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In defense of jury trials

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Donna K. W. Johnson

"I don't want to start a war," attorney Don Winder asserts. He doesn't want to worsen one that's already raging, either. But, he says, the time has come when he must speak up—or else sit back and see his nation suffer irreversible damage.

While hunting for case-disposition statistics to bolster his claim that Utah juries are not out of control (see *Record/Times*, January 26, 2007), Winder also analyzed the forces acting on public perception to create the impression that a problem exists. Those forces, he says, constitute a grave threat to Americans' most-basic rights. And the people who pose that threat may not even be aware that they're doing it.

"I think it was Thomas Jefferson who said that a citizen's right to trial by jury was the most-important right we have in this country," Winder says. "Jury trial is the great equalizer. When you go before a jury, it doesn't matter whether you're rich or poor, or how important or unimportant you are. None of that matters. All that matters is the truth of your case—what really happened."

Winder argues that those who attack so-called runaway jury verdicts may be attacking more than they think they are: "When you attack jury verdicts—when you say juries are out of control—are you really attacking juries themselves? And doesn't that mean you are actually attacking jurors? Aren't you really saying that people like you and me, all across this country, don't have the good judgment, public spirit and plain common sense to make good decisions collectively? And if you do say that, aren't you attacking our right to trial by jury itself? That kind of thinking is counter-intuitive to who Americans really are. If you can't trust us on a jury, the next step is going to be to say that you can't trust us in the voting booth."

Winder believes the attacks on juries are a direct result of the severe polarization, both commercial and political, that the nation is currently experiencing. That polarization, he says, comes straight from the profit motive. As he explains it, one way some big corporations can keep the political system from



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passing laws and regulations that will cost them money or restrict them in other ways is to distract the system by turning parts of it against other parts. Some corporations accomplish this type of polarization by donating money to support some political campaigns but not to others, and by lobbying for spe-

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cific breaks or the passage of specific laws. If two political parties, or two houses of Congress, are busy grappling over political trivialities, the system can't act effectively as a whole. Then those outside the system can do pretty much whatever they like—until the public complains.

When too much corporate license leads to consumer lawsuits, as it did in the *Campbell v. State Farm* case, juries act as watchdogs, Winder says. They keep would-be gamers of the system from getting too far out of line. But when polarization goes so far that corporate defendants' supporters refuse to admit that any plaintiff might have a valid case, they put pressure on lawmakers, who often end up passing ill-thought-out jury-curb laws in the guise of "tort reform." Those curbs effectively tie up the watchdogs [and the press]. "Eventually," Winder warns, "we wind up setting so many curbs in place that we cripple the jury and damage our right to a fair, unbiased jury trial. In the long run, polarizing the system is wronging the system."

Winder believes local and national chambers of commerce are unknowingly helping big corporations chip away at the right to trial by jury. Local chambers naturally want to help big companies prosper so they'll stay and provide jobs for residents. Obviously, the chambers feel, a good way to help a company prosper is to keep its costs down. One way to do that is to lessen the risk of an expensive verdict if the company gets sued. "So," Winder says, "the chambers of commerce make sure all the stories of exceptional verdicts—the really extreme, McDonald's-coffee-cup verdicts—get plenty of press. They never make a big deal of the stories about the dozens of other people who suffered third-degree burns because McDonald's coffee was too hot. They don't push the stories about how the plaintiff in the McDonald's coffee case actually suffered third-degree burns; they push the ones that make it sound like just a little scald. They know stories of huge verdicts will make people pressure their lawmakers to place caps on damage awards, and those caps will keep corporate costs down."

Polarization filters down from Capitol Hill to the everyday practice of law, according to Winder. "It used to be," he recalls, "that lawyers in this country represented one client at a time, one case at a time. They were just lawyers. Now the first thing people ask you when they hear that you're a litigator is

whether you represent plaintiffs' or defendants. It's getting to where you have to swear a blood oath to one side or another, and that's not the oath I took when I became a lawyer. These days, some insurance companies, medical associations and some corporations won't hire you if you do both plaintiffs' and defense work, and that's a shame. It ought to be about whether you're a good lawyer, not which side you're on."

Winder fights polarization by refusing to describe himself as a plaintiffs' or defense attorney. In his eyes, a lawyer can still represent both sides in Utah, one client at a time. "I do that," he says. "Most of the lawyers do that here at this firm. Other lawyers in town do that. It's good for us, and good for the state."

Polarization can even get in the way of a non-partisan stance, though, Winder knows. He produces proof. "I tell this story reluctantly," he says. "Right after I finished my study on Utah jury verdicts, I shared the results with one of Utah's senators at an event we both attended. 'Senator,' I said, 'if there is a problem, it isn't here in Utah.' He answered—and this is a direct quote—'Don, you have to understand that trial lawyers are the second- or third-biggest contributors to the Democratic Party. We can't stand for that.' I thought he should know the way things really were, and he didn't want to hear it. It was all about politics."

Despite all the time, money and energy some corporations and politicians invest in keeping jury verdicts down, juries still usually reach the right decisions, Winder believes. "Portions of corporate America," he explains, "may have a vested interest in perpetuating the myth of the runaway jury. But it is a myth. It doesn't happen here in Utah, and it doesn't happen in the vast majority of the nation. I'd bet that if you took my study and ran it the same way all across the country, the results would turn out to be similar in 90 percent of the places you tried. Maybe not in downtown LA, or certain parts of Florida, like Palm Beach. But almost everywhere else, it would be the same. I know it's the same in Wyoming, because another study that was done there returned similar results. People need to know the way things really are. The myth of the runaway jury has got to stop. Otherwise, it could damage the most-important right in our system of government—the right to trial by jury."