

Comments on H.417: An act requiring six-person juries in civil proceedings

Good morning. My name is Ritchie E. Berger and I have been a trial lawyer at the Burlington law firm DINSE for nearly 40 years where I head the firm's litigation group. I have tried to verdict many dozens of civil cases in every Superior Court except Essex (that one court has somehow eluded me!). I handle cases for both plaintiffs and defendants, although historically mine has been primarily a defense practice.

I have three serious concerns about H.417: (1) it is almost certainly unconstitutional; (2) it is unnecessary, seeking to "fix" a problem that does not exist; and (3) it is counterproductive as the proposed changes would result in worse outcomes for our judicial system and our local communities.

The proposed legislation is unconstitutional.

Chapter I, Article 12 of the Vermont Constitution provides "[t]hat when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred." Vt. Const., CH. I, Art. XII (**Attachment 1**). The Vermont Supreme Court has interpreted this constitutional right to require a jury of twelve members, including in civil cases:

We have no doubt, the "right of trial by jury" spoken of in the constitution, and which it is said "ought to be held sacred," means a jury as at common law, *which consists of twelve men, and that wherever a constitution guaranties "the right of trial by jury," it is not competent for a legislature to reduce that number to six, or any less number than twelve;* for the very theory of a trial by jury requires the unanimous consent of twelve men to the verdict.

Lincoln v. Smith, 27 Vt. 328, 358-59 (1855) (emphasis added). More recently, Justice Dooley provided a thorough analysis of this interpretation in his dissenting opinion in *State v. Machia*, 155 Vt. 192, 204-09, 583 A.2d 556, 563-66 (1990). He cited the 1869 case of *State v. Peterson*, 41 Vt. 504, which established that "a jury, as used in our Constitution, means a common law jury of twelve persons" and traced that holding back to the English common law's roots in the Magna Carta. *Machia*, 155 Vt. at 205, 583 A.2d at 563. As Justice Dooley observed, the Vermont Supreme Court had "never wavered from this position" and even the majority opinion from which he dissented "recognize[d] that the Vermont Constitution guarantees the right to a jury composed of twelve jurors." *Id.* He further noted:

The Vermont concept of a jury is deeply rooted in our heritage. Since this Court's holding in *Peterson* that a jury under the state constitution is composed of twelve members, the jury provision of Article 10 has been amended twice without any attempt to modify the common law definition. Hence, I believe it is clear that,

despite changing interpretations of the federal Constitution, the Vermont Constitution still guarantees the right to a twelve person jury in criminal cases.

Id. at 206, 583 A.2d at 563-64.

Although *Machia* was a criminal case, the Vermont Constitution's directive that the right to a jury trial must held sacred is not confined to criminal proceedings. *Lincoln* and *Machia* stand for the proposition that the Legislature cannot abridge this right to a twelve-person jury in the absence of a properly-enacted constitutional amendment, and this Committee should not suggest otherwise by advancing H.417.

I have been advised that my esteemed colleague Richard Cassidy, Esq. is to offer his support for H.417. Although reasonable people can disagree on many things in the law, I simply note that Attorney Cassidy himself has acknowledged the constitutional problems with adopting six-person juries. In his blog post published on September 28, 2020 (**Attachment 2**), Attorney Cassidy cited both *Lincoln* and *Machia* in noting that "an old Vermont Supreme Court case states that a 12-person jury is constitutionally required." He further acknowledged that any proposal to limit the size of civil juries to six members "would almost certainly face a constitutional challenge." I submit that this Committee should not approve a statutory enactment that is in contravention to Vermont's long-declared constitutional law.

The proposed legislation is unnecessary.

The draft of H.417 does not state its intended purpose or aim. Given the timing, as the COVID-19 pandemic is thankfully coming to an end, I assume the intent is to streamline civil trials in response to the backlog in Vermont state courts, which has recently captured public and government attention. However, I believe that the perceived "problem" to be addressed by instituting six-person civil juries is refuted by generations of history demonstrating that twelve-person civil juries work well in Vermont.

This Committee should understand that jury service is both an obligation and a privilege of citizenship. The Vermont Judiciary informs the public and prospective jurors that "[j]ury service may be the most serious obligation of citizenship" and describes it as "a service you are being asked to perform for your fellow citizens," "your opportunity to participate directly in our legal system and to have an essential voice in the administration of justice." (**Attachment 3**). In my experience, while of course some may grouse, Vermonters are more than willing to perform this service. Since 1982, I have tried well over a hundred civil cases with twelve-person juries in Vermont's state (and federal) courts, and not once has there been a problem seating a jury or taking a verdict. Nor have I ever experienced a hung jury, which is the specter often raised by proponents of smaller juries, and the truth is they are very, very rare in Vermont civil cases. I can also attest that many times after a verdict has been reached, I have had individual jurors tell me that the experience changed their preconceptions of the judicial system and imbued them with new respect for our third branch of government. Finally I note, as a practical matter, that

even in the post-pandemic era, criminal trials will still require twelve jurors, and there is no logical reason to impose a new, separate, and unequal system for civil trials. Simply put, the use of twelve-member juries in civil cases has worked well for over a century, and will continue to serve Vermonters well as the judiciary returns to full capacity.

The proposed legislation would actually cause harm to our judicial system.

Even if there were persuasive logistical or efficiency reasons to consider a switch to six-person juries, which become less compelling as COVID restrictions are lifted, there is a critical public policy consideration that weighs in favor of keeping with tradition: twelve-person juries yield better, more representative decisions. This is the conclusion reached in an excellent study published in 2020 entitled “Bringing Back the Twelve-Person Civil Jury.” (**Attachment 4**). The study analyzed data from 15 federal judicial districts for a three-year period, from 2016 to 2018, and found that larger juries produced “more predictable” verdicts and were “less likely to render outlier awards.” *Id.* at 52. Moreover, the study confirmed that twelve-person juries “likely make better decisions” than six- or even eight-person juries, with more pooled resources to remember and weigh the evidence. *Id.* Additionally, a twelve-person jury more accurately reflects the community from which it is drawn, while smaller juries significantly increase the risk of excluding underrepresented and minority groups. *See id.* at 52-53. I hope the Committee will carefully consider the unintended consequences that H.417 would have.

In sum, H.417 would represent a step back, not a step forward, for the Vermont civil justice system. If enacted, it would be highly vulnerable to constitutional challenge, potentially overturning many jury verdicts in the process. It would ignore the long and successful history of twelve-person juries in Vermont when, as the authors of the study discussed above aptly observed, “the case for [maintaining] the 12-person jury is stronger than ever.” Respectfully, the Legislature should not upend Vermont’s proven effective and efficient civil jury system in an effort to address a situation that will soon improve as the courts regain their footing and return to normal operations.

Thank you for allowing me to share my observations.

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