



Jury-Related Information
in Recent Libel Trials:

A Survey of Attorney Awareness

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Introduction

1. Purpose

Recently, LDRC has undertaken several studies of juror attitudes examining what factors have the most impact and motivate jurors to decide libel cases in a particular way -- all too often in favor of the plaintiff. Unfortunately, time and financial constraints make it difficult to interview in-depth the jurors in as many cases as might be ideal. Therefore, to supplement the limited number of in-depth case studies that LDRC will be able to complete, LDRC designed and conducted a telephone survey with attorneys who have represented media defendants in recent libel trials. The purpose of this survey was to shed some further insight into this area by attempting to learn from the attorneys how much they knew about their jurors before, during and after the trial; what type of juror they sought to have sit on their cases; whether they succeeded in getting that type of juror; their litigation strategies, particularly in relation to persuasion of their juries; and their attitudes toward other jury-related information.

What follows is a report on the general findings of this attorney awareness study. It should be noted that, although certain observations are made and conclusions suggested for the purposes of illuminating the mass of raw data developed, it is clear that the subjective nature of the attorney awareness survey, both in terms of the attorney's responses themselves and in terms of recording, characterizing and tabulating those responses, makes confident generalization difficult at best. Moreover, the size of the sample also necessarily limits the significance and reliability of any generalizations or ultimate conclusions at least to some extent. Nonetheless, even given these limitations, it is hoped that the LDRC attorney awareness survey will provide some useful data for the information of media defense counsel and their clients.

2. Methodology

LDRC undertook to study a sampling of defense attorney attitudes and opinions concerning jury-related information via confidential telephone interviews. Thirty-three recent libel cases

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involving media defendants and their respective defense trial attorneys were identified, based upon the previous listings of cases that had gone to trial and were reported in earlier Libel Defense Resource Center studies. Those cases identified were selected on the basis that (1) the defendant was involved in either the print or broadcasting field; (2) there was a trial by jury; and (3) the case was tried within the last three years. An effort was made to include cases involving both public and private figure plaintiffs as well as media defendants of varying sizes and reputations. The resulting group of 33 cases represented the substantial majority of recent media libel trials that LDRC was aware of and that fit this profile.

Next, a survey form consisting of almost 100 objective and subjective questions was developed in conjunction with a jury consultant. Essentially, these survey questions sought information covering the following general categories: pre-trial jury information; the jury selection process; trial strategies and techniques; the jury instructions; the jury deliberation process; and background material on the case and the parties. Letters were sent to the defense attorneys that had been identified, explaining the nature of the LDRC study, promising confidentiality and advising them to expect a follow-up telephone call to arrange a convenient time to conduct an interview based on the survey form. Of the 33 cases selected, all of the attorneys who were actually reached by telephone agreed to participate and interviews with those attorneys covering 25 cases were completed. All interviews were conducted by telephone and lasted between 20 and 45 minutes. The objective data was then computerized and statistically compiled. The answers to questions requiring a subjective response were also reviewed with an emphasis on factors related to, or having an impact on, the jury.

3. Cases Studied

The 25 cases studied in this manner turned out to be generally consistent with the types of cases previously included in LDRC studies, and they reflected trends similar to those previously identified by LDRC. Thus, of the 25 cases, 16 (64%) resulted in plaintiff wins at the trial court level, while the remaining 9 (36%) were defense wins. This is almost precisely identical to the pattern found in LDRC's Study #5, covering trials during the period 1982-84, which had reflected a 62% plaintiff win / 38% defense win rate for that period.

Damages awarded in the 16 cases lost also generally paralleled prior LDRC data, although the average award was lower than LDRC's previous averages -- primarily due to the absence of any gigantic, eight-figure type of award. Nonetheless, 6 of the awards in the cases studied were in excess of \$1 million, and the average of the 16 awards approached three-quarters of a million dollars (\$734,187.50). In 8 of the 16 cases punitive damages were awarded.

The 25 cases included 11 (44%) brought by public plaintiffs and 14 (56%) by private plaintiffs. Eighteen (72%) of the cases studied involved a print media defendant, and 7 (28%) had a broadcast organization as defendant -- again, roughly within the profile of previous LDRC studies. Finally, 18 (72%) of the cases were tried in state courts, with plaintiffs winning 14/18 (78%) of these state cases, and 7 (28%) in federal court with plaintiffs winning only 2/7 (29%) of these federal cases -- again a pattern essentially similar to the most recent LDRC study.

The one manner in which the cases studied did not fully accord with the patterns of LDRC's prior studies was in the relative ratios of wins and losses in cases applying a negligence standard. Thus, although negligence cases often result in greater plaintiff success, in this particular sampling the defense won only 1/8 (13%) of the negligence cases studied, compared to 28% in LDRC Study #5. On the other hand, the actual malice cases studied were precisely in line with previous data, with a 54% win rate in those cases, as compared to 53% in Study #5. (See Table 1 in the Appendix for a further general description of the cases surveyed.)

Findings of the Survey

A. Pre-trial Jury Information

Perhaps the most striking and consistent data developed in the LDRC attorney awareness survey was in the area of pre-trial jury information. Almost without exception the attorneys interviewed did not perceive any need for, or possibility of, supplemental analysis of the jury pool, prior to the selection process. This is not to say that they completely ignored any demographic information readily available to them, but rather that they almost universally did not choose to undertake any additional jury studies, either demographic or attitudinal. A similarly consistent degree of skepticism was evidenced with regard to professional jury consultants, with such assistance used in only one of the twenty-five cases.

The primary reason cited for this lack of enthusiasm for a "scientific" approach to jury selection was the pervasive attitude that more information would not translate into greater success in choosing a jury or -- presumably -- in otherwise developing the defense case. This perception appeared to be based on the belief that counsel has little control in actually choosing members of the jury, and what control that exists is limited to a minimum of challenges and also by a general fear that the next juror may be worse than the juror already challenged. A second reason for this de-emphasis on pre-selection juror information was the feeling expressed by many of the attorneys surveyed, particularly those in

relatively small or homogeneous communities, that they were already adequately familiar with the general characteristics of their local jury pool. And, additionally, that they already had an adequate understanding of many of the most relevant characteristics of the jury pool as they might bear upon the issues in their libel cases.

Other findings regarding pre-trial jury information included the following:

1. In none of the 25 cases did the attorneys contacted use demographic studies, nor did they commission any.
2. In none of the cases did the attorneys contacted use community attitude surveys, nor did they commission any.
3. Only two attorneys used pre-existing market or other surveys of media listeners or readers -- but in any event, in both of these cases the verdicts went against defendant.
4. In only one of the cases studied was a full-blown, professionally-supervised trial simulation used, although in three other cases attorneys had informally "moot-courted" their cases among their office staff. The one case that relied upon a professional jury consultant was won. Of the three "moot-court" cases, one was won and two were lost by defendant.

B. Voir Dire

1. In none of the 25 cases did the attorneys indicate use of specially-prepared written questionnaires for use prior to or during, voir dire, although in 5 cases standardized written questionnaires, normally administered by the court, were utilized. Presumably, these standardized questionnaires did not focus in any particular way on special factors related to libel or the media. Nonetheless, defendants won 4/5 (80%) of the written questionnaire cases; they won only 4/17 (24%) of those where questionnaires were not used.
2. In 12 of the 25 cases surveyed, voir dire was conducted by the attorneys; in 11 by the judge and in 2 by both. In 7 of 11 judicially-conducted voir dire the attorneys submitted proposed questions to the judge. Although the precise content of these proposed questions is not known, it does appear that generally, they were not extensive or elaborate in their proposed exploration of jury attitudes. In each of these 7 cases the proposed questions were used by the trial judge, at least to some extent.

3. Regardless of who conducted the voir dire, the attorneys involved in all cases in which defendant won felt that the voir dire was effective. In contrast, in cases in which the verdict was for the plaintiff, only one-quarter of the attorneys surveyed thought the voir dire was effective when conducted by the judge. However, when the voir dire was conducted by the attorneys, well over half of the respondents thought the voir dire was effective -- irrespective of the outcome of the case. (See Table 2 in the Appendix for a correlation between who conducted voir dire and its perceived effectiveness.)

4. In terms of the relative usefulness of the voir dire process to the plaintiff or to the defendant, 52% of the attorneys felt neither side gained a particular advantage, although 7 (28%) felt the voir dire was more useful to the defense and in 4 of these cases defendant won. In only 1 case -- a case plaintiff won -- did the attorney feel that the voir dire was more useful to the plaintiff. (See Table 3 in the Appendix.)

5. In 12% of the cases studied, the attorneys responded that they were not looking for anything specific in the potential jurors during the voir dire process. In each of these cases, defendant lost the case.

C. Jury Selection

1. Although the attorneys surveyed did not appear inclined to seek systematic information regarding the jury pool generally, or the venire panel in particular, most nonetheless did bring to the selection process a basic view regarding the kind of juror that would be most desirable for the defense.

2. Although there was by no means unanimity among the attorneys, or from one case to the next, regarding the characteristics of the ideal libel juror, in general the characteristics most often mentioned in the LDRC survey were education (the more the better); intelligence (the higher the better); community and media awareness (the more the better); class (middle to upper-middle preferred); and employment (people employed were preferred).

3. Factors not as frequently mentioned were age, sex, race -- unless those factors were especially relevant to the particular facts of the case or to the plaintiff.

4. With regard to politics, to the limited extent this factor was mentioned, the attorneys surveyed seemed to prefer "middle-of-the road" to "conservative" jurors.

5. Many of the attorneys, despite their image of the ideal juror, despaired of obtaining such individuals on their jury, not so much because plaintiff would necessarily exclude them, but because they were generally unavailable within their particular jury pool.

6. Despite all of these limitations on jury information and the selection process, 44% of the attorneys surveyed felt that, overall, they got the kind of jury they wanted, although 40% said they did not, with the rest having no opinion. (See Table 4 in the Appendix.)

7. Of those attorneys who felt they got the jury they wanted, overall, a significantly greater percentage won their cases (64%) than the average for all cases studied (36%). However, 4/11 (36%) of the attorneys who felt their jury was satisfactory still lost their cases. On the other hand, of those attorneys dissatisfied with their juries, 9/10 (90%) did in fact lose their cases. (See Id.)

D. Jury Persuasion

1. According to the survey, the basic themes argued to the jury did not appear to differ fundamentally between cases that were won and those that were lost.

2. By far the two most commonly mentioned themes adopted by both winners and losers, were:

(i) attacking the credibility of the plaintiff, especially in cases involving underlying alleged criminal activity; and

(ii) developing the theme that the defendant acted responsibly, adhering to accepted journalistic standards.

3. Other themes also mentioned were:

(i) focusing on the lack of harm caused by the publication and the lack of damage to the plaintiff;

(ii) establishing the truth of the publication; and

(iii) stressing the importance of freedom of the press.

4. Twelve (48%) of the attorneys surveyed felt they were "very successful" in developing their basic theme before the jury. Of these, all of the 9 defense wins were represented, although 3 (25%) of these cases were lost. On the other hand, among those attorneys who felt they were only

"somewhat," "not-too," or "not-at-all" successful in developing their basic trial theme, no case was won. (See Table 5 in the Appendix.)

5. Interestingly, when asked whether they would have changed their trial theme 17 (68%) would not have changed and this includes 8 cases that were lost. (See Table 6 in the Appendix.)

E. Litigation Choices and Strategies

In this section certain observations are made regarding aspects of the cases studied that fit loosely under the heading "Litigation Choices and Strategies." Due to the small sample size and the many other variables that have a bearing on the outcomes of libel trials, it is not suggested that these observations are statistically significant or that they necessarily support one best approach to litigating any individual libel case. Nonetheless, these are observations that stood out when individual factors surveyed were correlated with notable defense success rates, on the one hand, and notable plaintiff success rates, on the other. The "reversal" of defense or plaintiff success rates when these isolated factors were or were not present at least suggests that they may be interesting issues for consideration and discussion.

1. The larger the defense team, the greater the defense success. Thus, defendants won only 3/12 (25%) cases when the defense team consisted of 2 professionals or less; they won 6/12 (50%) when the team was 3 or more.

2. When the defense used visual or similar special litigation aides, such as blow-ups, charts, videotapes, they won 6/9 (67%) of their cases; when they did not, they won only 3/16 (19%).

3. When the case focused on the truth/falsity issue, defendants won 8/19 (42%) of the cases; when it did not, defendants won only 1/6 (16%).

4. When the main issue in the case was considered primarily factual, the defense won 8/12 (67%) of the cases; when primarily legal, the defense won only 1/12 (8%).

5. When the defense asserted a First Amendment defense, they won only 6/18 (34%) cases; when no First Amendment defense was asserted, the defense won 3/7 (43%) cases.

6. When the defense alone used expert witnesses, defendant won 2/3 (67%) cases. When both the plaintiff and defendant used experts, the defense won only 1/9 (11%). In the only case studied where plaintiff alone used an expert, the defense won.

7. When the defense included mention of a dollar amount of damages, the defendant won only 1/9 (11%); when no amount of damages was mentioned by the defense, half of the cases (8/16) were won. On the other hand, when plaintiff mentioned a damages figure, the defense won only 4/14 (29%) as compared to 4/9 (44%) when there was no mention.

F. The Jury Instructions

1. Among the attorneys surveyed, the substantial majority (approximately 80%) were satisfied with the jury instructions given when the case involved a public official or public figure. In contrast, substantially less than half (38%) were satisfied with the jury instructions given when the case involved a private figure. (See Table 7 in the Appendix.)

2. Similarly, in cases in which a negligence standard of liability was applied, only one-quarter of the attorneys contacted were satisfied with their jury instructions. In contrast, in 85% of the cases in which an actual malice standard was applied, the attorneys contacted were satisfied. (See Table 8 in the Appendix.)

3. In over half (56%) of the cases in which plaintiff won, the attorneys contacted were dissatisfied with the jury instructions, whereas, in almost all the cases in which defendant won, they were satisfied with the instructions.

4. Curiously, barely one-quarter of the attorneys contacted that defended broadcast clients were satisfied with their jury instructions. In contrast, almost three-quarters of the attorneys contacted that defended print clients were satisfied with their jury instructions.

G. Jury Results and Post-Trial Jury Information

1. Six major factors were identified by the attorneys contacted as being primarily responsible for the jury's decision in the cases surveyed: (i) credibility of plaintiff and plaintiff's witness; (ii) procedure -- unsatisfactory charge on standard of liability; (iii) sympathy for the plaintiff; (iv) antipathy toward the media; (v) peculiar aspects of the underlying fact pattern; and (vi) jury demographics. (See generally Table 9 in the Appendix.)

2. In over half of the defense wins, the attorneys surveyed identified the lack of credibility of the plaintiff as a major factor influencing the jury.

3. Over a third of the plaintiff wins were at least partially attributable to the jury being motivated by sympathy for the plaintiff, according to the attorneys surveyed.

4. Approximately one-fifth of plaintiff wins were attributed by the attorneys to juror antipathy toward the media in general.

5. An additional one-fifth of plaintiff wins were attributed to some peculiar aspect of the underlying fact pattern.

6. Only 13% of the attorneys surveyed identified procedure or unsatisfactory jury instructions as a major factor responsible for the jury's decision when the verdict was rendered in favor of the plaintiff.

7. In terms of accurate information regarding the basis for the jury's verdict, almost half of the attorneys surveyed had obtained some information from one or more jurors subsequent to the trial. However, none of these post-trial jury contacts were performed systematically by the attorneys or a person working with the attorneys. Most were the result of informal -- and presumably brief -- contacts in the courthouse immediately after the verdict. A few were the result of press reports rather than contacts conducted or initiated by defense counsel.

APPENDIX

Table 1
General Profile of Cases Studied

	<u>Total</u>	<u>Verdict</u>		<u>Amt. of Damage</u>			<u>Pun. Dam.</u>		<u>Jurisdiction</u>	
		<u>Pln.</u>	<u>Def.</u>	<u>None</u>	<u>\$1ML & LS</u>	<u>Over \$1ML</u>	<u>None</u>	<u>Any</u>	<u>State Ct.</u>	<u>Fed. Ct.</u>
Total Responses	25	16	9	7	11	7	13	11	18	7
Public Official	6 24%	4 25%	2 22%	1 14%	2 18%	3 43%	1 8%	5 45%	5 28%	1 14%
Public Figure	5 20%	2 13%	3 33%	2 29%	2 18%	1 14%	3 23%	1 9%	2 11%	3 43%
Private Figure	14 56%	10 62%	4 44%	4 57%	7 64%	3 43%	9 70%	5 45%	11 61%	3 43%

	<u>Media</u>		<u>Instruct.</u>		<u>Negli- gence</u>	<u>Standard</u>		
	<u>Prnt.</u>	<u>Bro- cast</u>	<u>Satis- fied</u>	<u>Not Sat.</u>		<u>Actual Malice</u>	<u>Both</u>	<u>Other</u>
Total Responses	18	7	15	10	8	13	2	2
Public Official	6 33%	0 0%	5 33%	1 10%	0	6 24%	0	0
Public Figure	3 17%	2 29%	4 27%	1 10%	0	4 16%	1 4%	0
Private Figure	9 52%	5 71%	6 40%	8 80%	8 32%	3 12%	1 4%	2 8%

Table 2

Correlation between Who Conducted Voir Dire and Perceived Effectiveness

		Voir Dire Effective		Voir Dire Not Effective		Don't Know Not Applicable	
Total		Plaintiff Verdict	Defendant Verdict	Plaintiff Verdict	Defendant Verdict	Plaintiff Verdict	Defendant Verdict
Judge	11	2 (28%)	4 (100%)	3 (42%)	0 (0%)	2 (28%)	0 (0%)
Attorneys	12	5 (55%)	3 (100%)	2 (22%)	0 (0%)	2 (22%)	0 (0%)
Both	2	0 (0%)	2 (100%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)

2-1-2

Table 3

Relative Usefulness of Voir Dire

	<u>Total</u>	<u>Verdict</u>	
		<u>Plain -tiff</u>	<u>Defen -dant</u>
Total Responses	25	16	9
Defense	7 28%	3 19%	4 44%
Plaintiff	1 4%	1 6%	0 0%
Equally Useful	13 52%	9 56%	4 44%
Don't Know/ Undecided	3 12%	2 13%	1 11%
No Answer/ Refused	1 4%	1 6%	0 0%

Table 4

Perceived Success at Obtaining Jury Desired

	<u>Total</u>	<u>Verdict</u>	
		<u>Plain-tiff</u>	<u>Defendant</u>
Total Responses	25	16	9
Yes	11 44%	4 25%	7 78%
No	10 40%	9 56%	1 11%
Don't Know/Undecided	2 8%	2 13%	0 0%
No Answer/Refused	2 8%	1 6%	1 11%

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Table 5

Correlation of Attorney's Perception of Relative Success
in Developing A Trial Theme or Strategy to Trial Outcome

	<u>Total</u>	<u>Verdict</u>	
		<u>Plain -tiff</u>	<u>Defen -dant</u>
<u>Total Responses</u>	25	16	9
Very Successful	12 48%	3 19%	9 100%
Somewhat Successful	6 24%	6 38%	0 0%
Not Too Successful	3 12%	3 19%	0 0%
Not At All Successful	3 12%	3 19%	0 0%
No Answer/Refused	1 4%	1 6%	0 0%

Table 6

Retrospective Evaluation of Trial Strategy

		<u>Verdict</u>	
	<u>Total</u>	<u>Plain</u> <u>-tiff</u>	<u>Defen</u> <u>-dant</u>
Total Responses	25	16	9
Desire to Change Trial Strategy	6 24%	6 38%	0 0%
No Desire to Change Trial Strategy	17 68%	8 50%	9 100%
Don't Know/Undecided	1 4%	1 6%	0 0%
No Answer/Refused	1 4%	1 6%	0 0%

V-7

Table 7

Jury Instruction Satisfaction from Defense Point of View

	<u>Verdict</u>		<u>Amt. of Damage</u>			<u>Pun. Dam.</u>		<u>Comp. Damages</u>		<u>Plaintiff</u>			<u>Media</u>			
	<u>Total</u>	<u>Pln.</u>	<u>Def.</u>	<u>None</u>	<u>\$1ML & LS</u>	<u>Over \$1ML</u>	<u>None</u>	<u>Any</u>	<u>None</u>	<u>Und. 100K</u>	<u>100K Plus</u>	<u>Pub. Off.</u>	<u>Pub. Fig.</u>	<u>Pvt. Fig.</u>	<u>Prnt.</u>	<u>Bro-cast</u>
	25															
Satisfied	15 60%	7 44%	8 89%	6 86%	4 36%	5 71%	9 69%	5 45%	7 88%	2 29%	5 56%	5 83%	4 80%	5 38%	13 72%	2 29%
Not Satisfied	10 40%	9 56%	1 11%	1 14%	7 64%	2 29%	4 31%	6 55%	1 13%	5 71%	4 44%	1 17%	1 20%	8 62%	5 28%	5 71%

Table 8

Correlation between Standard of Liability
Applied and Jury Instruction Satisfaction

	<u>Total</u>	<u>Satisfied</u>	<u>Not Satisfied</u>
Total Responses	25	15	10
Negligence	8	2 25%	6 75%
Actual Malice	13	11 85%	2 15%
A Combination of Negligence & Actual Malice	2	1 50%	1 50%
Some Other	2	1 50%	1 50%

Table 9Major Factors Influencing the Jury

	<u>CREDIBILITY OF PLAINTIFF/ WITNESSES</u>	<u>PROCEDURE</u>	<u>SYMPATHY FOR PLAINTIFF</u>	<u>ANTIPATHY TOWARD MEDIA</u>	<u>PECULIAR FACT PATTERN</u>	<u>JURY DEMOGRAPHICS</u>	<u>DON'T KNOW</u>
Plaintiff Verdict	0 (0%)	2 (12%)	6 (38%)	3 (19%)	3 (19%)	0 (0%)	2 (12%)
Defendant Verdict	5 (56%)	1 (11%)	0 (0%)	0 (0%)	2 (22%)	1 (11%)	0 (0%)