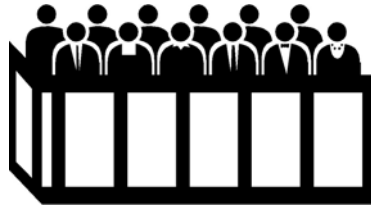


VERMONT SUPREME COURT

REPORT OF THE

JURY POLICY



Committee

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INTRODUCTION

The Committee on Jury Policy was created in November, 2001 by the Vermont Supreme Court to study and report on the major policy questions behind the structure and operation of juries in civil and criminal cases. The Charge and Designation, attached as Appendix A, stated:

The right to trial by jury is one of our most sacred constitutional rights. Jury service offers citizens an opportunity to participate in the

justice system. In Vermont, we entrust jurors with the heavy responsibility of deciding guilt or innocence in criminal cases and deciding liability, if appropriate, damages in civil cases. For the courts to dispense justice, the jury system must work fairly, competently and accurately; and Vermont citizens must willingly serve as jurors. Indeed, even the perception that the jury system is not working optimally undermines public trust and confidence in the judicial system.

The committee was a successor to the Supreme Court Committee on Jury Communications, Understanding and Deliberation.

In preparing this report, the Committee met through 2001, 2002 and into 2003. The Committee originally was charged with reporting by July 1, 2002, but budget reductions forced the committee to meet less frequently and delay its work. The membership of the Committee, a list of which is attached as Appendix B, was appointed by the Supreme Court and is representative of the civil and criminal bar and bench. It also includes the Court Administrator, a court manager and a Professor at Vermont Law School.

Based on the charge and designation, the Committee studied five main subjects:

1. Whether the current size of juries, twelve persons in both civil and criminal cases, is optimum for both kinds of cases.
2. Whether the requirement of unanimous agreement on a verdict of all jurors is optimum for both civil and criminal cases.
3. Whether the current methods of conducting voir dire in civil and criminal cases is appropriate.
4. Whether the current policy on number of challenges, grounds for challenges and procedures for challenges, as set out in 12 V.S.A. § 1941, V.R.C.P. 47 & V.R. Cr. P. 24, are appropriate.
5. Whether jury selection methods fairly produce a cross-section of Vermont adult citizens on juries, and if not, what procedural changes should be made to improve the representativeness of juries.

In accordance with the charge and designation, the Committee also looked at whether procedures should authorize the use of anonymous juries, but concluded that in this small, rural state it was impossible to create anonymity for jurors.

The Committee met eight times on December 6, 2001, March 15, 2002, May 29, 2002, September 26, 2002, October 30, 2002, December 4, 2002, February 3, 2003 & March 5, 2003 (by telephone). It had the benefit of an excellent series of presentations at its March 15, 2002 meeting, organized by Thomas Munsterman, Director, Center for Jury Studies, National Center for State Courts, and including as presenters Tom Munsterman; Paula Hannaford, staff attorney and senior research analyst for the National Center for State Courts; Judge Gregory Mize of the District of Columbia Superior Court; Judge Peter Lauriat of the Massachusetts Superior Court (agenda attached as Appendix C). The Munsterman A Team covered all the issues in the Committee's charge identifying how the issues are currently resolved in the various jurisdictions around the country and the considerations that should go into policy choices. Judge Mize particularly focused on peremptory challenges and standards for challenges for cause based on the findings of the District of Columbia Jury Project, Juries for the Year 2000 and Beyond. Judge Lauriat described the debate in Massachusetts over judge vs. lawyer conducted voir dire, and the use in that state of non-unanimous juries in civil cases. Following these presentations, Judge William Sessions of the United States District Court for the District of Vermont described how voir dire is conducted in the federal court in Vermont.

The committee also read and discussed a substantial sample of the current national literature and studies on the policies included in its charge. It reviewed the current law and procedure in depth. It was briefed in depth on the current system for drawing jury lists and jury panels by Windsor Superior Court Clerk Jane Ammel and Orleans District Court Clerk, Tina De La Bruere. Throughout the process, Court Administrator Lee Suskin and his staff produced statistical information on juries and jury usage in district and superior court.

Finally, the Committee would have been unable to complete its work without the able advice and drafting assistance of its Reporter, Dean Kinvin Wroth of Vermont Law School. Although the committee voted the wording of the proposed statutes and rules amendments contained in the following report, the drafting and explanatory reporter's notes were provided by Dean Wroth.

The following report is organized by section of the Committee's charge and reports the Committee's findings and recommendations for each section. Although the sections are separately considered, the committee stresses that the findings are interrelated. For example, the subjects of challenges for cause, peremptory challenges and voir dire procedure are interrelated so that a change in a recommended policy with respect to one of these subjects might make a policy change with respect to another appropriate.

JURY SIZE

As provided in V.R. Civ. P. 47(a) and V.R. Cr. P. 24(a), the size of the jury in civil and criminal cases in Vermont is 12 persons. The parties may stipulate to a smaller-size jury. V.R. Civ. P. 48; V.R. Cr. P. 23(b). The question before the Committee was whether juries of less than 12 members should be required in any or all criminal and civil cases.

Since the late 1960s there has been activity at the federal level and in many states relating to reduction in the size of juries. Decisions of the United States Supreme Court have sanctioned juries as small as six members under the Sixth and Seventh Amendments to the United States Constitution. *Williams v. Florida*, 399 U.S. 79 (1970)(criminal case); *Colgrove v. Battin*, 413 U.S. 149 (1973)(civil case). Nevertheless, the federal courts continue to require 12-member juries in all criminal cases unless the parties stipulate for a lesser number. F.R.Cr.P. 23. In civil cases the federal courts are authorized to seat juries of "not fewer than six and not more than twelve members." F.R.Civ.P. 48.

According to data from the National Center for State Courts, there are four states authorizing juries of 8 or 6 members in felony cases and nineteen states authorizing juries of 8, 7, or 6 members in misdemeanor cases. In civil cases there are four states authorizing 8-member juries, one state with 7-member juries, and seventeen states with 6-member juries. Appendix D shows the number of states using juries of each size.

Turning to Vermont, we note that the guarantees of the right to trial by jury appearing in the Vermont Constitution at Chapter I, Articles 10 and 12, and Chapter II, Section 38, have been ruled to require a jury of twelve men. @ *State v. Peterson*, 41 Vt. 504 (1869); *State v. Hirsch*, 91 Vt. 330, 335-336 (1916). These decisions were in criminal cases, and in the *Peterson* decision the opinion states in part: A Y we may infer that the framers of our state constitution intended its provisions should be in conformity to the federal constitution, in respect to trials by jury. @ 41 Vt. at 515. Whether a constitutional amendment would be necessary now to authorize juries smaller than 12 members in civil or criminal cases is beyond the charge of the committee.

As to criminal cases, the Committee has concluded that it should not recommend any reduction in the size of juries. A review of the literature found virtually no support for a jury size below 12 in criminal cases. Studies indicate that 12-person juries are more representative of the community, have a better collective understanding of the evidence, and are less likely to reach aberrational verdicts.

The Committee examined whether 12-member juries should be reduced in size or eliminated in minor offenses for the sake of economy. Based on data from the Court Administrator, the Committee found that there are very few jury trials in minor offenses in Vermont. Thus, a reduction in size of juries in minor cases would save very little money. The Committee has, therefore, concluded that jury size should remain at 12 even for minor offenses.

As to civil cases, the Committee reviewed the substantial volume of empirical studies comparing the performance of 12-member and 6-member juries. These studies show that the smaller juries are less likely to contain minority representation, that larger juries recall the evidence more accurately, and that the verdicts of larger juries are more predictable and consistent. E.g., Saks and Marti, A A Meta-Analysis of the Effects of Jury Size @ , 21 Law and Human Behavior 451 (1997). In 1995 the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recommended that Federal Civil Rule 48 be amended to restore the requirement that federal civil juries have 12 members, but this recommendation was rejected by the Judicial Conference in 1996.

The only reason to reduce the size of civil juries are to save money and time in jury selection. The Committee concluded that these considerations could not outweigh the likely reduction in the fairness and accuracy of verdicts, and the reduced opportunities for minorities to serve on civil juries. Therefore, the Committee has concluded that there should not be any change in the size of civil juries required in Vermont state courts.

JURY UNANIMITY

Unanimous juries are used in both civil and criminal cases in Vermont. Unanimous juries are required in criminal cases in Chapter I, Article 10 of the Vermont Constitution. No constitutional provision, statute or rule currently explicitly provides for a unanimous jury in civil cases. V.R. Civ. P. 48 provides that the parties may stipulate that a finding of a stated majority of the jurors shall be taken as the verdict. @

As with jury size, a number have states have experimented with elimination of jury unanimity requirements, particularly in civil cases. Two states, Oregon and Louisiana (felony only), allow verdicts based on a less-than-unanimous vote in criminal cases. Thirty states allow a non-unanimous verdict to be effective in civil cases B the most common rule (in 16 states) allows a verdict based on 5/6ths of the jury. See Appendix E.

The Committee concludes that because a change in jury unanimity for criminal cases would take a constitutional amendment a clear and compelling reason would be needed for such a change. The Committee also concludes that no such reason exists and, thus, recommends no change in the unanimous verdict rule for criminal cases.

The committee finds the situation different for civil cases. Only a minority of states retain the unanimous verdict requirement for civil cases. The trend to non-unanimous juries in civil cases reflects a recognition that a unanimity requirement leads to three negative consequences: lengthy and protracted deliberations, hung juries and compromised verdicts. Of the three, the Committee is most concerned with compromised verdicts which, it believes, have been a significant problem in Vermont. As Justice Louis Powell once observed: the unanimity requirement leads A not to full agreement among the twelve, but to agreement by none and compromise by all. @ In civil actions where a jury must be unanimous to determine both liability and the amount of damages, the opportunity for one or two jurors to force a significant compromise is apparent.

Research also supports the conclusion that unanimous verdicts are no more reliable than a super-majority verdict, for example, in which a 10 of 12 is needed. Very often, the holdouts are not being rational. In one study, the confidence level among juries required to reach a 10-2 verdict was higher than among unanimity-rule juries. Even holdout jurors on super-majority-rule juries expressed greater confidence in the verdict than did the jurors on unanimity-rule juries.

Also, the Committee had before it the example of Massachusetts, as provided by Judge Peter Lauriat of the Massachusetts Superior Court. By statute, Massachusetts provides that a vote of five-sixths of the jurors in a civil case shall constitute a verdict of the jury. Judge Lauriat reported that the judges support the super-majority requirement because it reduces hung juries and compromise verdicts.

The committee recommends elimination of the requirement of unanimous verdicts in civil cases and substituting a new rule making a vote of 80% of the jurors, a super-majority, a verdict of the jury. Although the unanimity requirement is found neither in statute nor rule, it is deeply ingrained in Vermont jurisprudence. Thus, the Committee recommends that the change be made both by legislation and by rule. The legislation would authorize the Supreme Court, by rule, to provide for super-majority verdicts of no less than 80% in civil cases.

The new rule would require at least 80% of the jury to agree on a verdict. Therefore, in the usual twelve-member jury, the vote of ten jurors (83.33%) will be sufficient; in an eleven-member jury, the vote of eight jurors (81.8%) will be sufficient. In jury sizes smaller than ten, however, a vote of all but one of the jurors will be required for a verdict. In choosing this alternative, the Committee notes that it represents the greatest super-majority requirement in use in other states, except for one state, Iowa, which requires a 7/8th verdict. It is also the super-majority requirement adopted in the most states B 16.

A. Statutory enabling authority:

' 1940. Jury: Number and percentage required for verdict.

The Supreme Court may by rule provide that in civil actions the verdict or finding of a number of jurors equal to at least eighty per cent (80%) of the jurors serving on a jury shall constitute the verdict or finding of the jury.

B. Civil Rules Amendment:

RULE 48. JURIES OF LESS THAN TWELVE MAJORITY VERDICT

(a) Majority Verdict. A number of jurors equal to at least eighty per cent of the total number of jurors serving on a jury may agree on a verdict or any finding submitted to the jury and return it into court as the verdict or finding of the jury, unless otherwise agreed by the parties in accordance with subdivision (b) of this rule.

(b) Stipulation As to Number and Majority. The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or finding of a stated ~~majority~~ number of the jurors shall be taken as the verdict or finding of the jury.

Reporter= s NotesB 2003 Amendment

Rule 48(a) is added to implement the recent enactment of 12 V.S.A. ' 1940 enabling the Supreme Court to provide by rule for 80% majority verdicts in civil actions. Present Rule 48 is retained as Rule 48(b), with the change that the parties may stipulate to a verdict or finding by a stated A number, @ rather than A majority, @ of the jury. The effect of this amendment is to make clear that if the parties wish to retain the requirement of unanimity, they may stipulate that a 100% majority is required.

The new rule requires A at least @ 80% of the jurors to agree on a verdict. Thus, in the usual 12-member jury the vote of ten jurors (83.33%) will be sufficient. If the parties have agreed to a jury of eight under Rule 48(b), the votes of seven will be required. With a six-member jury, five jurors will be necessary for a verdict. Rule 48(a) applies to trial by a jury ordered or consented to under Rule 39(b) or (c) unless the court in its order, or the parties by stipulation under Rule 48(b), makes a different provision.

The majority verdict in civil actions has been adopted in more than 30 states. *See Comment, 24 Fla. St. U. L. Rev. 671 (1997)* This trend reflects the desire to eliminate the problems that lack of jury unanimity may present in civil actions. Lengthy deliberations and, ultimately, hung juries occasioned by the unshakeable views of one or two jurors impose delay on an already over-burdened system and undue costs on litigants. These factors lead to the underlying problem that the requirement of unanimity often results in compromise verdicts. When a jury must be unanimous as to both liability and damages, the opportunity for one or two jurors to force a compromise is apparent. Furthermore, research shows that unanimous verdicts have no greater reliability and inspire no more confidence than 10-2 majority verdicts. *Comment, supra, at 671-675.*

There is no constitutional barrier to adoption of a majority-verdict rule. The Seventh Amendment does not apply to state civil proceedings. *Minneapolis and St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916). Chapter I, Article 10, of the Vermont Constitution requires a unanimous verdict for a finding of guilt in a criminal trial. Under Chapter 1, Article 12, however, although the right to a civil jury A ought to be held sacred, @ there is no comparable requirement of unanimity. *See also* Chapter II, ' 38. The general language of the Constitution applies only to the basic right, n of the incidents, of civil jury trial. *Cf. Colegrove v. Battin*, 413 U.S. 149 (1973) (upholding six-member jury in federal court against Seventh Amendment challenge).

VOIR DIRE

By rule in both civil and criminal cases, the primary responsibility for voir dire in Vermont is placed with the attorneys for the parties. See V.R. Civ. P. 47(a); V.R. Cr.P. 24(a). Both rules provide that the court may ask supplementary questions to those asked by the lawyers, but may conduct the voir dire alone only on agreement of the parties. The criminal rule provides that attorneys conduct voir dire under the supervision of the court.

The Committee was charged to determine whether the current methods of conducting voir dire in civil and criminal cases are appropriate. No part of its charge occupied more of the Committee= s time or engendered more disagreement.

The committee examined considerable materials on the issue including the ABA Standards for Criminal Justice; Landsmans, The Civil Jury in America, 62 Law & Contemp. Probs. 285 (1999); Suggs and Sales, Juror Self-Disclosure in the Voir Dire, A Social Science Analysis, 56 Ind. L.J. 245 (1981); Hastie, Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?, 40 Am. U. L. Rev. 703 (1991); Note, The Inadequacy of Massachusetts Voir Dire, 5 Suffolk J. Trial & App. Advoc. 81 (2000); McElhaney, Picking a Jury; Who Are You Talking To?, 67 Tenn. L. Rev. 517 (2000); McMahon & Kornblau, Chief Judge Judith Kaye's Program of Jury Selection Reform in New York, 10 St. Johns J. Legal Comment. 263 (1995); Hans, Improving Voir Dire Process in Civil Jury Trials, The Roscoe Pound Foundation, American Board of Trial Advocates, Delaware Chapter (2001); Mize, On Better Jury Selection, Spotting UFO Jurors Before They Enter the Jury Room, Court Review, (1999). Based on the literature, the common criticisms of current practices are that, rather than assisting in the selection of fair and impartial jurors, voir dire seeks to select an unbalanced jury made up of persons more favorable to one side of the other and also seeks to present an opening argument to jurors. A number of authors contend that current voir dire practices, by both bench and bar, fail to provide the essential information necessary for reason-based jury selection.

The Committee also had the benefit of descriptions and analysis of the voir dire system used in the federal court in Vermont as explained by Judge William Sessions. Judge Sessions assumes the primary responsibility for voir dire questioning and then allows the lawyers a defined-time to ask additional questions. He reported that most lawyers do not use up their allotted supplementary time.

It also had the benefit of the Massachusetts experience, as reported by Judge Peter Lauriat, a strong supporter of judge-conducted voir dire.

Finally, the Committee had the benefit of the experience and expertise of its members. Member Richard Rubin performed a demonstration of attorney-conducted voir dire in a difficult criminal case and was critiqued by member Superior Judge Matthew Katz.

Current practice in Vermont allows attorneys to conduct voir dire A under the supervision@ of the trial judge in criminal cases by rule and in civil cases by tradition. The trial court judge becomes directly involved in questioning jurors infrequently, usually at the explicit or implicit request of one of the trial attorneys. Judges manage the voir dire indirectly, usually with guidance on an ad hoc basis depending on the nature of the case and the propensities of the trial attorneys. Some judges have moved beyond ad hoc guidelines and formalized A Rules for Voir Dire@ . These rules direct all attorneys away from certain common practices that the judges find inappropriate B like arguing the case during voir dire. Neither the trial lawyers nor the trial judges have come to a consensus on the substance or value of these directions in whole or in part.

Some trial judges see voir dire practices as needlessly repetitious. Different counsel, in serial cases during a jury draw day in district court, ask the same questions to the same jurors again and again without gaining any new information. Others see voir dire questions directed at developing a basis beyond that for a cause challenge inherently suspect. Some judges see voir dire as a needlessly painful experience for some lawyers and for many jurors.

Trial lawyers, especially in complex civil litigation or serious criminal matters, believe that judge-conducted voir dire is largely ineffective to uncover bias or to obtain relevant information for the intelligent exercise of peremptory challenges. They believe that only the trial lawyers have the knowledge of their case, their clients, and the issues involved to conduct truly effective voir dire. They expressed concern that the judges lack both the expertise and motivation to induce potential jurors to be open and forthcoming about their feelings and biases about a particular issue in a case. They fear that the court is often more concerned with A moving the process along@ or A rehabilitating@ a potential juror than taking the time to ask follow-up or open-ended questions designed to induce jurors to talk freely. The trial lawyers, including prosecutors, were very zealous in their defense of the current Vermont practice.

In the end, the committee members could not come to a consensus on either defining a specific problem with the current practices or in offering specific recommendations for change. The committee employed a discussion device B specific changes to Civil Rule 47 and Criminal Rule 24 B as a set of guidelines to first list and then assign commonly understood voir dire tasks and topics between judges and trial lawyers. Discussion on the proposal, while helpful, failed to gain committee support for implementation of rule changes.

The committee did come together to some degree. While the committee saw civil and criminal jury voir dire practices through different prisms, they agreed that further discussion and change would assist the bar, the bench and the public. It reached four conclusions.

1. The bench and the bar do not share a common understanding of good voir dire practices.
2. A sufficient number of practicing lawyers consistently demonstrate good, if not excellent, practices with voir dire. Many lawyers could profit by further training on the subject.
3. Some abuses do occur. The frequency is not such that requires as dramatic a response as a rules change.
4. Lawyers and judges currently perceive any proposed rules change as a limitation on current practices rather than an assistance in curbing voir dire abuses.

The Committee recommends that the profession focus the issue as a skills concern rather than a rules concern. To that purpose, it recommends:

1. The Vermont Bar Association begin a dialogue with the trial bench on the issue of voir dire practices.
2. The Vermont Bar Association present a Continuing Legal Education course on the topic.
3. The Vermont Supreme Court not adopt a change to the current civil or criminal rules.

JUROR CHALLENGES

By statute, 12 V.S.A. ' 1941, each party in a civil or criminal proceeding may A peremptorily challenge six jurors and any number for cause. @ This provision is also included in the civil and criminal rules, which set out the procedures for exercising challenges. See V.R.Civ. P. 47(c); V.R. Cr. P. 24(c). Vermont currently allows more peremptory challenges than the majority of states in civil cases and in misdemeanor cases. The average number allowed in felonies is slightly smaller than six, but six remains the most popular number. The policies in other states are summarized in Appendix F.

As with other issues in this report, there has been considerable activity in the states, and considerable scholarly writing, with respect to peremptory challenges. While some see such challenges as a means to eliminate juror bias, others criticize them as discriminatory, to minimize categories of people B like minorities, young persons or persons of a particular gender B who are thought to be less favorable generally to the position of the party exercising the challenge. On balance, the Committee agrees that peremptory challenges are too infrequently used to eliminate biased jurors and too often used to shape the jury to favor the party exercising the challenge .

The Committee was persuaded, however, by Superior Judge Gregory Mize, Chairman of the District of Columbia Jury Project, that legitimate use of peremptory challenges is often frustrated by overly-conservative policies on use of challenges for cause. Thus, many of the current peremptory challenges are being used on jurors who should have been excused for cause. Thus , the Committee follows the recommendation of the D.C. Jury Project in recommending the substantial reduction in the availability of peremptory challenges, but only if there is a clear, liberal standard in place for challenges for cause.

With that policy in force, the committee voted to recommend reduction in the number of peremptory challenges available to parties in both civil and criminal matters. The votes pertaining to peremptory challenges in civil and criminal matters were initially tabled until the issues surrounding voir dire and challenges for cause could be discussed and voted upon by the committee. Committee members discussed at length the need for a defined standard relating to challenges for cause before the number of available peremptory challenges was reduced, noting the relationship between the two during the voir dire process. With the understanding that the vote would be contingent upon an acceptable challenge for cause standard, the committee voted to reduce the number of peremptory challenges in civil matters to three and to reduce the number in misdemeanor matters to three.

While discussing felony cases, the committee distinguished between less serious felonies and those cases which presented a potential for lengthy imprisonment. Therefore, the committee voted to reduce the number of peremptory challenges in felony cases to three and to allow six peremptory challenges in felony cases with the potential of fifteen years or more of imprisonment or life imprisonment.

With respect to the standard for challenges for cause, the Committee voted to amend the rule on challenges for cause to provide that the trial court should grant such a challenge A whenever there is any reasonable basis to question @ a prospective juror= s A ability to be fair and impartial. @ The court may consider A any relevant factor@ in making its decision, including the prospective juror= s responses to questions, behavior in the courtroom, and relationship to the parties, the attorneys, and (in criminal cases) to members of law enforcement. This proposal is intended to change existing practice by making it less difficult to make a successful challenge for cause.

The committee identified three reasons for this proposed change. First, many Committee members expressed frustration that, under current practice, it is too easy to A rehabilitate@ a prospective juror whose impartiality is in doubt by extracting a commitment that he or she will follow the judge= s instructions or a promise he or she will be fair despite *voir dire* responses that suggest the contrary. Second, the Committee concluded that, given its proposal to reduce the number of peremptory challenges in most cases, a challenge for cause standard with teeth is necessary in order to ensure fairness. Finally, Vermont case law has already recognized the doctrine of imputed bias. In *State v. Kelly*, 131 Vt. 358, 361 (1973), a prospective juror= s daughter worked as a secretary in the State= s Attorney= s office, and she had a nephew who was a prison guard. The Vermont Supreme Court made clear that A the trial court would have been better advised if it had excused [her] from service on the jury upon the challenge for cause. It is true that the prospective juror stated that she could judge the case before her in a fair and impartial manner, and we have no doubt that she was sincere in such statement. But, human nature being what it is, the trial court could have well presumed that she might be unconsciously influenced by her relationships with those involved in law enforcement agencies. @ The Committee concluded that this standard should be explicitly adopted by rule.

A. Statutory enabling authority:

' 1941. Jury challenges; peremptory and for cause.

(a) Civil Actions. ~~Upon the trial of a cause in any court~~ In any civil action, each party, ~~including the state~~, may peremptorily challenge ~~six~~ three jurors unless the Supreme Court by rule permits a greater number and may challenge any further number for cause. Several defendants or several plaintiffs may be considered as a single party for the purpose of making challenges or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

(b) Criminal Proceedings. In any criminal proceeding, each party may peremptorily challenge three jurors if the offense charged is a misdemeanor or a felony punishable by less than fifteen years of imprisonment and six jurors if the offense charged is punishable by fifteen years or more of imprisonment or by life imprisonment, unless the Supreme Court by rule permits a greater number. Each party may challenge any further number for cause.

B. Rules amendments.

RULE 47. JURORS

(b) Challenges for Cause. Challenges for cause of individual prospective jurors may be made at any time prior to the impanelment of the jury. The court shall excuse a prospective juror for cause whenever there is any reasonable basis to question the person's ability to be fair and impartial. In determining whether a prospective juror should be excused for cause, the court may consider any relevant factor, including the person's responses to questions, behavior in the courtroom, and relationship to the parties, counsel, or a prospective witness. When a prospective juror is challenged and excused for cause, a replacement juror shall be drawn, seated, and examined as provided in subdivision (a) of this rule.

(c) Peremptory Challenges.

(3) *Number.* Each party shall be entitled to ~~six~~ three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purpose of making challenges or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

Reporter's NotesB 2003 Amendment

Rule 47(b) is amended to clarify and articulate the standard for challenges for cause. A simultaneous amendment to Rule 47(c)(3) reduces the number of peremptory challenges for each party in a civil case from six to three in order to increase the fairness and efficiency of the trial process. Peremptory challenges are used in situations where there may in fact be grounds for challenge for cause. Although peremptory challenges have long been an important feature of trial by jury, their use may lead to delay and manipulation in the trial process and can result in the excuse of jurors for inappropriate reasons such as gender, ethnicity, or race and diminished public confidence in the courts. *See Broderick, A Why the Peremptory Challenge Should be Abolished, @ 65 Temple L. Rev. 369 (1992); Batson v. Kentucky, 476 U.S. 79, 102-08 (1986) (Marshall, J., concurring) (only by elimination of peremptories can discrimination be completely ended); Miller-El v. Cockrell, ___ U.S. ___ (No. 01-7762, 2/25/03).* The amendment of Rule 47(b) is intended to make challenges for cause more readily available and easily determinable to counterbalance the reduction in the number of peremptories. *See Council for Court Excellence District of Columbia Jury Project, Juries for the Year 2000 and Beyond 24-37 (1998).*

The amended rule establishes an objective standard that requires the court to act on a any reasonable basis to question@ the juror's ability to be fair and impartial. The juror's own statements of his or her impartiality are not necessarily controlling. The court must look at the content of the juror's answers on voir dire, demeanor, and the objective facts and impact of the jurors relationship to parties, counsel, witnesses, and the issues in the case. The rule is intended to embrace both the Vermont standard of A fixed opinion, bias, or prejudice@ and the Vermont practice regarding challenges for cause. *See State v. Grega, 168 Vt. 363 (1998); State v. Doleszny, 146 Vt. 621 (1986); Lattrell v. Swain & Swain, 127 Vt. 33 (1967).* The rule is also intended to adopt the doctrine of imputed bias recognized by the Court in *State v. Kelly, 131 Vt. 357, 361 (1973)*. In that case, the Court stated that a prospective juror whose daughter worked as a secretary in the State's Attorney's office and whose nephew was a prison guard should have been excused for cause despite her sincere statements of impartiality, because, A human nature being what it is, the trial court could well have presumed that she might be unconsciously influenced by her relationships with those involved in law enforcement agencies. @

The statutory standards found in many states illustrate the breadth of grounds that may be considered under the amended rule. *Compare* Ca. Civ. Pro. ' 229 (A implied bias@ includes consanguinity or affinity with party, corporate officer of party, witness, or victim; relationship as guardian, conservator, master, employer, landlord, principal, or debtor to the above; family member, business partner, surety, bondholder, stockholder, attorney, client of a party; service as a juror in same or related matter; interest in the outcome; unqualified belief as to the merits founded upon knowledge of material facts; state of mind evincing enmity or bias; status as party in action set for trial before same panel; conscientious objection to death penalty) *with* N.H.R.S.A. 500-A:12 (after examination under oath on motion of a party as to interest, relation to parties, opinion, prejudice, relation to counsel, A [i]f it appears that any juror is not indifferent he shall be set aside on that trial@).

RULE 24. TRIAL JURORS

(b) Challenges for Cause. Challenges for cause of individual prospective jurors may be made at any time prior to the impanelment of the jury. The court shall excuse a prospective juror for cause whenever there is any reasonable basis to question the person's ability to be fair and impartial. In determining whether a prospective juror should be excused for cause, the court may consider any relevant factor, including the person's responses to questions, behavior in the courtroom, and relationship to the parties, law enforcement personnel, counsel, or a prospective

witness. When a prospective juror is challenged and excused for cause, a replacement juror shall be drawn, seated, and examined as provided in subdivision (a) of this rule.

(c) Peremptory Challenges.

(3) *Number*. Each party shall be entitled to ~~six~~ three peremptory challenges if the offense charged is a misdemeanor or a felony punishable by less than fifteen years of imprisonment and six peremptory challenges if the offense charged is punishable by fifteen years or more of imprisonment or by life imprisonment.

Reporter= s NotesB 2003 Amendment

Rule 24(b) is amended to clarify and articulate the standard for challenges for cause. A simultaneous amendment to Rule 24(c)(3) reduces the number of peremptory challenges for each party from six to three in cases of misdemeanors or felonies punishable by sentences of less than 15 years and retains the allocation of six peremptories in cases where the offense is punishable by more than 15 years or by life imprisonment. The purpose of these amendments is to increase the fairness and efficiency of the trial process. Peremptory challenges are used in situations where there may in fact be grounds for challenge for cause. Although peremptory challenges have long been an important feature of trial by jury, their use may lead to delay and manipulation in the trial process and can result in the excuse of jurors for inappropriate reasons such as gender, ethnicity, or race and diminished public confidence in the courts. *See Broderick, A Why the Peremptory Challenge Should be Abolished*, @ 65 *Temple L. Rev.* 369 (1992); *Batson v. Kentucky*, 476 U.S. 79, 102-08 (1986) (Marshall, J., concurring) (only by elimination of peremptories can discrimination be completely ended); *Miller-El v. Cockrell*, ___ U.S. ___ (No. 01-7762, 2/25/03). The amendment of Rule 24(b) is intended to make challenges for cause more readily available and easily determinable to counterbalance the reduction in the number of peremptories. *See Council for Court Excellence District of Columbia Jury Project, Juries for the Year 2000 and Beyond* 24-37 (1998).

The amended rule establishes an objective standard that requires the court to act on a any reasonable basis to question@ the juror= s ability to be fair and impartial. The juror= s own statements of his or her impartiality are not necessarily controlling. The court must look at the content of the juror= s answers on voir dire, demeanor, and the objective facts and impact of the jurors relationship to parties, law enforcement, counsel, witnesses, and the issues in the case. The rule is intended to embrace both the Vermont standard of A fixed opinion, bias, or prejudice@ and the Vermont practice regarding challenges for cause. *See State v. Grega*, 168 Vt. 363 (1998); *State v. Doleszny*, 146 Vt. 621 (1986); *Lattrell v. Swain & Swain*, 127 Vt. 33 (1967). The rule is also intended to adopt the doctrine of imputed bias recognized by the Court in *State v. Kelly*, 131 Vt. 357, 361 (1973). In that case, the Court stated that a prospective juror whose daughter worked as a secretary in the State= s Attorney= s office and whose nephew was a prison guard should have been excused for cause despite her sincere statements of impartiality, because, A human nature being what it is, the trial court could well have presumed that she might be unconsciously influenced by her relationships with those involved in law enforcement agencies.@

The statutory standards found in many states illustrate the breadth of grounds that may be considered under the amended rule. *Compare* Ca. Civ. Pro. ' 229 (A implied bias@ includes consanguinity or affinity with party, corporate officer of party, witness, or victim; relationship as guardian, conservator, master, employer, landlord, principal, or debtor to the above; family member, business partner, surety, bondholder, stockholder, attorney, client of a party; service as a juror in same or related matter; interest in the outcome; unqualified belief as to the merits founded upon knowledge of material facts; state of mind evincing enmity or bias; status as party in action set for trial before same panel; conscientious objection to death penalty) *with* N.H.R.S.A. 500-A:12 (after examination under oath on motion of a party as to interest, relation to parties, opinion, prejudice, relation to counsel, A [i]f it appears that any juror is not indifferent he shall be set aside on that trial@).

JURY SOURCE LISTS

Pursuant to the Court Administrator= s Rules on Qualification, List, Selection and Summoning of All Jurors Rules 3 and 4, the master jury lists for each county are made up on or before July 1st in each year from lists of registered voters, licensed drivers and others who volunteer for jury service. In general, the use of these lists to derive jurors has been upheld as constitutional by the Vermont Supreme Court. *See State v. Pelican*, 154 Vt. 496, 507, 580 A.2d 942, 949 (1990). The use of voter and driver lists to make up jury lists is the most common procedure in the country. Half the states use this procedure. Some states use only one of these lists.

Because the voter lists are not available electronically for many towns, the process of drawing the master jury lists from the lists of voters and drivers in the county is a cumbersome manual operation, particularly to eliminate duplication. The committee understands that voter registration lists are likely to become available in electronic form as a result of recent voting procedure reforms enacted by the U.S. Congress. This will enable

the process of deriving jurors to be done electronically, a greatly needed reform to eliminate the unnecessary manual labor and expense in the current process.

Although the current lists are sufficient to meet constitutional standards, the committee believes that they fall short of assuring proportional representation of all segments of the community. The committee is also concerned whether the manual selection method achieves true randomness. These concerns are heightened as more racial and ethnic minorities appear in the Vermont population making it more diverse. A study of list merging in Connecticut showed that use of other lists B for example, state taxpayer lists B would add significant numbers of persons, not shown on other lists, to the combined list from which jurors are derived.

Recent reports in other jurisdictions have included recommendations to enhance jury source lists. The District of Columbia Jury Project recommended that source lists be expanded to include income tax, public assistance and naturalization lists. The New York Jury Project recommended adding lists of recipients of public assistance and unemployment compensation. The committee endorses the recommendations of these reports.

The committee recognizes that enhancing source lists addresses only one potential source of underinclusiveness. The lists must be reasonably current to include new residents and those who become eligible for jury service. In most respects, the annual development of the master juror list is adequate, but not with respect to age. Currently, the court administrator receives only licensed drivers who were 18 at the time of the license renewal. By the time the jurors are derived from this list, they are older than 18 years in most cases and no operators who become 18 years old are included. The committee recommends that the licensed driver source list be amplified to include all licensed drivers with the age eligibility determination made at the time the qualified master jury list is derived.

In other respects, current procedures do not operate to reduce representativeness. The Jury Communications committee found that the response rate to jury questionnaires and summons was sufficiently high so no corrective action is necessary. Vermont has eliminated most categorical exclusions from jury service that undermined representativeness. There is no reason to believe that case-by-case hardship determinations to excuse jurors operate discriminatorily.

The Committee wrestled with the difficulty of ensuring minority representation on juries for trials in which minorities are involved as litigants. A few jurisdictions with more substantial minority populations have adopted rules requiring minority representations on juries that will be deciding cases involving minority litigants. Others have dealt with the problem by selecting some jurors from geographical areas with a high incidence of minority populations. The Committee concluded that the relative size of the minority communities in Vermont's counties, and the lack of concentrated areas of residence, would make any such reforms impracticable. Thus, the Committee declined to recommend any changes, other than those outlined above, to address the representation of minorities. The Committee believes that drawing from broader lists will assure at least the representative nature of venires, while assuring representation of minorities on individual juries may be an unattainable goal.

The recommendations of the Committee in this area are as follows:

1. As soon as possible, the Court Administrator create county by county master source lists in electronic form and develop and distribute software to automate jury administration at all steps.
2. The current jury source lists be augmented by lists of income tax payers from the Vermont Department of Taxes, unemployment compensation recipients from the Department of Employment and Training, and public assistance recipients from the Department of Prevention, Assistance, Transition and Health Access.
3. The driver license lists be expanded to include all licensed drivers of any age, with the age eligibility determination made at the time the qualified master jury list is created.

CONCLUSION

In most respects the jury system continues to work well in Vermont, and it remains a critical part of the overall justice system. Like any institution, however, it requires periodic examination to determine whether changes in structure or procedure will enable to work better. The Committee on Jury Policy has identified a few instances where reform is desirable to allow less-than-unanimous verdicts in civil cases, to reduce the availability of peremptory challenges in all civil cases and most criminal cases, to liberalize the standards for challenges for cause and to automate and expand jury source lists to increase the representativeness of juries. These reforms will enable the system to fully meet the expectations of Vermont citizens and produce democratic justice.

Respectfully submitted,

Vermont Supreme Court Jury Policy Committee by: John A. Dooley, Chair

Members of Committee:

- . Tina de la Bruere
- . John Dooley, Chair
- . Edward J. Cashman
- . Karen R. Carroll

. Joseph Frank
. Samuel Hoar, Jr. ¹
. Matthew I. Katz ²
. Mark H. Kolter
. Michael S. Kupersmith
. Matthew I. Levine
. Dennis R. Pearson
. Richard Rubin
. Stephen Saltonstall
. Anna Saxman
. Pamela Stephens
. Judge David Suntag
. Lee Suskin
. David Tartter (resigned) and replaced by Matt Levine
. Dennis Tonsing (resigned)
. Jane Woodruff
. L. Kinvin Wroth, Reporter

¹ Sam Hoar dissented from the recommendation to allow non-unanimous juries in civil cases, but did not file a written statement.

² Judge Matthew Katz dissented from the recommended language of proposed Civil Rule 48(b) because it would allow parties to stipulate to a jury verdict based on greater than 80% of the jurors. The dissent is attached as Appendix G.

Appendix A

Committee on Jury Policy

Charge and Designation

A. Charge

The right to trial by jury is one of our most sacred constitutional rights. Jury service offers citizens an opportunity to participate in the justice system. In Vermont, we entrust jurors with the heavy responsibility of deciding guilt or innocence in criminal cases and deciding liability, and if appropriate, damages in civil cases. For the courts to dispense justice, the jury system must work fairly, competently and accurately; and Vermont citizens must willingly serve as jurors. Indeed, even the perception that the jury system is not working optimally undermines public trust and confidence in the judicial system.

The Supreme Court Committee on Jury Communications, Understanding and Deliberation has recently completed the first phase of its work and delivered a report to the Supreme Court, along with proposals for amending civil, criminal and jury administration rules. Following the work of jury communication committees in other states, the committee has identified areas in which communications with juries, juror understanding of the instructions and jury deliberation can be improved. These issues are, however, tied to larger issues of jury policy in Vermont, and the larger issues have not been examined in recent years. As with the issues explored by the earlier committee, the fundamental questions of jury size, degree of agreement and selection procedure have been analyzed in other states, and some states have made policy changes by constitutional amendment, statute or court rule.

The charge and designation of the Supreme Court Committee on Jury Communications, Understanding and Deliberation charged the committee A to examine the current rules and policies governing the operation of juries as related to their ability to fairly and accurately discharge their function in the justice system. @ It restricted the inquiry, however, to eleven specific areas and did not seek an examination of the broader policy issues governing our jury system. It also emphasized improvements that could be made by court rule. By this charge and designation, the Court begins the process of examination of fundamental jury policies, not evaluated by the original committee, with the understanding that any recommended policy changes may require constitutional and statutory changes, as well as new court rules.

Accordingly, the Vermont Supreme Court hereby establishes a Committee on Jury Policy to examine the current constitutional provisions, statutes, rules and policies governing the operation of juries as related to their ability to fairly and accurately discharge their function in the justice system. The committee is specifically charged with examining the following issues:

1. Whether the current size of juries, twelve persons in both civil and criminal cases, is optimum for both kinds of cases.
2. Whether the requirement of unanimous agreement on a verdict of all jurors is optimum for both civil and criminal cases.

3. Whether the current methods of conducting voir dire in civil and criminal cases is appropriate.
4. Whether the current policy on number of challenges, grounds for challenges and procedure for challenges, as set out in 12 V.S.A. ' 1941, V.R.C.P. 47 & V.R.Cr. P. 24, are appropriate.
5. Whether jury procedures should authorize the use of anonymous juries in civil or criminal cases with accompanying procedures.
6. Whether jury selection methods fairly produce a cross-section of Vermont adult citizens on juries, and if not, what procedural changes should be made to improve the representativeness of juries
7. Whether the policies and procedures for use of special verdicts and interrogatories in civil cases, as set out in V.R.C.P. 49, are appropriate.

The committee may examine other jury policy issues which it finds bear on the fairness, cost and accuracy of jury verdicts. The committee shall report to the Supreme Court by July 1, 2002. If the committee recommends changes in provisions of the Vermont Constitution, statutes or court rules, it shall draft and propose specific amendments consistent with its recommendation. The Committee may initiate rulemaking pursuant to Administrative Order No. 11 and shall be the proponent of rulemaking pursuant to that Order.

B. Designation

The Supreme Court hereby appoints to the Committee the following persons:

- . John Dooley, Associate Justice, Chair
- . Hon. Karen Carroll, Superior Judge
- . Hon. Edward Cashman, District Judge
- . Hon. Matthew Katz, Superior Judge
- . Hon. Michael Kupersmith, District Judge
- . Hon. Dennis Pearson, Superior Judge
- . Hon. David Suntag, District Judge
- . Samuel Hoar, Esq.
- . Joseph Frank, Esq.
- . Mark Kolter, Esq.
- . Stephen Saltonstall, Esq.
- . Anna Saxman, Esq.
- . Prof. Pamela Stephens, Vermont Law School
- . David Tartter, Esq.
- . Jane Woodruff, Esq.
- . Richard Rubin, Esq.
- . Dennis Tonsing, Vermont Law School
- . Tina de la Bruere, Clerk, Orleans District Court
- . Lee Suskin, Court Administrator, or his designee

The Court Administrator shall employ a reporter for drafting the report of the committee and any recommendations.

C. Expenses

In the performance of their duties, the non-Judicial Branch members of the Committee shall be reimbursed for reasonable and necessary expenses. The Judicial Branch members shall be reimbursed the normal state employee expenses. The Commissioner of Finance and Management shall pay from the judicial appropriation all expenses of the Committee when claims are submitted on proper vouchers approved by the Court Administrator or his designee.

Done in chambers at Montpelier, this ___th day of November, 2001.

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

James L. Morse, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Appendix B

Jury Policy Committee Members

- . Tina de la Bruere, Orleans District Court Manager
 - . Karen R. Carroll, Superior Judge
 - . Edward J. Cashman, District Judge
 - . John Dooley, Associate Justice, Chair
 - . Joseph Frank, Esq., Retired Trial Court Attorney
 - . Samuel Hoar, Jr., Esq., Dinse, Knapp & McAndrew, P.C.
 - . Matthew I. Katz, Superior Judge
 - . Mark H. Kolter, Esq., Darby Laundon Stearns Thorndike & Kolter
 - . Michael S. Kupersmith, District Judge
 - . Matthew I. Levine, Esq., Vermont Attorney General's Office
 - . Dennis R. Pearson, Superior Judge
 - . Richard Rubin, Esq., Rubin Kidney Myer & DeWolfe
 - . Stephen L. Saltonstall, Esq., Barr, Sternberg, Moss, Lawrence, Silver & Saltonstall, P.C.
 - . Anna Saxman, Esq., Vermont Defender General's Office
 - . Pamela Stephens, Professor, Vermont Law School
 - . David T. Suntag, District Judge
 - . Lee Suskin, Court Administrator
 - . Jane Woodruff, Esq., State's Attorney Office
 - . L. Kinvin Wroth, Dean, Vermont Law School
-

Appendix C

AGENDA and BACKGROUND

Meeting of Jury Policy Committee

March 15, 2002 – 9 AM

Costello Courthouse – 4th Floor Library

PRESENTERS

- Tom Munsterman – Director, Center for Jury Studies, National Center for State Courts.
- Paula Hannford - Staff Attorney and Senior Research Analyst, National Center for State Courts.
- Gregory Mize - Judge, D.C. Superior Court and Co-chair, D.C. Jury Project
- Peter Lauriat - Mass. Superior Judge

9:00 Welcome, Introductions, Background etc Justice Dooley

1. Diversity/representativeness, List considerations (other

considerations in other sessions like size and perempts)

What states are doing, good and bad

- . Lists
- . Stratification
- . Outreach

Tom Munsterman

D.C. experience – Gregory Mize

2. Structure: size and unanimity

State of the States Tom Munsterman

What are the issues? Paula Hannaford

Mass. experience with non-unanimous juries - Peter Lauriat

12:00 Lunch brought in (length based on agenda progress)

1:00 PM (approx.)

Voir Dire and Challenges

Overview of states – Tom Munsterman and Paula Hannaford

DC Task Force Study and recommendations, Gregory Mize

Mass Experience and plans for new pilot program, Peter Lauriat

What do jurors say: Paula Hannaford

4:00 Conclude

Appendix D, E and F:

Jury size in courts of general jurisdiction

[Click here](#) to read the National Center for State Courts presentation, this file is in PDF, you will need Adobe Reader. [Click here](#) to go to the Adobe Acrobat website and download Adobe Reader.

Appendix G:

JURY POLICY COMMITTEE

PARTIAL DISSENT

I support most of the Committee Report, but write to point out one area of disagreement—Civil Rule 48(b). As proposed, the Rule would permit the parties, through their attorneys, to stipulate that any jury verdict will require more than a mere 80% concurrence. They may stipulate to require a unanimous verdict, or that eleven of twelve jurors agree, in order for there to be a verdict.

Although the purpose of civil lawsuits is to resolve private disputes, when the parties bring their dispute to court, other interests become involved. Some of those other interests may not be strictly private, and should not necessarily be within the control of the disputing parties. As the Committee Report notes, there are a number of interests which converge on the question of non-unanimous jury verdicts:

- Ending the requirement for unanimity will reliably result in shorter deliberations. Hence, jurors will be able to go home and back to their lives in less time;
- Ending the requirement for unanimity will reduce the number of re-trials, necessitated by jury deadlock;
- Ending the requirement for unanimity will increase juror satisfaction with their role, as less compromise will be required, to reach a verdict;
- Less compromise around the jury table is more likely to vindicate the law's policies, as expressed to the jury in the judge's instructions of law. The compromise necessary to achieve unanimity must necessarily result in the majority of jurors feeling that they departed from strict adherence to that charge. Hewing closely to the law and the charge is, over the long run, in the interest of the courts in demonstrating the ultimate rule of law in the day-to-day lives of all Americans.

These interests are not insubstantial. We should not readily accede to their being compromised.

We should also recognize that litigants, themselves, are probably not all that consumed by such procedural issues as jury unanimity. In reality, if proposed Rule 48(b) is used, it will be because of the individual predilections of a particular pair of attorneys. We should not allow the substantial public interests reviewed above to be vitiated by the nostalgic predilection of a few lawyers for the unanimous, probably compromised, verdicts of yore.


For these reasons, I would exclude paragraph 48(b) and substitute therefor the following sentence, to be added to 48(a):
The parties may stipulate to a lower percentage.

Matthew I. Katz
March 5, 2003

Vermont Judiciary

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