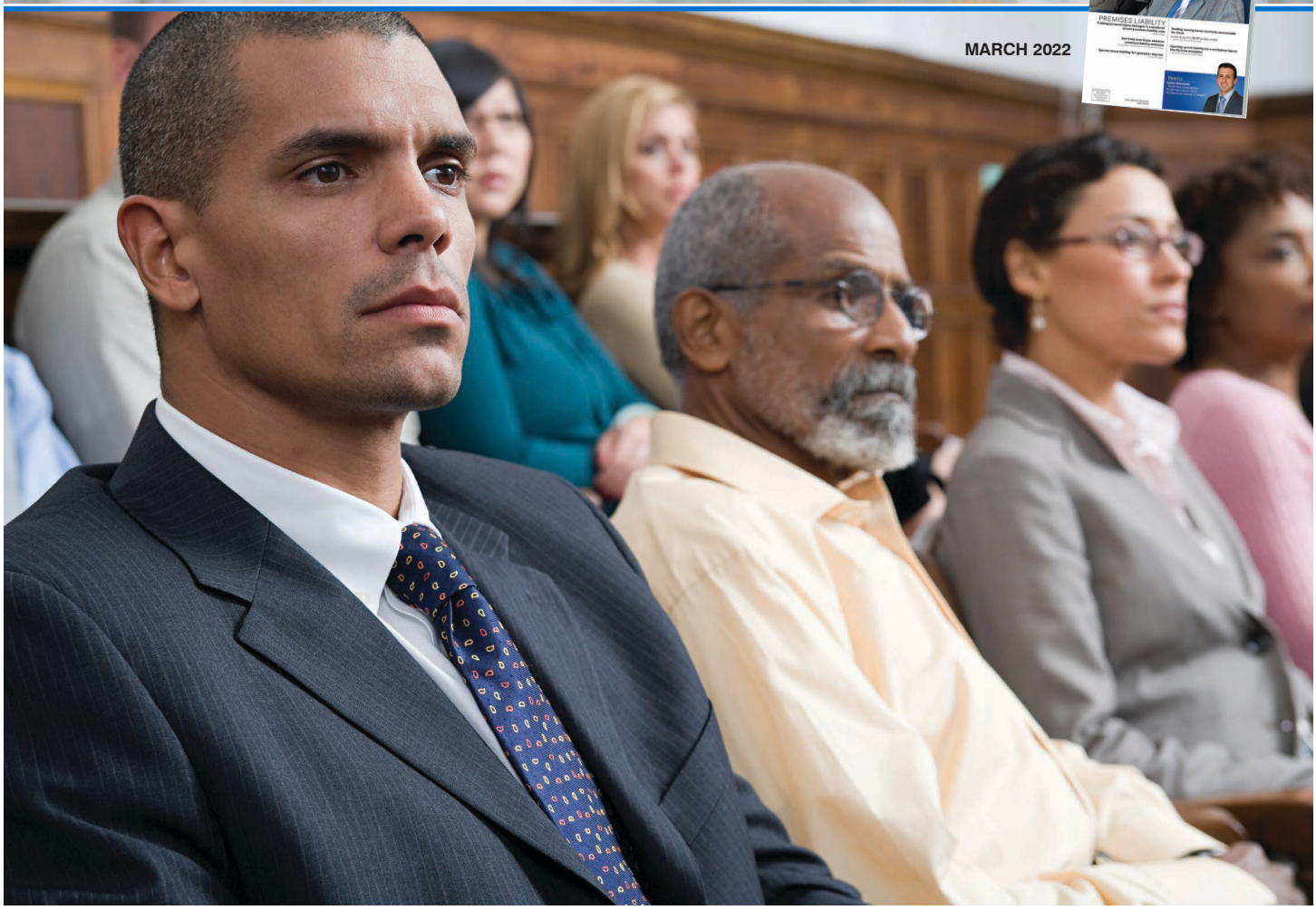


The effect of jury size on trial outcomes

Do smaller juries perform as well as 12-person juries?

By Carol Bauss

During the Pandemic, courts across the country struggled to resolve disputes during an unprecedented crisis that closed courthouses and continues to cause delays in 2022. Judges face obstacles in clearing the backlog of cases, including following Covid mitigation protocols limiting the number of people in a courtroom and respecting the public's reluctance to serve on a jury and risk exposure to the virus. Judges, faced with a smaller pool of jurors and courtrooms that cannot accommodate 12 jurors plus alternates socially distanced, have suggested that parties in civil cases consider a jury with fewer than 12 jurors.

California is one of 33 states currently using 12-person juries for civil trials. Many states have six- or eight-person juries, and the Federal Court System has eight-person juries (sometimes more with alternates). To keep the wheels of justice moving, some judges have encouraged the parties to reduce the number of jurors from 12 to nine or eight or even lower.

Attorneys wonder whether they should agree to a jury of less than 12 to give their clients their day in court. What are the implications of such a decision? Are smaller juries the functional equivalent of 12-person juries? Do larger or smaller juries favor the plaintiff? Is a nonunanimous 12-person jury better than a six-person jury?

While there is no simple answer to these questions, let's look at what we know about jury size and how it affects trial outcomes.

Historically, the U.S. followed English common law and used 12-person juries for criminal and civil trials until the 1970s. The erosion of the 12-person jury began in 1970 when the Supreme Court found that the Sixth Amendment did not guarantee the right to a 12-person jury in

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a criminal case, making way for states to reduce jury size. (*Williams v. Florida* (1970) 399 U.S. 78.) The Supreme Court later extended that finding to civil juries (*Colgrove v. Battin* (1973) 413 U.S. 149), but drew the line at six-person juries, finding that five-person juries were not representative and therefore unconstitutional. (*Ballew v. Georgia* (1978) 435 U.S. 223.)

In those decisions, the Supreme Court relied on social science studies to conclude that the differences between six- and 12-person juries in representativeness and decision-making were "negligible." In the ensuing years, the Court's interpretation of those studies has been criticized, and new research has been conducted, finding that six-person and 12-person juries act differently. Recently, some have called for a return to the 12-person civil jury, citing a body of research on small-group decision-making that shows that larger juries are more representative and perform better than smaller juries.

Advantages of smaller juries

States using six-person juries cite the efficiency and cost savings of smaller juries. It is debatable whether empaneling smaller juries leads to cost savings or whether the savings is due to the decreasing number of jury trials and the use of technology to streamline the process to summon jurors and manage jury service. The research is also mixed regarding the time savings of using six-person juries. Some research suggests that the time spent in voir dire is not significantly greater in 12-person juries than in six-person juries. Another argument favoring six-person juries is that jury duty can be perceived as a burden requiring time away from work and family obligations and resulting in financial sacrifices. With six-person juries, fewer community members have to bear those burdens. (Erica J. Boyce, *Time to Reflect: Has the research changed regarding the importance of jury size?* Special Report by the National Center for State Courts, (2022).)

Jurors talk more in smaller juries

From a trial lawyer's perspective, a smaller jury's most significant advantage is that more jurors participate. In smaller groups, those with differing views have to participate to defend their views. We know from social science research and mock jury research that in groups of six to seven, more group members participate, whereas, in larger groups of 10-12, there are often at least one or two people who contribute little. It is easier to 'hide' in a larger group and remain silent.

In social science terms, these silent jurors are said to be loafing. Social loafing is when individuals do not work as hard on a group task as they might on an individual task because they can rely on others in the group. In jury deliberations, this means they may not work as hard to recall facts in support of arguments and accept the representations of their fellow jurors instead. Loafing occurs when individuals believe they don't have anything of value to contribute to the group or that the group does not need their contributions to complete the task.

Social loafing may also be greater when individual contributions are not recognized, and individuals do not see the task as meaningful. In larger juries, alliances tend to form, and participation decreases as individuals rely on others in the alliance to voice their viewpoints. Social loafing is less likely to occur in six-person juries than 12-person juries. (Najdowski, C. J. Jurors and social loafing: Factors that reduce participation during jury deliberations (2010) American Journal of Forensic Psychology, 28(2), 39-64. Reprinted in American Journal of Forensic Psychiatry, 31(3), 49-76.).)

Smaller juries are more likely to reach a verdict

Smaller groups are more cohesive. Since everyone is participating and there is a small number of people, there is a greater desire for group harmony. Those with dissenting views are quicker to abandon them in smaller groups, where it is harder to find an ally and the pressure to conform is greater. Since smaller juries are more likely to reach an agreement, they are less likely to result in a hung jury, meaning resources are not wasted on retrying the case.

Potential for groupthink in smaller juries

However, another explanation for small group unity is the risk of groupthink. There is less opportunity for dissenting opinions to take hold in smaller groups, making it easier to reach a consensus. Groupthink occurs when smaller, cohesive groups reach an agreement without critical thinking. Groupthink leads to a loss of independent thought and a lack of creativity. Group members overestimate their decision-making ability and underestimate opposing views, failing to challenge their own biases. Groupthink can be exacerbated in homogeneous groups.

Smaller juries risk unpredictable verdicts

Because small juries tend not to examine the evidence and arguments as thoroughly as do larger juries, there is more room for error with a smaller jury. Similarly, one juror with an extremist view about the appropriate verdict or award can disproportionately influence the others. In civil trials, this can mean getting the judgment "wrong," based on the weight of the evidence, and awarding too much or too little money. Unpredictable verdicts lead to public skepticism about damages, possibly pushing damages down over time. Outlier verdicts that skew too far from the community consensus undermine public confidence in the system. We have all heard tort reform advocates using outlier verdicts to criticize the civil justice system in voir dire.

In summary, smaller groups encourage participation and cohesiveness and discourage social loafing, but they are

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vulnerable to groupthink and can deviate too far from community norms and reduce confidence in the civil justice system.

Advantages of larger juries

Larger juries have advantages over smaller juries. Social science research has consistently found that larger groups perform better than smaller groups on various metrics. Larger juries spend more time deliberating and examining the evidence more carefully and thoroughly. Twelve-person juries are more likely to focus on probative rather than non-probative evidence. Larger juries consider more viewpoints and arguments because there is a wider variety of demographics, life experiences, and opinions in the jury room. In addition, more heads increase accuracy because there are more memories and notes on which to rely. Social science studies support that 12-person juries are more likely to recall facts and trial testimony correctly. The bottom line is that, as a group, larger juries have better recall and are more accurate, so they are more likely to get it right. (For a good summary of the studies, see Gensler, S., et al., *Better By The Dozen: Bringing Back the Twelve-Person Jury* (2020) 104 Jud. 46.)

Larger juries are more diverse

One of the most important benefits of larger juries is that they are more likely to be diverse and representative of the communities from which they are drawn. Social science research has repeatedly demonstrated that 12-person juries are more diverse than six-person and even eight-person juries. A study of jury trial deliberations in Cook County, Illinois, showed that 12-person juries were more diverse than six-person juries, even after the exercise of peremptory challenges, often used by one side or the other (mostly the defense) to excuse people of color. (Shari S. Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge* (2009) 6 J. Empir. Leg. St. 425.)

Diverse juries perform better than homogeneous juries

Diverse juries take more time in deliberations, discuss more case facts, consider more personal viewpoints, make fewer factual errors, and are more likely to discuss the impact of race than homogeneous juries. A seminal study on diverse juries found that diverse groups were more open to discussing race issues. Black jurors shared their experiences and opinions while white jurors paid closer attention to the evidence. Being part of a diverse group changed how the white jurors approached the evidence and made them better jurors. Working with people of different backgrounds challenges ingrained thinking and leads to greater information exchange and better outcomes. (Sommers, S. R. (2006). *On racial diversity and group decision making: Identifying multiple effects of racial composition on jury deliberations*. Journal of Personality and Social Psychology, 90(4), 597-612).)

The benefits of diverse juries are stronger when there is more than one person of color in the group. Minority members are more likely to speak out and advocate for a particular view if they have an ally, and it is easier to find an ally in larger juries.

Verdicts are more predictable in larger juries

Verdicts are more predictable in 12-person juries, meaning they are more often in line with the expected community average. In other words, there are fewer unreasonably high verdicts or unreasonably low verdicts. More predictable verdicts engender more trust and confidence in the jury system. (Michael J. Saks, et al., *A Meta-Analysis of the Effects of Jury Size* (1997) 21 L. & Human Behav. 451.) For plaintiffs' attorneys, it might be easier to hit it big with a smaller jury but just as easy to be shut out of any damages or have a smaller award than the evidence supports. It is better to be confident that the damages are more likely to fall in line with the expected value of the harms.

Larger juries also allow more people to perform their civic duty. Jurors often report in post-trial interviews that they found jury service educational and rewarding. Hopefully, those who serve and have positive experiences encourage their friends and family to respond to a jury summons the next time it appears in their mailbox. Plaintiffs' attorneys benefit from this juror goodwill as more people show up for jury duty with a positive attitude and are willing to serve.

Nonunanimous verdicts

The research is clear that 12-person juries have advantages over smaller juries and make better decisions, but most of that research assumed the group was required to reach a unanimous decision. One of the biggest downsides of 12-person juries is the greater possibility for a hung jury. It is more difficult to succumb to groupthink in a larger jury. Someone with a minority opinion can find an ally and band together to resist the pressure of the majority. This means that a dissenting faction can hold out, causing a hung jury.

Because 12-person juries are less cohesive, resulting in more hung juries, California (and elsewhere) does not require civil juries to be unanimous, only nine of the 12 jurors have to agree to the verdict. One perspective is that even with the nonunanimous rule, 12-person juries increase diversity and allow the minority to build allies and persuade the majority. And, if the minority cannot convince more than three jurors, the majority wins, and there is no hung jury.

There is concern that a nonunanimous decision rule weakens the benefits of larger group decision-making by sidelining the minority perspective. Instead of engaging in productive debate, majority jurors can ignore minority perspectives because they don't count toward the verdict. As long as nine jurors agree to the verdict, there is no need to engage in discussion with the dissenters.

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One study looked at data from 50 jury trial deliberations in Arizona to analyze how the non-unanimity rule affects deliberations. Arizona civil juries have eight jurors, and at least six must agree on the verdict. The study found that in the majority of juries, someone pointed out early in deliberations that not everyone had to agree with the verdict. Some juries used the non-unanimity rule to suppress debate: "We don't need to listen to the minority jurors because we don't need their votes for a verdict." Many still had thorough discussions that included participation from the minority jurors, and some groups even attempted to reach a unanimous verdict engaging in a back-and-forth debate. The holdouts did not tend to favor one side or the other, so the non-unanimity rule does not favor or harm plaintiffs. Further, the holdouts took defensible positions based on the strength of the evidence, the credibility of witnesses, and the amount of damages under discussion, so wildcard jurors were not derailing the juries. (Shari Seidman Diamond, et al., *Revisiting The Unanimity Requirement: The Behavior of Non-Unanimous Civil* Jury (2005) 100 (1) Nw. U. L. Rev.1.)

While some nonunanimous juries will ignore the minority view and focus more on getting to the nine required votes than discussing differing viewpoints, this research demonstrates that even with a nonunanimous rule, advantages associated with larger juries can remain – jurors engage in debate, evaluate the evidence, and discuss dissenting opinions.

More recent research in the criminal context looked at jury size and unanimity requirements and how those variables work together to affect verdicts. Instead of using simulated jury research or data gathered from the courts in jury trials, this research used a deductive model from the field of economics to look at the interdependence of jury size and unanimity requirements on wrongful convictions, wrongful acquittals, and hung juries. The researchers concluded that verdicts were more accurate when smaller juries were required to be unanimous and when larger juries took a majority vote. One juror cannot derail deliberations in a six-person jury, and the jurors will work together to reach a verdict. Likewise, the number of hung juries decreases when 12-person juries do not have to be unanimous. Fewer hung juries result in more accurate verdicts. (Alice Guerra et al., *Accuracy of Verdicts Under Different Jury Sizes and Voting Rules* (2020) 28 S. Ct. Econ. Rev. 221.)

Based on these findings, attorneys agreeing to a significantly reduced jury size may want to argue for unanimity. This recommendation may run counter to intuition. Sometimes plaintiffs' attorneys think that smaller is better because they think it is easier to convince a smaller group. But that generally requires one or two strong leaders who will advocate for the plaintiff. Whether a plaintiff advocate is on the panel depends on who shows up for jury duty, voir dire conditions, and the strength of the evidence.

Twelve-person juries deliberate longer, consider more viewpoints, remember the facts better, focus on more probative evidence, are more diverse, and involve more community members paving the way to improving jury duty's reputation. These benefits can be, but are not necessarily, diminished when requiring only nine votes for a verdict.

Should plaintiffs' attorneys agree to fewer than 12 jurors?

How does this play out in the real world of trials? Should plaintiffs' attorneys agree to fewer than 12 jurors when pressured by judges trying to move trials along against impossible hurdles? There is no right answer, and it depends on the facts of the case, the strength of the evidence and witness testimony, and the trial venue. If the plaintiff is gravely ill, it may be better to get in front of a jury as soon as possible, even with fewer than 12 jurors.

However, in an employment discrimination case or a case where race is an issue, holding out for a 12-person juror may be advisable to increase the odds of seating someone who will have experiences and opinions that make them more open to the plaintiff's claims. The more people you bring together, the higher the chances that the seated jury includes a helpful and diverse perspective. The group is also more likely to examine its own biases and not rely on stereotypical thinking to evaluate the evidence and testimony.

A jury must want to find for a plaintiff. Jurors must be motivated to go against the status quo and vote against the defense. Keeping this in mind, a larger jury is more likely to include someone who will fight for the plaintiff and form a pro-plaintiff faction. With a larger jury, it is more likely that jurors will take the time to review the evidence carefully and systematically. A 12-person jury is more likely to recall the facts correctly. The quality of deliberations will be better, and the opportunity to get caught up in groupthink will be reduced. This is especially important if the trial venue is conservative, where anti-plaintiff bias is more significant.

However, a smaller jury may be fine in a plaintiff-friendly jurisdiction with a strong case and good voir dire conditions where jurors who cannot keep an open mind regardless of the evidence can be identified and excused.

Conclusion

Plaintiffs' attorneys have a vested interest in promoting and protecting the integrity of jury trials. An extensive body of social science research lays out the benefits of larger, more diverse juries. Plaintiffs' attorneys benefit from the better deliberative process in larger juries. The best way to ensure the continuing integrity of the jury system is to continue with 12-person juries unless extenuating circumstances exist. And juries of eight or nine jurors are better than juries of six. All things being equal, justice is more likely to prevail with a 12-person jury.

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Carol Bauss, J.D., is a Senior Litigation Consultant with NJP Litigation Consulting/ West. *She advises attorneys on trial presentation and jury selection strategy and works with witnesses to improve their communication skills. Her deep knowledge of juror attitudes, juror bias, and jury decision-making is drawn from her years of experience conducting focus groups, mock trials, and post-verdict juror interviews. She helps legal teams find the human story and universal themes within complex legal disputes. She is especially adept at designing and analyzing mock juror research and translating the research findings into practical recommendations for trial preparation and jury selection. Her background in law and rhetoric gives her expertise in helping attorneys cut through the legal jargon to deliver concise and persuasive messages to the jury and other fact-finders.*


Bauss

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