LDRC BULLETIN No. 14

LDRC Juror Attitudes Study I

Background

Over the past several years LDRC has systematically monitored the results of jury trials in media libel actions. Indeed, LDRC data documenting the fact that jurors have been voting against media defendants in the great majority of recent libel trials, has been one of the central features of the ongoing debate over the impact of libel claims on freedom of speech and of the press in the United States. Jury results have showed some improvement over the past two years -- down from a loss rate approaching 90% during the period 1980-82, to a rate closer to 60% during the period 1982-84. But the loss rate is still unacceptably high -- 75% on average over the past four years -- and losses continue to result in staggeringly large initial juror damage awards, averaging in excess of $2 million per award.

Ironically, despite LDRC's systematic tracking of empirical data on the objectively observable results of jury actions in media libel cases, little is systematically known about the actual, subjective attitudes of jurors in such cases. Why do they vote against the media defendant and for the libel plaintiff in 3 out of 4 cases? Why do they award mega-damage awards including huge awards of punitive damages? It is to shed light on these and related issues, of fundamental importance to an understanding of current trends, that LDRC has embarked upon a series of jury attitude studies, based upon interviews with jurors who have served in actual libel cases.

What follows is a report on the first of these studies. In order to ensure juror confidentiality, and in order to protect the integrity of the litigation process -- an appeal is expected in this first case under study -- the materials that follow do not specifically identify either the litigants or the jurors. It is nonetheless believed that the following report adequately describes the essential character of the litigation as well as the attitudes of the jurors who chose to impose liability and award substantial damages against the defendant newspaper.

Jury Study I

This first LDRC juror attitude study was undertaken in a case that resulted in an adverse jury verdict and an award approaching $1 million, something under half of it denominated as "actual" damages and the greater half, "punitive" damages. The plaintiff was a public official, a prominent former prosecuting attorney. The defendant was a major daily newspaper, generally considered to be a top-flight publication in terms of editorial quality and content.

The libel case that went to trial was actually the second, and in a sense the lesser, of a pair of cases brought against the newspaper by the same plaintiff. Plaintiff was apparently of the view that he and his prosecutor's office was being covered inaccurately and unfairly by the newspaper. In a series of articles, published over a period of at least several months, the newspaper reported on a series of related allegations by other officials suggesting that plaintiff and his office were ineffectual, were politically motivated in their prosecution policy and were soft on white-collar criminals.

Plaintiff's first case was brought based on an article published after plaintiff's resignation as prosecutor in which knowledgeable official sources were quoted as suggesting that if plaintiff hadn't voluntarily resigned he would have been asked to resign by higher authorities.

While plaintiff's first case was still pending, the newspaper published another story erroneously stating that plaintiff's successor, at a press conference, had made specific reference to allegations about plaintiff's allegedly less-than-vigorous pursuit of white-collar crime when suspects were politically well-connected. In fact, plaintiff's successor had not mentioned plaintiff at all at the press conference and his remarks were in fact only generally about politics and prosecutions with no reference to accusations regarding plaintiff. The newspaper contended that the error resulted from an honest mistake by a re-write reporter under deadline pressure who erroneously linked plaintiff to his successor's general comments and then simply inserted as background material the prior allegations about plaintiff based upon the editor's knowledge of the newspaper's prior publications on the subject of plaintiff's performance as prosecutor. When the on-scene reporter read the article the day it appeared she immediately recommended and wrote a correction which was published two days later in an edition with wider circulation than the original publication.

The newspaper moved for summary judgment in both actions. The trial court granted both motions and these orders were affirmed by an equally divided intermediate appellate court. The state's highest court affirmed the grant of summary judgment in the first action. It relied on the fact that one of the defendant's sources for the "resign or be fired" article had come forward -- indeed, had come forward at a deposition noticed by the plaintiff. The court found that defendant had a right to rely on and publish this high official's apparently authoritative statements, absent proof of knowledge of falsity and despite the newspaper's awareness of denials by plaintiff, plaintiff's office and other highly-placed officials. However, the state supreme court reversed the grant of summary judgment in the second action. In a brief section of its opinion, that appears to confuse the fair report privilege with the constitutional actual malice rule, the Court held that the newspaper's conceded error in mistakenly embellishing it's report of the press conference with clearly false and defamatory materials about plaintiff was sufficient to defeat a motion for summary judgment on the issue of actual malice. The court refused to consider, for purposes of summary judgment, the "testimonial" affidavits of the newspaper's reporters in which each of them denied that they ever, in fact, were aware of the falsity of the article as of the time it was published.

At trial, defense counsel had to acknowledge, of course, the central error of the second publication -- that plaintiff and accusations about plaintiff had not been specifically mentioned at the press conference, that the re-write reporter made a mistake and that, in fact, the newspaper voluntarily corrected the error. Having acknowledged the error the defense strategy was, essentially, to defend on the issue of actual malice. The defense argued strenuously that this was not a knowing fabrication; this was an honest error. The re-write reporter and the reporter testified as to how the mistake came to be made and then to be voluntarily corrected. In addition, because the re-write reporter had injected the background material concerning "accusations" about plaintiff into his report, and because plaintiff sought to prove that the underlying accusations were false, defense counsel also had to deal, in some manner, with the issue of the truth or falsity of the "accusations" about plaintiff's performance in office. Defense counsel attempted to tread the fine and difficult line between becoming an advocate of the truth of the underlying accusations and avoiding any concession that they were false. The defense theme was that, true or false, these accusations were in fact being made by

highly-placed public officials and the newspaper was simply reporting on them. Defense counsel spent a fair amount of time introducing into evidence stories from the defendant newspaper -- as well as from other local publications -- reciting these various accusations as proof that, true or false, they were not merely figments of the newspaper's imagination.

On the other side, plaintiff's attorney, having the benefit of defendant's necessary concession of error in linking plaintiff to the press conference, sought to prove falsity and actual malice by casting doubt on the motives and integrity of the newspaper and its sources. At first, plaintiff's counsel attempted to suggest that the reporter had a grudge against the prosecutor because he refused, as a matter of prosecutorial ethics, to leak information to the newspaper. When that strategy failed to make headway, because of the reporter's obvious professionalism and integrity and because of proof that the prosecutor may well have selectively leaked information on other pending cases when it suited his purposes, he shifted ground. Instead, he hammered away at his client's critics, claiming that all of the accusations were based on rumor, supposition, political motivation and not hard fact. He also sought to put questions in the jurors' minds about how the erroneous information in the press conference story could possibly have been inserted unless someone consciously intended to put it in, without justification, in order to harm the plaintiff. Clearly he argued, the newspaper was "out to get" the plaintiff, by consistently printing unsupported, politically-motivated accusations, even when they hadn't been made. As to the correction, this was characterized as simply part of a continuing willful effort by the newspaper to repeat accusations, without any genuine apology, and its placement in an edition with greater circulation was said merely to compound the harm.

On the issue of damages, a stipulation was entered into that plaintiff (who was apparently successful in private practice after resigning as prosecutor -- despite the alleged defamation) was not claiming loss of earnings, but only harm to reputation and related emotional distress. He was even allowed to testify as to the distress that his family and young son had allegedly suffered. On the issue of punitive damages, plaintiff was allowed to introduce evidence of the multi-million dollar worth of the newspaper.

The judge's instructions were actually reasonably good from the defense view, all things considered. Adequate definitions of actual malice, burden of proof and clear and convincing evidence

were provided. Moreover, in addition to the basic legal elements, the judge provided, at defense counsel's request, further elaborations instructing that a mere mistake or lack of good judgment would be insufficient proof of fault; that misquotation or erroneous assumptions were not enough; that mere negligence or sloppiness would not be enough and that hot news could justify more error than might otherwise be acceptible. Finally, the jury was instructed that it could return a verdict based upon the approval of 10 out of its 12 members.

The jury was excused at around 5:00 P.M. and thereupon deliberated for a total of about three hours into the evening, including dinner and a return to the courtroom for a re-reading of the four basic elements of defamation as outlined in the judge's instructions. The judge refused to re-read the entire charge and did not re-read the elaborations on what would or would not constitute sufficient fault. At approximately 8:00 P.M. the jury returned to announce its unanimous verdict in favor of the plaintiff and its award of actual and punitive damage approaching a million dollars.

The LDRC Jury Study

LDRC undertook to study the attitudes of each of the jurors in this case, including the two alternate jurors. Briefs, opinions and the available portions of the trial record* were studied to achieve an independent understanding of the issues, arguments and proofs in the case. A list of the jurors was obtained which provided not only names and addresses but also certain minimal demographic data (e.g., age, marital status, occupation, educational background) of a kind typically provided to attorneys from the court clerk's office regarding all jurors on the venire. Then, using names and addresses, telephone numbers were located for ten jurors, including both alternates. Letters were written to all of the jurors explaining the nature of the LDRC study, asking for their voluntary coperation and promising confidentiality. The ten jurors with numbers were told to expect a followup telephone call. The four jurors without telephone numbers were asked to return a self-addressed reply card with their telephone numbers.

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* Because the trial was only recently completed, the full trial record was not available at the time of the juror interviews. Only the summations, and the judge's instructions were available.

Seven out of the ten jurors (five regulars and both alternates) whose numbers were initially available agreed to meet with LDRC for an interview. These interviews were conducted either in the jurors' homes or their offices and generally lasted between 1 1/2 to 2 hours. A 25-page written script was loosely followed by the interviewer and the interviews were also tape recorded. After this first round of interviews, additional efforts were made to contact the other jurors. As a result, two other jurors were interviewed by telephone. In sum, a total of nine jurors were interviewed in the study -- 7 out of 12 regular jurors and both alternates. Of the five jurors not interviewed, three were spoken to by telephone but declined to be interviewed for a variety of stated reasons; the final two jurors never responded to a series of letters. All of the interviews were conducted within three to four months after the conclusion of the trial, so loss of memory of significant details was not generally a problem in this Study.

The Jury's Verdict

(i) Liability

It appears that the jury deliberated for no more than half an hour on the issue of liability, a portion of that time taken up with a return to the courtroom for a re-reading of portions of the jury instructions. An initial poll among the jurors revealed that, at the outset, nine of the jurors favored plaintiff; only three initially favored the newspaper. LDRC interviewed five of the pro-plaintiff jurors and two out of three of those who initially voted in favor of the defendant. Both alternates indicated that they favored plaintiff as of the time they were discharged. Curiously, although all of the jurors officially joined in the unanimous verdict for plaintiff, both of the initial dissenters interviewed by LDRC indicated that they in fact never changed their views as a result of the brief deliberations on the liability issue. Apparently, they both joined in the verdict simply to make the result unanimous. In any event, in this case under state practice ten jurors could have constituted a binding, non-unanimous verdict.

While each juror expressed his or her views on liability in a somewhat different fashion, the jury's overall view on the liability issue can to some extent be generalized. Most of the jurors went into the jury room with a basic pro-plaintiff reaction to the factual dispute over the truth or falsity of the underlying "accusations" about plaintiff and this basic view decisively colored their brief consideration of the liability issue. In effect, the *defense had been drawn into battle over plaintiff's integrity, had become identified with plaintiff's accusers and had quite simply lost the case when it failed to do what it never really tried to do* -- i.e., conclusively to establish the truth of those accusations. The jury just didn't believe that the accusations against the *plaintiff were true and they held this against the newspaper.* Almost all of these jurors failed to distinguish between this factual conclusion and what the defense had argued was the very separate issue of whether the newspaper was aware of this alleged falsity.

To the extent the jurors, individually, or during the deliberations, attempted to develop a link between falsity and knowlege of falsity, they bridged the gap based upon a loose theory that the newspaper was, or must have been, "out to get" the plaintiff. Since, however, a number of the jurors believed that the reporter had attempted to be accurate and only a few did not believe the re-write reporter's assertions of honest mistake, this left those jurors who considered the issue to rely on a vague theory that "someone" at the newspaper -- possibly other editors who had not testified at the trial -- had either directly or indirectly influenced, caused, or at least not prevented, publication of the defamatory article. Perhaps because most of the jurors were quite convinced of their basic factual view of the case, perhaps because of the brevity of the liability deliberations, perhaps because of the judge's failure to re-read the detailed instructions on the nature of actionable actual malice, perhaps because of the lack of need for a unanimous verdict by convincing hold-out jurors, or some combination of these factors, there was never really any serious *effort to isolate or define the precise locus of actual malice* within the defendant newspaper and then to consider whether this actual malice had actually been proven by clear and convincing evidence.

(ii) Damages

The question of damages took up the lion's share of the jury's deliberations. A number of jurors complained that they had been given little guidance to evaluate the amount of damages. Although a few jurors didn't believe plaintiff had suffered significant damages, most of the jurors did feel that more than nominal damages were appropriate and most wished to award a substantial punitive award to punish (and deter) the newspaper for (and from) what they felt was its improper conduct. However, when, at the outset of the damages phase, one juror suggested an award of $2 or $3 million, most of the jurors professed shock and disagreement with such a large amount. Nonetheless, the jurors ultimately agreed on an award approaching $1 million.

The jury reached its verdict arithmetically. Each juror wrote a suggested lump sum damage amount on a piece of paper. Notably, a few of the jurors who would have favored a far lower award silently increased the amount they initially recorded, in the belief that a lower amount would be rejected by the other jurors. Since only the one highest and one lowest amount were eliminated, and the remaining sums were averaged, this had the effect of increasing the resulting arithmetic award, contrary to the initial views of those jurors. When one juror recalled that the judge's instructions required that actual and punitive damages bear some reasonable relationship to one another, the jury agreed to split the resulting lump sum verdict amount to approximately 45% denominated as actual damages and 55% as punitive damages. While this process of arriving at a damage award would hardly appear to be ideal it is nonetheless not possible to conclude that the award was entirely corrupt. The resulting average, approaching a million dollars, was agreed upon and appeared to satisfy most of the jurors interviewed. Most of the jurors felt that there had been some actual damage, although no one really had any specific piece of evidence as to the amount of such actual damage because in fact they had been provided with no such evidence during the trial.

In sum, it is fair to conclude that the primary basis in the jurors' minds for the huge award was punishment based upon the jurors' view that the newpaper had engaged in willful and reprehensible conduct.

Attitudes toward the Media

There has been much speculation as to whether the average juror will generally be biased against the media defendant in a libel trial. Certainly this first study, of a sampling of one jury, will not definitively answer this question. But the limited data from this study does shed at least some light on this important issue.

Only two of the nine jurors interviewed admitted to having specific negative feelings, pre-dating the trial, about the defendant newspaper. One of these noted his view that the media in general, including the defendant, were becoming too opinionated and unreliable, although he did continue to read defendant's newspaper. The other juror viewed this issue in terms of "liberal" vs. "conservative" media. He found the defendant's newspaper to be too liberal for his taste and had specifically concluded that the newspaper had been "out to get" other conservative politicians whom he favored. He had preferred to read what he considered to be the city's "conservative" newspaper. Interestingly, however, there did not in general seem to be a strong correlation in this limited study between political views or affiliations and attitudes toward the media.

Of the other seven jurors interviewed, four generally read the defendant's newspaper, while three relied only on smaller suburban publications or less news-oriented general interest magazines. None of these seven specifically admitted to pre-existing feelings against the defendant, and four of the seven (including the two who initially voted for defendant) felt that the media do a basically good job and are basically fair, although they recognized the possibility of errors being made. The other three seemed to place more emphasis on the potential of the media to make mistakes and to be unfair.

Despite this mix of views, not all entirely negative toward the media, at least six of the seven jurors interviewed who voted (or would have voted) against the defendant, were willing to believe that a respected big city daily newspaper might be "out to get" a local public official and, as a result, might willfully publish false material, harmful to the plaintiff, with knowledge of its falsity. Moreover, these same jurors were willing, with relative ease, to translate these negative perceptions of the media defendant into a near-million dollar damage award which, almost to a person

and regardless of the strength of the general concerns about bias or unfairness in the media, the jurors intended to inflict punishment and deterrence against this publisher and the media in general.

Demographics*

Perhaps because of the relatively small sampling, perhaps because of the relative homogeneity of this jury, composed primarily of blue collar/middle class suburban jurors, few with post-high school education, or perhaps because most of the jurors became so powerfully persuaded of a basic factual pattern and story which they felt favored the plaintiff, there do not appear to be many significant variations in views that can be meaningfully correlated to demographic variables among the jurors.

(i) Education

The level of the jurors' education does not appear to have meaningfully correlated with their voting. Only four jurors, including one juror to whom we did not speak, were college educated. The remaining jurors, with the exception of one woman to whom we did not speak, had completed high school. Of the three college educated people with whom we spoke, one was one of the three dissenters, one was the person who voted to give the highest damage award, and one voted for plaintiff but wanted to give a relatively low damage award of $100,000. This is not to suggest, however, that a jury composed of perhaps more college educated individuals might not have been somewhat more likely to appreciate the subtle distinctions upon which the defense was relying, or that a jury composed of more persons used to analyzing problems might not have been inclined to seek a more complete and carefully thought through theory of the case, particularly vis-a-vis the issue of actual malice.

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* As noted above, some of this data was available to counsel on computer printouts provided by the court clerk for all members of the jury venire panel. Some of these observations are based on the juror interviews. With regard to information developed during the voir dire was apparently minimal. Voir dire was conducted primarily bythe judge. Although the defense attorneys had submitted a list of written questions, most of these were not used by the trial judge and the resulting voir dire was anything but searching. It provided little opportunity to educatate the jurors to the issues in the case or even meaningfully to challenge or strike jurors on the venire panel. The jury selection began the first morning of the trial and the jury had already been seated before lunch.

(ii) Sex

The sex of the jurors does not appear to have been correlated with their voting. Among the women, for example, one woman was a dissenter, one voted to give the highest damage award, and one voted for a more moderate damage award.

(iii) Age

Once again, the age of the jurors does not appear to have correlated definitively with their voting. For example, five jurors, including three to whom LDRC did not speak, were at least 60 years old. In this group was at least one of the three dissenters and one person who voted to give the highest damage award. On the other hand, the two jurors in their twenties (both alternates), both favored plaintiff; one of whom would have given over $1 million and one who would have given only $20,000. Of the three jurors in their thirties, (one of whom favored defendant and two of whom favored plaintiff), one favored a high damage award, one favored a relatively low damage award of $100,000.

(iv) Occupation

Again, no apparent correlation. Of the two dissenters interviewed, one was a retired secretary, the other an engineer. On plaintiff's side were arrayed housekeepers and blue collar workers as well as an executive and two technicians.

(v) Political Affiliation

No apparent correlation. One of the two dissenters was a conservative republican; the affiliation of the other is not known. Those voting for plaintiff were all over the spectrum, including independents, moderates, republicans and democrats, liberals, moderates and conservatives. Of course, overall the jury was on the conservative side and it is, again, unclear what effect a distinctly liberal jury would have had on the jury's overall attitude toward a case such as the one studied.

Attitudes toward the Personalities and Evidence in the Case

In evaluating the juror's attitudes, LDRC also sought to assess to what extent personalities -- of the judge, or the attorneys, or the parties or the witnesses -- and also documentary evidence were or were not issues in the case.

(i) The Judge

Putting aside his substantive rulings, or any subtle influences not consciously noted by the jurors, from all indications the judge was universally viewed by the jurors as fair and impartial. The record revealed that defense counsel registered more objections with the judge than plaintiff's counsel but, at least according to the jurors, the trial judge still managed to maintain a position of neutrality.

(ii) The Attorneys

To the extent that the jurors were not neutral on the subject, those who expressed a preference between the two attorneys generally favored plaintiff's counsel, at least as to style. While the majority of jurors found both attorneys well prepared, three jurors expressed a clear preference for plaintiff's counsel while three others liked them both, but favored plaintiff's counsel slightly. One juror, an alternate, favored defense counsel for his aggressive style, but most of the jurors who favored plaintiff's counsel stressed his calmer, more "low-key" style. Five jurors expressed no preference regarding counsel.

Despite the results of the attorney popularity contest, only one juror admitted to being significantly influenced by her preference for plaintiff's counsel -- indeed, for whatever reason, this juror admitted to having formed her preference on first sight from the moment defense counsel walked into the courtroom. On the other hand, even one of the dissenters preferred plaintiff's counsel and was disappointed that defense counsel had not, in her view, more effectively proven the accusations against plaintiff. While a few of the jurors noted that defense counsel was doing more objecting -- a few specifically recalled and mentioned counsel's objection to a question asked by the judge -- they did not seem to hold this against the defense side of the case.

A number of jurors did become irritated, however, at the length of sidebar conferences, although they again did not appear to blame one side or the other for this. A number of jurors also became either bored or irritated at the lengthy introduction of a long series of newspaper articles by defense counsel, of which few, if any, of the jurors appreciated the relevance. A number of jurors also expressed the feeling that defense counsel seemed to be "on the defensive," but it is not clear to what extent this perception was simply a function of the jury's failure fully to comprehend the limited significance of the concession of error in the press conference article, or whether this "defensiveness" was in evidence as a matter of style throughout the case. In the end, given the majority of juror's strong acceptance of plaintiff's factual view of the case, it is difficult to determine to what extent the juror's perceptions of counsel were influenced by reaction to the factual presentations and to what extent their view of the facts was influenced by counsel's persuasiveness, style and approach.

(iii) The Parties

Given the "unanimous" outcome of the case against the defendant, it is perhaps not surprising that plaintiff (and his supporting witnesses -- see below) generally scored well with the majority of jurors. What is perhaps more surprising is how well defendant's reporter and re-write editor were viewed, personally, considering that the jury ultimately found malice or reckless disregard on the part of the newspaper.

Most jurors and the two alternates liked plaintiff and found him believable. Only two jurors, one of the dissenters and one who favored a relatively low damage award ($100,000), expressed any significant reservations about him. One of the dissenters did not believe him and thought he "looked guilty." The juror who favored a relatively low verdict had mixed feelings about him. This is not to suggest that plaintiff's testimony was fully accepted. In particular, a number of jurors expressed skepticism about plaintiff's damage claims and a number observed the apparent disparity between plaintiff's claims of injury and his well-heeled appearance. Also, a number of the jurors -- even those who seemed to like plaintiff -- were uncertain about the question of plaintiff's role in the leaking of information. But apparently these doubts were not enough to shake the jury's basic conclusion that the accusations against plaintiff were essentially false or

unproven. Indeed many of the jurors who expressed respect for plaintiff, and who voted for him, volunteered the observation that they didn't believe he was by any means perfect. This was such a consistently repeated response that one suspects it was a theme stressed by plaintiff, or his counsel and witnesses, throughout the trial.

The defendant was present at the trial primarily through its counsel and two key witnessess -- its reporter who covered the press conference and the re-write reporter. Interestingly, as noted, despite the adverse verdict, most of the jurors responded favorably to these two defense representatives.

As might be expected, both jurors interviewed who favored the defendant viewed favorably both the reporter and the re-write reporter. But even among the jurors interviewed who favored plaintiff, a number found the reporter to be basically believeable, with some of these even expressing the view that she was in fact a good or very competent reporter. Perhaps more significantly, only two of the jurors interviewed expressed the view that it was the reporter who was "out to get" the plaintiff. With regard to the re-write reporter, again a substantial number of the jurors believed his testimony that he had simply made an honest error. Only two of the nine jurors interviewed did not believe his testimony in this regard. These two jurors linked him somehow to their belief that the newspaper was "out to get" plaintiff. The re-write reporter also generated a good deal of sympathy among the jurors, with three or four of them specifically stating that they felt sorry for him, and did not blame him for the defamation. Yet most of those who felt sorry for the re-writer still concluded that his article was published with actual malice. As noted, these jurors blamed editors or "others" at the newspaper who they felt "set up" the re-writer, misled him. Interestingly, the two alternate jurors, while they did believe the re-writer simply made a mistake, seemed to feel that he nonetheless was subject to blame for his role in the publication. It is possible this suggests that during the brief jury deliberations a consensus developed among the pro-plaintiff jurors that, while the re-writer made a mistake, not he but the others were ultimately to be blamed for the publication.

(iv) Plaintiff's Witnesses

As noted, plaintiff's factual story carried the day with most of the jurors so decisively that they did not tarry long over the legal issues. A central reason for this, in addition to plaintiff's own credibility with the jurors, was apparently the testimony of

plaintiff's key witness. These supporters, former colleagues from his prosecutor's office and two judges who served essentially as character witnesses, made a powerful and clearly recalled impact on most of the jurors. In contrast, as noted below, defendant's witnesses seemed to have impressed the jurors far less. Although personalities may also have played a role in this, what emerges most clearly from LDRC's interviews is that the story told by plaintiff's witness made more sense to the jurors and more strongly supported a theory of the case that the jurors found easier to believe and understand.

Plaintiff's story was of a prosecutor and an office trying to go about its business as carefully and professionally as possible. Accusations against the office and the prosecutor were argued to be vague, politically motivated, unsupported and reckless charges that oversimplified a complex situation and that stood in the way of good people trying to do an important and difficult job. The demeanor and personality of plaintiff's witnesses apparently meshed well with this story. According to most of the jurors, his colleagues appeared calm, bright, professional and credible and they gave the jury -- as one juror put it -- a civics lesson. Interestingly, although the prominent judges called as character witnesses didn't appear to hurt plaintiff's case, many jurors thought their testimony was either duplicative or overstated. Apparently, these jurors were already convinced and were in need of no further, generalized support for plaintiff, particularly where it had the ring of overstatement or partisanship.

(v) *Defendant's Witnesses*

Defendant's witnesses simply did not fare nearly as well as plaintiff's in either persuasiveness or recognition even though -- at least in theory -- they were equally professional, prominent and qualified attorneys and prosecutors whose judgment had apparently been that plaintiff's office was not as effective or as free from question as plaintiff's witnessess had testified. Most jurors did not question the honesty of defendant's witnesses. However, either because of effective cross-examination or because their story was more difficult for them to support or for the jury to believe, or some combination of these or other factors, their testimony simply did not convince the jury and did not even stick with them. The jurors' recall of defendant's witnesses was markedly less sharp than of plaintiff's. In fact not only did the defense lose the battle of choice between stories of the two sets of witnesses concerning the truth or falsity of the underlying accusations, but the defense also

lost the war because, along with this defeat, somehow the message was missed that the newspaper did not intend, or need, to sponsor the ultimate truth of these witnesses' accusations.

Two other factors regarding defense witnesses may also have had a bearing upon the defense's ultimate inability to convince the jury of its view of the key factual issues in the case. The first relates to the reluctant battle over the truth or falsity, or at least the substantiation, of the underlying allegations about plaintiff's performance as prosecutor. A strong theme developed by plaintiff's counsel was to ask of each of the defense witnesses for proof of even one specific allegation of wrongdoing. The jury apparently concluded that the defense witnesses had failed to provide adequate substantiation for these charges. The jury also apparently concluded that this failure was relevant to plaintiff's defamation claim and that the failure should be charged against the defendant. Additionally, plaintiff's counsel successfully suggested to the jury that there were improper political motives for what he argued were these vague, baseless and unsupported allegations.

Thus, despite the fact that few jurors expressly disbelieved the fact witnesses that the defense did put on the stand, plaintiff's counsel was nonetheless able to cast doubt on the authoritativeness of the witnesses' testimony and also to raise questions in the jurors' minds about the motives of certain absent witnesses. This wasn't done so much in the heavy handed manner of asking the jury "where's witness 'Doe'?" Rather, the absence of these other witnesses simply enabled the jury to build its own scenario of intrigue and malicious intent without having to confront additional live witnessess who -- assuming they would have made themselves available to the defense, and assuming they could have believeably denied and counteracted these suggestions -- might have made such loose suspicions more difficult for the jurors to entertain.

Similarly, while not strongly articulated by all of the jurors, the absence of other more highly-placed editors, executives or other witnesses from the newspaper may also have damaged the defense case in general and in particular on the issue of actual malice. To some extent this may have been unavoidable since apparently no one else at the newspaper was in fact directly involved in the preparation of the allegedly defamatory news story. Nonetheless, the absence of other more highly-placed newspaper witnesses arguably took away a certain amount of personality and sympathy from the newspaper in the jurors' eyes, particularly in

light of the personable impression given by plaintiff in the courtroom. Relatedly, it may have supported the belief of many jurors that the erroneous story was published without sufficient checks, balances and supervision by higher officials within the news organization. Finally, it enabled the jurors to imagine a scenario of malice and political intrigue among nameless "others" at the newspaper, an allegation barely suggested and certainly never proven in court, that surely would have been more difficult for the jurors to conjure up if other reasonably sympathetic persons from the newspaper had testified and had been believed.

(vi) Documentary Evidence

Other than the articles in suit, documentary evidence played a remarkably small role in the jury's decisionmaking. As noted, the jury was presented by the defense with a series of articles intended to demonstrate that accusations concerning the prosecutor and his office had long been in circulation, in defendant's newspaper, in other local publications and in at least one independent study. These were thought to support the defense contention that the accusations were not a figment or creation of the newspaper's imagination, that these were accusations and conclusions also reached and reported by others, and that the one error in the press conference article had its source in other accurate reports.

As noted, this defense argument made no headway with the jurors and, indeed, it proved to be counterproductive. Most of the jurors did not understand why they were seeing these articles. One particular independent article, published in a local magazine and containing conclusions or allegations that the defense argued closely paralleled its publications, was given special emphasis by the defense. It is difficult fully to explain how little impact this article had on the jury. Those few jurors who even remembered it, remembered it as being, at worst, neutral toward the plaintiff. Another report, prepared by an independent prosecutor after the defendant's stories ran, likewise had almost a nil effect on the jury, even though the report was not only introduced into evidence, but its author appeared as a witness to testify about his report. Literally, only one of the nine jurors interviewed had any meaningful recollection of the report or its author; most had no recollection of either. Even the one juror who recalled the author, had no recollection of the report which certainly had no effect on his vote in favor of the plaintiff.

The Decisionmaking Process

As noted, the jury's decision had essentially been made before it began deliberations, indeed for most of the jurors, even before they received the judge's instructions on the law. The initial poll was 9 to 3 in favor of the plaintiff. What "deliberation" there was on liability was, at least from the defense point of view, perfunctory and incomplete. Indeed, a number of jurors made note of the fact that they were tired, that they had been dismissed to begin their deliberations at the end of the day and that it was stiflingly hot in the jury room. Despite these unfortunate pressures, the jurors did seem to want to be assured that their strongly held views on the facts of the case could be fit into the judge's instructions, and they requested a re-reading of the instructions. However, it is clear that the jury spent little time actually reviewing or discussing the law or the evidence. Indeed, at least two of the three initial dissenters were never really convinced of the verdict. They simply changed their votes after a very brief deliberation of no more than an hour on the liability issue, in order to make a unanimous verdict. One or two of the jurors interviewed did appear to recognize the need for a specific theory -- beyond the general sense shared by a majority of the jury that the newspaper had been wrong, careless or worse -- linking the admitted error in the press conference article with some proof of actual malice or reckless disregard in the legal sense. For those jurors that link was in short order supplied by the notion of "others" at the newspaper who "must" have known of the error and must have intended to defame the plaintiff. Perhaps if the jurors had been more divided, or more uncertain of their basic perceptions, or if unanimity had been required and one or more of the dissenters had insisted that these alleged links be more carefully scrutinized and subjected to the clear and convincing evidence requirement, the result might have been different. Or at least a more satisfyingly complete deliberation would have occurred.

How it is that so many of the jurors entered the jury room in agreement, prepared to reach a verdict on liability so quickly and with so little meaningful deliberation is not entirely clear. It is clear, however, that the jurors were scrupulously obedient to the judge's admonition not to discuss the case with each other. On the other hand, more than one juror expressed the feeling that they had become convinced at some point during the trial, without any actual discussion, that the other jurors (or at least most of them) had already decided the case and that they were strongly leaning toward

the plaintiff. These jurors admitted to surprise when as many as three of the jurors initially voted for the newspaper. Something in the courtroom, over the 11 days of the trial, must have suggested to these jurors, whether by body language, mood, or whatever, that this was an easy case, that plaintiff was (or should be) winning and that the outcome was a foregone conclusion. On the other hand, the decision was not so clear for all of the jurors. In addition to the three dissenters, one of the jurors interviewed and one alternate were wavering in their support for plaintiff as the trial progressed. While three pro-plaintiff jurors admitted to having favored the plaintiff right from the opening statements, the other pro-plaintiff jurors indicated that they were uncertain of their views during some portion of the remainder of the trial testimony.

Almost all of the jurors had pretty much decided the case before the closing arguments, which had little effect on the jurors, or else which merely solidified their pre-existing views on the issue of liability. *Perhaps not surprisingly, those who felt* strongly about the lawyers developed those feelings right from the opening statement and stuck with them. The only juror who adamantly disliked defense counsel favored plaintiff from the outset; and one of the two dissenters liked defense counsel from the outset.

Conclusion

It should be noted that, although certain observations made, and conclusions suggested in this study for purposes of illuminating the mass of raw data presented, it is clear that any ultimate conclusions regarding the general attitudes of libel jurors or the population as a whole, must await further studies that provide a broader, more diverse and more reliable sample base. LDRC is currently preparing an additional number of in-depth case studies of juror attitudes in actual recent libel cases. Initially, these are being funded and will be presented in conjunction with the ANPA/NAB/LDRC Libel Trial Symposium, to be held at the Chicago Hyatt Regency Hotel on August 21-23, 1985. (See additional information on the Symposium accompanying this Bulletin). Thereafter, the series of LDRC studies may be separately published, either in the LDRC Bulletin or in the forum of a special report.