Memorandum 93-67

Trial Court Unification: Trial by Jury

Article 1, Section 16, of the California Constitution on jury trial provides:

> Sec. 16. Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.
>
> In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. In civil causes in municipal or justice court the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court.
>
> In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court.

Trial court unification will necessitate revising the second paragraph of Section 16 permitting the Legislature to provide for an eight-person jury in civil cases in "municipal or justice court" to recognize whatever new scheme is adopted for assigning larger and smaller cases. Unification also raises questions about the permissible area for selecting jurors (vicinage), and about the possible need to reorganize the office of jury commissioner.

Number of Jurors in Civil Cases

The 1993 Judicial Council Report would amend the constitution to classify civil cases into two categories:

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>
> In Category One civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. In

Category Two civil causes ~~in municipal or justice court~~ the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court. All causes shall be assigned to Category One or Category Two as provided in Article VI, Section 11.

In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court.

These amendments would tie the question of when an eight-person jury may be used to the question of appellate jurisdiction as determined under Article VI, Section 11. The Judicial Council Report would amend Article VI, Section 11, to authorize the Judicial Council to determine by rules approved by the California Supreme Court which cases will be assigned to Category One and which to Category Two for the purpose of appellate jurisdiction.

Should the determination of which civil cases may be tried by a jury of less than 12 be by statute or rule? The Judicial Council Report says the question of appellate jurisdiction is "largely a matter of judicial policy and administration," and therefore should be determined by rule rather than by statute. The Report notes that the Supreme Courts of the United States, New York, and Illinois have rule-making authority over appeals.

In terms of rights of litigants, it seems no more troubling to define the size of civil juries by rule than to define appellate jurisdiction by rule. The U. S. Constitution does not require states to give litigants a right of appeal. Similarly, there is no federal constitutional right to jury trial in civil cases in state courts. County of El Dorado v. Schneider, 191 Cal. App. 3d 1263, 1271, 237 Cal. Rptr. 51 (1987); California Civil Procedure During Trial § 7.2, at 134 (Cal. Cont. Ed. Bar Supp., June, 1993). For ease of administration, it makes sense to define categories of cases for all purposes — original and appellate jurisdiction, jury size, and extraordinary writs. This suggests that all these questions should be determined in the same way, whether by statute or rule.

The Judicial Council Report anticipates that coordination will be required between implementing legislation and initial rules of appellate jurisdiction. Although cases would be classified by court rule, implementing legislation must address such questions as the limited discovery and motion provisions of the Economic Litigation Program. The Report also assumes the initial rules of

appellate jurisdiction will preserve the status quo by classifying cases now within the jurisdiction of municipal and justice courts as Category Two cases.

Arguably the status quo would be better preserved by not taking away the Legislature's constitutional authority to provide by statute for eight-person juries. The Legislature has been cautious in exercising this authority. In 1981, the Legislature authorized an experimental project using eight-person civil juries in municipal and justice courts in Los Angeles County, but that project has expired. See Code Civ. Proc. § 221. There are no other statutes authorizing eight-person juries, except by agreement of the parties. See *id.* § 220.

Although we must look again at the rule-or-statute question when we consider appellate jurisdiction and extraordinary writs, for now the staff proposes the eight-person-jury question be resolved by statute. See draft below under "Staff Recommendation."

Vicinage

Some commentators have had concerns about the effect of unification on the federal constitutional right of a criminal defendant to be tried by jurors selected from the district where the offense occurred — the "vicinage" right. 5 B. Witkin, California Criminal Law *Trial* § 2643, at 3171 (2d ed. 1989). See also Code Civ. Proc. §§ 191-192, 197; Pen. Code § 1046 (jurors in civil and criminal cases must be selected from the "population of the area served by the court"). There was concern about the constitutionality of making the selection area either too large or too small.

If the selection area is not larger than county-wide, there appears to be no violation of federal vicinage rights. In the controlling case, the California Supreme Court held that under the U. S. Constitution "vicinage is defined as the *county* in which the crime was committed." Hernandez v. Municipal Court, 49 Cal. 3d 713, 717, 781 P.2d 547, 263 Cal. Rptr. 513 (1989). The court rejected defendant's contention that vicinage should be construed narrowly to require jurors to be selected from the judicial district where the crime occurred. Thus the federal vicinage right will not prevent selecting jurors on a county-wide basis.

In *Hernandez*, the offense occurred in Watts, eight miles south of the downtown courthouse of the Municipal Court for the Los Angeles Judicial District. The case was sent for trial to the San Fernando branch court in the same municipal court district. The jury was selected from within 20 miles of the San Fernando courthouse, effectively excluding jurors from the area of the crime.

The court said "there is no violation of the vicinage requirement when a criminal defendant is tried in Los Angeles County by a jury drawn from Los Angeles County." The court concluded that "in California the boundaries of the vicinage are coterminous with the boundaries of the county."

In early English practice, juries were from the neighborhood of the crime because they had to determine the facts based on their personal knowledge. Although English juries evolved into bodies to hear evidence, and knowledge of the facts became a cause for rejecting jurors, they nevertheless continued to be drawn from the vicinity of the crime. The vicinage principle gained vitality during the American Revolution in response to English laws permitting trial in England of crimes of treason committed in the colonies. The *Hernandez* court concluded that:

> Jurors are no longer permitted, let alone required, to possess personal knowledge of the crime; our citizens are no longer threatened with transportation across the seas for criminal trials. Transformations in our government as well as in our society make clear that narrowly interpreting the vicinage requirement is no longer warranted.

It has also been said that the vicinage right belongs to the community as well as to the accused. It vindicates the community's right to sit in judgment on crimes committed within its territory. Local communities, through their juries, are able to make criminal law for their community. It serves therapeutic needs of the community. Trial in the community of local criminal matters, particularly shocking crimes, provide a substitute for natural human reactions of outrage, protest, and vengeful self-help. People v. Guzman, 45 Cal. 3d 915, 936-37, 755 P.2d 917, 248 Cal. Rptr. 467 (1988). This policy does not appear to be undermined by a county-wide jury selection area, particularly given the wide area now served by newspaper, radio, and television. Moreover, local outrage may compel a change of venue to assure a fair trial. The community right to have criminal cases tried locally is outweighed by the right of the accused to a fair trial.

Some statutes localize jury selection to avoid having jurors travel long distances. See, e.g., Code Civ. Proc. § 199.2. See also *id.* §§ 198.5, 199, 199.3, 199.5. This suggests that, if branch courts are established, jurors should be drawn from the area served by the branch court, rather than from the whole county.

Some commentators have suggested organizing rural courts in multi-county districts. If this is done, jurors in criminal cases should be drawn from the county

in which the offense was committed to avoid federal vicinage issues. Courts might uphold a selection area larger than the county, but limiting the selection area to the county would avoid litigating constitutional issues.

The staff thinks these questions should be addressed by statute rather than by a constitutional provision. If multi-county districts are created, Sections 191 and 197 of the Code of Civil Procedure should be revised to say jurors shall be selected from an area not larger than the county where the offense occurred, and to permit smaller areas to be provided by court rule.

One commentator urges vicinage rules be statewide, adopted by the Judicial Council rather than by local court rule. The Judicial Council Report recommends determining vicinage by local court rule. This seems appropriate since local courts are familiar with local conditions. Statutes now authorize local court rules for selecting jurors. See, e.g., Code Civ. Proc. §§ 198, 199, 199.2, 199.3, 199.5, 200. There is no compelling reason to divest local courts of authority to make rules for jury selection not inconsistent with statute or Judicial Council rules.

Jury Commissioners

There is one jury commissioner in each county, appointed by a majority of the superior court judges in that county. Code Civ. Proc. § 195(a). If the county has a superior court administrator or executive officer, that person serves as ex officio jury commissioner. *Id.* The jury commissioner serves for all superior, municipal, and justice courts in the county. *Id.* §§ 194(b), 195(a). A majority of the judges of the municipal and justice courts in the county may appoint the clerk or administrator of those courts to select their jurors. *Id.* § 195(a). The staff is informed that the statewide trend is to have one jury commissioner for all courts in the county, and that the provision for municipal and justice court judges to appoint their own jury commissioner is falling into disuse.

Trial court unification will not require significant revision of this scheme. The trend toward consolidating the jury commissioner function should probably be codified as part of trial court unification by conforming revisions to Section 195.

Limiting Right to Jury Trial

Several judges have urged elimination of the requirement that all criminal cases be tried by jury so misdemeanors punishable by six months or less in the county jail could be tried by the court. In Memorandum 93-53, the staff recommends that we limit our effort to remedying immediate problems created

by unification and not address other possible reforms now. The staff thinks limiting jury trials is in the category of other possible reforms and should not be addressed in this study.

Staff Recommendation

The staff recommends amending Article 1, Section 16, of the California Constitution as follows:

> **Const. Art. 1, § 16. Trial by jury**
>
> Sec. 16. Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.
>
> In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. In civil causes ~~in municipal or justice court~~ designated by the Legislature ~~may provide that~~ the jury shall consist of eight persons or a lesser number agreed on by the parties in open court.
>
> In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court.
>
> **Comment.** The second paragraph of Section 16 is amended to delete the former reference to "municipal or justice court," and to replace it with authority for the Legislature to designate the civil causes in which an eight-person jury may be used. This preserves the effect of former Section 10 of Article VI under which the Legislature could define the jurisdiction of municipal and justice courts, thereby determining the civil cases in which an eight-person jury may be used.

The following statutory sections on juries use "superior court" or "municipal court" terminology and should be conformed: Code of Civil Procedure Sections 194-195, 198.5-201, 215, 217, 221, 234, and 237, and Penal Code Section 1089.

Respectfully submitted,

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