Civil Justice Reform – Law Firms

Derail The "Runaway Jury" By Promoting Jury Service Within Corporate America: Employers Should Support Jury Service – Here Is How

By Joseph M. Rebein and Cary Silverman

SHOOK, HARDY & BACON L.L.P.

I. Introduction

"Runaway Jury" – to ordinary citizens this is just the title of a popular John Grisham novel and new motion picture. But, to any in-house counsel or civil defense lawyer, the phrase is likely to create anxiety. Will a lightning strike at trial hit me? Astronomical judgments that would have been considered extreme even just a few years ago have been handed down in several recent cases. These include several verdicts since 1998 exceeding $1 billion.

For small businesses the lottery-like nature of the civil justice system is particularly worrisome. Most small businesses are just one large verdict away from bankruptcy. A 2000 survey of more than 1,200 small-business owners commissioned by the National Federation of Independent Business (NFIB) found that one out of three small businesses had been sued and more than half have been threatened with a lawsuit within a five-year period.

Ensuring that juries are balanced and representative of the entire community can help bring about greater predictability and fairness in civil litigation. Often, jury pools lack the perspective of persons working in business, and do not contain members with backgrounds helpful for evaluating or properly weighing complex technical, scientific, or other evidence. Some jurors may even believe that their role is to transfer wealth and not render justice on the merits of the case. By way of contrast, a jury pool that includes business people may reflect less anti-corporate bias and may be more likely to reach a fairer judgment.

Litigants often fail to receive a trial by an actual jury of their peers because some states automatically exempt certain professions from jury service. Other professionals and working Americans escape jury service through a convenient excuse or by simply disregarding their summons to appear in court. Those who do show up are likely to be excused because the state-provided compensation for jurors is so low that most working people cannot serve on a jury and make ends meet unless they continue to be paid by their employers.

This article offers several steps that employers can take on their own initiative to encourage jury service. It then discusses model Jury Patriotism Act legislation developed by the American Legislative Exchange Council (ALEC), the nation's largest bipartisan membership organization of state legislators. The model Act would promote jury service by alleviating the inconvenience and financial burden placed on those called to serve, while making it more difficult for people to escape from jury service without showing true hardship.

The Jury Patriotism Act finds support across the political spectrum. Just a few of its supporters include the NFIB, National Association of Wholesaler-Distributors, AFL-CIO, and National Black Chamber of Commerce. Elected officials have responded to this broad-based support. Several states passed laws based on the model Jury Patriotism Act within months of its approval by ALEC's membership in the Winter of 2002/2003.

II. Steps Employers Can Take To Encourage Jury Service

It is important that employers encourage their employees to serve on juries. Unfortunately, some businesses tend to view jury service as a nuisance and impediment to their operation. There have even been reports that some businesses may discourage their employees from serving on juries and offer them tips to get out of service. This may occur in formal employment policies or at the water cooler. Employers should realize, however, that by discouraging jury service, they are acting against their long-term collective self-interest. It is important to have representative juries that include people who are familiar with the business environment.

A. Continuing Employee Pay During Jury Service

One major reason that people avoid jury duty is the financial burden that service may impose. Most state courts provide a miniscule daily fee for those who serve. Usually, this amount is barely enough to cover the cost of a sandwich and parking near the courthouse. Only a handful of states require employers to pay their employees while they are away serving on a jury: Alabama, Connecticut, Colorado, the District of Columbia, Massachusetts, Nebraska, New York, and Tennessee (as well as certain employers in Miami-Dade County, Florida and certain state-contractors in Los Angeles County, California). The requirements vary in how many days an employer must pay during jury service, whether all employees or only full time employees are eligible for compensation, whether there is a limit on the amount of daily compensation, and whether there is an exemption for small businesses or those who might suffer financial hardship.

Many employers have appreciated that supporting employees who serve on juries is not only the right thing to do, but also makes good business sense. A study by the American Judicature Society estimates suggest that about seventy percent of large employers pay their employees during jury service. Paying employees during jury service is important to help ensure that juries include a representative mix of working people.

Unfortunately, too many businesses are unwilling to pay employees for time spent in jury service. Data gathered from a 1999 telephone survey of 800 Michigan residents conducted by the court system found that even those with the highest education levels, 56% of those with a college degree and 44% of those with postgraduate study, would not receive their regular salary during jury service. A 2001 report prepared for the Los Angeles County Superior Court found that 13.5% of private employers in that area do not pay their employees at all during jury service. The same survey found that only 22% of employers pay their employees their full wages during their entire period of jury service, and that 43% of employers provided ten paid days of jury service.

Some of these businesses may have decided that it would be too costly to pay employees for time away from work. But, the frequency in which an employer can expect to lose an employee to jury service is low, and may be lower with the adoption of the reforms suggested later in this article. Lewis Maltby, the President of the National Workrights Institute, estimates that, on average, a company with 100 employees can expect to lose a single employee every year for two and a half days. Employers also should appreciate that there is also a "cost" for not encouraging workers to serve on juries and paying them while they serve. That "cost" is the systematic exclusion of workers and their views from juries.

B. Adopting Jury-Friendly Employment Policies

Nearly all states already make it illegal for an employer to fire an employee who responds to a juror summons. A few states go further and prevent an employer from taking any adverse action against an employee, or denying advancement opportunities or benefits.

An employer jury service policy can go further to encourage employees to serve on juries. Employers should make clear that employees will not suffer any denial of employment rights or advancement opportunities because of time taken off to serve on a jury. An employment policy should not require employees to use accumulated annual, sick, or personal leave time to fulfill their civic obligation. Employees should not be asked to choose between serving on a jury and taking their annual vacation.

C. Promotion of Jury Service and Leading by Example

Formal policies can only go so far to promote jury service. Executives and managers also should lead by example. They should serve when called for jury service and let their employees know the importance of this civic responsibility. Public officials have taken this message to heart. Recently, Mayor Rudolph Guiliani and former President Bill Clinton made headlines when they responded to the juror call. Corporate CEOs, managers, and small business owners can also inspire others to serve.

In addition, businesses should consider distributing an informational booklet encouraging jury service by employees. Posters placed in employee break rooms and internal websites are other ways employers can show their support for jury service.

III. Support The Jury Patriotism Act

ALEC adopted the Jury Patriotism Act with the goal of reducing obstacles to jury service and making it easier for citizens to serve. (For a summary of the model law, see Victor E. Schwartz et al., *The Jury Patriotism Act: Making Jury Service More Appealing and Rewarding to Citizens*, THE STATE FACTOR (Am. Legis. Exch. Council, Apr. 2003), *available at* http://www.alec.org/meSWFiles/pdf/0309.pdf). The bill helps ensure a representative jury by eliminating automatic exemptions from jury service based on a person's occupation. In addition, it provides guidance to courts on the acceptable grounds for an excuse from service in order to ensure that only those who will suffer true hardship are let go. The Jury Patriotism Act also provides several benefits to businesses as well as their employees. That is the reason why many business groups support the model legislation.

A. Increasing the Flexibility of Scheduling

In many states, jurors are instructed to report at a certain date and time with little consideration for their business and personal obligations. They may be forced to throw themselves upon the mercy of the court and plead for a deferral of their service. Under the Jury Patriotism Act, jurors would have a simple and easy means to automatically postpone jury service. They could call, write, or e-mail the court to reschedule service within six months of the summoned date. A juror could use this one-time postponement for any reason, such as to schedule jury service around seasonal rush times or other work responsibilities. The American Bar Association has observed that such procedures "enable a broader spectrum of the community to serve as jurors."

B. Adopting a Shorter Term of Service

In some states, the length of jury service can be several days, weeks, or even months. When a person is called for a long term of jury service, his or her employer may lose the services of an essential employee or face the unpredictability of having an employee on-call by the court. The "one-day/one-trial" system included in the Jury Patriotism Act guarantees that if a juror is not selected to sit on a trial, he or she is dismissed by the end of the day. This practice has been adopted by about one-half of the state courts and endorsed by the National Center for State Courts as a best practice.

A one-day/one-trial system lessens the impact of jury service on employers. For example, in Massachusetts, which has adopted the one-day/one-trial system, 85% of those who appear complete their jury service in just one day and 95% finish in three days. New York's adoption of this system reduced the statewide average term of service, previously over 5 days, to 2.2 days - a decrease of more than 50%. In announcing the adoption of the one-day/one-trial system throughout the California judiciary, Los Angeles Superior Court Presiding Judge James Bascue commented, "We know that one-day/one-trial is in the best interest of our employers and the communities we serve."

C. Better Compensating Jurors Selected to Serve on Lengthy Civil Trials.

It may be difficult for some employers, especially small and mid-sized businesses, to voluntarily compensate employees for trials lasting more than ten days. For this reason, many employees of smaller businesses, small business owners, independent contractors, and sole proprietors, as well as any other citizen who does not receive their usual income during jury service, is likely to be excused, and the jury will lose the benefit of their perspectives and experiences. This situation is particularly troubling in high-stakes complex civil trials, where a citizen who is not paid by his or her employer will experience an extreme financial hardship.

Ideally, states would pay their jurors more than they do. Unfortunately, in this time of tight state budgets, states are not in a position to significantly increase juror compensation out of the state treasury. The Jury Patriotism Act includes an innovative "Lengthy Trial Fund" to help relieve the burden on jurors serving on lengthy civil cases. The model act would provide jurors who serve on civil trials lasting longer than three days with supplemental compensation (up to $100 per day) if they would otherwise be excused from service due to financial hardship. In the rare case that a civil trial lasts ten days or more, jurors who are not fully compensated by their employers would be eligible to receive additional supplemental compensation from the fund (up to $300 per day).

The lengthy trial fund would be self-sustaining and not require any allocation of resources by the legislature. Rather, the fund would be financed through a minimal court filing fee – in essence, a small "user fee" of about ten dollars. The fund is based on the premise that those who use and benefit from the jury system should help pay to finance it. The filing fee is not intended to be a barrier to the filing of lawsuits and would be the minimum amount necessary to fairly support jurors who serve on lengthy civil trials. At roughly the cost of a movie ticket or meal at McDonald's, the fee will not place any credible burden on lawyers or their clients. Furthermore, since the fee applies to anyone who files a civil suit, it is just as likely to be paid by a lawyer representing a business suing another business as it is to be paid by a personal injury lawyer. The lengthy trial fund would lend considerable support to jurors serving on extended civil trials.

D. Protecting Small Businesses from Losing Multiple Employees

Currently, there is nothing to stop a court from summoning more than one employee of the same business for jury service during the same period. Should this occur, it can be particularly hard on small businesses. Under the Jury Patriotism Act, courts would be required to postpone the service of a summoned juror of an employer with five or fewer full-time employees, or their equivalent, if another employee of that employer is summoned to appear during the same period.

IV. Conclusion

There are many ways to make jury service a more rewarding experience. Some courts have improved their juror facilities, and provided parking, day care, workspace, comfortable seating, and refreshments. Other courts have focused on engaging jurors in the trial experience. These courts allow jurors to take notes, ask questions, and engage in pre-deliberative discussions. All of these reforms may encourage citizens to serve. Employers can also contribute to this effort by adopting juror-friendly policies and demonstrating that jury service is valued in their company. Employers should also support the Jury Patriotism Act, which provides further benefits to employers and makes jury service more flexible and less of a burden for all citizens. Through these combined efforts, it will be more likely that a litigant will be judged by a jury that represents the community.

Joseph M. Rebein is a Partner in the Kansas City, Missouri office of Shook, Hardy & Bacon L.L.P., where he serves as Chair of the firm's General Litigation Division and specializes in complex litigation. In this role, he serves as lead trial counsel in complex cases, including antitrust and securities class actions. Cary Silverman is an Associate in the Public Policy Group of Shook, Hardy & Bacon L.L.P., and practices in the firm's Washington, D.C. office.