

VENUE DIFFERENCES FOR HIGH TECH IP LITIGATION:

Comparing NDCA, WDTX, and
the District of Delaware

A Study by the DOAR Research Center

About The Author



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Chad Lackey Ph.D. is a Director in DOAR's jury consulting practice. He has extensive experience designing and conducting focus group, survey, and mock trial research to test the persuasiveness of case themes and arguments. Additionally, he routinely partners with clients throughout all aspects of jury selection, including helping clients negotiate issues with the court and opposing counsel, identifying personal experiences and attitudes that bias deliberations and decision making, and drafting and grading supplemental juror questionnaires.

Dr. Lackey has a widespread consulting background. He has consulted on hundreds of civil and criminal matters across the country involving employment, complex commercial, insurance, patent, insider trading, child sexual abuse, securities fraud, murder, political corruption, terrorism, and the death penalty.

Dr. Lackey has a Ph.D. from the University of Colorado Boulder. He regularly lectures on jury selection and presentation strategy to civil, criminal, and regulatory attorneys.

Introduction

A large, dark, metallic star sculpture with five points, set against a cloudy sky and surrounded by trees. The star is the central focus of the image, with its sharp points reaching towards the top and bottom edges. The background is a dark, overcast sky with some lighter clouds. Trees are visible on the left and right sides of the frame, framing the star.

How much do jurors differ across popular venues for patent litigation? A great deal, not much at all, or it depends.

Ever since the 2017 *TC Heartland* decision, high tech patent disputes have, in increasing numbers, been litigated outside of the once-popular Rocket Docket in Marshal Texas. According to Unified Patents Q1 2020 Report, two venues seeing significant growth in high tech patent litigation are the District of Delaware and the Western District of Texas. To some extent, the growth in high tech patent litigation in Delaware District Courts is not surprising. Not only are many corporations headquartered in Delaware, but District Courts in Delaware have also adjudicated patent litigation in the pharmaceutical sector for years. The growth of cases in the Western District of Texas is largely the result of Judge Alan D. Albright, a former patent litigator appointed to the Court by President Trump. While Austin has been an emerging tech hub in the South, it is the Waco Division, not the Austin Division, that has seen the largest growth in high tech patent litigation.

While jurists in these venues may be capable of adjudicating patent cases, what about the jurors who will decide them? Waco, Texas and Wilmington, Delaware are very different places. What do potential jurors in these areas think about technology and the companies that make it? What do they think about companies illegally copying or stealing technology? What do they think about the prospect of the USPTO issuing patents in error?

What do potential jurors in different venues think about technology and the companies that produce it?

The Survey

In April of this year, DOAR conducted an online survey of residents of three venues experiencing growth in patent litigation since *TC Heartland*: the Waco Division of the Western District of Texas, the District of Delaware, and the Northern District of California. In total, 791 respondents completed the survey; 500 from the Northern District of California, 151 from the District of Delaware, and 140 from the Waco Division of the Western District of Texas. The varying numbers of respondents from each venue not only reflect the different population sizes, but the relative difficulty in conducting research in two of these three venues as well. Venues of Delaware and West Texas are much less researched and, as a result, pose greater challenges in securing large numbers of respondents.

The resulting sample proved largely representative of each venue, and any unrepresentative characteristics were factored into our analysis.¹ Our analysis focuses on statistically significant differences between venues regarding attitudes relevant to high tech patent litigation. We also examine how sociodemographic factors affect attitudes about technology to understand better how venue differences can be exacerbated or nullified depending on the makeup of jury panels.

¹ The sample had two unrepresentative characteristics that shaped our analysis. First, and most importantly, more women responded to the survey in all venues. As a result, we take a close look at gender differences before assessing venue differences. Second, the survey underrepresents Hispanic residents in these venues. As a result, we confine our analysis on differences that emerge when we compare whites to non-white respondents generally.

Key Findings

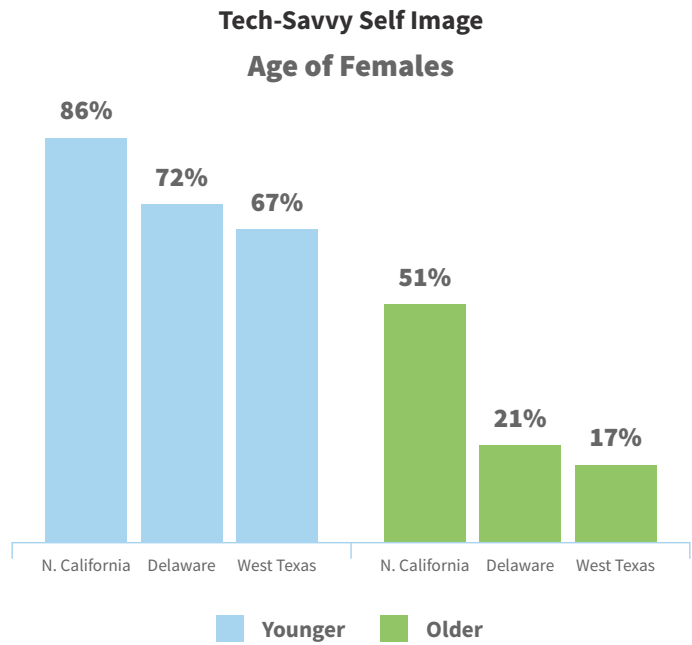
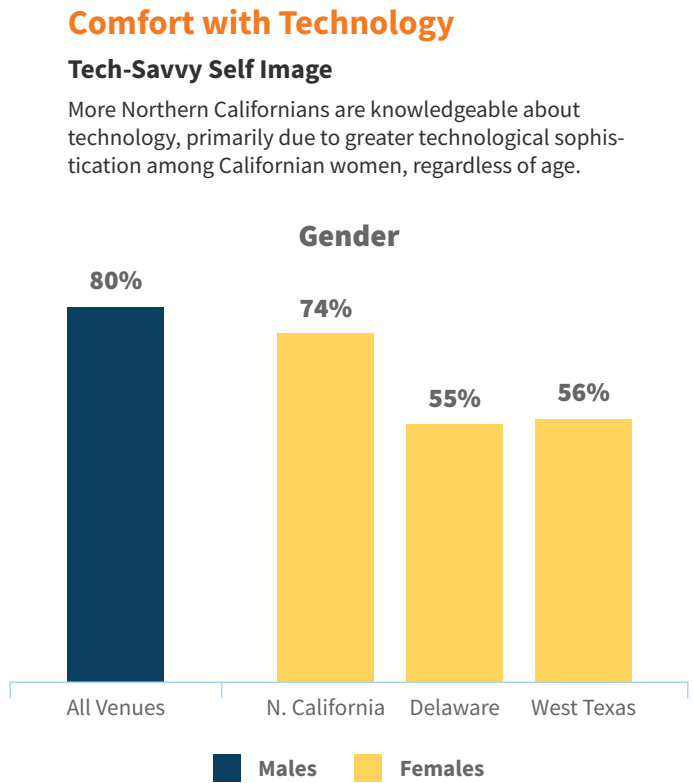
DOAR's venue survey highlights fundamental similarities and noteworthy, even dramatic, differences among NDCA, WDTX, and Delaware jurors.

Interest in Technology

Admittedly, the advanced technology at the heart of most patent disputes can be difficult to comprehend for the average person. However, people can differ in the degree to which they are intimidated by technology. In this vein, we ask respondents whether they consider themselves to be technologically savvy. While their answers to this question do not shed light on their ability to comprehend autonomous vehicle technology, source code, or other complicated technical subjects, it does shed light on the degree to which they feel comfortable with technology.

More Northern Californians are knowledgeable about technology, primarily due to greater technological sophistication among California women.

Not surprisingly, Northern Californians consider themselves more tech-savvy than West Texans or Delaware residents—a likely consequence of their proximity to Silicon Valley. However, results show gender lies at the heart of this venue difference. Regardless of venue, approximately 80 percent of men consider themselves technologically savvy. Not so with women. While generally speaking, women are significantly less likely than men to perceive themselves as tech-savvy, Northern California women come close, with 74% describing themselves as tech-savvy. In contrast,



significantly fewer women in Delaware (55%) and Texas (56%) do. Therefore, numerically, much, if not all, of the difference in venue is attributable to the greater technological sophistication of California women.

Age also has a notable effect on whether respondents perceive themselves to be tech-savvy. A higher number of younger respondents consider themselves to be tech-savvy than older respondents, although this effect is less pronounced for men than women. Yet, results show that the venue difference due to California women remains, regardless of age. For example, almost 86% of younger California women (age 18-39) identify as tech-savvy whereas only 72% and 67% of younger Delaware and Texas women do. And among older women (age 65 or over), the majority in California (51%) see themselves as tech-savvy while only 21% and 17% of those in Delaware and Texas do.

Results show a similar pattern regarding whether respondents closely follow developments in technology. Regardless of where they reside, Northern California, Delaware or West Texas, more men, at least 89%, closely follow technology. Significantly fewer women do so, although California women do so more than others. Sixty-four percent of California women closely follow technology, whereas only 54%-57% of women from Delaware or Texas do.

Regardless of venue, most men and women are optimistic that technological developments will improve their life.

While the percentage of those who are tech-savvy and

closely follow technology varies from one subgroup to another, most are optimistic that advances in technology will benefit their life. For example, almost all men (at least 90%) and most women (75%-89%) are optimistic that developments in technology will improve their life, regardless of where they live.

Attitudes Toward Tech Companies

While there are many different types of tech companies, our survey focuses on large tech companies and foreign tech companies. Given the increasing involvement of Non-Practicing Entities in patent litigation, we solicit opinions on NPEs as well.

More Delaware residents have positive opinions of big tech.

To begin, the majority of respondents in each venue have positive opinions of big tech. Of the different venues, Delaware has the most positive opinions of big tech (77%), and California has the least (68%). Almost three-quarters of Texans (74%) have positive opinions of big tech. Although few respondents have negative opinions of big tech, California (15%) has almost twice as many residents with negative opinions as Delaware or Texas (7%-8%) do.

More Delaware residents believe large tech companies are ethical.

Additionally, significantly more Delaware residents (68%) think large tech companies are ethical than do California (55%) or Texas (56%) residents. And this finding holds true for both men and women. While significantly more men than women believe large tech companies are ethical, men and women from Delaware (Men 72%; Women 65%) are more likely than their counterparts from California (Men 61%; Women 51%) or Texas (Men 57%; Women 55%) to believe big tech is ethical.

A sizable majority have concerns about big tech and their conduct, regardless of venue.

Despite the largely positive opinion of big tech in each of these three venues, respondents express concerns about some conduct of large technology companies. For example, almost all respondents from California (90%), Delaware (83%), and Texas (88%) believe that large tech companies get away with too much because of their size, power, or money. Additionally, almost all respondents from California (91%), Delaware (85%), and Texas (84%) have concerns about big tech companies like Amazon, Facebook, and Google selling their data.

Foreign Technology Companies

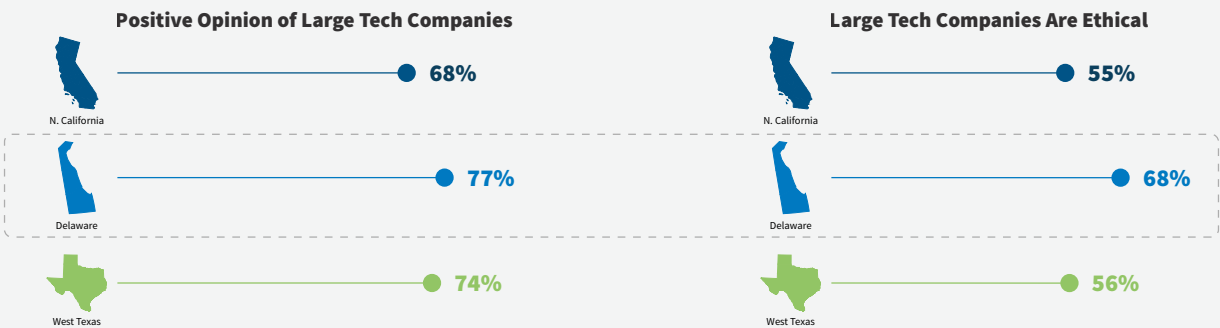
More Delaware residents believe foreign tech companies are more likely than their American counterparts to disregard US law.

To assess respondents' views of foreign tech companies, we first ask whether foreign tech companies doing business in the US are more likely than American tech companies to disregard US law. Data show more respondents (72%) from Delaware hold this belief than respondents from California (64%) or Texas (65%) do— not surprising given the trust Delaware residents have in large American tech companies.

Because Republicans exhibit more suspicion towards foreign tech companies, West Texas juries will likely exhibit more suspicion as well.

Notably, this suspicion of foreign tech companies is largely informed by political affiliation. Most Republicans in California, Delaware, and Texas (81%-82%) believe that foreign tech companies are more likely than American tech companies to disregard US Law. In contrast, significantly fewer Democrats take this position (i.e., California 61%; Delaware 68%; Texas 57%).

Delaware Most Favorable for Big Tech



The effects of political affiliation on suspicion toward foreign tech companies change the venue calculus somewhat, especially regarding West Texas. Republicans comprise a significantly greater proportion of the population in West Texas than in California or Delaware. Therefore, it would be reasonable to expect greater numbers of Republicans, and more suspicion toward foreign companies, in West Texas jury pools. As a practical matter, according to the data, foreign tech companies accused of violating US patent laws would likely find Texas to be a challenging venue—a likely reason so many NPEs have brought cases against foreign companies, such as Samsung and ZTE, in the Western District of Texas (see *Unified Patents*, Q1 March 2020 Report).

West Texans and Delaware residents are more likely to believe the US justice system should protect the interests of American companies over those of foreign companies that do business here.

We also ask respondents whether, in their opinion, the US justice system should protect the interests of American tech companies over those of foreign tech companies that do business in the US. Results show that

this “America First” belief is significantly more common in Texas (84%) and Delaware (82%) than in California (71%), although the belief is rather widespread in all venues.

Not surprisingly, this “America First” belief is more common among Republicans. For example, in California, 85% of Republicans hold this belief, whereas only 66% of Democrats do. In Texas, 96% of Republicans hold this belief while only 76% of Democrats do. Again, these data reveal some of the difficulties foreign technology companies might face when litigating a case in West Texas, especially in front of a jury that is predominantly Republican.

Nevertheless, data show the news is not all bad for foreign companies in West Texas. West Texans do appreciate the products foreign tech companies make. Data showed the majority of respondents from Texas, albeit a slight majority (56%), believed foreign tech companies make better products than their American counterparts. The majority in California (51%) and Delaware (53%) disagreed. According to them, American companies make better products.

However, Texans’ appreciation for the quality of foreign-made products is tied to their political affiliation and age. For example, the majority of younger Texans (67%) and Texas Democrats (66%) believe foreign companies make better products. In contrast, the majority of Texas Republicans (56%) and two-thirds of older Texans (age 65 or older) disagree, believing that American companies make better products.

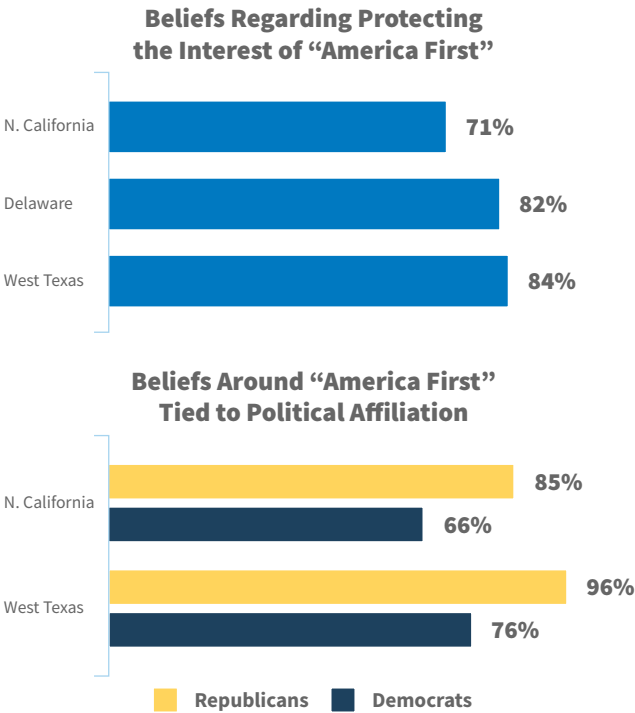
Non-Practicing Entities

Because NPEs are common litigants in the high-tech sector of patent litigation, we ask respondents about their opinions of these organizations. After a brief introduction defining and neutrally explaining their business model, we asked respondents to identify which interpretation of NPEs was most likely true:

- 1. These companies stand in the shoes of the little guy and sue large companies who steal technology from those who lack the resources to fund lawsuits.
- 2. These companies are leeches in the business of filing frivolous lawsuits, clog up the legal system, and make technology more expensive for everyone.

Attitudes Towards Foreign Tech Companies

West Texans and Delaware residents are more likely to believe the US justice system should protect the interests of American companies over those of foreign companies that do business here.



The majority in all venues perceived NPEs as leeches; however, majorities in some notable subgroups viewed them positively.

Results show little variation among venues. The majority in California, Delaware, and Texas (58%-61%) view NPEs as leeches.

However, opinions of NPEs vary greatly by age and racial affiliation. For example, in California, two-thirds of older respondents (age 65 or over) view NPEs as leeches, while the majority (56%) of younger respondents (aged 18-39) view them positively. In Texas, almost three-quarters of white respondents (72%) view NPEs as leeches, whereas the majority of non-whites (52%) view them positively.

Patent Infringement

Majorities in all venues believe big tech is more likely to steal from a small tech company than another large tech company.

To gain insight on issues central to patent infringement, we question respondents on their views about companies illegally copying or stealing technology. First, we ask about large tech companies and how much more likely they would be to illegally copy or steal from a small tech company versus another large one. Approximately three-quarters in each venue believe big tech was more likely to steal from a small company than another large tech company—not surprising given the popularity of the David versus Goliath theme among small tech company plaintiffs.

Delaware residents are less likely than West Texans to believe big tech would illegally copy or steal technology if they could get away with it.

More venue disparity emerges on the subject of whether big tech is more likely to illegally copy or steal technology if they could get away with it. Although a majority believe that big tech is likely to steal technology if they could get away with it, significantly fewer Delaware respondents (65%²) believe this than West Texas respondents (81%) do. About three-quarters of Californians (76%) take this position.

A sizable percentage across venues, although not a majority, believe foreign tech companies are

more likely to illegally copy or steal technology.

We also gauge respondents' opinions about who is more likely to illegally copy or steal technology, foreign tech companies or American tech companies. Results show a sizable percentage (approximately 42-49%), albeit not a majority, across venues believe foreign tech companies are more likely to steal technology. While many Delaware residents believe foreign companies are more likely to disregard US law, fewer are willing to go as far as stating foreign companies are more likely to break the law by stealing.

Beliefs that foreign tech companies are more likely to illegally copy or steal technology vary significantly by personal characteristics other than place of residence.

While there is little difference between venues on this issue, much more substantial differences emerge for other types of personal characteristics. For example,

The majority of men in California, Delaware, and Texas believe that foreign companies are more likely to steal technology; women disagree.

consider the differences between men and women. The majority of men in each state believe foreign companies are more likely to steal technology (Texas men 57%; Delaware men 54%; California men 52%). However, the majority of women disagree. Only 41% of Texas women, 37% of Delaware women, and 36% of California women believe foreign companies are more likely to illegally copy or steal technology.

While the effects of gender extended across all

2 Sixty-eight percent of survey respondents reported this belief, but, in Delaware these responses varied significantly by gender. Men (54%) are much less likely than women (75%) to believe big tech would steal if they could get away with it. The 65% reported represents a weighted estimate correcting for the overrepresentation of women in the sample. Nevertheless, both weighted and unweighted Delaware percentages are significantly different from percentages in West Texas ($p < .05$).

venues, some notable differences emerged within specific venues. For example, in Texas, the majority of Republicans (56%) and whites (55%) believe that foreign companies are more likely to illegally copy or steal technology. In comparison, only 32% of Democrats and 36% of non-whites do. In California, the majority of Republicans (54%) and respondents age 65 or older (53%) believe foreign companies are more likely to steal, while only 40% of California Democrats and 34% of younger Californians (age 18-39) do.

Patent Validity

Patent litigators well know that juries rarely invalidate patents. Most jurors are exceedingly reluctant to second-guess the judgment of patent examiners. We queried respondents on their trust that the government would only issue patents on technological innovations that deserved them. While responses ranged from 1 (Completely trust) to 10 (Do not trust at all), our analysis focuses on those who exhibit the least amount of trust, namely those who respond from 7 to 10.

More in Northern California, especially young men, do not trust the government to award patents only to innovations that deserve them.

Results show that significantly more Californians (38%) indicate low levels of trust as compared to those from Delaware (26%), with Texans falling somewhere in the middle (36%). Notably, among Californians, the majority of young males (53%) indicate they have little to no trust that the government only issues patents to technological innovations that deserve them. These findings show that Californians, particularly young men from California, would be the most receptive to defendants' invalidity arguments.

Aside from assessing trust in patent examiners' decision making, we also looked at several popular defense arguments/themes used to justify finding a patent, or specific claims within a patent, invalid. We asked respondents to identify the top two reasons mistakes are made in issuing patents. The arguments include:

1. Technology has become too complicated for any one person to understand fully.
2. Most government workers, including patent examiners, are overworked and underpaid.
3. The government cannot afford to hire the best and brightest, even among patent examiners

4. Inventors don't always provide all the information the patent examiner needs.
5. Patent examiners simply overlook a critical piece of information

If the government errs in awarding a patent, according to respondents across all venues, it is most likely because technology has become too complicated, not because the government cannot afford to hire the best and brightest.

Results show little difference among venues, at least among the most versus least likely source of errors made by patent examiners. Regardless of venue, the most common reason respondents chose was that technology has become too complicated. In contrast, the reason least chosen by respondents in all venues was that the government could not afford to hire the best and brightest.

However, data show much more significant differences when other personal characteristics, aside from venue, are considered. For example, most older respondents believe errors are likely caused by how complicated technology has become. In Texas, all older respondents (age 65 or over) identify this as a source of error, while only 48% of younger respondents do. Similar patterns exist among older respondents from Northern California (74%) and Delaware (64%), albeit not as extreme. In addition, the majority of Texas women (55%) are likely to believe errors are caused by inventors withholding relevant information from patent examiners.

Trade Secrets

Aside from examining patent infringement and validity issues, we also examine respondents' views of trade secrets and, broadly speaking, their beliefs about the ownership of work product. Specifically, we ask respondents how acceptable or unacceptable is it for a departing employee to take technical plans for technology that an employer developed. The responses range from 1 "Completely Acceptable" to 6 "Completely Unacceptable." Results are largely unsurprising. A sizable majority (regardless of venue or income, education, gender, etc.) believe it is unacceptable for a departing employee to take technical plans for technology their employer developed.



WELCOME TO DELAWARE THE FIRST STATE

The majority of West Texas respondents believe it is acceptable for a departing employee to take their employer's technical plans if the employee helped develop them.

However, we also asked whether it was unacceptable for a departing employee to take technical plans when the employee helped develop them. The answers to this question, especially those from West Texans, are truly shocking. While the majority of California (59%) and Delaware (55%) residents surveyed believe such conduct is unacceptable, the majority of West Texans (54%) believe it is acceptable for a departing employee to take an employer's technical plans if they helped develop them. Data also show Texans most likely to find this conduct acceptable include men (62%), college-degreed (67%), age 18-39 (63%), Democrats (62%) and non-whites (63%).

This finding suggests that plaintiffs in trade secret litigation, or infringement litigation with trade secret claims, will find West Texas a very different venue than Northern California or Delaware. Granted, respondents were never questioned about signed employee agreements or confidentiality agreements, and introducing those subjects may very well change the way many West Texans feel about this issue. Nevertheless, these findings make clear that litigators cannot and should not take for granted that residents in West Texas will find this kind of behavior morally objectionable.

Experts

Patent litigation is often tried on the backs of experts; therefore, a better understanding of how prospective jurors view experts can effectively guide trial strategy. In this vein, we question respondents about two characteristics of experts: 1) the source of their expertise, industry or academia, and 2) their pay.

Most across all venues prefer industry experts rather than academic experts.

First, the vast majority of respondents surveyed, regardless of whether they live in California (86%), Delaware (85%), or Texas (80%) prefer to learn about technology from an industry expert rather than an academic. In some cases, the percentage of those preferring an industry expert even approaches 100%. For example, in California, almost all Republicans (96%) and respondents age 65 or over (92%) prefer an industry expert. In Texas, all 17 respondents age 65 or older prefer to learn from someone with years of industry experience rather than an academic with no industry experience.

Sizable majorities in all venues are not suspicious of highly paid experts.

Because experts in patent litigation are often highly paid, we also ask respondents their first impressions of hypothetical pay scales for experts. We present them with a scenario where one expert, Dr. Smith, earns \$1000/hour, and another, Dr. Jones, earns \$300/hour. Respondents are asked which of the following best reflects their opinion: 1) Dr. Smith is more qualified and commands higher pay, 2) Dr. Smith's high pay makes his opinion suspect, and 3) Their pay difference is irrelevant.

Results show a sizable majority of jurors in each venue either think that pay is irrelevant or high pay is a positive, indicating exceptional qualifications (California 74%; Delaware 73%; Texas 67%).

Although a greater number of West Texans (33%) are suspicious of highly paid experts, a notable subgroup in the venue felt differently. Sixty-eight percent of white Republicans in Texas either thought high pay was irrelevant or believed it demonstrated exceptional qualifications.

Conclusion

Underlying juror attitudes can help or hurt a case. Understanding those attitudes is vital to framing and building a case, reinforcing those attitudes that help your case, and subverting those that harm it.

Key Attitudinal Differences



N. California

- More Tech Savvy
- Relatively more favorable to foreign tech companies
- More distrust of US patent system, especially among young men



West Texas

- Most biased against foreign tech companies, especially among Republicans
- More distrust of US patent system
- Conditional approval of trade secret lawbreaking



Delaware

- Trust Big Tech
- Favor American over foreign tech companies
- Fewer distrust US patent system

Overall, results of this online survey provide some very interesting and valuable differences between the attitudes of jurors in the Northern District of California, the District of Delaware, and the Waco Division of the Western District of Texas. However, results also show many similarities exist between venues. For example, majorities in all three venues:

- are optimistic about the promise of technology
- have positive opinions of big tech, but are simultaneously troubled by some of its conduct
- exhibit suspicion of foreign tech companies
- prefer industry experts rather than academics
- have no problems with experts who were highly paid

However, differences between venues did emerge, and many are worthy of consideration for litigants facing the choice of which venue to file a case and litigants who find themselves accused and dragged into a venue against their will. So, what are the major venue differences we uncovered?

Residents of Northern California are much more tech-savvy and up to date on technological developments. The greater percentage of tech-savvy and up to date in the venue is because women in California are much more tech-oriented than their counterparts in Delaware and West Texas.

Northern California is the locus of high tech in this country, the home of Silicon Valley. Tech companies not

only abound in the area, which means more women work or know someone who works in the industry, but it is also embedded in the local culture. It is a recurrent topic on the news and in dinnertime conversations. Apps and other technological advances, such as self-driving cars, are often tested and released early in the Bay Area. High tech is simply a much more integral part of life in the Bay Area, which is why so many California women are knowledgeable about technology.

While the majority of Northern California residents exhibit some suspicion of foreign technology companies, many more residents of Delaware and Texas exhibit this suspicion. The fact that the Bay Area is a Democratic stronghold would further exacerbate these differences, as Democrats are significantly less suspicious of foreign companies than Republicans and more likely to find themselves in Bay Area jury pools. Additionally, more residents in Northern California indicate a lack of trust that the government will only award patents to innovations that deserve them—suggesting that Northern Californians, especially young men, would be receptive to validity arguments.

In contrast, Delaware residents tend to exhibit the most trust of big technology companies, especially American ones, even though significantly fewer Delaware residents consider themselves tech-savvy or up to date on technology. More Delaware residents consider big tech to be ethical and less likely to illegally copy or steal technology. This trust in American big business is not surprising given big business is a key sector in the

state's economy. Delaware's elected officials, whether Republican or Democrat, tend to side with big business.

However, this trust does not extend to foreign tech companies. More Delaware residents believe that foreign companies are more likely than their American counterparts to disregard US law. Delaware residents are also more likely to believe that the US justice system should prioritize the interests of American tech companies over foreign companies that do business in the US.

Residents of West Texas also tend to exhibit bias against foreign tech companies. Many, especially Republicans, believe that foreign tech companies are more likely to illegally copy and steal technology. Additionally, West Texans are more likely to believe the US justice system should protect the interests of American tech companies over foreign tech companies that do business here. The fact that West Texas is a Republican stronghold will likely exacerbate these differences as Republicans comprise a large portion of the venire. These kinds of "America First" views are common among Republicans.

Although a majority of West Texans are not critical of

highly paid experts, one-in-three viewed highly paid experts suspiciously. Finally, residents of West Texas dramatically differ in their views on the ownership of work product as it relates to trade secrets. Remarkably, unlike residents of Delaware and Northern California, the majority in West Texas believe it is acceptable for a departing employee to take technical plans for technology their employer developed if that employee helped develop those plans. For them, ownership rights of work product lean toward the employee rather than the employer.

At the end of the day, differences between these venues do exist, and their impact, or lack thereof, on any case will depend on the parties involved, allegations made, and the fact patterns unique to each case. As this survey repeatedly shows, these venue differences can be exacerbated or substantially nullified depending on the income, education, gender, political affiliation, or race of the prospective jurors under consideration. While different venues may pose advantages or disadvantages, once a venue is chosen, undergoing significant jury research to identify the best and worst jurors in that venue can significantly affect the degree to which, if at all, venue differences influence case outcomes. ■

Let DOAR provide you with a concise review of our research findings around venue differences for high tech IP litigation. We can offer you strategic recommendations to assist you in your intellectual property litigation practice.

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