

Public Response Associates, Inc.

REFLECTIONS ON
WESTMORELAND v. CBS

AN INTERVIEW WITH
JURORS AND DEFENSE COUNSEL

GUIDE FOR THE VIDEOTAPE PRESENTATION,
AUGUST, 1985

CONDUCTED FOR:

THE LIBEL DEFENSE RESOURCE CENTER
404 PARK AVENUE SOUTH, 16TH FLOOR
NEW YORK NY 10016



Opinion Research Consultants

Opera Plaza
601 Van Ness Suite 2056
San Francisco, CA 94102
(415) 771-2525

1050 Thomas Jefferson St. N.W. Sixth Floor
Washington, DC 20007
(202) 347-1454

After 68 days of trial, the jury which had heard each side's evidence and arguments in the libel case brought by General William C. Westmoreland against CBS and the producer of its documentary, "The Uncounted Enemy," George Crile, was deprived of the opportunity to deliberate and render a verdict. Immediately preceding the presentation of defendant's final witnesses, a settlement agreement was reached and the suit dismissed.

Because the Westmoreland case raised many factual and legal issues of importance to those who defend libel claims at trial and because the case also presented a unique opportunity to "debrief" jurors who had sat through such a lengthy trial but had not actually deliberated or rendered a verdict, the Libel Defense Resource Center commissioned Public Response Associates, Inc. to interview the defense attorneys for CBS as well as many of the jurors who had participated in the trial.

The first interview was conducted with David Boies of Cravath, Swaine & Moore, defense counsel for CBS, and Victor Kovner of Lankenau, Kovner & Bickford, defense counsel for Crile. The second interview was of nine people who served on the jury. We made no distinctions between the six interviewees who were actually jurors and might have deliberated and the three who were only alternates.

The decision to use both was vindicated in the interviews, which revealed that the alternates put forth as much effort and

concern into what was commonly perceived as a historic and important case. In fact, all of the interviewees were uncommonly committed to being "judges of the fact" and had followed the case with increasing interest and dedication. Only one juror was relieved that no deliberation had occurred. Far more prevalent a view was a sense of being deprived of a place in history.

Both interviews focused on the way in which counsel selected, prepared for, communicated with and attempted to persuade the jurors.

We further asked the attorneys to use the case to generalize to future libel cases and to discuss its implications in considerable detail.

Specifically, we asked both the attorneys and jurors to discuss the following topics:

- The jury selection process: how it was organized by the counsel and how it was perceived by those selected.
- The judge's instructions: how the attorneys and jurors perceived and responded to the judge's initial instructions concerning the distinction between truth and falsity issues and state of mind issues, the judge's admonishment to avoid news accounts (rather than forbid them access) and the draft of the final charge the judge would have delivered.
- The trial; how each of the following events was interpreted by counsel and received by the jurors:
 - opening statements,
 - note taking by jurors,
 - issues and themes of plaintiff and defendants,

- interim summations,
- interim instructions,
- witness performance and credibility,
- the direct and cross examination of General Westmoreland, an extremely sympathetic plaintiff by all accounts, as well as other Vietnam-era military leaders, nationally prominent figures and the producers of the CBS documentary,
- reactions to and understanding of the documents used, and
- attorney performance and juror evaluation of the attorneys
- ~~Attitudes toward the media~~: the basis for juror's pre-trial and post-trial views, including awareness of and attitudes toward libel issues and their understanding of such standards as actual malice and fairness.

No attempt was made in the interviews to discuss the evidentiary part of the trial, though the jurors were eager to talk about the relationship of the trial to what they came to see as the fascinating history of the Vietnam War. Again, with but one exception, all the jurors felt that they had had both an incredible learning experience and a valuable opportunity to view the famous and powerful at close range.

After the sessions had been completed, the videotapes were edited to reflect juror and attorney perspective of the major trial events described in our topic outline. Where possible, the views on specific issues were compared and contrasted. A total of eight hours of videotaping was compressed to 77 minutes. Deleted from the final edited tape, for these purposes, were many other

fascinating insights, most particularly regarding the background events at issue in the case, and the witnesses and participants in those events. It was felt that while those observations were of great interest as footnotes to this historic trial, they were less capable of generalization for libel attorneys in future cases. If interest is sufficient, it may be possible, working through LDRC, to view copies of the whole tapings as well as to obtain copies of the transcripts of the tapes.

Among the major observations deleted from the edited tape are the following:

- The majority of the jurors interviewed indicated that they would have decided in favor of CBS, at least on the state of mind (actual malice) issue. Notwithstanding this tendency, a substantial number felt that several of the statements made about the plaintiff were in fact defamatory and were not sure whether they would have found them true or false. This indication is particularly significant in light of the widespread speculation that General Westmoreland's attorneys had urged settlement for fear that the jury would find that the statements complained of were in fact true.
- The jurors felt that Westmoreland obtained virtually nothing from the joint statement disposing of the action. Several felt he would have obtained much more had the case gone to verdict. If he were able to prove falsity, he would be vindicated. They felt he had been badly advised by his friends and attorneys and should not have brought suit

in the first place.

- The one juror who most vociferously sided with General Westmoreland on all issues seemed to do so for reasons basically unrelated to the libel issues, i.e., the General's patriotism and the military position in which he found himself. The juror's attitude revealed that his own military experience influenced his opinions.
- There seemed to be a sense among the jurors that the numbers involving enemy troop strength in Vietnam were indeed manipulated. However, the jurors were still grappling with whether such manipulation was standard operating procedure known to all or was in fact tantamount to the conspiracy charge made by the defendants. Whether General Westmoreland had specially ordered the manipulation also continued to trouble the jurors.
- The jurors uniformly praised Judge Leval as having been fair, impartial and patient. And they uniformly felt that the defense team had strongly outperformed plaintiff's counsel in all respects.
- Several of the jurors believed that a court of law was not the proper forum for a public figure like Westmoreland to attempt to vindicate himself but rather that his access to the media would have enabled him to make his own public statement about his position. The jurors emphasized the high cost of prosecution of the case. Several of them seemed to feel that most libel cases are won by the press at trial and that the overwhelming majority of plaintiff's verdicts

are reduced on appeal.

- In evaluation of the credibility of the witnesses, the jurors seemed to place a premium on modesty, common sense and testimony adverse to one's own interest. They reacted most strongly against perceived witness arrogance and the appearance of holding back information to cover themselves. Using their notes, they appeared able to sharply focus on what they detected to be contradiction within the testimony of a witness or among several witnesses. On the whole, defendant's witnesses, particularly source witnesses who were current and former high ranking military and intelligence officials, were perceived as the more credible and persuasive witnesses.

The backgrounds of the participant jurors follows:

Randy Frost, 25, small city (JUROR)

- Single, homeowner, some college
- Plant manager
- Democrat, moderate
- Low middle-income; no stocks or bonds
- No prior jury service

Norma R. Parker, 51, New York City (ALTERNATE)

- Married, renter, high school graduate
- Nursing Assistant (husband: factory worker)
- Democrat, Episcopalian, no "ideology"
- Low income; no stocks or bonds
- Had served on a jury, no verdict

Richard Benveniste, 34, New York City (JUROR; FOREPERSON)

- Single, renter, college graduate
- Casualty underwriter
- Democrat, moderate, Jewish
- Low middle-income, stock owner
- Had served on a jury, deliberated, found guilty

Loretta Brown, 47, New York City (JUROR)

- Single, renter, some high school
- Office aide
- No political party, moderate
- Low income
- Had served on a jury, no verdict

Cheryl Raymond, 37, New York City (ALTERNATE)

- Single, renter, some college
- Administrative Associate to the NY Public Library
- Democrat, somewhat liberal
- Low middle-income
- Had served on a jury, found guilty

Patricia Roth, 43, small town (JUROR)

- Married, homeowner, college graduate
- Art teacher, real estate agent (husband: insurance underwriter)
- Independent, somewhat liberal, "no religious preference"
- High income, owns stocks
- No prior jury service

Myron Gold, 50, small suburb (JUROR)

- Married, homeowner, college graduate
- Manager, IRS (wife: dental hygienist)
- Democrat, moderate, no religious preference
- High middle-income, does not own stocks or bonds

Harold Boro, 66, small town (ALTERNATE)

- Married, homeowner, high school graduate
- Supervisor, NY Transit Authority Bus System (wife: therapy aide)
- Republican, moderate, Catholic
- Served on a jury and found not guilty in a case in which a "child ran out into the street"

David Lederman, 27, New York City (JUROR)

- Single, renter, college graduate
- Biomedical research assistant
- Democrat, somewhat liberal, religion is "philosophical"
- Low middle-income
- No prior jury service