

America's Evaporating Jury Pool

By Kristin Armshaw and Kimberly Martin

The right to a trial by jury in civil lawsuits, guaranteed by the Seventh Amendment to the United States Constitution, is an essential part of the checks and balances system of government on which our liberties rely.¹ As the Founding Fathers recognized, the substantial and far-reaching power of a judge can create the susceptibility to undue influence. The Founders, therefore, established a right of trial by jury, whereby ordinary people could check the exercise of judicial power. The Founders thought that jurors would be less inclined to abuse their own power because they would be selected randomly from a cross-section of society, and would be required to make decisions as a group. The group dynamic would further insulate the parties involved in civil litigation from abuse of power by any one juror. Over the years, however, the jury selection safeguards that once allowed for a representative jury pool and the fair administration of justice have largely broken down. The result is the drying up of America's once-deep jury pool.

The Jury Pool Drought

The United States Supreme Court has found that, "What is required [by the Seventh Amendment] for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community."² Despite the Supreme Court's emphasis on the need for juries to represent a cross-section of the community, current jury selection practices may limit the diversity of perspectives shared among jurors because they may exclude professionals from the jury pool. Some

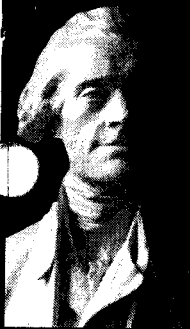
professionals are automatically excluded from jury service or qualify by the nature of their occupation for a "hardship" exemption. Exempt professionals may choose not to serve on juries because the burden of missing a day or more of work is too great. Other non-exempt professionals may evade their obligation to serve because the burden of missing work would exceed the penalty for failing to serve.

Most jurisdictions limit their jury pool to include registered voters and licensed drivers. To expand that pool to include a population of people who are neither registered to vote, nor licensed to drive, the District of Columbia added welfare rolls, unemployment filings, and tax lists to its jury pool.³ One way to make a jury pool more representative of the people who live and work in a jurisdiction, however, would require the addition of lists of people licensed to practice their profession in that jurisdiction.

In 27 states, professionals, such as practicing attorneys, members of the clergy, teachers, doctors, and accountants, can receive automatic exemptions from serving on a jury.⁴ New York had the highest number of exemptions until the legislature enacted an "everybody serves" policy in December of 1995⁵. Today, professionals and high-ranking officials are no longer exempt from performing their duty as a citizen in New York.

In 1999, New York Mayor Rudolph Giuliani served as a jury foreman.⁶ It is noteworthy that Mayor Giuliani's jury ruled against a plaintiff suing his landlord who claimed he was scalded in his shower, awarding him no damages.

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In addition to eliminating automatic exemptions, states should be encouraged to limit hardship excuses. New York allows summoned parties to postpone jury service once for any reason and to choose their own rescheduling date by calling a toll free number.⁷ California decreased the number of acceptable reasons to be excused from jury service this year.⁸

Finally, some jurisdictions experience non-response rates of up to 60 percent.⁹ To increase response rates, jurisdictions should take measures to keep their address lists up-to-date and to discourage non-responsiveness. Jurisdictions should consider increasing penalties for failure to update address changes in a timely manner, and for failing to respond to summonses. Texas strengthened civil penalties against employers who fire employees for performing jury duty, added criminal penalties, and clarified that the trial court summoning the juror may punish by contempt employers who fire, threaten to fire, penalize, or threaten to penalize employees for performing jury duty.¹⁰ D.C. Superior Court Chief Judge Rufus King III made a move to start enforcing the District's \$300 fine and possible incarceration for seven days for failure to appear for jury service. He said in August 2001 that he would start requiring those who fail to appear for service to "show cause" why they should not be held in contempt for defying the court's order.¹¹

Relieving the Burden of Jury Service

For many people, serving on a jury means sacrificing nights and weekends to catch up on missed work or canceling visits to their office. To mitigate these problems, some jurisdictions have adopted a "one day/one trial" rule. Under this rule, a summoned person participates in one day of jury selection. If he is chosen for trial, he serves. If not, he will not be called again until an allotted time has passed. Approximately 40 percent of jurisdictions have adopted the "one day/one trial" rule.¹²

In addition to time spent away from work, the conditions of many courthouses are another deterrent to jury service. Many courthouses are dark, crowded, and poorly ventilated. Jurors have no access to phones, reading material, a television, or the Internet. For many professionals, spending even one day in such conditions is a sacrifice worthy of avoidance.

To alleviate the discomfort of courtrooms, some jurisdictions have ensured that jurors have access to Internet data ports, refreshments, breaks, and reading materials. The National Center for State Courts has suggested a number of no-cost solutions to increase juror comfort level, including providing magazines obtained from post offices or magazine companies for free, and starting a "perpetual library" stocked with books donated by jurors.¹³ The nonpartisan American Judicature Society has also begun to explore ways to improve jury service.

Expanding Jurors' Roles

Serving on a jury can often be an unduly stressful experience for jurists. While it is important for jurists to understand the gravity of their responsibility, much of the stress results from the lack of information they receive. Many jurists feel under-informed and ill prepared when the time comes for them to render their verdict.

Jury education should begin as soon as the summons is sent. Clear service instructions, juror orientation videos and detailed and written instructions detailing jurors' responsibilities are all ways to ensure that jurors are more comfortable with serving.

In addition, it is important that jurors have a clear understanding of the *voir dire* process, which is often cited by potential jurists as one of the most stressful parts of service. To alleviate juror confusion, the National Center for State Courts recommends that jurisdictions explain the difference between preemptory challenges and removal for cause, provide introductory information on the case, and explain the reasoning behind certain questions. It is also important for jurists to understand that they have a right to privacy. They should know that they have the option to meet with the judge privately if the answering of certain questions (i.e. regarding substance abuse, prejudices, etc.) makes them uncomfortable.¹⁴ The American Bar Association's Committee on Jury Standards suggests the use of preliminary questionnaires to protect juror privacy and cut down on the time of the *voir dire* process.¹⁵

During the trial it is essential that juries receive a clear and detailed explanation of the law and charges pending against the defendant. This is particularly important in complex litigation, where jurists are often not familiar with the legal terms, charges, and rules of evidence.

Finally, jurors should not be forced to separate fact from fiction—at the state court level, rules of evidence for expert witnesses should be strengthened. Judges should assume the role of gatekeeper, thereby determining whether expert opinions and evidence are reliable and based on sound scientific theory. To hold states to the same stringent rules found in federal courts, a growing number of states have adopted legislation or court rules similar to the American Legislative Exchange Council's *Common Sense Scientific and Technical Evidence Act*.¹⁶

Active Jurists

If a student walked into a classroom without a pen or notepad and never asked a question, not only would she not win the respect of her professor, but she would very likely not take home a passing grade. Most jurisdictions insist that jurors embrace this passive role. Unfortunately, courtrooms, unlike classrooms, have more than a passing grade at stake. In a courtroom, the defendant's life, reputation, or livelihood is often at stake. In recent years, there has been a trend toward creating a more "active" jury. Permitting note-taking and questions from the jury box allows jurors to remain attentive, clarify confusion, keep a clear record of facts and arguments, and feel more comfortable rendering a just verdict.

The original impetus for prohibiting note-taking was a desire to ensure that literate jurists were not favored over illiterate jurists. Today, all federal jurisdictions and 42 states have at least a minimal requirement for English proficiency and the ability to read and write—eradicating the reasoning behind the original prohibition on note-taking.¹⁷ Slowly, more and more courts are permitting and even encouraging jurors to take notes, relieving many jurors of the stress of having to rely solely on their memory or the memory of other jurors in preparing their verdict. In a national survey, 87 percent of

jurors given the opportunity to take notes did so.¹⁸ In the same survey, those who did take notes averaged 14.4 pages of notes in civil trials. Considering that the average length of civil trials is 10 days, the importance of notes as a memory aid cannot be underestimated.

Another method of "activating" a jury is permitting the jurists to ask questions. By submitting questions to the judge, jurists are able to clarify any confusion prior to rendering their verdict. The judge, again acting as a gatekeeper, screens the questions to ensure that none is inappropriate or prejudicial. Juror questions can be particularly important in complex civil litigation, where the outcome of a case often hinges on scientific or technical concepts about which the average American is likely to have little or no understanding.

Arizona became a pioneer in 1995 when the state Supreme Court approved sweeping jury reforms, including allowing jurors to ask questions. According to Arizona Judge Niles Jackson, since questions were permitted, "Jurors pay more attention. . . I haven't had a single hung jury."¹⁹ More and more states are beginning to follow Arizona's lead, with about a dozen states either mandating or encouraging allowing jurors to ask questions. Mississippi, infamous for its jackpot justice and enormous jury awards, is the only state that completely prohibits jurors from asking questions.²⁰

Conclusion

Though jury summonses are often opened with a groan, exit interviews with jurists tell us that most Americans feel satisfied with themselves for fulfilling their civic duty as jurors. States can do many things to encourage jury service and help jurors be more comfortable and better informed. America's private sector can also play an important role in encouraging jury service. Corporate defendants and businesses plagued by lawsuits should look internally when they complain about outrageous jury awards and seemingly unfair verdicts. By voluntarily encouraging jury service within their companies, corporations can do their part to ensure a more diverse jury pool, representative of both professionals and non-professionals. #

Endnotes:

¹ U.S. Const. amend. VII. ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved...").

² *Colgrove v. Battin*, 413 U.S. 149, 160 n.16 (1973).

³ District of Columbia Jury Reform Act of 1986

⁴ *State Court Organization 1998*, U.S. Department of Justice Bureau of Justice Statistics, p. 269.

⁵ See, L. 1995, c. 86, 4 and 5 (eff. Jan. 1, 1996), NY repealing judiciary law 511 and 512.

⁶ *Mrs. Hope gets Award*, THE GRAND RAPIDS PRESS, September 10, 1999

⁷ See, L. 1995, c. 86, 4 and 5 (eff. Jan. 1, 1996), NY repealing judiciary law 511 and 512.

⁸ CAL. CT. C.P.R. 860, 204 and 219 (830.1), (830.2(a)) (states that the only statutory exemption for occupation conflicts is for Law Enforcement Officers).

⁹ Dees, Tom M., *Juries: On the Verge of Extinction? A Discussion of Jury Reform*, SMUL. REV., 2001.

¹⁰ *Jury Reform Proposals Become Law*, 62 TEX. B.J. 764, (1999).

[This law is HB 1324 if we want to mention that.... The cite would be H.B. 1324, 1999 Leg., 76th Sess. (Tx. 1999).]

¹¹ *Muscle Behind Jury Service*, Editorial, WASH. POST, August 26, 2001, at B06.

¹² Mount, Chester H. and G. Thomas Munsterman, *Summit Sessions Assessed Representative Quality of Juries and Juror Communication Issues*, N.Y. ST. B.J. (June, 2001).

¹³ *Through the Eyes of the Juror: A Manual for Addressing Juror Stress*, National Center for State Courts, (1998), at 13.

¹⁴ *Id.*

¹⁵ American Bar Association Standard 20 on Juror Privacy (1998)

¹⁶ Contact ALEC's Civil Justice Task Force or www.alec.org for model legislation language.

¹⁷ *State Court Organization 1998*, U.S. Department of Justice Bureau of Justice Statistics, at 263-264.

¹⁸ Steven Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making, Psychology, Public Policy and Law* Vol. 3, No. 2/3, at 265. (1997)

¹⁹ *Any Questions? Juries Take On An Active Role*, WALL STREET JOURNAL, Apr. 26, 1999.

²⁰ *Jury Questioning: The Verdict is In*, TRIAL MAGAZINE, June 2000.

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