COUNCIL ON COURT PROCEDURES

Minutes of Meeting of March 14, 1992

Oregon State Bar Center
5200 Southwest Meadows Road
Lake Oswego, Oregon

Present:	Richard L. Barron	Henry Kantor
	Richard C. Bemis	R. L. Marceau
	William D. Cramer, Sr.	Michael V. Phillips
	Susan P. Graber	Charles A. Sams
	John E. Hart	William C. Snouffer
	Lafayette G. Harter	Janice M. Stewart
	Maury Holland	Elizabeth Welch
	Bernard Jolles	
Excused:	Susan G. Bischoff	John V. Kelly
	Bruce C. Hamlin	Winfrid K.F. Liepe
	Lee Johnson	
Absent:	Paul J. DeMuniz	
	Richard T. Kropp	
	Robert B. McConville	

(The following also were present: Hon. Owen M. Panner and Hon. Kurt C. Rossman; Attorneys Larry Wobbrock, Charlie Williamson, Peter Glazer, and Charles Tauman. Gilma J. Henthorne, Executive Assistant, was also present.)

The meeting was called to order by Chair Henry Kantor at 9:30 a.m.

The Chair announced that the meeting was an advertised public meeting and invited those members of the public present to make any statements they wished to make during the meeting.

Agenda Item No. 1: Approval of minutes of meeting held February 8, 1992. Upon motion made and seconded, the minutes of the meeting held February 8, 1992 were unanimously approved.

Agenda Item No. 2: Six-person jury (Ron Marceau; Hon. Owen M. Panner and Hon. Kurt C. Rossman). Ron Marceau stated that Judge Panner and Judge Rossman had each had considerable experience with six-person juries and felt their testimony would

be helpful in the Council's deliberation of the subject. He also acknowledged the letter from Ron Bailey (attached) opposing the reduction of jury size from 12 to 6. Ron Marceau invited all members of the public to participate in the discussion following the presentations by the judges.

Hon. Owen Panner, Judge, U.S. District Court for the District of Oregon, Portland, said that he did not have any strong feelings about the subject of six-person juries but wanted to give the Council his impressions after having visited with and interviewed many lawyers from both the plaintiff and the defense bar. He said there had been serious opposition in 1973 when the Supreme Court said that federal courts could go to six-person juries and that since 1973 federal courts throughout the United States have been using six-person juries with alternate jurors in cases that are extensive. He recalled that the plaintiffs' bar was very much opposed to the reduction from 12 at that time. Since then, he has found no distinction between plaintiffs' lawyers and defense lawyers in their feelings about a six-person jury. His own personal impression was that it really does not make any difference. He said that they have a unanimous verdict in federal court and have no more hung juries (two in twelve years) than in state court. He said he had visited with all of the judges on his court and they do not feel there is any advantage or disadvantage one way or another. He very much approved of the new federal rule (effective December 1) of having 7 or 8 jurors instead of 6. He said the problem with the old rule of alternates was that if an alternate was excused at the end of the trial before the jury started to deliberate and if there were a medical emergency, there would be a mistrial.

A discussion followed Judge Panner's presentation. The Chair inquired whether there presently is any discussion at the federal level (local or nationally) to change the existing system, and Judge Panner stated he was not aware of any such movement.

Hon. Kurt C. Rossman, Court of Appeals Judge, Salem, said that he first wanted to bring a message from Chief Justice Carson about the current position of his office and the Judicial Department. He reminded the Council that the former Chief Justice and Bill Linden of the State Court Administrator's Office felt that the subject of six-person juries should not be submitted to the Council, that the legislature should handle the matter administratively, and that no more empirical studies were necessary. Judge Rossman stated that Chief Justice Carson does not share that position. Judge Rossman said that the Chief Justice Carson does feel, however, that in light of Measure 5, it may very well be that we will get six-person juries regardless, based upon projected figures that it would result in a savings of from $200,000 to $400,000 (Judge Rossman knew nothing about the reliability of those cost studies). He said the Chief Justice

wanted his thoughts about whether or not litigants should pay for the added six jurors if they were insistent on having a twelve-person jury.

Judge Rossman told about his experiences in the seventies with the jury system. He said he became involved with group deliberationists (one of whom was a psychologist on the Linfield College faculty) in order to obtain some knowledge and understanding of group dynamics, i.e. what happens when you get six people in a room as opposed to 12. He said the group made presentations in various places around the state with different bar associations and circuit court judges associations in order to determine their viewpoints. Judge Rossman said that, in his experience, the plaintiffs' bar almost always asked for six jurors and the defense bar felt the opposite almost 100%. He told about an experiment in his court where, at the beginning of each term, they would put on a mock trial to determine whether six-person juries and 12-person juries presented a different brand of justice. He said that those in the six-person setting felt that their votes counted for something, that they could participate in the discussions, and generally felt needed. He added that during that twelve-year period (before his present position), 40% of the civil cases had six-person juries.

Judge Rossman said that it was the opinion of a well-known expert witness in criminal cases that a group of 5 to 7 jurors in civil is the most efficient because there is enough diversity of opinion for an efficient decision-making process; that groups of over 7 members do not necessarily make input more diversified, rather they tended to lengthen the time necessary to make a decision; that in larger groups some members do not participate; that there is a greater likelihood of a conviction in a criminal case with a six-person jury than in a 12-person jury. He had heard other varying arguments: it is far more difficult for a plaintiff to convince 9 people than it is 5; if you have six people together, one is going to run roughshod and take control of that group and there would be a lot of one-person justice; if you start with 6, the next year it would be 3, and soon it would be a court trial. According to the two doctors with whom he had been associated, a 12-person jury is more subject to domination by one person than is a six-person jury.

A discussion followed Judge Rossman's presentation. The Chair inquired of Judge Rossman whether, in the experiment conducted in his trial court, they had ever looked for a majority of something other than 5 out of 6, i.e. had they tried 4 out of 6, and the judge said they had not done so. The Chair thought that the Council should try to find out what other studies exist regarding different possibilities. He pointed out that at the present time there is a constitutional requirement that there be at least three-quarters of the jury coming in with a verdict.

Charlie Williamson, Attorney, Portland, speaking on behalf of OTLA, stated that OTLA did not have a position for or against the 6-person jury proposal. He suggested that, if the Council were seriously considering having a 6-person jury, they might also consider having an 8-person jury (still retaining the three-quarter verdict requirement). He stated that OTLA opposed the idea that a litigant could pay to have a 12-person jury.

John Hart said that the OADC has not changed its position with respect to its opposition to six-person juries. He emphasized the position taken by Ron Bailey in his January 7, 1992 letter that research suggests that bigger is better and smaller saves little time or money, suggesting that the quality of the judicial system will suffer by reducing the number of jurors to six persons, possibly including reduced minority representation.

Bernie Jolles asked for both judges' comments on the suggestion that the six-person jury tends to lead to less minority participation. Judge Rossman said that issue concerned him also and that he felt it was necessary to get as broad a cross-section of the community as possible. Judge Panner commented that with 12 there would be a better chance of getting minorities on the jury. It was Judge Snouffer's impression that when he was doing six-person jury trials in district court, there was no particular problem getting a minority or two on a six-person jury.

The Chair stated that the initial reports about the tremendous savings that would be obtained by reducing 12-person juries to six-person juries did not seem to be accurate.

It was Maury Holland's opinion that, based upon anecdotal reports, the vast majority of citizens who have been required to serve as jurors, particularly in civil cases, is less than favorable -- that they feel imposed upon and that their time is wasted. He said he questioned the argument in favor of retaining a larger jury on the theory that it helps create citizen involvement and citizen support of our judicial system. He added that those who sat on criminal cases felt much more positive because they felt they performed an indispensable role. Judge Rossman said that the attitude of jurors could vary from district to district, depending on how the jurors are treated.

Larry Wobbrock, Attorney, Portland, speaking on behalf of OTLA, agreed with Judge Rossman that the way jurors are treated would affect their feelings about serving as jurors. He said the main point he wanted to make is the cost involved when a juror or jurors become ill in the middle of deliberations and a mistrial results. He encouraged the Council to consider a rule analogous to that in Judge Panner's court (using 6 to 8 jurors).

The Chair asked whether anyone had any information about how often cases are mistried due to lack of a juror for one reason or another.

Justice Graber hoped that the issue of juror discontent and the problem of jurors becoming ill could be segregated from the main issue.

Judge Panner said that one of the advantages in the new federal rule is the flexibility it gives to a judge, depending on the kind of case involved. As an example, he mentioned a case which was going to take three or four months to try. He said they started with 12 with the understanding that they would still pick six, but he thought generally you probably should not start by adding to 12.

Judge Barron said he had been encouraging six-person juries recently in circuit court and criminal cases. He suggested that perhaps the Council should look at it from the results reached. He said he didn't think size of juries makes any difference when people work hard.

Ron Marceau wondered whether the Council shouldn't look at the issue from a different direction and that is from the legislature's point of view. During the last legislative session there was a proposal for a six-person jury and the Council asked that the matter be referred back to it. He said that the former Chief Justice and Bill Linden were concerned that the issue would come before the legislature at the next session. Ron Marceau asked the Council whether they thought the legislature, after hearing Judge Panner's and Judge Rossman's views, would not adopt the proposal for a six-person jury.

The Chair suggested that after the discussion today perhaps a straw poll could be taken to see if there is a sufficient level of interest in working on a draft to present to the public and members of the Bar so that comments could be elicited.

Judge Snouffer asked Judge Panner if any cost studies had been done in the federal system. Judge Panner said that he was not aware of any cost studies and that he was not aware of any cost savings. Judge Panner stated that, whatever system is used, there would be the question as to how much cost saving is involved.

Judge Sams said he did not think there is much cost savings. He said that in his county they are settling many more cases. He did not think the cost is very much higher for 12 and that most people in his area seem to favor 12. He said that in fourteen years he had only one juror get sick. He said he didn't think the Council should build a rule on something that happens infrequently. Judge Snouffer mentioned that the Judicial

Conference is going to be held toward the end of April and perhaps six-person juries would be a topic of conversation then.

Janice Stewart asked whether the Council had to decide to pursue a six-person jury before any proposed change would be publicized to elicit comments. She said she would like to hear from other organizations before making a decision one way or the other. She was not in favor of changing something unless there is a very good reason for doing so and, without substantial cost savings, she was not sure the rationale would be there for pushing the change to a six-person jury. She said that she would like the opportunity to obtain viewpoints from the Multnomah County Bar Association. Ms. Stewart said she did not know whether the OSB Procedure & Practice Committee had dealt with the issue.

Bill Cramer said he thought it would be fairly easy to obtain some data on the cost issue. His own emotional feeling was that if the jury system were abolished, one's civil rights would also be abolished. He felt that once the size of a jury is cut, you start eliminating the need for a jury at all. He thought it logical to say that if the number of jurors were cut, there would be less compromising and there would be greater extremes.

The Chair asked for a show of hands to get a sense of whether the six-person jury issue is a subject the Council would be interested in pursuing and perhaps elicit comments from other members of the bar. The Council decided to pursue the subject.

A discussion ensued about whether or not to follow the federal system of using 6 to 8 jurors and what the required number for a verdict should be. Mike Phillips thought that the Council should report to the legislature as to whether the quality of justice would be affected by a reduction of jurors from 12 to 6, and Ron Marceau concurred that whether or not the quality of justice is affected would be the bottom-line, threshold question. Ron Marceau said that unless the Council had a good reason for not going along with the six-person jury, there would be a problem when reporting to the legislature.

Judge Snouffer said that the Calvin & Zeisel American Jury Study done in the late fifties and early sixties explored a lot of the group dynamics issues, and it evolved that 5 or 6 is the smallest group where you can have a reasonable consensus and cross-section of the community.

Larry Wobbrock wondered whether, if 5 out of 6 (which is more than three-quarters) is required for a verdict, a greater burden is placed on the plaintiff than is required now.

The Chair asked whether the Council wanted to consider an

experimental program of some sort. Dick Bemis said that no comparison could be made unless the same case were tried again with no deviation in the evidence. Judge Barron did not think the cost factor would be involved because there are many more dispute resolutions, and civil cases are not being tried as often. He said that if the number of jurors were to be cut down, a juror's service might be cut down from a month of service to two weeks of service. John Hart said he would like to propose that the Council favor the 12-person jury but was willing to get more information from the Multnomah Bar and other organizations. Mike Phillips said he thought that the issue of whether or not money would be saved would be something for the legislature to decide. Judge Graber pointed out that cost factors have been considered by the Council when other rule changes had been made. Further discussion followed.

The Chair thought that the legislature should receive guidance from the Council if the number of jurors were changed to six. Janice Stewart felt that the legislature should receive from the Council a very detailed report, weighing all the pros and cons. The Chair asked whether there was an interest for perhaps three or so people to try to put together a report summarizing what the Council is learning and presenting other studies. The Chair asked Ron Marceau to continue to work with OADC, Larry Wobbrock, Maury Holland, and others and put together a compilation on which a vote could be taken.

Agenda Item No. 3: Summons warning - progress report (Judge Welch). Judge Welch reported that almost a year ago the Bar had received a letter saying that New Jersey had a summons telling people what the telephone number was for the New Jersey State Bar and the New Jersey Law Referral Services, giving telephone numbers on a county-by-county basis, and Judge Welch had taken it upon herself to try to find out the answer to an issue raised by Council members whether that language in the summons wasn't just another opportunity to have something wrong on the form and be the basis for a dismissal or default. Anne Bartsch of the OSB had called and written letters to try to find out whether New Jersey had experienced any problems; Ms. Bartsch learned that there had never been any problem in New Jersey with using that language in the summons.

Judge Welch suggested the following language: "If you need a lawyer and you don't have a lawyer, call the Oregon State Bar Lawyer Referral Service." She pointed out that the Lawyer Referral Service of the Oregon State Bar is a completely integrated referral service.

Judge Graber said she supported the idea of having language in the summons and moved that the following slightly different wording be adopted [which would be an amendment to ORCP 7 C(3)]:

"If you have questions, you should see [an attorney] **a lawyer** immediately. **If you need help in finding a lawyer, you may call the Oregon State Bar's Referral and Information Service at (503) 684-3763 or toll-free in Oregon at (800) 452-7636.**"

Judge Welch seconded the motion. After discussion, the motion passed unanimously.

Agenda Item No. 4: Limiting secrecy in personal injury actions (proposal by OADC and OTLA). Larry Wobbrock, President-Elect of OTLA, reminded the Council that he and other members of OADC, as well as Judge Robert P. Jones, had appeared before the Council previously. He said they were proponents of a bill stating that settlement agreements and compromise agreements shall not be considered secret items and that they can be shared among the public and other litigants. The other aspect of the bill was that plaintiffs' lawyers be allowed to, in representing injured people in similar situations with identical products, share information. He stated that Texas Court Rule 76a (previously furnished to the Council) accomplished both aspects of OTLA's bill. Mr. Wobbrock distributed copies of Senate Bill 579, which he said is a modification of the ORCP which allows the voluntary sharing of material unless good cause can be shown otherwise, and Senate Bill 580, which says that an agreement between parties in a civil action to keep settlement terms confidential shall not be binding unless the court so orders, finding that confidentiality is necessary to protect one or more of the parties and that the public interest will not be harmed. He said that he and John Hart (on behalf of the OADC) had some preliminary discussions.

John Hart said that everyone in the OADC felt strongly that a judge should have the discretion to on occasion make a determination if there are trade secrets. He said for the few people who have taken an interest on the defense side, they thought that if the rule is going to be that there is no presumption that there will be secrecy, i.e. everything open, then it would not be necessary to change that because by definition it is a matter of public record. He stated that there were some drafting problems in wording the judge's discretion in certain cases. He had been unavailable to work on language for a proposal because of his trial schedule. It became clear that OTLA and OADC had not yet reached an agreement.

The Chair asked the Council whether they wanted to hear more testimony concerning Senate Bill 579 or vote on it. It was moved and seconded to adopt the amendments described in the bill. A discussion followed.

Janice Stewart said that there was an inconsistency between the first sentence in C.(2) and the remainder of it; she did not

know why the first sentence needed to be in the rule. Ron Marceau pointed out that after reading the first sentence, you would conclude that information will be voluntarily shared but in reading the second sentence, you find out that you can only voluntarily share if there is a disclosure or order. Maury Holland concurred that the wording was incoherent. Judge Graber suggested eliminating the last sentence and changing the first sentence, using the following language:

> "A lawyer may disclose materials or information covered by a protective order issued under subsection (1) to a lawyer representing a client in a similar or related matter if the lawyer first obtains a court order after notice and an opportunity to be heard ..."

and continuing with the next sentence where it says, "Disclosure shall be allowed by the court ...", which would be a direction to the judge as to how to deal with the situation.

Mike Phillips stated that he had been troubled by the particular language since first reading it. He said his observation had been that most protective orders are entered by stipulation, rather than by a judicial determination of need. He thought that is an expedient way to conduct the court's business. He understood the objective of the proposed rule to be this: if plaintiff's counsel wants to share the information with other counsel, the burden of showing the need for secrecy from the receiving counsel still rests with the party wanting secrecy, even if there is an order in place. He said he hoped the Council's redrafting would not shift that burden just because there is a stipulated order in place.

After further discussion, the Chair said that John Hart and he would work on simplifying and shortening the language, incorporating some of the suggestions made at this meeting. He then asked whether the Council wanted to make a decision regarding Senate Bill 580. After discussion, it was the consensus that the particular proposal in Senate Bill 580 is beyond its jurisdiction, i.e. that it is not a procedural matter.

Agenda Item No. 6: Subpoenas without trial or deposition and hospital records (Executive Director's memorandum and Karen Creason). The Chair said that the matter would be placed on the agenda for a future meeting. It was also suggested that Larry Thorp and Karen Creason be invited to attend that meeting.

NEW BUSINESS

The Chair announced that the Council had received a letter from the Oregon Dispute Resolution Commission inviting representation from the Council on the Advisory Committee on

Court Panels and Procedures. He said he would review the materials and report back at the next meeting.

The meeting adjourned at 11:57 a.m.

Recorder:

Gilma J. Henthorne

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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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JURY ANALYSIS

(Continued from page 33)

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

-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 axiom that people see and evaluate things differently; it is one function of the jury to bring these divergent attitudes together into a 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.

Mation'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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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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PERSPECTIVE

(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 25 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*

Senate Bill 579

Sponsored by Senator KERANS; Senator L. HILL

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Allows disclosure of materials or information produced during discovery related to personal injury action or action for wrongful death to another attorney representing client in similar or related matter despite issuance of protective order. Requires notice to parties protected by order and opportunity to be heard. Requires court to allow disclosure except for good cause shown. Applies only to protective orders issued on or after effective date of Act.

A BILL FOR AN ACT

Relating to discovery; creating new provisions; and amending ORCP 36 C.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORCP 36 C. is amended to read:

C. Court order limiting extent of disclosure.

C.(1) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or (9) that to prevent hardship the party requesting discovery pay to the other party reasonable expenses incurred in attending the deposition or otherwise responding to the request for discovery.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

C.(2) A protective order issued under subsection (1) of this section to prevent disclosure of materials or other information related to a personal injury action or action for wrongful death shall not prevent an attorney from voluntarily sharing such materials or information with an attorney representing a client in a similar or related matter. Disclosure may only be made by order of the court, after notice and an opportunity to be heard is afforded to the parties or persons for whose benefit the protective order has been issued. Disclosure shall be allowed by the court except for good cause shown by the parties or persons for whose

NOTE: Matter in bold face in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.

benefit the protective order has been issued. No order shall be issued allowing disclosure unless the attorney receiving the material or information agrees in writing to be bound by the terms of the protective order. The provisions of this subsection apply to protective orders in all cases and is not limited to actions for personal injury or wrongful death.

SECTION 2. The amendments to ORCP 36 C. by section 1 of this Act shall apply only to protective orders issued on or after the effective date of this Act.

Senate Bill 580

Sponsored by Senator KERANS; Senators L. HILL, SPRINGER

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Provides that agreements between parties to civil action that terms of settlement or compromise agreement be confidential are not binding. Specifies that order may only be issued upon motion of a party and finding by court that confidentiality is needed to protect one of parties and that public interest will not be harmed. Applies only to agreements entered into on or after effective date of Act.

A BILL FOR AN ACT

Relating to confidential settlements.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) An agreement between parties to a civil action to keep the terms of any settlement or compromise of the action confidential shall not be binding on the parties unless the court so orders. An order to keep the terms of the settlement confidential shall be issued by a court only upon motion of a party and upon a finding by the court that:

(a) Confidentiality is necessary to protect one or more of the parties to the action; and

(b) The public interest will not be harmed by the issuance of the order.

(2) An order issued under subsection (1) of this section shall not bar an attorney or party to the cause in which the order is issued from voluntarily sharing with other persons any material and information gathered during discovery or otherwise during the preparation or investigation of the case, provided such information or material does not disclose the terms of the settlement or compromise agreed to by the parties.

SECTION 2. This Act shall apply only to settlement or compromise agreements entered into on or after the effective date of this Act.

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.