J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

February 20, 2008 OAG—3—08

Mr. A. John Voelker
Director of State Courts
16 East, State Capitol
Madison, WI 53702

Dear Mr. Voelker:

You ask whether Wisconsin law permits a court to deliberately summon a greater number of potential jurors from some geographic areas than from others in an attempt to ensure that the racial and ethnic makeup of the juries that hear cases in the court better reflects a representative cross-section of the community served by the court.

I conclude that Wisconsin law, which requires that all qualified persons have an equal opportunity to be randomly summoned for jury service, does not permit a jury selection system that gives some persons a greater, and other persons a lesser, opportunity to be summoned, depending on the area of the community where they live.

The Wisconsin statutes governing the selection of juries expressly provide that "[a]ll persons selected for jury service shall be selected at random from the population of the area served by the circuit court," and that "[a]ll qualified persons shall have an equal opportunity to be considered for jury service . . . ." Wis. Stat. § 756.001(4) (2005-06). To this end, courts must use some "method of selection that provides each qualified person with an equal probability of selection for jury service." *Id.*

In selecting persons to be summoned for jury service, the clerk of the circuit court "shall compile the list of prospective jurors by selecting names at random" from either a "list of persons residing in the area served by that circuit court" submitted annually by the Department of Transportation or a "master list." Wis. Stat. § 756.04(3) and (4) (2005-06).

The clerk of circuit court may create a master list using the department list and any of the following:

1. Voter registration lists.

2. Telephone and municipal directories.

3. Utility company lists.

4. Lists of payers of real property taxes.

5. Lists of high school graduates who are 18 years of age or older.

6. Lists of persons who are receiving aid to families with dependent children under subch. III of ch. 49.

Wis. Stat. § 756.04(5)(a).

"To create a master list, the clerk of circuit court shall select randomly a sample of names from each source used. The same percentage of names shall be selected from each source used." Wis. Stat. § 756.04(5)(b). Duplicate names appearing on more than one list shall be removed. *Id.* The non-duplicate names from the optional lists used "shall be combined with the names selected from the department list to create the master list." *Id.*

After a juror list has been created, "the clerk of circuit court shall provide the court with a sufficient number of names of prospective jurors . . . [by] randomly select[ing] names from the department list or master list." Wis. Stat. § 756.04(9).

These statutorily prescribed procedures for selecting prospective jurors are mandatory and must be complied with strictly.

Except for the option to create a master list, the jury selection statutes uniformly and repeatedly use the commandment "shall" in establishing the procedures to be followed. "Shall" is presumed to be mandatory, especially where it is used in the same statute as the term "may," unless a different construction is necessary to carry out the clear legislative intent. *State v. Thiel*, 2004 WI App 225, ¶ 14, 277 Wis. 2d 698, 691 N.W.2d 388; *Fond du Lac County v. Elizabeth M.P.*, 2003 WI App 232, ¶ 24, 267 Wis. 2d 739, 672 N.W.2d 88.

The clear intent of the prescribed procedures is to guarantee "that all qualified citizens have the opportunity and the obligation to serve as jurors" by "obtaining jurors on the basis of objective qualifications . . . selected at random, and from a broad cross-section of the community," so that there will "be no discriminatory practices in the selection." *State v. Coble*, 100 Wis. 2d 179, 212-13, 301 N.W.2d 221 (1981).

Methods of selection that deviate from the procedures carefully crafted to carry out this intent may "fail[] to insure, as does the statutory procedure, that a jury composed of persons qualified under the statutes is selected at random from a broad cross-section of the community." *Id.*, 100 Wis. 2d at 212. Therefore, the statutory procedures for selecting jurors are mandatory. *See Oliver v. Heritage Mut. Ins. Co.*, 179 Wis. 2d 1, 9, 505 N.W.2d 452 (Ct. App. 1993).

The Legislature has underscored the mandatory nature of the statutory selection procedures by requiring clerks who draw up a jury list to "certify that the names [of prospective jurors provided to the court] were selected in strict conformity with . . . chapter [756]." Wis. Stat. § 756.04(9). The courts of this state have agreed that the "jury selection procedure must be . . . in strict conformity with statutory requirements." *Coble*, 100 Wis. 2d at 206; *see Oliver*, 179 Wis. 2d at 9-11.

Deliberately summoning a greater number of potential jurors from some geographic areas than from others does not strictly comply with the mandatory statutory requirement that all persons selected for jury service must be selected at random from the population of the area served by the circuit court.

"Random" is a commonly used word whose meaning can be ascertained from a recognized dictionary. *See, e.g.*, *Orion Flight Serv. v. Basler Flight Serv.*, 2006 WI 51, ¶¶ 16, 24, 290 Wis. 2d 421, 714 N.W.2d 130. Something is "random" when it has no regular or specific plan or pattern. THE AMERICAN HERITAGE DICTIONARY 1496 (3d ed. 1996); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1880 (Unabridged ed. 1986). There must be the same or equal chance of occurrence for each and every member of a group. *Id.*

Deliberately summoning different numbers of potential jurors from different districts plainly constitutes a plan or pattern that is contrary to the concept of randomness. Randomness is also skewed because the plan or pattern gives residents of some areas a greater chance, while offering others a lesser chance, of being summoned.

Moreover, because some persons have a greater chance of being summoned than others, this plan or pattern does not strictly comply with the statutory requirement that the method of selecting potential jurors must provide each qualified person with an equal probability of selection for jury service.

While increasing the proportional representation of minority groups on juries might be a desirable goal, it cannot be accomplished by means that conflict with the statutes which are designed to guarantee equality of individual, not group, participation on juries. This goal cannot be accomplished at the expense of individuals who are not members of minority groups by decreasing the chances that they will be summoned for jury service by sending fewer summonses to persons who live in areas predominantly populated by groups that are not considered minorities.

A federal court recently invalidated a similar jury selection plan in *In re United States*, 426 F.3d 1 (1st Cir. 2005). In that case, to compensate for misdeliveries and nonresponses that occurred proportionally more in minority areas, a district judge ordered the jury administrator to draw an additional name from the same zip code for each person to whom a summons could not be delivered or who did not return a summons. *Id.*, 426 F.3d at 4. This procedure drew

proportionally more supplemental names from areas that had larger than average populations of minorities. *Id.*

The Court of Appeals for the First Circuit held that this plan violated the statutory requirement that persons considered for jury service must be selected at random to insure that the odds of any individual name being selected are substantially the same. *Id.* at 6. The court held that a plan which gave preference to those in certain areas failed to provide equal odds of selection to every person on the jury list. *Id.*

In *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998), the Sixth Circuit invalidated a jury selection plan that tried to achieve racial balance by removing the names of non-minority persons from the jury wheel, thereby increasing the proportion of minorities represented on the wheel.

The court held that this plan also violated the statute that required all citizens to have an equal opportunity to be considered for service as jurors. *Id*., 136 F.3d at 1099-100. The court said that although the government had a strong interest in increasing the representation of minorities on juries, it could not do so by means that denied non-minorities an equal opportunity to serve on juries. *Id.* at 1105-06. The court said that the government's goal should be achieved by supplementing driver and voter lists with names from alternative sources to avoid discriminating against individuals. *Id.* at 1106.

Although dealing with a different situation, the Wisconsin Court of Appeals has expressed similar reasoning. In *Oliver*, the court held that ordering the clerk to place on the array and the jury panel an African-American whose name had not been chosen at random violated Wis. Stat. §§ 756.001(2) and 756.096(2)(a). *Oliver*, 179 Wis. 2d at 10-11. The court stated that "the ethos of our system is a jury picked at random. That much is codified in sec. 756.001(2), Stats. It is also apparent from our case law." *Id.* at 11. The court ruled that deliberately "'salting'" the jury with a minority member who had not been chosen at random violated this ideal. *Id.*

Deliberately "salting" the jury list with minority members who have been selected by preference rather than at random is no less violative of the fundamental principle that requires juries to be chosen totally at random without discriminating for or against any person on account of their race, or on account of the place where they live as a surrogate for race.

Conversely, the Wisconsin Supreme Court has stated that apportioning the array "among wards, villages, and towns on a per capita equality standard . . . assures each person in the county of an equal opportunity to serve upon a jury regardless of where he may reside within the county." *State v. Nutley*, 24 Wis. 2d 527, 539, 129 N.W.2d 155 (1964), *cert. denied*, 380 U.S. 918 (1965).

Random selection of individual jurors might result in underrepresentation of some groups on juries. But the mere lack of proportional racial representation, absent intentional and systematic exclusion, is not discrimination or otherwise constitutionally deficient. *Wilson v. State*, 59 Wis. 2d 269, 281-82, 208 N.W.2d 134 (1973). "The jury pool need not be a statistical mirror of the community. . . . Absolute proportional representation is not required. The fair-cross-section requirement is met if *substantial* representation of a distinctive group exists." *State v. Pruitt*, 95 Wis. 2d 69, 78, 289 N.W.2d 343 (Ct. App. 1980) (emphasis in original) (citations omitted).

If greater representation of minorities on juries is sought, it must be by means that maintain a non-discriminatory random selection procedure, such as the suggestion of the federal court of appeals to supplement the lists from which the names of prospective jurors are obtained with other lists that are more likely to include the names of those minority individuals which do not appear in the most commonly used sources.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:TJB:ajw