COUNCIL ON COURT PROCEDURES

Saturday, February 8, 1992 Meeting
9:30 a.m.

Room 350
State Capitol
Salem, Oregon

A G E N D A

1. Approval of minutes of meeting held December 14, 1991

2. Oaths for depositions by telephone (subcommittee report - Mike Phillips and Bruce Hamlin; letters from Kathryn Augustson and Stephen Thompson)

3. Exclusion of witnesses at depositions (Janice Stewart)

4. Limiting secrecy in personal injury actions (John Hart)

5. Class actions (subcommittee report - Janice Stewart)

6. Administrative subpoenas and hospital records (Executive Director memorandum)

7. Costs - copying of public records (Executive Director memorandum)

8. ORS sections limiting ORCP 7 E (Executive Director memorandum)

9. Summons warning (Judge Welch)

10. NEW BUSINESS: Hugh Collins letter proposing amendment to ORCP 54 A(1); letter from Ron Bailey regarding six-person juries

# # # #

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December 13, 1991

Henry Kantor
Chair
Oregon Council on Court Procedures
Possi Wilson, et al.
1400 Standard Plaza
1100 S.W. 6th Avenue
Portland, OR 97204-1087

Re: OSB Procedure and Practice Committee Proposal for Amendment to ORCP 39 C(7)

Dear Mr. Kantor:

I am chair of the 1991-92 Procedure and Practice Committee. Our committee has endorsed a proposal for amendment to ORCP 39 C(7) regarding depositions by telephone. I have enclosed a copy of the proposal.

The committee requests that this proposed amendment be placed on the Council's agenda for consideration at an upcoming meeting. I previously appointed Bend attorney, Dennis J. Hubel, to be our committee's liaison to the Council.

Even though it now appears that several of our committee's meetings will be held at the same time as Council meetings, Mr. Hubel or I can certainly arrange to be present to present our proposed amendment at a convenient time and date. Thank you for your cooperation.

Sincerely,

JOHNSTON & AUGUSTSON, P.C.

Kathryn S. Augustson

Kathryn S. Augustson

KSA:sb
Enclosure

cc: Procedure and Practice Committee
Members (w/o enclosure)
William Wheatley, Esq. (w/o enclosure)
Susan Grabe, Esq. (w/o enclosure)

Proposal for Amendment to ORCP C(7). Deposition by telephone.

FOURTH DRAFT

(C)7 Deposition by telephone. Parties may agree by stipulation, or the court may upon motion order that testimony at a deposition be taken by telephone, in which event the stipulation or order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

In the event of a stipulation between the parties, such stipulation shall be made a part of the record by the person authorized to administer oaths, as described in Rule 38. Acceptance of a stipulation as provided in this subsection constitutes a waiver of any objection to the telephonic transmission of the testimony.

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December 23, 1991

Henry Kantor, Chairman
Council on Court Procedures
POZZI, WILSON, ATCHISON, O'LEARY & CONBOY
1400 Standard Plaza
1100 S.W. 6th Avenue
Portland, OR 97204

Re: ORCP 39(C)(7)

Dear Mr. Kantor:

As you may know, the OSB Procedure & Practice Committee has been working for some time on a proposed change to ORCP 39(C)(7) with respect to the use of telephone depositions in Oregon. The committee has adopted and approved a proposal which we would like to present to the Council on Court Procedures at the next available time. I would appreciate it if you would let me know when the Council's agenda might permit me to present the proposal.

Thank you for your assistance.

Very truly yours,

BRICKER, ZAKOVICS & QUERIN, P.C.

Stephen C. Thompson

Stephen C. Thompson
Secretary, OSB Procedures & Practice Committee

SCT:ghp

cc: Kathryn Augustson
Dennis J. Hubel
Ronald L. Marceau

January 27, 1992

M E M O R A N D U M

TO: MEMBERS, COUNCIL ON COURT PROCEDURES

FROM: Fred Merrill, Executive Director

RE: Agenda items for February 8, 1992 Council meeting

The following are some tentative drafts and discussion relating to items on the agenda for the February meeting (listed by agenda number):

2. **Oaths for depositions by telephone:**

After discussion with Kathy Augustson from the State Bar Procedure and Practice Committee, the subcommittee on oaths for depositions by telephone suggests the following amendments to ORCP 39 C(7) and G(1):

ORCP 39 C(7) **Depositions by telephone.**

C(7)(a) The parties may agree by stipulation or [T]the court may upon motion order that testimony at a deposition be taken by telephone[,]. [in which event] If testimony at a deposition is taken by telephone pursuant to court order, the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by telephone pursuant to stipulation between the parties, such stipulation shall be made a part of the record by the party taking the deposition. Acceptance of a stipulation as provided in this subsection constitutes a waiver of any objection to the taking of a deposition by telephone.

C(7)(b) The oath or affirmation may be administered by an officer or person authorized to administer oaths as provided in Rules 38 A or 38 B. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition. If the deponent is not physically in the presence of the officer or person administering the oath, the oath shall have the same force and effect as if the deponent were physically present before the officer. For purposes of this rule, for determining the place of examination under Rule 55 F(2), for

securing attendance of a deponent under Rules 38 B and 55 C(1), or relating to motions for sanctions for failure to be sworn or answer questions at a deposition under Rules 46 A(1) and 46 B(1), depositions taken by telephone are taken at the place where the deponent is to answer questions propounded to the deponent. If the place where the deponent is to answer questions is located outside this state, motions to terminate or limit examination under section E of this rule may only be made to the court in the state in which the action is pending and other applications for orders, subpoenas, and sanctions may be made to the court in the state in which the action is pending or a court of general jurisdiction in the county of the state where the deposition is being taken.

ORCP 39 G(1) **Certification.** When a deposition is stenographically taken, the stenographic reporter shall certify, under oath, on the transcript that the witness was duly sworn [in the reporter's presence] and that the transcript is a true record of the testimony given by the witness.

This redraft of ORCP 39, approved by the subcommittee, relating to depositions by telephone, attempts to incorporate suggestions from the State Bar Procedure and Practice Committee and made by Council members at the last meeting.

Paragraph 39 C(7)(a) was suggested by the Procedure and Practice Committee and relates to stipulations for depositions by telephone. We changed the language in paragraph C(7)(a) to provide that the party taking the deposition, not the person administering the oath, has the responsibility of getting the stipulation in the record. This is more consistent with the overall approach of Rule 39. We also changed the words "telephonic transmission of testimony" to "taking of a deposition by telephone". The subcommittee also changed the proposed language to make clear that the stipulation in the record need not cover all of the details relating to taking the deposition.

Paragraph 39 C(7)(b) deals with three questions: (1) who can administer the oath for a deposition by telephone? (2) physically how is that accomplished? and, (3) for purposes of compelling attendance and participation of a non-party witness, where is the deposition being taken?

On the first question, the description of who could take the deposition in the first draft did not clearly mesh with ORCP 38. The first sentence of this draft says that, at the option of the person taking the deposition, the oath may be administered either under ORCP 38 A or 38 B. In other words, when the deponent is physically outside this state, for purposes of administering the

oath, the person taking the deposition can treat the deposition as one taken either in this state or outside the state. The second sentence addresses the second question and says that the deponent may or may not be in the physical presence of the deponent. The third sentence of the paragraph makes clear that lack of physical presence does not change the validity of the oath.

The last two sentences of the paragraph deal with the question of location of the deposition in terms of: (a) what limitations are there on travel by the deponent and (b) what court must be used to compel attendance or participation in the deposition?

Relating to travel by the deponent, the draft contains the same limit as any deposition taken outside the state. A non-party foreign deponent can only be forced to appear where he or she is served with a subpoena or where the court orders.

The draft follows the federal rule and, for a foreign non-party witness, says that a court in the state where the deponent is located may issue the subpoena, order participation, and issue sanctions for non-appearance and non-participation. As a practical matter this is the only possible approach. The Oregon Court, where the case is pending, cannot issue a subpoena or an order to a non-party witness that has a binding effect outside the state. Only a court in the state where the deponent is located can effectively order the deponent to testify and punish a deponent for failure to testify. This assumes cooperation of the foreign court either through the Uniform Foreign Deposition Act or comity in response to a commission or a letter rogatory (covered by ORCP 38 B).

For purposes of an order limiting the deposition, however, the rule differs from the federal rule and limits such orders to the Oregon court where the case is pending. This is more convenient for the local party taking the deposition and avoids having a foreign court, unfamiliar with Oregon practice, rule upon the availability of discovery in a case pending in Oregon. It could subject the deponent or other objecting party to the burden of traveling to a foreign court.

The last sentence of the proposed paragraph also deals with the proper foreign court to be used. ORCP 46 and 55 use language more appropriate for depositions being taken in another county in Oregon rather than outside the state. They refer to sanctions and orders by circuit and district courts in the county were the deposition is being taken. Courts in other jurisdictions will have different names and jurisdiction than Oregon Circuit and District Courts. All states have at least one court of general jurisdiction, which would be similar to an Oregon Circuit Court.

The draft does not deal with one problem discussed at the meeting and that is the reliability of an oath administered over the telephone. It could be argued that the person administering the oath should be in the physical presence of the witness to make the witness recognize the importance of the testimony and truthfulness. It could also be argued that, if the person administering the oath cannot observe the demeanor of the witness and secure identification, there is no guarantee that the person testifying is actually the person sought to be deposed. The Council members were, however, adamant that they wanted a procedure that would allow a local court reporter to administer the oath by telephone. As a practical matter, the ceremonial effect of the presence of the person administering the oath is probably overstated. As for identity of the witness, the person taking the deposition, or anyone who might wish to use it for any purpose, would have the burden of suggesting identification procedures that would assure proper identification of the deponent.

3. **Exclusion of witnesses at depositions**

After discussion with Janice Stewart, we suggest the following as a redraft of ORCP 39 D. This draft attempts to control presence of witnesses at depositions in light of the concerns expressed by the Council at the last meeting:

> ORCP 39 D. **Examination and cross-examination; record of examination; oath; objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Oregon Evidence Code. Unless the court orders otherwise, only the following persons may be present during the deposition: (1) attorneys representing the parties, (2) any party who is a natural person, and (3) an officer or employee of a party which is not a natural person designated as its representative by its attorney.

The existing rule says that examination and cross-examination may proceed as at trial. This draft refers to the Oregon Evidence Code. The Oregon Evidence Code is defined in ORS 40.010.

The draft defines who ordinarily may be present at deposition and requires a court order to change the usual rule. ORE 615 allows the court to direct that witnesses be excluded from trial, except for certain categories of witnesses. The deposition categories of normal attenders are generally the categories that cannot be excluded from trial under ORE 615. It is the opposite of ORE 615 because a court order is necessary to change the limitation not to create it.

The categories used differ slightly between this draft and ORE 615. ORE 615 does not specifically mention attorneys. This draft would allow any attorney representing a party to be present, not just an attorney of record for a party. There is no limit upon the number of attorneys that may attend for one party. The rule would, however, allow only one corporate representative without court order. This is consistent with ORE 615.

ORE 615 says that the court cannot exclude persons whose presence is essential to the presentation of a party's cause. This category is not used for depositions because it is too vague to be applied without court discretion. It would provide one basis for arguing that the court should allow an additional person to attend the deposition.

Other than a court order, if a party wants to have additional persons in attendance, the stipulation of all parties to the case would be necessary.

4. **Limiting secrecy in personal injury actions.**

In addition to the material which you have already received on secrecy in personal injury actions, Maury Holland has called our attention to an article in the 1991 Harvard Law Review by Professor Arthur Miller, "Confidentiality, Protective Orders and Public Access to the Courts", 105 Harvard Law Review 427. The article is an excellent and thoughtful review of the area.

His summary of current legislation and rules is somewhat different than that submitted by OTLA. He identified over 30 states where proposals for general and substantial legislative or rule changes have been introduced, but only three where these proposals have been adopted (Virginia, Florida, and Texas; copies of these statutes or rules were furnished to us by OTLA). In Oregon and North Carolina, the changes are limited to cases involving public agencies. The New York rule only codifies existing practice by requiring a showing of due cause before public records can be sealed. He also identifies four of the states listed as pending by OTLA as states rejecting change. In Alaska and Maine, the proposals died in committee and in California and Hawaii, the proposals have been withdrawn by their sponsors.

Miller ends up opposing any elaborate procedural changes or presumption of public access. The entire article is too long to distribute, but his suggestions for modification of existing practice in the area are attached.

6. **Administrative subpoenas and hospital records.**

I recommend that the following changes be made in ORCP 55. The new language would make the subpoena for production of

records without a command to appear at trial or deposition inapplicable to hospital records as defined in ORCP 55 H(1). It would make the procedure described in ORCP 55 H the only procedure applicable to hospital records. This would solve the problems pointed out by Karen Creason and be consistent with the intent of the Council during the last biennium.

55 A. **Defined; form.** A subpoena is a writ or order directed to a person and may require the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or**, except as provided in paragraph H(4)(a) of this rule,** may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place. A subpoena requiring attendance to testify as a witness requires that the witness remain until the testimony is closed unless sooner discharged, but at the end of each day's attendance a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court and the title of the action.

* * *

55 H.(4) **Limitation of use of subpoena to produce hospital records without command for appearance; [P]personal attendance of custodian of records may be required.**

H.(4)(a) **Hospital records may not be subject to a subpoena commanding production of such records without a command to appear for deposition, hearing, or trial.**

H.(4)(b) The personal attendance of a custodian of hospital records and the production of original hospital records is required if the subpoena duces tecum contains the following statement:

The personal attendance of a custodian of hospital records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H.(2) shall not be deemed sufficient compliance with this subpoena.

H.(4)[(b)]**(c)** If more than one subpoena duces tecum is served on a custodian of hospital records and personal attendance is required under each pursuant to paragraph (a)

of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

* * *

7. **Costs - copying of public records**

The following language is intended to limit application of the public records provision in ORCP 68 A(2) to situations where use of certified copies of public records was mandatory. The word "necessary" in the existing rule is redundant.

> ORCP 68 A(2) **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the [necessary] expense of copying of any public record, book or document [used as evidence on trial] admitted into evidence at trial pursuant to ORS 40.570 (Oregon Evidence Code, Rule 1005); ...

8. **ORS sections limiting ORCP 7 E.**

As requested, I did a computer search to see how many ORS sections changed the limits on who may serve summons found in ORCP 7 E. The only ORS section that modifies ORCP 7 E is ORS 180.260 (attached) which allows employees of the Department of Justice to serve summons and process in cases in which the state is interested. The statute was enacted by the 1989 Legislature. We could amend ORCP 7 E as follows:

> ORCP 7 E. **By whom served; compensation.** A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, **except as provided in ORS 180.260,** an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. ...

Attachments

adversary system and hardly is unique to protective orders.[312] The criminal attorney who seeks a not-guilty verdict for a client he knows to be guilty faces the same concerns. Yet that attorney is expected to defend the client without fear of being treated as an accomplice after the fact. The judgment has been made that society is benefitted if clients may rely on their lawyers not to disclose their confidences[313] and are assured that their lawyers' personal judgments regarding the desirability of public disclosure will not prejudice their cases.[314] The rules of professional responsibility on this issue are clear — the attorney's duty is to pursue the client's best interests zealously.[315] If doing so creates a personal conflict of interest, the attorney should refuse to take the case[316] or should secure the client's informed consent to the disclosure of any matter affecting public health or safety before the question of a protective order arises.[317]

VII. Balancing the Competing Interests of Confidentiality and Public Access: A Proposal for the Refinement of Current Practice

No one doubts that a rational civil justice system should have a concern for public health and safety. It is also clear that, because there are benefits from discovery sharing, it should be allowed when sharing truly promotes fairness and efficiency. However, the civil justice system also must promote effective judicial management, efficiency in the resolution of disputes, and the preservation of confidentiality. Further, the system must not lose sight of the primary objectives of discovery: "Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes."[318] Thus, the national concern for public health and safety or the openness of our courts must be addressed in a way that does not substantially hinder the achievement of these other goals.

[312] *See* Model Code of Professional Responsibility Canon 4 (1986) ("A Lawyer Should Preserve the Confidences and Secrets of a Client."); Model Rules of Professional Conduct Rule 1.6 cmt. [4] (1983) ("A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.").

[313] *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613, 617 (arguing that to find in lawyers "a moral obligation to refuse to facilitate that which the lawyer believes to be immoral, is to substitute lawyers' beliefs for individual autonomy and diversity. Such a screening submits each to the prior restraint of the judge/facilitator and to rule by an oligarchy of lawyers.").

[314] *See* Model Rules of Professional Conduct Rule 3.6 (1983) (advising that a lawyer should not make extrajudicial statements that may be disseminated to the public if it will materially prejudice the adjudicative process).

[315] *See* Model Code of Professional Responsibility Canon 7 (1986).

[316] *See* Model Rules of Professional Conduct Rule 1.7 (1983) (instructing that a lawyer should not represent a client if representation will be limited by the lawyer's own or another client's interests).

[317] Because, in reality, disclosure will often weaken the plaintiff's bargaining position for securing the defendant's acquiescence in discovery of certain materials and also damage the plaintiff's ability to maximize the settlement value, the client's informed consent is critical.

These varied and sometimes divergent policies can be served by our civil justice process, but only by trusting trial courts to exercise their traditional discretion guided by a careful analysis of the various competing interests. No one is advocating the automatic or cavalier issuance of protective or sealing orders, let alone that they be granted without regard for substantially deleterious effects on public health and safety. But although disclosure of health and safety information is important, disclosure must be controlled, not indiscriminate. First, a neutral arbiter — the judge and not the litigants — must decide what information is to be revealed in the interest of public health and safety. Second, because a trial court has neither the time nor the expertise to examine carefully every claim of confidentiality that impairs legitimate and important public interests,[319] the process would be facilitated if, after a preliminary judicial determination that information should not be kept wholly confidential, disclosure were usually made to the appropriate governmental agency for further evaluation rather than to the public at large.

The most rational approach, therefore, is to try to accommodate the concerns raised by critics of protective orders without sacrificing the utility of protective orders themselves. Public health and safety can be promoted without resort to uncontrolled and potentially damaging public dissemination of information by the litigants. The benefits and harms of providing confidentiality or permitting disclosure can be balanced to achieve the most appropriate resolution of a particular conflict. The key, however, is retaining judicial discretion. If that discretion is constricted arbitrarily, the trial court's ability to meet the divergent goals of the pretrial process will be diminished.

Because proponents of reform have not demonstrated that significant modification of the present framework is necessary, the existing pragmatic and discretionary balancing technique should be retained. It may be true that substituting a rule that creates a presumption of access for all information, or for enumerated predetermined classes of information, would result in somewhat more predictable outcomes. Unfortunately, the results would correlate only haphazardly to notions of fairness, which are inevitably a function of the particulars of a given case. Too many relevant factors demand consideration to reduce the question of whether to grant a protective order to a simple rule or one with arbitrary criteria for disclosure or nondisclosure.

[318] Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984).

[319] *See* Marcus, *supra* note 9, at 472.

Discretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases.[320] By focusing on the particular circumstances in the cases before them, courts are in the best position to prevent both the overly broad use of protective and sealing orders and the unnecessary denial of confidentiality for information that deserves it, whether or not the information falls within one of the classes for which confidentiality is traditionally sought.[321]

The existing procedural framework, however, must be applied with a heightened sense of the importance of the issues raised by both sides of the current debate. Judges must guard against any notion that the issuance of protective orders is routine, let alone automatic, even when the application is supported by all the parties.[322] Thus, they must look carefully at each case and tailor appropriate responses, which should take account of a kaleidoscope of factors, including the likely outcome on the merits, the value or importance of commercial or personal data, the identity of the parties and any apparent outside interests, the existence of any threat to health and safety, and the

[320] A court has broad discretion under Federal Rule 26(c), for example, to shape a protective order to the needs of a specific case. *See* Tahoe Ins. Co. v. Morrison-Knudsen Co., 84 F.R.D. 362, 364 (D. Idaho 1979); 8 WRIGHT & MILLER, *supra* note 14, § 2036, at 269; *see also* Lewis R. Pyle Memorial Hosp. v. Superior Court, 717 P.2d 872, 876 (Ariz. 1986) ("The good cause standard gives courts very broad discretion to tailor protective provisions to fit the needs of the case.").

[321] For example, the Texas rule requires public notice of every request to seal court records. *See* TEX. R. CIV. P. ANN. r. 76a(3) (West Supp. 1991). Requests have been made to seal a wide variety of information. In a wrongful death case, the defendant sought confidentiality for an employee handbook that contained a pizza recipe. *See* DePriest v. Pizza Management Inc., No. 483, 464 (Travis County Dist. Ct., 53rd Jud. Dist., Tx. Sept. 17, 1990). In a malpractice action, the plaintiff sought confidentiality for personal bank account statements, personal income tax returns, real estate deeds, certificates of stock ownership, and certificates of title to motor vehicles. *See* McGowen v. Jones, No. 141-126533-90 (Tarrant County Dist. Ct., 141st Jud. Dist., Tx. Sept. 21, 1990). In a personal injury action, defendant sought confidentiality for design and sales information about a popular athletic shoe. *See* White v. Reebok Int'l, Ltd., No. 88-45391 (Harris County Dist. Ct., 125th Jud. Dist., Tx. Nov. 26, 1990). In another case involving a counterclaim for breach of contract and deceptive trade practices, the counter-plaintiff sought a court seal for records concerning the price and intended use of property involved in the contract dispute. *See* Lindsay v. Jacobs, No. 90-06657 (Harris County Dist. Ct., 165th Jud. Dist., Tx. Oct. 24, 1990).

[322] When all the parties support the protective order or seal, as often is the case when the defendant seeks confidentiality and the plaintiff wants to facilitate its own access to discovery materials, the court is faced with an essentially non-adversarial situation and must assume the duty of making an independent inquiry. A useful analogue is the "fiduciary" burden assumed by federal judges in evaluating a proposed class action settlement under Federal Rule 23(e). *See generally* 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1797.1, at 378–416 (2d ed. 1986) (detailing the issues a judge should consider). This seems to have been the approach taken in City of Hartford v. Chase, No. 91-7074, 1991 U.S. App. LEXIS 18995 (2d Cir. Aug. 14, 1991), which spoke of the court's "larger role" in this context. *See id.* at *15–16.

presence of a governmental agency with primary responsibility for the subject matter of the data. The burden imposed by carefully considering requests for protective orders is justified by the importance of the competing values at stake and is an effective way to conserve judicial resources. Because the current practice has become increasingly well-adapted to controlling discovery abuses, it can be expected to be more efficient in balancing the various interests than other alternatives.

By contrast, a regime that has a public access presumption and removes judicial discretion in shaping protective orders invites exploitation of the discovery process by those primarily seeking to gather information rather than to adjudicate a dispute. Moreover, the proposed public access regime holds out pernicious incentives not only to the parties to the litigation, but also to any curious member of the general public. In addition, retaining judicial discretion only requires judges to undertake a task that is familiar and appropriate to them — balancing the rights of the private parties before them. Shifting to a presumption of public access would require judges to assume the extrajudicial task of factoring in the interests of third parties and the public, which in turn would necessitate that judges become experts in the countless subjects that come before them — a task for which they are not necessarily equipped — and that they reach a decision outside the confines of a fully adversarial dispute.[323]

Trial courts generally should require the parties to the case or third parties to submit specific, written showings of why access should be granted, and they should feel free to review the documents in camera.[324] Based on their careful review, courts should deny disclosure of information worthy of protection unless the party seeking it establishes relevance, demonstrates a true need for the information, and shows that this need outweighs the potential harm to the party opposing discovery.[325]

When the information is subject to discovery, the question then becomes whether terms and conditions should be imposed to minimize the damage public availability of the information might cause. In

[323] *See supra* pp. 487–88.

[324] *See generally* G. I. Fodier, Annotation, *In Camera Trial or Hearing and Other Procedures to Safeguard Trade Secrets or the Like Against Undue Disclosure in Course of Civil Action Involving Such Secret*, 62 A.L.R.2d 509, 516–33 (1958) (discussing a procedure that could be used to protect trade secrets from public or other disclosure). Even the disclosures that occur in the process of adjudicating the protective-order question pose risks that must be guarded against. *See generally* Michael A. Pope, William R. Quinlan & Thomas L. Duston, *Protecting a Client's Secret Data*, NAT'L L.J., July 8, 1991, at 15 (emphasizing the importance of developing sophisticated judicial approaches to discovery that can protect confidential business secrets).

[325] It would be more difficult for third parties to satisfy the first two requirements than it would be for parties to the action. This outcome is both sensible and consonant with current law.

considering terms and conditions, courts should pay attention to the possible existence of any specific nonparty interests or the importance of public disclosure. It would be a mistake, however, to establish an elaborate public notice and intervention procedure — let alone provide for appellate review — each time a protective order is sought.[326] These procedures would delay and distract the litigation, increase the costs to the litigants, dissipate judicial energies, and in themselves would lead to a disclosure of some or all of the information. Instead, the court usually can rely on one of the parties to represent any outside interest or to notify those persons or institutions of the proceeding so that they may seek to intervene. Moreover, the media generally have their own methods for staying abreast of potentially newsworthy cases.[327] When these safeguards might not be effective, the court can use its discretion to require the parties to present any public health and safety concerns to the court or appoint a third person to do so.

When a party requesting protection has made a meritorious showing regarding the need for confidentiality but the judge nonetheless decides that the public interest in some of the information precludes completely sealing the records, the court should limit the information made available to that which is critical to the perceived public interest. Clearly, any confidential information unrelated to the potential harm, such as sensitive marketing or financial data, trade secrets, personal information, and a variety of other items, could and should be protected, even when it is appropriate to make some other portion of the information available to the public.

Even after the information is redacted and limited to that thought relevant to the public interest, the court must consider the proper mode of its disclosure. In most cases, release to an appropriate governmental agency or a limited number of people should suffice.[328] This solution places the information in the hands of those best situated to evaluate it and spares the judge from undertaking a detailed and time-consuming analysis to balance the likelihood of risk to the public against the harm to the disclosing party — an evaluation a judge is often ill-equipped to conduct.[329] If appropriate, further dissemination

[326] One of the least desirable aspects of some of the public access proposals is that they are heavily weighted with procedural requirements such as public notice, waiting periods, intervention proceedings, and rights to appeal. *See, e.g.*, TEX. R. CIV. P. ANN. r. 76a (West Supp. 1991).

[327] *See, e.g.*, City of Hartford v. Chase, No. 91-7074, 1991 U.S. App. LEXIS 18995, at *4–5 (2d Cir. Aug. 14, 1991).

[328] *See, e.g.*, Anderson v. Cryovac, Inc., 805 F.2d 1, 8 (1st Cir. 1986) ("In a case involving allegations that a city's water supply had been poisoned by toxic chemicals, the public interest required that information bearing on this problem be made available to those charged with protecting the public's health.").

[329] *See supra* pp. 488–90.

by the litigants and the outside recipients of the data must be prohibited.

This technique for limiting access has been used in other contexts, as when the government has a legitimate reason to intrude into the private affairs of its citizens, but the intrusion is limited to the particular persons and the purposes necessary to achieve the government's original objective.[330] Partial disclosure is also common practice in civil litigation when documents contain a mixture of information that falls both within and outside the work product doctrine.[331] Nevertheless, there may be instances when public dissemination is appropriate and no protective order should issue, although these occasions should be rare when the data is truly confidential.[332]

In addition, if confidential information is to be disclosed under a protective order, a court must define the terms of that release with precision.[333] The trial court should consider exactly who should have access to the data other than the discovering party's attorney, and for what purpose. The court must decide whether expert witnesses, support personnel, and other litigants and their attorneys are to have access.[334] Once again, the circumstances of the particular case should control. For example, when the litigation is between business com-

[330] *Cf.* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 4.5(b), at 236–37 (1985) (stating that the government must minimize the scope of intrusion during authorized electronic surveillance). Some information privacy statutes limit access to personal information on a need-to-know basis. *See, e.g.*, Federal Fair Information Practices Act, 5 U.S.C. § 552a (1988); Federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1988).

[331] *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 400 (1981).

[332] *Cf.* Note, *supra* note 205, at 1348–49 (proposing that, although failure to provide a protective order for trade secrets generally would work a taking under the Fifth Amendment, a narrow "nuisance" exception should apply to "allow public disclosure . . . only if limiting access would significantly endanger the public").

[333] Courts have great flexibility to shape protective orders in order to meet the needs of a particular case. *See* 8 WRIGHT & MILLER, *supra* note 14, § 2043, at 305–08. A good example of this flexibility is Maritime Cinema Serv. Corp. v. Movies en Route, Inc., 60 F.R.D. 587 (S.D.N.Y. 1973), which allowed the plaintiff to compel the defendant to answer certain interrogatories only on condition that the answers be seen by plaintiff's counsel but not by the plaintiff itself. *See id.* at 589–90.

[334] A number of courts have limited disclosure to parties' counsel and sometimes their expert witnesses. *See, e.g.*, Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 999 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965); General Elec. Co. v. Allinger, No. 91-316-FR, 1991 U.S. Dist. LEXIS 10878, at *4 (D. Or. Aug. 1, 1991); Ohm Resource Recovery Corp. v. Industrial Fuels & Resources, Inc., No. S90-511, 1991 U.S. Dist. LEXIS 10297, at *14 (N.D. Ind. July 24, 1991); Coca-Cola Bottling Co. v. Coca-Cola Co., 107 F.R.D. 288, 300 (D. Del. 1985). Courts have also prevented a governmental agency from using discovery material for purposes outside the litigation, *see* Harris v. Amoco Prod. Co., 768 F.2d 669, 686 (5th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), and have prevented a state from divulging information to the public and to government employees other than designated workers who signed confidentiality affidavits, *see* New York v. United States Metal Ref. Co., 771 F.2d 796, 805 (3d Cir. 1985).

petitors, the court must take seriously the claim that disclosing research and development information to the opposing party can have serious negative marketplace consequences. It is unrealistic to believe that even well-intentioned scientists and managers can purge their minds of an opponent's commercially valuable information once it is disclosed through discovery. In some cases, it may be necessary to limit distribution to the discovering party's attorneys — perhaps even restricting it to outside counsel — under carefully drawn conditions. In other cases, the discovery objectives can be achieved by using a neutral third party or master to screen the material. In another group of cases, disclosure to the opposing party will not have any special adverse consequences, and these types of precautions will be unnecessary.

As already indicated,[335] disclosure to experts poses special difficulties and risks. If experts are to be granted access, the terms and conditions should be defined with care, and the recipients should be brought under the court's control by having them sign a pledge to adhere to the order's limitations. The court also must consider whether photocopying or computerization is to be permitted and when and on what terms the original material and any copies are to be returned to the owner.[336] Anyone receiving the protected data should be made responsible for maintaining its confidentiality and for impressing that obligation on their employees. The court should be especially careful when materials belonging to nonparties are involved.

In addition to minimizing the risks to the disclosing party, courts must allocate their resources wisely. To avoid increasing the court's workload unnecessarily, a determination regarding the public's interest in discovery materials or settlement terms and any supervision of the release may be obviated if the information can be procured from an alternative source in substantially equivalent form. This requirement is analogous to the practice under Federal Rule 26(b)(3) and under similar rules in most states regarding the discoverability of work product.[337] If the information is otherwise available, grappling with the protective order issue and imposing a supervisory burden on the courts is not justified.[338]

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[335] *See supra* p. 471.

[336] *See, e.g.*, *Allinger*, 1991 U.S. Dist. LEXIS 10878, at *4.

[337] *See* Upjohn v. United States, 449 U.S. 383, 400 (1981).

[338] *See* City of Hartford v. Chase, No. 91-7074, 1991 U.S. App. LEXIS 18995, at *16 (2d Cir. Aug. 14, 1991) (concluding that a confidentiality order should only be issued after a careful, particularized review); *cf.* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 761 (1989) (arguing that, if federal agencies were required to disseminate information to the public about private individuals merely because the information was contained in public records, the government would be "transformed in one fell swoop into *the* clearinghouse for highly personal information, releasing records on any person, to any requestor, for any purpose").

Discovery sharing is a particularly interesting problem. It can take either of two forms: the discovering party seeks to share the fruits of its efforts with an outsider engaged in similar or related litigation, or an outsider tries to gain access to the fruits of discovery independent of the litigants' desires. Courts have not been consistent in their treatment of these situations;[339] the nature of the problem probably makes that inconsistency inevitable.

It is difficult, and indeed unwise, to have an absolute prohibition on discovery sharing, given the extraordinarily high cost of litigation and the reality that discovery accounts for the largest component of that expense in many cases. Barring sharing smacks too much of requiring each litigant to reinvent the wheel, and not surprisingly it has been rejected on that basis by some courts.[340] As Judge Wisdom has put it, there "is no reason to erect gratuitous roadblocks in the path of a litigant who finds a trail blazed by another."[341] But always permitting sharing would be a mistake as well. Once again, leaving the decision to permit or deny sharing in the judge's discretion seems the best course to follow.

Certainly, discovery sharing should not be left to the whims or private interests of individual parties. In analyzing a discovery sharing request, the court's central inquiry should be whether granting the request will actually promote litigation efficiency and fairness. Thus, the court should be particularly hesitant when the sharing seems motivated by a desire to commercialize the data by selling it to other

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[339] The cases allowing sharing include Wilk v. AMA, 635 F.2d 1295 (7th Cir. 1980); Wauchop v. Domino's Pizza, Inc., No. S90-496(RLM), 1991 U.S. Dist. LEXIS 11694 (N.D. Ind. Aug. 6, 1991); Nestle Foods Corp. v. Aetna Casualty & Sur. Co., No. 89-1701(CSF), 1990 U.S. Dist. LEXIS 12137 (D.N.J. Jan. 25, 1990); United States v. Kentucky Utils. Co., 124 F.R.D. 146 (E.D. Ky. 1989); and Deford v. Schmid Prods. Co., 120 F.R.D. 648 (D. Md. 1987). Cases denying sharing include Scott v. Monsanto Co., 868 F.2d 786 (5th Cir. 1989); Palmieri v. New York, 779 F.2d 861 (2d Cir. 1985); and Mampe v. Ayerst Labs., 548 A.2d 798 (D.C. 1988). *See generally* Gary L. Wilson, Note, Seattle Times: *What Effect on Discovery Sharing?*, 1985 WIS. L. REV. 1055 (arguing that the use of *Seattle Times* as a legal support against discovery sharing is improper); Thomas M. Fleming, Annotation, *Propriety and Extent of State Court Protective Order Restricting Party's Right to Disclose Discovered Information to Others Engaged in Similar Litigation*, 83 A.L.R. 4TH 987 (1991) (analyzing cases that have considered protective orders for the disclosure of discovered material to similarly situated litigants and observing that state courts generally disapprove of categorical prohibitions on disclosure but are willing to impose restrictions to protect trade secrets). The new Virginia statute expressly authorizes the sharing of discovery materials that are under a protective order. *See* VA. CODE ANN. § 8.01-420.01 (Michie Supp. 1991).

[340] *See, e.g.*, Wauchop v. Domino's Pizza, Inc., No. S90-496(RLM), 1991 U.S. Dist. LEXIS 11694, at *13 (N.D. Ind. Aug. 6, 1991); Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982); Patterson v. Ford Motor Co., 85 F.R.D. 152, 153-54 (W.D. Tex. 1980); *see also* Baker v. Liggett Group, Inc., 132 F.R.D. 123, 126 (D. Mass. 1990) (issuing a protective order authorizing disclosure of confidential materials to other tobacco tort litigants, under appropriate restraints).

[341] Wilk v. AMA, 635 F.2d 1295, 1301 (7th Cir. 1980).

attorneys rather than by a desire to promote litigation efficiency[342] or when the action itself was brought to gain access to discovery.[343] The judge should consider whether the benefits of making the material available in other lawsuits and the economies achieved when lawyers collaborate in preparing their cases outweigh the likelihood of increasing discovery disputes in the original lawsuit and the other deleterious consequences of dissemination. For example, when a single event has given rise to complex or multidistrict litigation, the adjudicatory system will often be well-served by allowing the pooling of discovery materials in all the suits, particularly when some have been consolidated for pretrial or all purposes.[344] The same occurs naturally when disputes are aggregated into a class action.

The problem is somewhat more difficult when the cases in which the protected data would be used are not fused with the one in which

[342] In Campbell, *supra* note 11, the author suggests that there are financial rewards in vending discovery materials. *See id.* at 774; *see also* Brad N. Friedman, Note, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered by a Protective Order*, 60 N.Y.U. L. REV. 1137, 1155–58 (1985) (discussing the ethical implications of compensation raised by information markets in discovered material). Although the commercialization of discovery material cannot be condoned, particularly when it contains proprietary data, it may be appropriate to allow a plaintiff to recoup the costs incurred in developing the information. *See* Marcus, *supra* note 9, at 498–99; *cf.* Edward F. Sherman & Stephen O. Kinnard, *Federal Court Discovery in the 80's — Making the Rules Work*, 95 F.R.D. 245, 289 (1982) (proposing the imposition of a duty on the plaintiff to make discovery available to others without "undue" profit). Unfortunately, only the court is in a position to make a neutral judgment as to what is reasonable, and requiring courts to make those judgments would divert scarce judicial resources.

[343] *See generally Wilk*, 635 F.2d at 1300–01 (implying that a party bringing suit solely to obtain discovery material would not be entitled to a "day in court"); *Wauchop*, 1991 U.S. Dist. LEXIS 11694, at *15 (recognizing that a different result would be appropriate "if litigation was commenced solely for purposes of engaging in discovery"); *Patterson*, 85 F.R.D. at 154 (allowing the full use of information in other forums absent a showing that the "discovering party is exploiting the instant litigation solely to assist litigation in a foreign forum").

[344] *See, e.g.*, *In re* Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 81 F.R.D. 482, 484 (E.D. Mich. 1979) (vacating a protective order and thereby allowing state court plaintiffs to share discovery information with consolidated federal multidistrict litigation plaintiffs), *aff'd*, 664 F.2d 114 (6th Cir. 1981).

Numerous proposals in recent years suggest that a substantial increase in the aggregation of related lawsuits is likely in the future. *See, e.g.*, 136 CONG. REC. H3116–19 (daily ed. June 5, 1990) (voting to pass the Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess.); AMERICAN BAR ASS'N, REPORT OF THE COMMISSION ON MASS TORTS (1989); JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 91, at 44–45 (proposing an amendment to a multidistrict litigation statute to permit consolidated trials as well as pretrial proceedings); American Law Inst., Complex Litigation Project (Tentative Draft No. 4) §§ 4.01–.02, at 25–92 (Sept. 19, 1991) (providing for the transfer of related cases from federal to state court as well as from state to state); American Law Inst., Complex Litigation Project (Tentative Draft No. 2) §§ 3.01–.10, at 1–26 (Apr. 6, 1990) (proposing federal intrasystem consolidation and transfer, including trial); *id.* §§ 5.01–.05, at 33–129 (discussing a proposed complex litigation statute for federal-state intersystem consolidation); National Conference of Comm'rs of Uniform State Laws, Transfer of Litigation Act (July 1991).

it is originally produced and the relationship is somewhat attenuated or when the cases are dispersed in multiple judicial systems. Still, a collaborative approach in handling related litigation of this type may be best. The court must scrutinize these situations with extreme care, and it should communicate with the judges in the other pending actions when that seems desirable. Of course, if confidential information is to be shared among litigants, they all should be subject to the court's restrictions on further dissemination or any other limitations it might initially have ordered.[345] Again, the participation of the judges handling the related cases would be desirable.

The least sympathetic case for discovery sharing is presented by a request for access on behalf of someone who is merely contemplating the commencement of litigation. The risk of a fishing expedition or some other form of mischief is greatest in this context. The safest course seems to be denial of discovery sharing until the requesting party actually has begun a lawsuit, unless he demonstrates extraordinary need. This requirement will maximize the likelihood that the sharing has a legitimate litigation purpose, that the actions have a relationship to each other so that some discovery economy actually will be achieved, and that the requester is subject to the authority of a court, which might prove valuable for sanctions purposes.

An important and related problem arises when parties seek access to material that was previously disclosed under a protective order.[346] Because that order presumably was issued to prevent harm to the litigants and to promote cooperation during discovery, the court should consider the overall effect of modifying or eliminating that protection.[347] The critical question is to what degree not giving continued effect to earlier protective orders will diminish their efficacy as a discovery management device. To the extent that the parties relied on the protective order when they freely disclosed information without

[345] *See, e.g.*, United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1428 (10th Cir. 1990) (allowing discovery sharing but imposing on the third party "the restrictions on use and disclosure contained in the original protective order"), *cert. denied*, 111 S. Ct. 799 (1991).

[346] Requests for modification of protective orders are relatively common and are subject to varying treatment by courts. *See, e.g.*, Westchester Radiological Ass'n P.C. v. Blue Cross/Blue Shield of Greater New York, Inc., No. 85-CV-2733(KMW), 1991 U.S. Dist. LEXIS 9216 (S.D.N.Y. July 3, 1991); *see also* HARE, GILBERT & REMINE, *supra* note 11, § 6.11, at 144 (discussing cases on order modification); 8 WRIGHT & MILLER, *supra* note 14, § 2042, at 299 n.13 (1970 & Supp. 1991) (same); Robin C. Larner, Annotation, *Modification of Protective Order Entered Pursuant to Rule 26(c), Federal Rules of Civil Procedure*, 85 A.L.R. FED. 538 (1987 & Supp. 1990) (same).

[347] *See* Béchamps, *supra* note 255, at 130 (1990); *see also* Grundberg v. Upjohn Co., No. C-89-2746, 1991 U.S. Dist. LEXIS 14991 (D. Utah Oct. 4, 1991) (considering all relevant factors to determine whether changed circumstances warranted the modification of a protective order); All-Tone Communications, Inc. v. American Info. Technologies, No. 87-C-2186, 1991 U.S. Dist. LEXIS 10096, at *6 (N.D. Ill. July 18, 1991) (adopting the view that a court should consider the circumstances leading up to production prior to releasing judicial records).

further contesting the discovery requests,[348] subsequent dissemination would be unfair.[349] A graphic illustration of this injustice would be a party or witness who chooses to forego a plausible claim of privilege under the assurance that a protective order will shield the communication from subsequent disclosure.[350] Conversely, compulsory disclosure of information to a governmental or public entity under circumstances that make it accessible to the public, a significant passage of time, or a change in other circumstances may undermine the credibility of any claim of reliance. Indeed, some of these events might vitiate the data's sensitivity to the point of assuring that its release will not cause any injury to the original parties. If the information implicates personal privacy, however, in certain circumstances the passage of time may strengthen the privacy interest and militate against modification of the protective order.[351]

Quite understandably, a court's reaction to a modification request should depend in part on the nature of the information and the type of modification that is sought. The protection of sensitive personal or commercial information should be continued. But if the material could improve the efficiency of handling other lawsuits without jeopardizing the rights of the parties to the protective order, modification may be appropriate.

Beyond unfairness to particular parties is the reality that, the more readily protective orders are destabilized, the less confidence litigants will have in them. If protective orders are not reliable, people will be more likely to contest discovery requests when private or commercially valuable data is involved. A protective order can be effective as a management tool and as a mechanism for preventing discovery abuse only if parties believe it is credible. If the parties know that the protective order can be abrogated easily, cooperation in discovery would be compromised and one significant incentive to settle would

[348] *See, e.g.*, H L. Hayden Co. v. Siemens Medical Sys., 130 F.R.D. 281, 282 (S.D.N.Y. 1989); Tavoulareas v. Washington Post Co., 111 F.R.D. 653, 658–59 (D.D.C. 1986); *In re* Consumers Power Co. Sec. Litig., 109 F.R.D. 45, 55 (E.D. Mich. 1985).

[349] *See, e.g.*, Martindell v. ITT Corp., 594 F.2d 291, 295–96 (2d Cir. 1979); *see also Westchester*, 1991 U.S. Dist. LEXIS 9216, at *17 (modifying a confidentiality order to permit the disclosure of documents and testimony given before an order was in place). One court has suggested that "some element of a breach of faith" is involved. *In re* Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, 18 Fed. R. Serv. 2d (Callaghan) 1251, 1252 (N.D. Cal. 1974).

[350] The unfair consequences are not limited to the parties. Indeed, a nonparty witness who testifies under the aegis of a protective order only to have his guarantee of confidentiality eliminated by a modification of the order quite properly can feel aggrieved.

[351] For example, in United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989), the Court refused to require that the press be given access to ten-year-old criminal records; it found that any public interest in the criminal activity had been vitiated by the passage of time and that the subject of the record now had a protectable privacy interest that did not exist at the time the criminal act originally took place. *See id.* at 762–71.

be reduced. Thus, unless strong evidence exists that a litigant did not rely on the existence of a protective order during discovery (for example, when the party continued to resist reasonable discovery requests) or that no legitimate interest exists in maintaining confidentiality, the balancing of the competing values that led the initial trial court to issue the order should not be undermined in a later proceeding.[352] The reality seems obvious: for protective orders to be effective, litigants must be able to rely on them.[353]

VIII. CONCLUSION

When all of the elements in the confidentiality and public access debate are placed on the scales, the balance clearly favors retaining the essence of the present practice. Courts should continue to use their discretion to protect parties' legitimate litigation, privacy, and property interests, and the parties should retain their rights to negotiate protective and sealing agreements voluntarily, subject to judicial veto in the exceptional case. This practice seems wise, because it leaves our judges free to consider the public interest and to further it when circumstances so require. Moreover, on the whole, judges appear to have exercised this authority appropriately in the past, and there is no reason to believe that their performance will change, especially if they are encouraged to continue their current practices. Because the court is the only neutral participant in the litigation process, it seems appropriate to leave the decisionmaking process with it.

Further, no evidence has been presented that the current practice has created significant risks to public health or safety. At a minimum, therefore, before we rush sheeplike down the path chosen by Texas, Florida, and Virginia and create anything in the nature of a presumption of public access, we must evaluate carefully the public health and safety claims to determine whether a problem exists. Certainly, no evidence has emerged to date that comes close to justifying the fundamental changes in the process sought by those advocating them, especially when the negative effects of these changes would be

[352] *See* Palmieri v. New York, 779 F.2d 861, 862 (2d Cir. 1985) ("[A]bsent an express finding by the district court of improvidence in the magistrate's initial grant of the protective orders or of extraordinary circumstances or compelling need by the State for the information protected thereunder, it was error for the district court to modify the magistrate's orders."); New York v. United States Metals Ref. Co., 771 F.2d 796, 805 (3d Cir. 1985) (concluding that the district court did not abuse its discretion by including a report under a protective order on the basis of irreparable harm to defendant and the absence of public welfare concerns).

[353] *See generally* Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 18 (1983) (questioning whether litigants can still rely on protective orders).

felt in the vast majority of civil cases, which have nothing to do with public health or safety.

Despite protestations to the contrary, the existing system gives the public, including the media, virtually unfettered access to the courts and court records. The presumption advocated by the current public access campaign undermines the greater judicial control necessary for discovery and pretrial reform, and it comes at a time when the need for treating certain types of litigation information confidentially never has been greater. It would be folly to allow undocumented claims to move our complex and integrated procedural systems in the wrong direction.

The current debate has been quite useful, however. It has called the attention of the bench and bar to the importance of the underlying issues[354] and has increased everyone's awareness of the importance of both confidentiality and public access. The controversy should counteract any existing tendencies by judges to issue protective and sealing orders perfunctorily or cavalierly. If that awareness is coupled with a judicial willingness to follow the procedural requirements proposed earlier for resolving clashes between confidentiality and disclosure, the debate will have served a valuable purpose.

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[354] *See, e.g.*, John F. Rooney, *Issue of Sealed Files, Secrecy in the Courts Won't Be Swept Under the Rug*, CHI. DAILY L. BULL., Apr. 20, 1991, at 1 (chronicling the increase in judicial sensitivity toward sealing orders).

SHOULD THE LAW PROHIBIT "MANIPULATION" IN FINANCIAL MARKETS?

Daniel R. Fischel and David J. Ross***

I. INTRODUCTION

Much of the regulation of financial markets seeks to prevent manipulation. The drafters of the Securities Act of 1933[1] and the Securities Exchange Act of 1934,[2] for example, were convinced that there was a direct link between excessive speculation, the stock market crash of 1929, and the Great Depression of the 1930s. Thus, section 2 of the Securities Exchange Act states:

> National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets . . . .[3]

Of particular concern to the drafters, as they repeatedly emphasized in the legislative history, were the well-publicized "pools" dating from the mid-nineteenth century in which perceived combinations of issuers, underwriters, and speculators, by their trading activities, allegedly caused wild fluctuations in security prices.[4]

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The authors would like to thank Frank Easterbrook, William Landes, Louis Loss, Andrew Rosenfield, and seminar participants at the Law and Economics Workshops at Harvard University and the University of Chicago for valuable comments.

[1] Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a–77aa (1988)).

[2] Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a–78*ll* (1988)).

[3] 15 U.S.C. § 78b(4) (1988).

[4] The legislative history of the securities laws, including the concern about the "pools," is exhaustively analyzed in Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 424–61 (1990) [hereinafter Thel, *Original Conception*]; and Steve Thel, *Regulation of Manipulation Under Section 10(b): Security Prices and the Text of the Securities Exchange Act of 1934*, 1988 COLUM. BUS. L. REV. 359, 362–82 [hereinafter Thel, *Manipulation Under Section 10(b)*]. *See also* TWENTIETH CENTURY FUND, INC., THE SECURITY MARKETS 445 (Alfred L. Bernheim & Margaret G. Schneider eds., 1935) ("[T]he more important [manipulative] market campaigns . . . are the work of groups organized into syndicates, pools or joint accounts."); Norman S. Poser, *Stock Market Manipulation and Corporate Control Transactions*, 40 MIAMI L. REV. 671, 691 (1986) ("Beginning at least as early as the middle of the nineteenth century and continuing until the very time that Congress considered

180.260 Service of process by department employees. (1) Notwithstanding ORCP 7 E. or any other law, employees and officers of the Department of Justice other than attorneys may serve summons, process and other notice, including notices and findings of financial responsibility under ORS 416.415, in litigation and other proceedings in which the state is interested. No employee or officer shall serve process or other notice in any case or proceeding in which the employee or officer has a personal interest or in which it reasonably may be anticipated that the employee or officer will be a material witness.

(2) The authority granted by subsection (1) of this section may be exercised only in, and within reasonable proximity of, the regular business offices of the Department of Justice, or in situations in which the immediate service of process is necessary to protect the legal interests of the state. [1989 c.323 §2]

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OUR FILE NO.

(503) 772-9034

December 19, 1991

Fredrick R. Merrill
University of Oregon
School of Law
Eugene, OR 97403

Re: ORCP 54A. (1)

Dear Fred:

When one of several defendants prevails on a motion to dismiss, and the plaintiff's attorney decides not to proceed further against that defendant, yet doesn't feel inclined to comply with ORCP 54A (c), or when a plaintiff otherwise decides to discontinue the action against a particular defendant, he merely files an amended complaint omitting that defendant. If that omitted defendant wishes to bring the case to termination against him as of record, and file a cost bill, that omitted defendant must move the court for an order dismissing him from the action. Otherwise, the composition of the parties remains in doubt until judgment, and sometimes the change in parties is overlooked. To say the least, this makes for a sloppy record.

My suggestion: Amend ORCP 54.A (1) to insert after the first sentence the following: "Filing an amended complaint that omits a defendant operates as a notice of dismissal as to that defendant."

What little authority I could quickly find supports the proposal; 27 CJS 478, Dismissal & Nonsuit §75 fn 46.

Sincerely,

HUGH B. COLLINS/dez

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January 7, 1992

Council on Court Procedures
c/o Frederic C. Merrill
Executive Director
University of Oregon
School of Law
Eugene, OR 97403-1221

Re: January 11, 1992 Meeting
Consideration of Six-person Juries

Dear Mr. Merrill:

This letter and enclosed articles are submitted in opposition to a reduction of jury size from 12 to 6. The Council wisely prevailed on the legislative judiciary committees to refer the matter to the Council for more study and appropriate action. The Oregon Association of Defense Counsel (OADC) opposed the proposed cost-saving measure before the judiciary committees because of the absence of a showing of effective cost savings and the absence of information of the potential effect on the judicial system.

Research now suggests that bigger is better and smaller saves little time or money. In June, 1990, the National Center for State Courts, released the results of their two-year study of civil trials in Los Angeles for the Judicial Council of California. The study revealed no significant savings of either time or money with the reduced eight-person juries. Furthermore, the study confirmed what numerous studies have confirmed -- **that small jury panels reduce minorities' participation; they are less representative of the communities from which they are drawn.**

The sanctity of 12 as the magic number for a jury has been the subject of a number of U.S. Supreme Court cases, particularly six cases decided in the '70s which dealt with the constitutionality of jury decisions reached by juries with fewer than 12 members. In the first of these cases, Williams v. Florida, (1970), the court cited six studies as evidence that there is no discernible difference between the process used and the results reached by the two differed-sized juries.

However, when social scientists reviewed those six studies, they found them flawed, unverifiable, based on eyewitness opinions by individuals who were not trained observers, and generally unscientific and unreliable. The critics of the U.S. Supreme Court's decisions in these cases state that "the court's use of empirical evidence is uniformly dreadful." They go on to advance the proposition that there is a considerable body of social science which makes a case for the superiority of 12-member juries over six.

In her 1991 article on the subject, written for the Tennessee Bar Journal, Dr. Lucy Keele, a Ph.D. from the University of Oregon and now on the faculty of the California State University, says that the real issue in evaluating the relative merits of various sized juries is how well each reflects the varying values of the given community and how well each jury completes its task, which is to carefully evaluate the case before it and come to the best possible decisions. When you analyze the criteria for measuring a jury's effectiveness -- demographic representation, the deliberation process, group dynamics on conformity, individual participation in the process, and quality -- studies recommend 12 over 6. She points out that both the Litigation Section and the Torts and Insurance Practice (TIPS) Section of the ABA have adopted platforms in favor of retaining and restoring 12-person juries based on the findings of these studies.

These reports put in question whether the objective of cost savings can be achieved, and suggest that the quality of our system will suffer by reducing juries to six.

Very truly yours,

Ronald E. Bailey

REB/jlc
Enclosures:
- 27 Tennessee Bar Journal, Keele, Lucy M. (Jan-Feb 1991)
- ABA Articles Summarizing Los Angeles County Study

cc: Henry Kantor (w/o enc.)

An Analysis of Six vs. 12-Person Juries

By Lucy M. Keele, Ph.D.

The litany of court woes is long and well-known: congestion, case backlog, administrative costs. State and federal courts are desperate to find ways to ensure justice while moving cases along in a more timely fashion.

Our modern jury system is a direct descendent of the English jury system which had its beginnings in the 11th century. In its infancy, the jury was both witness and trier of fact, and the importance of a case was revealed by the size of the jury — seriousness of the crime as well as number of witnesses determined the jury's size which could be as large as 48 people. By the 14th century, jury size was standardized into a 12-member body of men whose sole duty was to make a decision of guilt or innocence based on fact.

In the American colonies, the 12-person jury was established in 1607 by the Charter of Jamestown. From this beginning, it was fully incorporated into the American legal system of the young nation via Article III, Section 2 of the Constitution, which secured the right to a jury trial in all common law actions in the federal courts where the matter in controversy exceeds the sum of $20. This right was extended to state criminal prosecutions by the 14th Amendment. State constitutions generally extend express guaranties of the right to a jury trial in civil and criminal matters. In both the civil and criminal arenas, the option to have factual controversies adjudicated by a jury of one's peers remains a fundamental right.

The sanctity of 12 as the magic number for a jury was first questioned in *Thompson vs. Utah* (1898), when the Supreme Court held that the Constitution required a 12-member jury in federal criminal cases; this opinion was later upheld in *Capital Traction vs. Hog* (1899) when the Court held that federal civil trials also required 12-member juries. As early as 1900, however, the 12-person jury at the state level was undermined when the court upheld the constitutionality of an eight-member jury in a state civil case (*Maxwell vs. Dow*). Seventy years later, a Florida statute was upheld in *Williams vs. Florida* (1970), when the court held that a six-person jury was sufficient to try any non-capital criminal case. Three years later, the Court held in *Colgrove vs. Battin* (1973) that in civil trials there is no measurable difference in the quality of decisions made by six or 12-member juries. Six-person juries are the rule in federal civil cases, while criminal trials in federal court require 12 persons as triers of fact. Forty states allow for juries ranging in size from six to 10 for civil trials; only 10 states continue to require 12.

Unanimous versus non-unanimous verdicts have also been the subject of recent court decisions: in *Johnson vs. Louisiana* (1972) and *Apodaca vs. Oregon* (1972), the court held that non-unanimous verdicts of nine out of 10 and 10 out of 12 were sufficient for determining the guilt or innocence of an accused. In 1979, the Supreme Court ruled that unanimous verdicts in criminal trials were required if the jury numbered only six (*Burch vs. Louisiana*).

The old phrase "necessity is the mother

Dr. Lucy Keele, communications specialist, works with witnesses and attorneys to improve their ability to communicate effectively to jurors. Dr. Keele has a Ph.D. in speech communications from the University of Oregon and is on the faculty of the California State University.

of invention" comes to mind when considering the impetus for juries numbering fewer than 12 and for non-unanimous verdicts as a basis for decision-making. The litany of court woes is long and well-known: congestion, case backlog, administrative costs. State and federal courts are desperate to find ways to ensure justice while moving cases along in a more timely fashion. The primary reasons most frequently offered for reducing jury size are: 1) reduction in jury size will correspond to less cost to maintain the system; 2) the time spent by judges, lawyers, clerks and jurors is better spent if the jury size is reduced; 3) judges' expertise and experience can effectively take the place of a jury; and 4) the difference between 12 and six is insignificant as set forth in both *Williams* and *Colgrove*.

For the past 20 years, social scientists, court administrators and legal scholars have debated the merits of juries numbering fewer than 12. The rationale for jury size reduction has been the subject of sharp critique, and the bases on which the Court made its decisions are generally debunked as non-scientific research, warranting a critical review of the arguments in favor of six-person juries.

Cost and Time

Chief Justice Burger estimated in 1971 that reducing the size of federal civil juries to six would result in an annual savings of $4 million. This figure represents a modest 2.4 percent of the total federal judicial budget for that year and a little more than one thousandth of one percent of the federal budget of that same year. The empirical data referenced in the Court's response to the economic advantage were in part taken from evidence offered by Judge Lloyd L. Wiehl in 1968. He stated that in a Massachusetts District Court experiment, six-member juries resulted in prompt trials and lower costs. He concluded that there would be at least a one-third savings in public funds if the size of juries were reduced.

To substantiate their claim that the six-member jury is more efficient, hence saving time and money, the Supreme Court cited a study conducted by W. Pabst in which he reviewed the District of Columbia U.S. District Court as it was undergoing a transition from 12 to six-person juries. During the first half of 1971, 69 civil cases were tried by 12-person juries; during the second half, 78 cases were tried by six-person juries. From the data collected, the court announced a savings of 41.9 percent in direct person-hours per trial due to reduced jury size. In 1972, however, Pabst undermined the court's conclusions drawn from his study when he wrote that overall savings may be related more directly to the size of the panels that the juries are selected from than to the reduction in direct juror hours. Pabst's calculations were based on four factors: average time of *voir dire*, average trial time, average number of people on jury panels and the size of the jury (six versus 12). His data revealed that the average time for *voir dire* (52 minutes for six-person juries vs. 52.1 minutes for 12-person juries) in six and 12-member juries was virtually identical. These two factors are the only ones that directly relate to actual time used in court; the data reveal no actual court time saved by reducing the jury size.

The size of the jury panel is directly related to the administrative capacity of the court to manage juror usage. The reduction from 27.54 people used to impanel a 12-person jury compares to 21.67 people needed to select a six-person jury; this represents a reduction in person-hours of 21 percent instead of the 41.9 percent overall reduction cited by the Court. The other 20.9 percent of saved person-hours is attributed to the difference found when multiplying the number of jurors by the number of persons in the panel from which the jury is chosen; this number is significant because it reveals that in a jury of 12, six more people are spending person-hours in jury duty. According to Pabst's data, the court is not affected by the extra person-hours cited. The only ones affected are the six jurors who spend their time in court.

A Federal Judicial Center Study (1971) buttressed Pabst's conclusions. Their data show that Federal District Court judges spend 8 percent of their total working time trying civil jury cases. Estimating that impaneling the jurors takes about 10 percent of the trial time, then only 10 percent of eight percent (or just under one percent) of the judge's total working time is consumed impaneling juries. Intuitively, it may seem that a reduction in jury size would take less judicial time, but because in most federal courts the jurors are examined by the judge who usually directs his/her questions to all jurors at once, there are no savings. Even if impaneling time were cut in half, the amount of time saved is only four-tenths of one percent of the judge's total working time. Studies conclude that it takes one and one-half minutes longer to impanel a jury of 12 than a jury of six.

Another aspect of the time rationale for a six-person jury is that attorney time and jury's decision-making time can be shortened. Citing a New Jersey study, the Supreme Court reported in the *Williams* decision that the hour savings was from 11 hours to 5.6 hours. Hans Zeisel observed, however, that this study was conducted in a jurisdiction in which the litigants had a choice of jury size; the larger juries tried the more complicated cases, necessitating longer deliberation time.

Finally, deliberation time is a factor influencing decisions about jury size. Although generally unsupported by statistical evidence, advocates of the six-person jury claim that the deliberation time will be reduced in relation to the reduced jury size — fewer jurors, less time to reach a decision. An alternative explanation, even if this equation holds, would be that "majority persuasion" is more effective in a smaller group. Smaller juries may be faster, but this does not necessarily mean they are more effective than, or even as effective as larger juries.

Functional Considerations

The functional differences between six and 12-person juries were explored in the *Williams* decision. The Court cited six studies as evidence that there is "no discernable difference between the result reached by the two different sized juries." Unfortunately, the Court may have overstated the case of functional equivalence between juries of six and 12. To qualify the "studies" as verifiable is questionable when the six studies are reviewed: 1) Judge Wiehl cited Charles Joiner when Joiner asserted "it could easily be argued that a six-man jury would deliberate equally as well as one of 12." However, Joiner offered no supporting evidence, so Wiehl's conclusion is flawed; 2) five-person juries used

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in the District of Columbia were presided over, in part, by Judge Tamm, who said they were "satisfactory" — hardly solid evidence; 3) Cronin based his conclusions regarding the success of the Worchester, Mass., experiment on interviews with the court clerk and three attorneys involved in cases, none of which resulted in a verdict of more than $2,500. The court clerk said "six-member jury verdicts are about the same as those returned by 12-member juries." The three lawyers said they could not detect any differences in verdicts rendered by juries of different sizes. These data are hardly substantive; 4) the Court's fourth cited authority consisted of a summary of Cronin's study and the Massachusetts experiment. Again, lawyers and clerks are quoted as saying there are no differences. This does not constitute evidence; 5) an article from the *ABA Bulletin* noted that the Monmouth, N.J., County Court had experimented with a six-person jury in a civil negligence case. Simple reporting is not evidence; 6) a summary of the economic advantages found by a Connecticut law which allowed litigants to choose a six-member jury was offered. No mention was included of the quality of the jury's decision.

Nearly all of the evidence used to support the *Williams* decision relies solely on eyewitness opinion by individuals who are not trained observers and who are not necessarily proceeding from any recognized and consistent assumptions regarding the goals of jury decision-making.

Similarly, the 1973 *Colgrove vs. Battin* decision finding no difference in quality between six and 12-person juries was based on flawed research. In support of their decision, the justices cited four recent studies providing "convincing empirical evidence of the correctness of the *Williams* conclusion that there is no discernible difference between the results reached by the two different sized juries." The first study was based on 128 workman compensation trials in which six jurors were used unless the litigating parties requested 12. The fact that a 12-member jury costs twice as much to the litigant suggests that the choice was not made randomly. The second study was the New Jersey study comparing six and 12-person juries in simple and complex litigation (drawbacks of this study were noted earlier). The third study cited was conducted by the University of Michigan, utilizing a laboratory setting in which different sized juries were shown a videotaped trial, after which they deliberated. The researchers concluded that after hearing the same testimony and given ample deliberation time, six and 12-person juries reached similar decisions. The major problem with this research, however, is that the case was heavily weighted in favor of the defense; in the pre-deliberation vote, 10 of the juries already had the necessary 10 of 12 or five or six to render a verdict. The final study cited in *Colgrove vs. Battin* reviewed the Michigan court before and after six-member juries were instituted. The authors conclude no discernable difference. Their conclusions would be stronger had other court changes not been instituted simultaneously, such as the formation of a mediation board and modification of procedural rules. This last study is not negated, but it is not strong enough to conclude that six and 12-person juries are alike.

In June 1990, The National Center for State Courts released the results of their two-year study of 133 civil trials in municipal court in Los Angeles for the Judicial Council of California. State law in California currently allows six-person juries in civil trials when both lawyers agree. The Los Angeles study revealed no significant savings of either time or money with the reduced jury size.

The *Williams* decision did, however, set up criteria by which the effectiveness of a jury could be judged. The Court determined that a reduction in size would not adversely affect the quality of a jury's decision if the following were to remain intact: 1) the assurance of a fair possibility of obtaining a representative cross-section of the community; and 2) the requirement that group deliberation take place. Research that relates jury size to these two goals is imperative.

Demographic Representation

The real issue in evaluating the relative merits of various sized juries is how well each jury reflects the varying values of people in a given community. Since there are few verifiable data to conclude that six is preferable to 12 in dimensions of cost, efficiency, and time savings, the question for interested parties is how well each jury completes its task, which is to carefully evaluate the case before it and come to the best possible decision.

Nancy McDermid, Ph.D. and LL.D., sharply criticized the notion that research on six versus 12-person juries was revealing. She argued vigorously that a serious limitation of most of the studies is that there is very little recognition of the underlying premise of trial by jury, which is not that the jury should make a quick decision or come to agreement on some kind of "right answer," but rather, that the jury should consider all the evidence before reaching a decision.

Dr. McDermid posits that most research does not take into account the absolute need of the jury to reflect community values. Hans Zeisel supports this concern when he reasons that although no individual 12-member jury can be expected to be fully representative of all competing community values, a six-member jury is even less likely to be so. Zeisel demonstrates statistically that a six-person jury is much less likely to match community norms than a 12-person jury.

The most serious indictment of the smaller jury is the decreased likelihood of minority representation. Numerous studies have confirmed that small jury panels reduce minorities' participation. Zeisel suggests that on more than one occasion when the jury is reduced from 12 to six persons, it is less representative of the community from which it is drawn. He calculated that a 12-person jury is one and one-half times as likely as a six-person jury to have at least one minority member. Zeisel articulates the impact of the less representative character of the six-person jury when he notes that such a jury is not a true reflection of community attitudes and experiences. Women, furthermore, constitute 30 percent of all six-person juries, but 57 percent of all 12-member juries. Greater age and occupation diversity are found on 12-person juries.

The 1990 National Center for State Courts research is specific in condemning

the 8-person municipal juries studied. The study found it twice as likely that at least one black person will serve on a 12-person jury as on an eight-person jury. About 20 percent of the 133 civil trials reviewed included no blacks, and 31 percent included no Hispanics. The people who conducted the study concluded that a reduction in the number of jurors per jury lessened the mathematical likelihood of having at least one minority juror in a given case. It follows that six-person juries will have even less chance of including a minority, even if the community being represented is composed of many minorities.

The Deliberation Process

The second requirement for an effective jury set out in the *Williams* decision is that the jury must promote deliberation. The jury system is predicated on the notion that people see and evaluate things differently; it is one function of the jury to bring these divergent attitudes together i single unified decision. This can only be accomplished by the deliberation process.

Basic statistics remind us that more viewpoints are available in a larger group. Again, no one is arguing that 12 is perfect; 12 is, however, 100 percent more than six. Nor does anyone argue that differing viewpoints ensure deliberation, but there are advantages from the greater number. Minority representation may inhibit overt prejudice in the deliberation process that may unfairly influence others. Related to this advantage is the additional effect that with more differing viewpoints there is greater opportunity for needed expertise among the jurors. One researcher related how one black juror was able to explain to fellow jurors why a black youth might flee from the police even if he were innocent. The potential that so-called "expertise" may be misleading is offset by the greater likelihood in a greater number to have counterinput if the explanation offered is meritless. There is also the potential that in a larger jury there will be a greater chance for the one extreme viewpoint, such as the individual who believed that God had ordained a conviction of the "Harrisburg 7." Such extreme views, however, are rare; even if present, the potential for offsetting is greater among 12 than among six.

Conformity

Consideration of the jury deliberation process requires a review of jury size and accompanying group dynamics. The first dynamic to explore is conformity. Research is replete with examples demonstrating that an individual holding a minority opinion is unlikely to resist group pressures to conform unless he/she is aware that at least one other member shares the position. Conformity to the group is not a rare occurrence. Rita Simon found that 10 percent of her jury subjects were willing to admit that they voted against their preferred positions. Conclusive research on small group conformity was conducted by Asch. From his many experiments, it is clear that a person alone is very vulnera-

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ble to group pressures; by adding just one more confederate, the person felt more secure in holding out against the influence of a large majority. A jury of six with one holdout is proportionally the same as a jury of 12 with two holdouts, but while the proportions are the same, the influence of the majority of a six-person jury over its minority is much greater, according to Asch's work, than that of the 12-member jury over its minority of two. Zeisel's statistics confirm this conclusion. He reported that in 290 six-person criminal trials, juries hung only 2.4 percent of the time, whereas, in a larger nationwide sample, 12-person juries hung 5 percent of the time. Whether or not hung juries are desirable or undesirable depends entirely on the perspective of the participants, but, in any case, minority opinion holdouts represent an aspect of community opinion that should be reflected in the jury's decision.

Participation

Proponents of the six-person jury point to research in small group dynamics which suggests that larger groups are less likely than smaller groups to foster individual participation. Bales and Strodtbeck, for example, showed that as groups increase in size, there is less time available for each member to participate, and those who do contribute are likely to talk more and be more visible and influential. The differences in the frequency of participation are intensified and polarized, and subgroups are more likely to develop. Obviously, minority opinions won't be heard if there is less opportunity for minorities to participate. This concern is not as relevant to jury deliberation, however, because there is no fixed time limit on jury discussions. Also, juries, unlike the groups in Bales and Strodtbeck's study, have a foreperson who is likely to seek out the contribution of each jury member. In another study by Strodtbeck, for instance, it was found that jury forepersons, traditionally thought to be the most verbally active members, were involved in only about 25 percent of the interaction in 12-member juries and tended to take neutral positions.

Quality

Finally, numerous studies concerning the impact of a reduction in jury size have shown that the quality of the group's discussion is higher in larger groups. One study in particular concluded that the dynamics of jury decision-making are adversely affected by a reduction in jury size. In experiments involving different sized groups working on complex human relations problems, it was revealed that the larger group was able in the same length of time to organize and establish channels of communication superior in quality to those of the smaller group. Complex human relations problems are the common tasks of juries.

Marlon's book on communication in the legal process sums up other research regarding six versus 12-person juries in civil suits. All studies except one found no statistically significant differences favoring the plaintiff when juries of six and 12 were compared; criminal litigation verdicts also do not differ between six and 12-person juries given the same case material, although 12-member juries are more consistent in reaching the same decision on the same case than are multiple six-person juries given the identical information.

The American Bar Association's Section of Litigation supports ABA efforts to restore civil jury size to 12, permitting 10 of 12 to render a verdict. Section Chair Michael Tigar offered the rationale in an August 1990 statement, "It [12-person jury] enhances the chances of truly attaining the deliberative process we all want and diminishes the disproportionate effect of having a strong or aberrant juror."

The Section of Tort and Insurance Practice (TIPS) also supports the ABA move to restore the 12-person jury. Their reasoning stems from a review of a TIPS report which concluded that a smaller jury "reduces markedly the accommodation of minority views, and its verdicts are less

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CLASSIFIED ADVERTISING

POSITIONS

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predictable than those of the 12-person jury, both with respect to the liability decision and the size of the damage award." The TIPS report also noted that six-member juries fail to represent various minorities or a cross section of societal attitudes.

At this time, there are few data which support that a smaller than 12-person jury will save litigation time or money. The process of deliberation when assessed against criteria for decision-making required in the *Williams* decision tilts in favor of the larger-sized jury.

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CAMPAIGN PROFILE

(Continued from page 3)

in the immediate future. To help prepare for this eventuality, the TBA currently has active committees on advertising and professionalism, and the TBA House of Delegates is taking up the issue of specialization. What has previously been regarded as three separate issues of advertising, professionalism, and specialization can now be seen as interrelated aspects of the same problem.

The fact that a 200-year-old document called the Bill of Rights can reach out and bite the legal profession at this late date attests to its continuing vitality as it begins its third century of existence.

Small-Jury Study

Fewer jurors mean less minority representation, report says

Cutting juries from 12 members to eight should cut the time and money courts spend on trials, right?

Not quite, says an unreleased report on a ground-breaking, two-year experiment in Los Angeles. Smaller juries on average save courts only 36 minutes and $87 per small civil trial, the study found. The cost savings for courts, parties, jurors and jurors' employers combined is less than $2,000.

What actually gets cut is the number of juries that include minorities. And the likely explanation is attorneys' peremptory challenges.

The experiment, the first to compare traditional juries directly to smaller ones, randomly assigned either eight- or 12-member juries to civil cases in four large municipal court districts in Los Angeles County.

The study found, for example, that 31 percent of the eight-person juries in Los Angeles Municipal Court had no Hispanics, and 20 percent had no blacks. The study had used sampling theory to predict that when the juries were smaller, the number containing minorities would drop. But the problem proved worse than the statistics foresaw. (See chart.)

The authors of the study—Janice T. and G. Thomas Munsterman of the National Center for State Courts' office in Arlington, Va., with University of Minnesota Law Professor Steven D. Penrod as a consultant—stressed they could not say for sure that lawyers were "using their peremptory challenges and challenges for cause in a discriminatory way."

But they added that "it would be naive to assume that parties would use their peremptory challenges to yield a demographically balanced jury."

The National Center for State Courts conducted the experiment under a contract from the Judicial Council of California, the governing body of the California court system, which acted in turn on an order from the state legislature.

California is one of 23 states that require 12 jurors for all types of jury trials. The other states and the federal courts allow fewer jurors in, most commonly, civil or misdemeanor cases. The American Bar Association "Standards Relating to Juror Use and Management" recommend 12 jurors for serious crimes and at least six in most misdemeanor and civil cases.

The study may doom hopes for legislation to reduce jury size in California courts, according to some Judicial Council members. If the findings about minority jurors are true, "that probably kills the experiment and should," said council member Peter Hinton, a Bay Area plaintiffs' lawyer.

Instead of immediately forwarding the report to the legislature, the council agreed to seek clarifications of portions of the study. It will probably act on the report at its meeting later this month.

Peremptory Issues

Susan Finlay, who chairs the council's Municipal Courts and Justice Committee, said that one topic needing clarification was the effect of peremptory challenges. Attorneys participating in the experiment were allowed to reject six jurors without cause whether they were picking an eight- or a 12-member jury. Finlay said she could not tell from the national center's report whether reducing the number of peremptory challenges along with jury size would have produced more juries with minority members.

Finlay, a municipal court judge in San Diego County, also wondered whether cutting peremptories from six to four would have allowed jury selection in small-jury cases to move faster.

The study found that eight-juror trials lasted on average 0.6 hours less than 12-juror trials. But the finding is complicated by the fact that litigants in 33 cases slated by random assignment for eight-person juries demanded 12 jurors instead.

This significant number of "opt-out" cases was "a major complication for the study in that 'opting out' may foil the purposes of random assignment," the report states.

In fact, those 33 cases appeared to be weak, overinflated suits. Only 26 percent ended in plaintiff verdicts, compared to 59 percent for the eight-juror cases and 55 percent for the cases assigned 12 jurors. And those cases spent noticeably more time on jury selection.

Discounting the "opt-out" cases, the study found no differences between the number of verdicts for the plaintiff overall. Both sets of verdicts also matched trial judges' predictions equally well.

But the 12-member juries awarded winning plaintiffs significantly less money on average: $3,881, compared to $7,645 from eight-person juries and $6,500 from the eight-person and opt-out juries combined. Civil cases in California municipal courts are limited to $25,000.

—Don J. DeBenedictis

Percent of Juries Without Minorities

(Los Angeles Municipal Courts)

	8-PERSON JURY: 8 JURORS ASSIGNED	12-PERSON JURY: REFUSED 8-PERSON JURY	12-PERSON JURY: 12 JURORS ASSIGNED
WITHOUT HISPANICS			
Expected	20%	23%	10%
Actual	31%	30%	18%
WITHOUT BLACKS			
Expected	6%	1%	3%
Actual	20%	7%	16%
Total No. of Cases	35	27	45

Source: "A Comparison of the Performance of Eight- and Twelve-Person Juries" (preliminary version), National Center for State Courts

Jury Study Revised

A ground-breaking study comparing eight- and 12-member juries has been revised, and an implied criticism of attorneys has been considerably toned down.

Researchers for the National Center for State Courts had found a greater than expected number of juries in several municipal courts in Los Angeles County with no black jurors. (See "Small-Jury Study," March *ABA Journal*, page 24.) The disparity between statistical prediction and courtroom reality was worse for the smaller juries, leading the researchers to conclude last year that "the exercise of peremptory challenges or challenges for cause, for whatever reason, increased the number of juries without blacks."

When the study was delivered to the Judicial Council of California in November, the council demanded clarifications. In the revised report, the blame ascribed to attorneys' challenges has vanished.

"[T]he primary explanation of minority representation on the juries was the jury size and, not surprisingly, the number of blacks on the panels from which the juries were selected. Peremptory challenges, challenges for cause and excuses from the panel were not statistically related to the representation of blacks. ... Discriminatory use of peremptory challenges was not seen in these municipal court civil jury selections."

—*Don J. DeBenedictis*