews the instructions for both legal accuracy and clarity, placing a major emphasis on the use of plain language. Several years ago, a nationally respected legal writing expert joined the

committee as an advisory member to assist with its ongoing effort to prepare plain language instructions.

Final instructions

The court may instruct the jury either before or after closing arguments. Wis. Stat. § 805.13(4). After the jury retires, the court may reinstruct the jury on previously given instructions or may give supplementary instructions if appropriate. Wis. Stat. 805.13(5).

Seventy percent of judges responded that they give final instructions before closing arguments, as opposed to after argument..

Taking jury instructions into deliberation

The court is required in both civil and criminal cases to provide the jury with one complete set of written instructions providing the burden of proof and the substantive law to be applied. Wis. Stat. §§ 805.13(4) & 972.10(5). The burden of proof requirement was added to §972.10(5) in 1986, after the holding in *In Matter of E.B.*, 111 Wis. 2d 175, 330 N.W.2d 584 (1983) (Discussing separation of powers doctrine).

According to the survey, only 65% of judges provide juries with a copy of the instructions while in deliberation. As courtroom technology becomes available in more courthouse, judges are taking the extra step of using power point presentations or document cameras to display instructions to the jurors.

Debriefing by judge

This topic might encompass such things as how to deal with media, counseling in emotionally difficult trials, or meeting with the jurors to answer questions. Crim. J.I. 525 and Civil J.I. 197 are optional instructions that inform jurors that they may, but are not required to, discuss the case and what occurred in deliberations.

SCR 73.02 requires judges to provide jurors with “information concerning jurors’ rights and responsibilities” when discharged.

According to the survey, approximately 62% judges “always” or “often” debrief jurors in some respect after completion of their service.

Follow-up on outcome of case

When asked in the survey whether they afforded jurors any follow-up on the final outcome of a case (i.e. civil damages or criminal sentence), approximately 79% of judges responded “rarely” or “never.”

While much information is available to jurors, and counties vary in the style and degree to which they provide jurors information, until every county can report providing jurors with orientation

materials. Wisconsin cannot be said to be in full compliance with this standard. And, many judges have concerns with providing preliminary instruction to jurors as to the elements of a claim.

17. *Jury Size and Unanimity of Verdict: Twelve and No Fewer than 6; Unanimous in Criminal Cases, ¾ in Civil Cases*

Jury Size

Wis. Stat. § 756.06 sets forth the jury size for different types of cases. Wis. Stat. § 972.02 also addresses the number of jurors for criminal cases. Generally, the number of jurors is as follows:

Felony: 12 jurors

Misdemeanor: 12 jurors (but only 6 jurors according to statute)

(However, the statute was held to violate the Wisconsin Constitution in *State v. Hansford*, 219 Wis. 2d 226 (1998), which requires 12 jurors for misdemeanors.)

Civil Forfeitures: 6 jurors

Civil: 6 jurors, but up to 12 upon request of either party or on court's own motion

Unanimity of Verdict

Civil cases may be decided by a five-sixths verdict. If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all of the questions. Wis. Stat. § 805.09(2); WI Const. Art. I, Sec. 5.

Criminal cases must be decided by a unanimous verdict. See *State v. Lomagro*, 113 Wis. 2d 582, 590-91, 335 N.W.2d 583 (1983).

Wisconsin meets this Standard.

18. *Jury Deliberations*

Assistance with deliberation

SCR 73.03 requires, amongst other things, that:

(1) Jury deliberations shall take place under conditions and pursuant to procedures that are designed to maintain impartiality and to enhance rational decision making.

(2) The judge shall instruct the jury concerning the appropriate procedures to be followed during deliberations.

Only 12% of judges reported that jurors are provided with additional guidance or assistance on how to proceed in deliberation. However, there is a poster from the American Judicature Society in many jury rooms across the state, and as noted above, much information is available on court websites, which can be viewed prior to service.

Discussing case before deliberation

Some have advocated for allowing jurors to discuss the case before final deliberations. Although the practice does not appear to be prohibited outright by statute, both Wis. Stat. §§ 805.13(2)(b) & 972.10 (1)(b), state that the preliminary instructions to the jury may include, amongst other things, directions not to discuss the case until deliberations begin. It is likely that premature deliberation is prohibited under the common law.

Crim. J.I. 50, Preliminary Instruction, directs jurors not to discuss the case with anyone or amongst themselves before final deliberations in the jury room.

Deliberations Outside Normal Working Hours

Due to the press of caseloads, many judges hold juries after normal working hours. Indications are jurors are not consulted. The Supreme Court has guidelines for deliberation facilities, as noted above, but county-supplied facilities vary in design and amenities. In September 2006 statewide training for jury bailiffs is being conducted by the Director of State Courts office. The degree to which Wisconsin courts meet this Standard will vary depending on the nature of judicial calendaring and county facilities.

19. *Sequestration of Jurors*

Sequestration is briefly addressed in Wis. Stat. § 972.12: The court may direct that the jurors sworn be kept together or be permitted to separate. The court may appoint an officer of the court to keep the jurors together and to prevent communication between the jurors and others.

However, it was held in *State v. Halmo*, that allowing the jury to separate during its deliberations created a rebuttable presumption of prejudice. 125 Wis. 2d 369, 371 N.W.2d 424 (Ct. App. 1985).

Only 23% of judges reported that jurors were ever sequestered. Sequestration (except during actual deliberation) is very rare in Wisconsin. Wisconsin courts meet this Standard.

20. *Juror Privacy*

Six percent of circuits, based on juror feedback, reported jurors felt privacy issues were not adequately addressed.

When there are grounds to believe the jury in a criminal case needs protection, the trial court may take reasonable steps to protect the identity of potential jurors. Preventing references on the record to juror's names, employment, and addresses while providing the defense with copies of the juror questionnaires during voir dire was within the court's discretion. *State v. Britt*, 203 Wis. 2d 25, 553 N.W.2d 528 (Ct. App. 1995).

If a court withholds any juror information in open court, it must: 1) find that the jury needs protection; and 2) take reasonable precautions to avoid prejudicing the defendant. When jurors'

names are withheld, the court, at a minimum, must make a precautionary statement to the jury that the use of numbers instead of names should in no way be interpreted as a reflection of the defendant's guilt or innocence. *State v. Tucker*, 2003 WI 12, 259 Wis. 2d 484, 657 N.W.2d 374.

Crim. J.I. 146 provides a precautionary statement that may be used in the case of anonymous and "number" juries.

Juror privacy is addressed differently across the state. Statutes do contain provisions for anonymous jurors, but that is rarely used. Some counties collect back and destroy the information given to attorneys for voir dire. Others have reduced the amount of printed personal information given to attorneys to limit what is saved in court files and therefore available to any one under Wisconsin's generous open records law.

With the open records law of Wisconsin, any information the court obtains from jurors must be released to any requester, unless the records are specifically sealed by the trial judge. The problem of juror privacy has been considered in Wisconsin, but specific, statewide solutions have not yet been identified or implemented. Compliance with this Standard is questionable.

III. What next?

The reforms realized by the 1997 creation of SCR 73 and revision of Ch. 756 Stats. were significantly shaped by the ABA Judicial Administration Division's 1993 *Standards Relating to Juror Use and Management*. However, in the spring of 2004 the ABA's American Jury Project began the task of reviewing, consolidating and updating the existing ABA standards relating to jury trials. In August 2005, the ABA published the new *ABA Principles Relating to Juries and Jury Trials*. These new standards amend not only the Judicial Division standards relied upon in the review of Wisconsin reforms, but also the *ABA Standards for Criminal Justice Discovery and Trial by Jury (Third Edition)* and the Section of Litigation's *Civil Trial Practice Standards*. The 2005 jury standards have been divided into five general categories: (1) General Principles, (2) Assembling a Jury, (3) Conducting Jury Trials, (4) Jury Deliberations, and (5) Post-Verdict Activity.

A cursory review of the new standards reveals that Wisconsin remains in substantial compliance with recommended best jury practices. However, as with any system, there remains room for improvement. Therefore, we should not be complacent but continue to monitor practices and procedures statewide, encourage refinements and innovations and work toward full compliance with the national guidelines. A logical stepping off point would be to reexamine Wisconsin's current practices in light of the new 2005 standards.⁸

Based on the results of this review, the Subcommittee developed the following recommendations to be presented to the Committee of Chief Judges for consideration of further action.

1. Ask the Director of State Courts office to coordinate efforts to research and implement means and methods of increasing minority representation in those jurisdictions where this may be a concern, either through rule, policy or legislation. The Subcommittee shall

- consider options and provide recommendations to the Director regarding additional source lists, mechanical methods such as stratified summoning or other means deemed to have a potential positive effect.
2. The Subcommittee shall work with the Office of Judicial Education to offer courts programs describing best practices and with CCAP to provide the automated tools necessary to address summoning and qualification issues, including one-step summoning procedures and effective follow-up. The Subcommittee, in conjunction with the Director of State Courts Office and the Legislative Committee of the Judicial Conference pursue legislation to increase penalty limits.
 3. Request Chief Judges to submit a petition to the Supreme Court amending SCR 73 to require written annual evaluations of the jury system in each county, to be submitted to the Director of State Courts. In that regard, the Chief Judges should work with the Wisconsin Clerks of Court Association to promote a standard jury year to provide consistent statewide data and to allow comparisons of the effectiveness of various administrative techniques across county lines.
 4. Request the Director of State Courts to update the Guide to Monitoring your Jury System to assist courts to perform the annual evaluation.
 5. Request the Director's office to establish state standards for statistical measures such as overcall and under use of jurors.
 6. Request the Wisconsin Clerks of Court Association and Chief Judges to follow up with counties on the issue of providing more orientation and instruction for jurors, increasing consistency across counties so all citizens are provided the same basic information.
 7. Request the Director of States Courts Office and Chief Judges, short of introducing mandatory rules or statutory language, promote shorter terms of service.
 8. The Subcommittee shall study feasibility and desirability of modifying the compensation structure.
 9. The Subcommittee shall develop a plan for improved juror privacy and determine if a successful petition to the Supreme Court is viable.
 10. The Subcommittee will continue to monitor innovations being introduced nationwide and identify those appropriate for the Wisconsin Court system, and through judicial; education and the administrative structure, share with judges and clerks of court those innovations with potential to improve the trial process and the experience of those citizens summoned to serve as jurors.

¹ Heuer, L. B., & Penrod, S. D. (1988). Increasing jurors' participation in trials: A field experiment with jury notetaking and question asking. *Law and Human Behavior*, 12, 231-262.

Heuer, L., & Penrod, S. D. (1989). Instructing jurors: A field experiment with written and preliminary instructions. *Law and Human Behavior*, 13, 131-162.

² Penrod, S., Linz, D., & Rios, P. A. (1984). *Allowing jurors to ask questions in the courtroom: A field experiment*. Unpublished manuscript, University of Wisconsin--Madison.

³ The Judicial Conference, established by SCR 70.15, is comprised of all of Wisconsin's justices, appellate and circuit judges, reserve judges, and three representative judges each from the municipal and tribal courts. The Chief Justice presides over the Conference at its mandated annual meetings.

⁴ The Judicial Council, established by Wis. Stat. 758.13 is a policy advisory group comprised of 21 members including justices, judges, legislators, the director of state courts, deans of the law schools, and others.

⁵ The drafting committee was comprised of: Judge Thomas Barland, Eau Claire County, James L. Fullin, Executive Secretary to the Judicial Council, Donna Seidel, Marathon County Clerk of Circuit Court, Robert Brick, Office of Court Operations Senior Analyst, and District 5 Court Administrator Gail Richardson

⁶ Orders 95-11, 96-05, and 96-08

⁷ The Consolidated Court Automation Programs (CCAP) is an integrated statewide computer network that coordinates and provides a number of administrative functions, such as providing juror master lists and access to public court records. CCAP began offering courts an automated jury management system in 1990.

⁸ The ABA's 2005 *Principles for Juries and Jury Trials* are available online at:
<http://www.abanet.org/juryprojectstandards/principles>.

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April 27, 2006

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