

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks

report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

HOUSE COMMITTEE ON AGENCY REORGANIZATION AND REFORM April 11,
1991Hearing Room D 3:30 p.m.Tapes 56 - 57

MEMBERS PRESENT:Rep. Clarno, Chair Rep. Derfler Rep. Jones Rep. Katz
Rep. Clark

MEMBER EXCUSED: Rep. Hugo, Vice-Chair Rep. Brian

STAFF PRESENT: Susan Browning, Committee Administrator Scott
Kaden, Committee Assistant

MEASURES CONSIDERED:HB 2885 - Civil Jury Bill, PH HB 3542 - Civil Jury
Bill (Judiciary's Bill), PH

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TAPE 56, SIDE A

005 CHAIRPERSON CLARNO: Calls the meeting to order at 3:36 p.m.. -
Addresses committee business and future agendas.

036 SUSAN BROWNING, COMMITTEE ADMINISTRATOR: Explains HB 2885 and HB
3542, identical bills with the exception of the peremptory challenge
section.

057 REP. DERFLER: What is a peremptory challenge?

058 BROWNING: HB 3542 is identical to HB 2885, but it adds a clause for
peremptory challenge. A peremptory challenge is an objection to a juror
for which the attorney doesn't need to give a reason. The court will
accept that juror exclusion without question. Currently, there are three
peremptory challenges in civil circuit court cases. HB 3542 would
reduce that number from three challenges to two challenges. That is the
primary difference between HB 354 2 and HB 2885.

070 REP. JONES: With regard to the peremptory challenges, is that per
juror, or per the entire jury panel?

072 BROWNING: Per the entire sitting jury.

073 REP. JONES: Two out of the six, in other words. If you have a six
member jury, you could challenge twice.

074 BROWNING: During the process to get a six person jury, you would be able to issue two peremptory challenges. For a twelve person jury, we currently have three peremptory challenges. This challenge clause is the only difference between these two bills. - HB 3542 has a different fiscal impact, somewhat greater, because of the peremptory challenge provision.

(Tape 56, Side A) HB 2885 and HB 3542 - CIVIL JURY BILLS, PUBLIC HEARING
Witnesses: Judge Thomas Mosgrove, Deschutes County Judge Kurt C. Rossman, Oregon Court of Appeals Chief Justice Edwin Peterson, Oregon Supreme Court Charlie Williamson, Oregon Trial Lawyers Association Jim Edmonds, Oregon State Bar - Practice and Procedures Committee

082 CHAIRPERSON CLARNO: Introduction of Judge Thomas Mosgrove.

092 JUDGE THOMAS MOSGROVE, PRESIDING CIRCUIT COURT JUDGE - DESCHUTES COUNTY: I am favor of this proposition. I took an informal straw poll in Deschutes County and found that there was considerable opposition to the bill, for a variety of issues. The primary reason given was that they felt that a strong juror could more easily sway a jury in one direction. Thus, they were afraid that might pose a problem.

107 REP. CLARK: On that point, what do they say about federal court?

108 MOSGROVE: They didn't say anything about federal court.

109 REP. CLARK: We do this in federal court and everything seems to work fine. Do we have weaker jurors in federal court? I don't understand the distinction.

111 MOSGROVE: That was just a fear expressed. I am not saying that I agree with it, because in fact I don't think that is what will happen.

112 REP. CLARK: I understand. I am trying to understand why people oppose this concept and how they treat the argument about federal court. That definitely must be addressed.

114 REP. DERFLER: They do this in several other states. Has there been some indication that there have been problems?

116 MOSGROVE: Not that I am aware of but I am not privy to surveys of what has happened in other states. I was given a handout on this matter which addresses what has been done with a variety of results. Different studies offer different results. You can find support for any position that you might want to take. Some say that juries are more erratic on a six person jury versus a twelve person jury. Others say there is no perceptible difference. - Sometimes the circuit court will allow six person juries, if both parties agree to a six person jury. I have tried several of those juries. I have seen nothing erratic about the behavior of jurors or the results that they obtain.

136 REP. JONES: Does the current statute allow you to have a six person jury, if both sides agree to this jury?

139 MOSGROVE: Yes.

140 REP. JONES: So it is permissible and it is being used in some cases?

141 MOSGROVE: The cases are very infrequent. Over the years, I have had just a few. It is infrequent.

142 CHAIRPERSON CLARNO: It isn't what you would call a practice?

143 MOSGROVE: No, it is not a practice at all. For those who favor this concept, they definitely want the three peremptory challenges maintained. I think there are benefits to be obtained from a smaller jury because of some fringe benefits found around the state. Our district courtrooms around the state generally have six person jury boxes. Many of the judicial districts have consolidated their courts and shift judges back and forth as they are available. This bill would make more courtroom space available.

172 REP. DERFLER: I am not familiar with the court process, so I am looking for an explanation. Doesn't the attorney on each side take a look at each juror?

175 MOSGROVE: They have the opportunity to ask questions of each juror.

176 REP. DERFLER: If they had all their exemptions, that would allow each attorney to dismiss three potential jurors?

178 MOSGROVE: Currently with a twelve person jury, they are allowed three exemptions on each side.

179 REP. DERFLER: HB 3542 will cut that to two on each side?

180 MOSGROVE: Yes, each side would have two. The attorneys ask jurors a lot of questions. If they can show that the juror has some actual bias and cannot be fair for one reason or another, the juror can be excused because of the bias. That is not a peremptory challenge. When they are done with the questioning process, then they can just pick the jurors they want to challenge, and they don't have to provide a reason.

187 REP. KATZ: Educate the Committee for one moment. Circuit court has twelve jurors with a possibility of six?

189 MOSGROVE: If both parties agree.

190 REP. KATZ: District court?

191 MOSGROVE: Six.

192 REP. KATZ: Federal court?

193 MOSGROVE: Six.

194 REP. CLARK: District court criminal cases?

195 MOSGROVE: Six.

196 REP. KATZ: What is the history on the twelve member jury for the circuit court?

197 MOSGROVE: I don't know, to be very frank.

198 REP. CLARK: It comes right out of the common law, "twelve men, tried and true."

199 REP. KATZ: In the past, were there twelve men juries for the other courts?

201 MOSGROVE: I think as the system developed, that became the customary practice.

202 REP. KATZ: But it is six in district court?

203 MOSGROVE: Yes.

204 REP. DERFLER: That is the way we have always done it.

205 CHAIRPERSON CLARNO: We hear that often, don't we?

206 MOSGROVE: I have talked to a few people on this and have found some opposition. When I became aware of substantial organized opposition, it was suggested that it be an option for both parties to elect to have a twelve person jury. If they elected to do so, they would have to pay an additional fee. I would suggest \$150 for the first trial day and \$100 for each additional day.

228 REP. CLARK: To be included, or not, in recoverable expenses?

229 MOSGROVE: Not. If it is recoverable, the procedure will be used extensively, thus defeating the purpose of this bill. - I feel that once the attorneys begin to use the six person jury and discover that it is not the ogre they fear, then they will be comfortable with it and use it much more.

242 REP. CLARK: There is one substantive difference. With this bill, you have to get 5 out of 6 instead of 9 out of 12. For that reason, it does raise the burden of proof.

252 MOSGROVE: It raises the burden of persuasion, at least. When I have tried cases with six persons, usually the agreement was that you needed unanimous agreement, and they have gotten it.

257 REP. CLARK: If that is the case, I am surprised the defense attorneys don't like the bill.

260 MOSGROVE: I have heard the reasons for the opposition to this bill. My suspicion is that it is a fear of the unknown. They know how the twelve person jury operates and are comfortable with it. They do not want to be forced into this change.

271 REP. JONES: Currently, what is required in the other courts with six person juries, in terms of the number of jurors who need to be persuaded?

275 MOSGROVE: I don't know.

276 REP. JONES: Do you know, Rep. Clark?

277 REP. CLARK: In some of the courts, it is six.

277 REP. JONES: Is that in a criminal case?

278 REP. CLARK: Criminal cases get a twelve person jury. Criminal court district cases have to be unanimous.

280 REP. JONES: Judge Mosgrove said six persons.

281 REP. CLARK: I understand that. But in district court criminal cases, it has to be all six. Right?

283 CHAIRPERSON CLARNO: It appears that you have help coming up to the table. I would like to take this opportunity to ask if Judge Kurt Rossman would come up to the table and join Judge Mosgrove.

291 MOSGROVE: I think I can answer your question now. Kingsley Click from the State Court Administrators Office just handed me the information on this topic. There are seven states that have six jurors and those must be unanimous. Six states have six jurors and require agreement of five of those. There is one state that has seven jurors which must unanimously agree. One state requires a nine person jury with unanimity.

303 REP. JONES: I have that information that you are reading. My interest was the cases that can now be tried in Oregon with six jurors. Do those courts require five to agree on a verdict? That was my question.

308 JUDGE KURT ROSSMAN: District court and civil court is five out of six. In the courts that I presided over, in a felony case within the circuit court level, if you stipulate to a six person jury, you needed six. The federal system has always been five out of six for civil cases.

313 REP. KATZ: My question should really be asked of the opponents to this bill. Would they support the raising of the requirement of six to twelve persons? I need to understand what the opposition thinks of this.

322 MOSGROVE: The Council on Court Procedures requests that this matter be referred to them for study, because they were set up by the Legislature to review Oregon Rules of Civil Procedure. The requirements happen to be in the Rules. I suspect if it is referred without some reporting-back time frame, you probably won't see it this session. - This really is something more than procedure. It is a matter of public policy. It is not just procedural.

337 REP. CLARK: I couldn't agree more. I have always supported sending bills out of Judiciary to the Council on Court Procedures when the bills needed to go there. But this is different. This is not like, how many days you have to respond to motion for summary judgment. This is a decision for the Legislature, it seems to me.

342 REP. KATZ: Did you want to continue with the hearing? Otherwise, I would like to have both our distinguished judges address the true reasons for opposition once again.

348 JUDGE KURT C. ROSSMAN, ASSOCIATE JUSTICE - OREGON COURT OF APPEALS: I developed a program in Yamhill County in the early 1970's in which we had a stipulated agreement which allowed six person juries in any case they wanted. Of course, both parties must have agreed. That was a very successful program and everyone was happy with it. I took this program on the road and explained it to groups all over the state. I concentrated my presentation on the dynamics which go on in a group of six versus a group of twelve. - When I did this tour, I tried not to be an advocate of my county's success. I tried to bring in objectivity. As time went on, I admit, I did become a salesman for the six person jury. I have spent a lot of time with specialists in the field of group deliberations, clinical psychologists, etc. - Arguments against a six person jury: 1. The smaller the jury, the less of a cross-section of society you will have. This is a valid point, especially in criminal cases. 2. Not enough studies have been done on reduced panels. 3. Twelve is the way it has been done and it works. Staunch traditionalists feel very content with twelve jurors. 4. "Two heads work better than one." Therefore, twelve jurors will be able to better recall the testimony and evidence. 5. Some feel that any time you start to reduce the number of jurors, you are taking the dangerous first step to doing away with the jury process. Many genuinely believe this is a

step towards ending the jury system. 6. Six person juries are more likely to be subject to one person rule. (Psychiatrists believe just the opposite.) 7. Six person juries tend to be more extreme in their results, i.e. higher verdicts.

TAPE 57, SIDE A

058 CHAIRPERSON CLARNO: What is an average caseload for a courtroom with regard to criminal versus civil?

062 MOSGROVE: In our courtroom, we have about 1,100 felonies filed each year. We have about 400 civil cases and about 400 - 500 dissolution cases. Criminal is about one third of our load, and civil is about one-sixth.

067 REP. DERFLER: Shouldn't the make-up of the jury have the most influence, rather than some of the other items that you have mentioned?

072 ROSSMAN: Are you reading from Dr. Bumpus's remarks (EXHIBIT A)?

073 REP. DERFLER: No, I am reading from my notes on your remarks. I would think that the type of people that you select would have greater influence than some of the items you suggested.

075 ROSSMAN: Well, I am sure that can have an effect. The reason I embrace this concept is the enjoyment the jurors get from participating on a six person jury. The courts can only be as strong as peoples' confidence in them. It is very rewarding for a judge to see a juror "turned on" about participation in the court system. If you are on a six person jury, you are forced into a position where your performance, contribution, and participation is vital. You cannot hide in the corner like you can on a twelve person jury. There are no "wallflowers."

090 REP. DERFLER: Using that analogy, I would think you would end up with a better verdict.

092 ROSSMAN: Absolutely. I am convinced of that. I feel that participation means quality.

097 MOSGROVE: There was a study done by the Judicial Council of California (1990), and their findings suggest that there is no difference in the accuracy or acceptance of the verdicts, when comparing an eight person jury to a twelve person jury.

114 ROSSMAN: Submits and summarizes exhibits (EXHIBIT A AND EXHIBIT B). I have provided you with Terrance Hall's paper on the six man jury composite.

123 CHAIRPERSON CLARNO: I understand this is an issue that you have pursued for quite some time. Sometimes opposition is based on fear of the unknown. Could you comment on the issue of peremptory challenges?

134 ROSSMAN: In civil cases, there are three peremptory challenges. I would imagine that reducing the challenges to two would probably not be widely accepted.

139 MOSGROVE: That is my impression as well. There is an American Bar Association study which recommends that with less than twelve jurors, you should have two peremptory challenges instead of three. I do think there would be more chance of acceptance if you retain the three peremptory challenges.

145 CHAIRPERSON CLARNO: Do either of you see a problem with two

peremptory challenges, or am I putting you on the spot too much?

147 ROSSMAN: You are talking about millions of dollars when you are talking about civil cases. I know if I was down in the pit, I would want to have a crack at least three people. Two is not a whole lot.

151 REP. JONES: Do they currently have three exemptions with other six member juries throughout the state?

153 ROSSMAN: Ours were all stipulated. In other words, both parties decided what they wanted and shook hands. In civil district court, don't they go with three exemptions or do they have two exemptions?

155 REP. JONES: That was my question.

156 MOSGROVE: I am not sure that I know.

158 REP. KATZ: I think we need to know that. We need to know how many peremptory challenges other courts currently have.

159 REP. CLARK: I think Kingsley Click or Charlie Williamson ought to know that. Could you check the law on that? I believe it is three.

171 REP. KATZ: Are you a Goldschmidt appointee?

172 ROSSMAN: No. I originally became a district court judge in 1965 by election. Governor Hatfield appointed me a year later to the circuit bench. Governor Atiyeh put me where I am now.

178 REP. KATZ: That's fine. I was just curious.

187 CHAIRPERSON CLARNO: Do we have an answer on the exemptions yet? I hear from the crowd that it is three exemptions.

193 ROSSMAN: This information that you sent me contains one error. In the Staff Measure Summary, the real purpose behind the 1972 amendment to the Oregon Constitution was to allow a reduced panel at circuit court.

207 BROWNING: Explains the error contained in the Staff Measure Summary, as pointed out by Judge Rossman.

227 KINGSLEY CLICK, DEPUTY STATE COURT ADMINISTRATOR: Reads from the ORS 46.190, with respect to the challenge of jurors. Civil actions are allowed two peremptory challenges each side, and no more.

239 CHAIRPERSON CLARNO: Thank you, Ms. Click, for your help. Chief Justice Peterson, could you please come up and join our distinguished panel?

251 CHIEF JUSTICE EDWIN J. PETERSON, OREGON SUPREME COURT: I have had a hectic day, and I had wished for more time to get my thoughts organized but I will proceed. - I am a strong advocate for the jury system. I have tried a lot of civil cases, both in the state and federal courts. - Studies have shown that the ideal size for a group charged with forming solid judgments is between five to seven people. When you appoint more than seven people to a committee, the communication is not the same.

305 REP. CLARK: I think this explains some of the problems coming out of the House Judiciary Committee.

307 REP. KATZ: Or the Joint Trade and Economic Development Committee.

312 REP. DERFLER: In the Labor Committee, we went from nine members to

seven members, and we have just as many problems.

315 PETERSON: The studies do show that the minority will be more effective with twelve on the committee rather than six. It is easy for five people to overrun one person. In this sense, the deliberative process is not enhanced. - In the federal court, we do have six jurors. They require an unanimous verdict, and I never once had a hung jury in the federal court. I had many hung juries in state courts where you only need nine of the twelve to agree. To me, that proves that it is just as easy, if not easier, to reach unanimity with a six person jury. - I would suggest that one change be made to the bill (see HB 2885, line 5). I would suggest adding the words "not less than" before the word "six." This would allow the judge the opportunity to have seven or eight jurors, allowing for an alternate juror.

427 CHAIRPERSON CLARNO: It was suggested by Judge Mosgrove that we might want to amend the bill so that either party may elect to have a 12 person jury and pay an additional amount.

443 PETERSON: I have heard that before, and I don't suppose that I would have an objection to that. But it tends to give a different quality of justice to the person who can afford to pay for twelve jurors. That is not an insubstantial consideration.

454 CHAIRPERSON CLARNO: Judge Mosgrove has explained that there will be a lot of resistance to this bill and allowing this amendment would make the bill more palatable to lawyers. We might have to look at that possibility when we hear from those opposed to the bill.

464 PETERSON: I feel that should be considered because it is my guess that after a few years of experience with the six person jury, it will generally be accepted by all.

468 MOSGROVE: That is the point that I made, Justice Peterson.

470 CHAIRPERSON CLARNO: People hate to change and maybe we could use this to help people get used to the six person jury on a more gradual pace.

478 REP. KATZ: Talk to the Committee about the representation of minorities on six member jury versus a twelve member jury.

483 PETERSON: There was a California study that touched upon that briefly, if I recall correctly. If you have fewer than twelve members, the likelihood of minorities being on the jury would be reduced. I would think that the number of minorities you have in the general population would tend to be the number of minorities you would have on the juries. Maybe I am missing something here.

TAPE 56, SIDE B

038 REP. KATZ: I don't think I would agree with you on that. I would ask you what basis you would have for that, due to the relationship of the minorities' desire to serve and their relationships with their employers, plus many other societal factors.

043 PETERSON: It strikes me that the factors that you have just mentioned would apply whether you had juries of six, twelve or twenty.

046 REP. KATZ: My sense is that they do. Reducing the jury size might aggravate those factors even further.

048 MOSGROVE: It is interesting to note that we are collecting jury panels from a much broader base than in previous years. We are now using driver's license registration as well as voter registration. I am sure that has helped the minority representation on juries.

053 REP KATZ: When I served, it was voter registration only. Driver's registration would certainly broaden the collection of jurors.

057 REP. JONES: We have not changed the amount that we pay jurors for many years. Can you comment on the impact that low pay has on the juries? I have received letters from constituents which basically state that they cannot serve because of the costs associated with serving on a jury.

066 PETERSON: I will defer that question to the gentlemen on either side of me. They are much more qualified to answer that question.

067 MOSGROVE: Many companies who have a sense of civic obligation pay their employees their regular wage while serving on juries. The problem arises when people are self-employed, work for an employer who does not reimburse, or do not work. It is a hardship for those people. People do come in and ask to be excused because of financial hardship. I think most judges are pretty liberal with excusing people if they can demonstrate a real financial hardship. In my view, \$10 per day is a ridiculous figure.

081 ROSSMAN: I agree.

082 CHAIRPERSON CLARNO: I believe that I have read somewhere in our information packets that jurors are reimbursed eight cents per mile?

083 BROWNING: Yes. In the information provided in the Legislative Fiscal Impact, it is eight cents per mile. So the average cost per juror per day is \$11.60.

085 REP. JONES: I have a bill in this body which addresses this issue. I recognize that we have concerns for keeping the State's costs low, but it looks to me that this is an improper, inadequate compensation.

091 PETERSON: I would like to point out one additional bill that is pending in the Legislative Assembly, which reduces the number of jurors from twelve to six in misdemeanor cases tried in the circuit court. I cannot recall the number of that bill. It is coming up for hearing next Monday. I just want to alert you to that. I believe it may be a Senate bill.

099 CHAIRPERSON CLARNO: I thank you for alerting us. It possibly is a Senate bill, but we will be on the lookout for it. Are there any other questions?

102 REP. KATZ: Is this bill for misdemeanors being tried in the circuit court?

103 PETERSON: Yes.

104 REP. KATZ: We have the right "relating to" clause.

105 CHAIRPERSON CLARNO: Yes, we do. I will have our Committee Administrator check into that bill and make sure that we address the issue. - I thank you for your testimony. Thank you for driving great distances to get here. - We will have a public hearing on this bill next Tuesday, but I am willing to allow those who have signed up today to testify. Charlie Williamson and Jim Edmonds, would you please come to

the witness table?

120 CHARLIE WILLIAMSON, OREGON TRIAL LAWYERS ASSOCIATION: I would be glad to wait until next Tuesday.

121 CHAIRPERSON CLARNO: Would you prefer to do that?

122 REP. KATZ: I would like to hear your testimony, but I have to leave in about five minutes.

124 JIM EDMONDS, OREGON STATE BAR - PRACTICE AND PROCEDURES COMMITTEE: I could wait until next week as well. Our committee is meeting this Saturday, and I think we might want to consider some of the issues which came up today in this hearing.

129 CHAIRPERSON CLARNO: Were you here for most of the hearing?

130 EDMONDS: Yes. I would like to have our committee address some of the concerns that you have expressed and also some things the panelists have brought forth.

131 CHAIRPERSON CLARNO: Specifically Judge Mosgrove's comment on the option for the larger jury. We will look forward to seeing you next Tuesday.

134 EDMONDS: Either myself or another person of the committee will be here next Tuesday.

136 BROWNING: If I may, Madame Chair, the committee hearing next Tuesday will start at 4:00 p.m. and will run until 6:00 p.m..

137 CHAIRPERSON CLARNO: We will have some work sessions next week. Hopefully, that will not be a problem. - This committee meeting is adjourned.

EXHIBIT LOG Exhibit A - Judge Kurt Rossman - 2 pages Exhibit B - Judge Kurt Rossman - 10 pages

Submitted by:

Reviewed by:

Scott Kaden

Susan M. Browning