

Opinion Poll Issues Flawed Results

We have seen this scenario time and again: a defendant, upon being served with a lawsuit issues a press release stating that he or she "intends to vigorously defend this frivolous lawsuit." The phrase has become so overused it has lost any meaning.

This phrase is echoed in a recent nation-wide study conducted by the U.S. Chamber of Commerce's Institute for Legal Reform (ILR) entitled "Lawsuit Climate 2010: Ranking the States." In the poll, released on Monday, March 22, California is ranked as one of the worst states in terms of the "fairness of its litigation environment." The results of the entire poll can be found at <http://www.instituteforlegalreform.com/lawsuit-climate.html>.

But, what is this study and why was it conducted? Those questions must be probed before one can rely on its results.



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The ILR states on its Web site that it is "a national campaign, representing the nation's business community, with the critical mission of making America's legal system simpler, fairer and faster for everyone." See <http://www.instituteforlegalreform.com/about-ilr.html> The ILR was founded in 1998 to "address the country's litigation explosion, ILR is the only national legal reform advocate to approach reform comprehensively by not only working to change the laws, but also changing the legal climate." While the ILR touts its support of grassroots activities, the ILR also aims to "eliminate frivolous lawsuits."

The ILR's study was conducted in an effort to identify the perceptions of U.S. business interests in this country's judicial system, including legislative priorities. The study asked its respondents to analyze the largest problems they faced in litigation, as well as issues to improve the "litigation environment." The study evaluated states as a whole and acknowledged that "[i]t is important to remember that courts and localities within a state may vary a great deal in fairness and reasonableness...to explore the detailed nuances within each state would have required extensive questioning about each state and was beyond the scope and purpose of this study." California, the largest judicial system in the country, may be difficult to judge as a consistent unit. Nevertheless, a state-by-state analysis was conducted, and each of this nation's 50 states were



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ranked - #1 being the best (pro-business), #50 being the worst (anti-business).

Historically, this survey has resulted in California being ranked as one of the worst states in terms of its litigation climate. This year was no different. As in previous studies conducted by the ILR, California was ranked among the worst - #46. However, one must look beneath the surface to uncover the fallacies of the study.

The study acknowledges that the "overwhelming majority (92 percent) of respondents were general counsel, corporate counsel, associate or assistant counsel or some other senior litigator or attorney." Indeed, the "random" sample of 1,482 respondents was based on a list of general counsel at companies with annual revenues of at least \$100 million (read: companies that get sued a lot). Clearly, this poll did not include a proper cross-section of the legal community and/or the business community.

The top factor driving down the perception of California's fairness were the 37 percent of respondents who indicated that there were "biased/partial juries/judges." What the study fails to note, however, is that perhaps justice was actually served in those cases. A study of plaintiffs who lost their cases in court or by summary judgment might yield similar results of "perception" in relation to bias or partiality. Just because corporate counsel believes that California judges and juries are biased does not make it so.

Perhaps what the respondents noted as bias or partiality was, in fact, fairness. Interestingly, this year a study entitled "Wage Theft and Workplace Violations in Los Angeles" (Institute for Research on Labor and Employment, University of California, Los Angeles, 2010), detailed abuses of workers in Los Angeles - and several of the abuses were violations of basic labor laws. For example, of a random sample of workers in the Los Angeles area, 29.7 percent indicated that they were paid below the minimum wage in the week prior to the survey. Many of these workers who suffered these violations likely work for employers who do not have annual revenues of over \$100 million dollars per year.

The "Lawsuit Climate 2010: Ranking the States" study deals with perceptions, but it fails to deal with the reality that violations of law must be addressed, and are being redressed by the California judiciary. In fact, the "Wage Theft and Workplace Violations in Los Angeles" concluded that in Los Angeles County over 600,000 workers "suffer at least one pay-based violation." As such, greater enforcement mechanisms, increased penalties and governmental intervention are required to combat this alarming trend of low wage workers being cheated out of their earnings. Clearly, academics have a very different view than the IRL, which exists to serve large business interests.

Some other factors in the respondents' ranking of states were: "overburdened with cases/too many cases," "slow process," and "inefficient court system." Not surprisingly, Los Angeles and San Francisco were



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two of the counties with the worst offenses. But, the study fails to take into account the fact that these two cities are two of the largest, most populated cities in the nation. Moreover, anyone litigating in Los Angeles before the recent court layoffs can attest to the fact that Los Angeles County did not move slowly but rather quite expeditiously in its fast-track system.

So, what can the state judiciary and legislature do to fix this "fairness" problem? Should we do away with consumer protections that our state has so vigorously upheld? Should we place caps on personal injury cases? Should we disallow private rights of action entirely and go to the government directly to redress of all of our problems?

The answer is a resounding no.

California's reputation should remain as it has for decades, "the most innovative of the state judiciaries, setting precedents in areas of criminal justice, civil liberties, racial integration, and consumer protection that heavily influence other states and the federal bench." Joann Lublin, "Trailblazing Bench: California High Court Often Points the Way for Judges Elsewhere," *Wall Street Journal*, 20 July 1972, 1. We should be proud of the judicial progressiveness of our state, and we should continue to live up to this state's prestigious legacy.