

In Defense of the First Amendment

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First Amendment

U.S. news leaders feel less able to confront issues in court in the digital age



Introduction

*report fully
on public figures*

In the 20th century, news organizations played a major role in protecting the press and speech freedoms enshrined by the First Amendment to the U.S. Constitution. They went to the nation's highest courts to fight for government documents, report fully on public figures, fight censorship and protect confidential sources. Their efforts helped to shape American laws on libel, privacy, prior restraint and many other legal principles. In the latter half of the 20th century, daily newspapers in particular paid hefty legal bills to fight for—and in some cases expand—speech and press rights.

In the past decade, however, economic pressures on traditional news companies appear to have diminished their capacity to engage in legal activity.¹ What's more, the digital-age technologies that upended legacy media economics also have complicated First Amendment law. Today, Americans can carry a megaphone, a printing press, a protest march, a petition or even a virtual church in their pockets. We can exercise each of our First Amendment rights within a smartphone. These devices, and the electronic systems that make them possible, do not slide easily into existing law.

¹ Surveys <http://www.nfoic.org/2013-nfoic-mlrc-open-government-survey-showed-troubling-trends-transparency> have reported fewer traditional media organizations are going to court over freedom of information cases, even at the federal level, and those that do are going to court less frequently. <http://foiaproject.org/2013/03/14/media-making-fewer-challenges-to-government-secrecy-in-federal-court/> Those that do are going to court less frequently.

*we used an
online poll*

To better understand how newspapers are responding to the changing economic and legal environment, the John S. and James L. Knight Foundation, American Society of News Editors (ASNE), Associated Press Media Editors (APME) and Reporters Committee for Freedom of the Press surveyed top editors nationwide. Late last year, we used an online poll to get a broad sense of their perceptions around these issues. The survey was not a scientific, representative sample, but was instead a cross-section of editors from ASNE and APME—two leading news associations. We wanted to know if, in the digital age, leading newspapers were still taking on First Amendment challenges. The survey solicited responses from ASNE and APME members because they are more likely to contain the news leaders who would spearhead such legal challenges. All respondents were top editors, disproportionately representative of larger print and online publications, who witness firsthand the tensions between reporting the news and adhering to the law.²

² Research was conducted by Beck Research in the form of an online survey distributed to leading news organizations Dec. 2-21, 2015. A total of 66 top news editors (defined as editor-in-chief, managing editor, senior editor, or other top editor) completed the survey. News organizations comprised a mix of circulation/audience sizes and print plus online as well as online-only. For full methodological details, please see Methodology section.

The results were sobering. While good legal work still goes on, many editors were worried about the future of the First Amendment.³

³ A good example of those concerns was an essay distributed during 2016's Sunshine Week, an annual observation by American newspapers of the role of freedom of information laws in self-governance. <http://www.poynter.org/2016/will-the-first-amendment-survive-the-information-age/401868/>

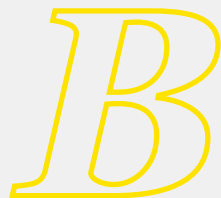
Among the survey's findings:



Editors say the news industry is less able to go to court:

News leaders are not sanguine about their industry's capacity to police and protect the First Amendment. Nearly two-thirds **65%** of the editors who responded reported that the news industry is weaker in its ability to pursue legal activity around First Amendment-related issues than it was 10 years ago. Many of the news leaders surveyed said this was happening at their own organizations. A majority **53%** agreed with the statement that

“News organizations are no longer prepared to go to court to preserve First Amendment freedoms.”



Money cited as key reason:

Editors see economic pressures as a key piece of the puzzle. When those who had described the industry as less able to go to court were asked the reason for diminished capability, an overwhelming **89%** cited money. More than a quarter **27%** of the editors noted cases at their own news organizations that could have been pursued but were not.

Many unsettled questions in the digital age:

There was clear consensus that the digital age has brought new challenges to press freedom, but few ways of addressing them. When offered a series of statements around the state of First Amendment law in the digital era, most news leaders said the law was behind the times. A majority **59%** disagreed with the statement that ***“First Amendment law is largely settled,”*** and nearly 9 in 10 **88%** agreed with the statement that ***“In the digital age, there are many unsettled legal questions about the scope of free expression.”*** A strong majority **71%** agreed with the statement that ***“First Amendment law has not kept up with technological developments.”***



Editors perceive loss in ability to pursue proactive cases:

While the overall rate of legal activity is a mixed picture compared to 10 years ago, editors do perceive a decline in proactive cases—those in which a news organization is going on **“offense,”** such as suing to open up access to information. A majority **65%** of the news leaders said their organizations were engaged in activity related to a lawsuit—in court or settlement—in 2014 and 2015. At some news organizations, this is a smaller share than it was a decade ago, but at others it is the same or more. Larger newsrooms are still more likely to go to court over First Amendment issues. And, in general, editors did not see any major change in the ability of news organizations to defend themselves from government subpoenas or in libel cases. A plurality of **44%**, however, said they were less able to go on the **“offensive”** by, for example, suing to open up access or information.

D

Larger newsrooms are still more likely to go to court

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A majority believes the industry is “less able”

Nearly two-thirds **65%** of the news leaders responding to the poll said they believed that the news industry is less able now than it was 10 years ago in its ability to pursue legal action involving free expression.⁴ One-quarter **25%** said that the industry is “**a lot weaker.**” Editors from all manner of news organizations were part of the majority saying they believed the industry is challenged when it comes to pursuing legal action.

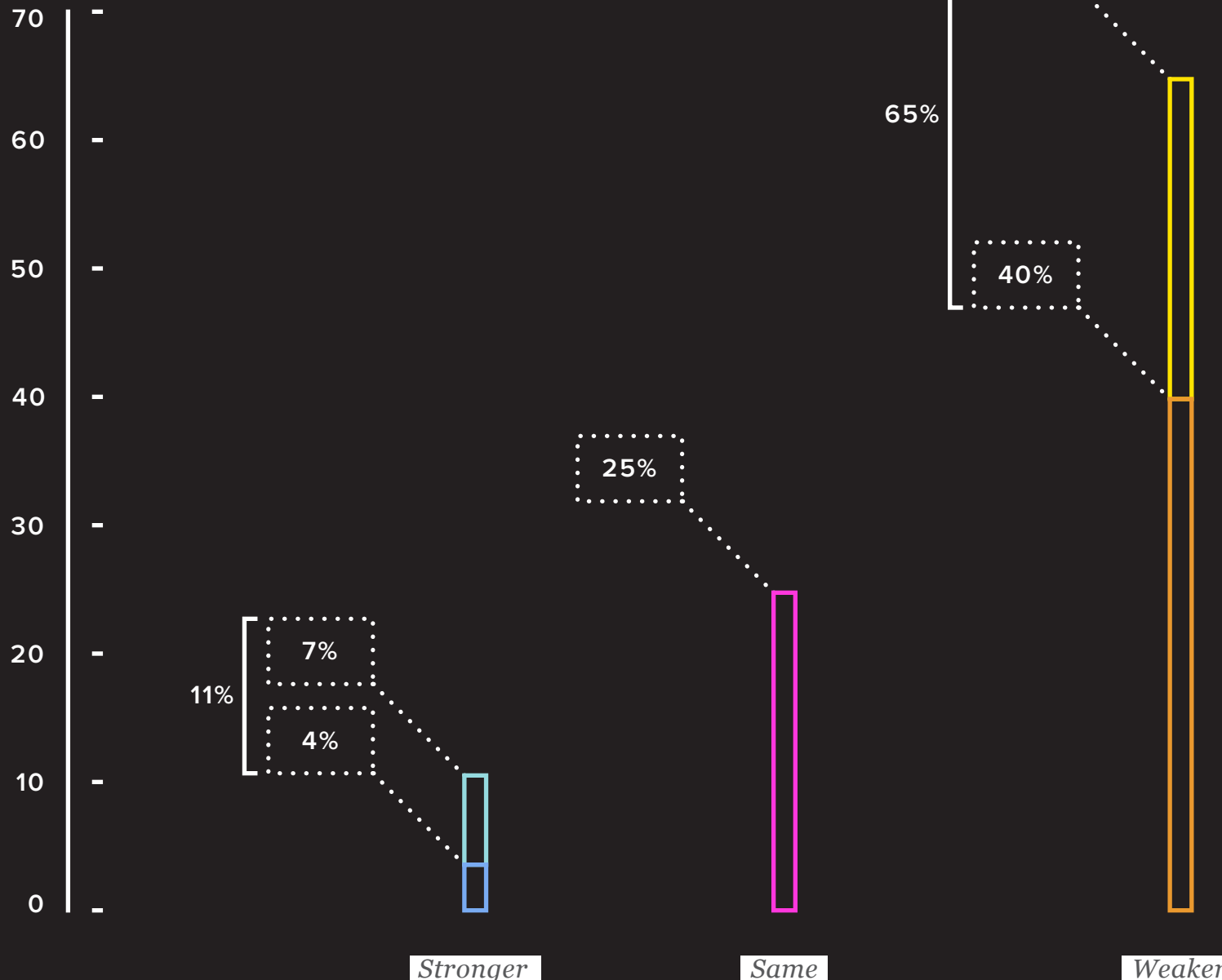
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⁴ “How would you rate the overall strength of the news industry to pursue legal action of any type when it comes to free expression? Compared to the last 10 years, we are: a lot stronger, somewhat stronger, about the same, somewhat weaker, a lot weaker.”

Strength of News Industry to Pursue Legal Action

- *A lot stronger*
- *Somewhat stronger*
- *About the same*
- *Somewhat weaker*
- *A lot weaker*

Survey of News Editors. Beck Research, commissioned by the American Society of News Editors, Reporters Committee for Freedom of the Press, the Associated Press Media Editors, and the John S. and James L. Knight Foundation. December 2-21, 2015. Numbers may not sum to 100% due to rounding.



Many see diminished capacity in their own organizations

A significant number of the news leaders surveyed view the legal capacity of their own organizations as shrinking during the past decade. A plurality **44%** of editors at news organizations reported being **“less able”** to pursue First Amendment cases in court.⁵

At the same time, **20%** of the editors who responded to the poll said their news organizations were more able to go to court. A news organization’s size may be a factor. Said one respondent:

“Newspaper-based (and especially TV-based) companies have tougher budgets and are less willing to spend on lawyers to challenge sunshine and public records violations. Fortunately, my company is spending more than ever—and winning every case.”

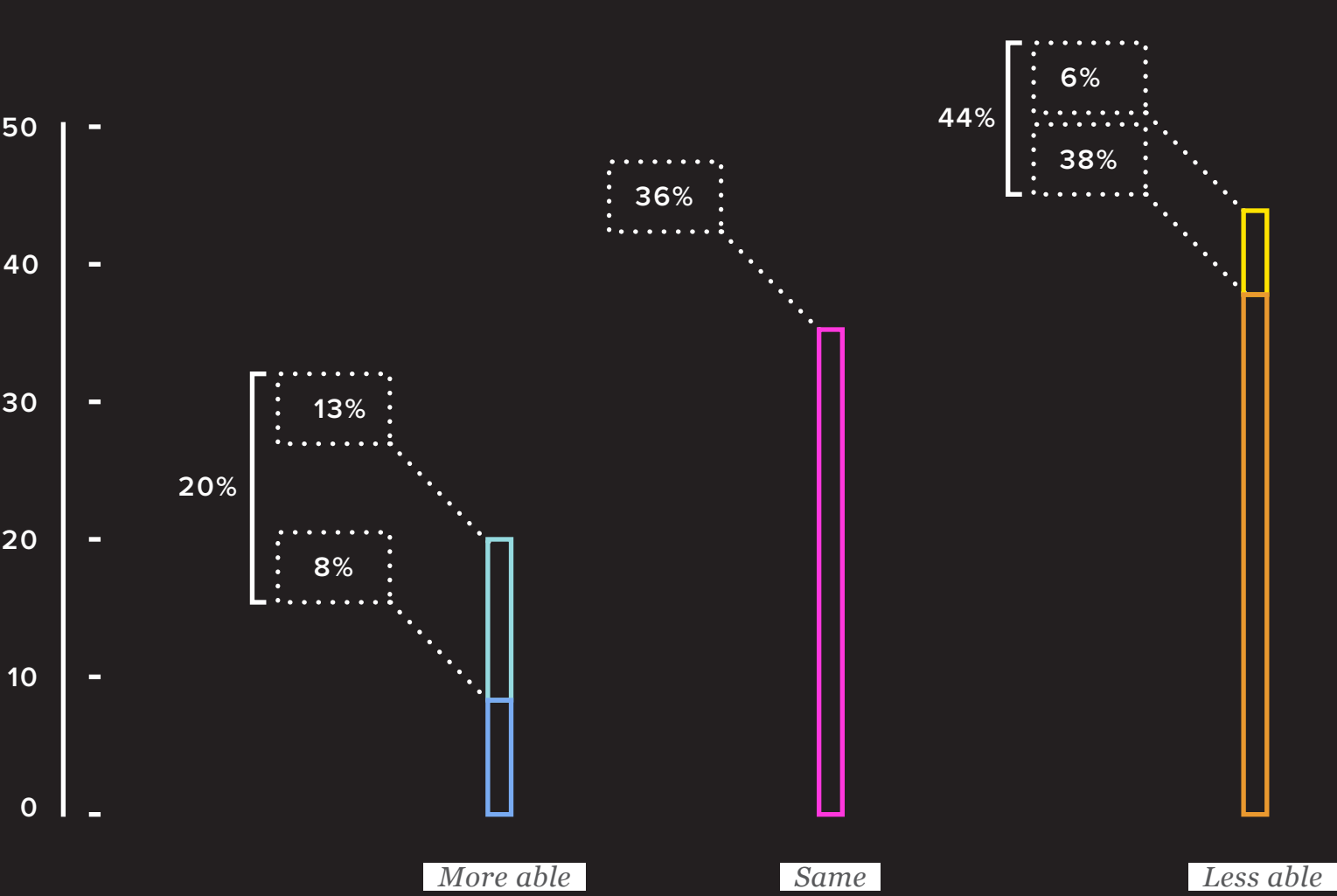
In general, **53%** of the news leaders agreed with the statement that ***“News organizations are no longer prepared to go to court to preserve First Amendment freedoms.”*** But the same majority said individual cases are a different story: **53%** agreed with the statement that ***“News organizations are prepared for occasional legal issues that may arise.”***



⁵ “How would rate your newsroom’s ability to pursue this type of legal activity today compared with 10 years ago? Much more able, somewhat more able, about the same, somewhat less able, much less able.”

Their News Organization's Legal Capacity

- *Much more able*
- *Somewhat more able*
- *About the same*
- *Somewhat less able*
- *Much less able*



Survey of News Editors. Beck Research, commissioned by the American Society of News Editors, Reporters Committee for Freedom of the Press, the Associated Press Media Editors, and the John S. and James L. Knight Foundation. December 2-21, 2015. Numbers may not sum to 100% due to rounding.

Barriers to legal action: Money, mission

Of the editors who said the news industry is less able now than it was 10 years ago to pursue First Amendment-related litigation, an overwhelming **89%** said the reason was money.⁶ One put it in stark terms: ***“The loss of journalist jobs and publishers’ declining profits mean there’s less opportunity to pursue difficult stories and sue for access to information.”***

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⁶ In response to the question “How would you rate the overall strength of the news industry to pursue legal action of any type when it comes to free expression? Compared to the last 10 years, we are: a lot stronger, somewhat stronger, about the same, somewhat weaker, a lot weaker,” 65 percent said “somewhat weaker” or “a lot weaker.” Of those 65 percent, a further question was asked: “If you think the news industry’s ability to pursue legal action is weaker, what is the main reason? Don’t have the money; staff bandwidth; fewer media organizations rising to the challenge; US Patriot Act and other federal legislation; our need for access to public records and documents is less than in the past; no longer do major investigations; don’t see it as our role.”

In response to open-ended questions, some editors mentioned a second factor—the news organization’s mission. They cited declining **“watchdog journalism”** as a reason for fewer First Amendment legal challenges. With less accountability journalism, one editor said, comes **“less investigative work, which is often the type of reporting that results in legal fights over records and access.”** In fact, news organizations may be increasingly pursuing stories that are less likely to result in legal issues. Said one editor:

“My impression is that the industry is far less tenacious about legal challenges than in the past because our newsroom budgets are smaller and far tighter and legal fights for information are expensive. Also, with fewer people the industry is in general doing less investigative work, which is often the type of reporting that results in legal fights over records and access. Plus, so many newsrooms do not cover government to the extent they used to. Instead, they are focusing on “passion” or “franchise” topics and they often are not topics that require record-based reporting.”

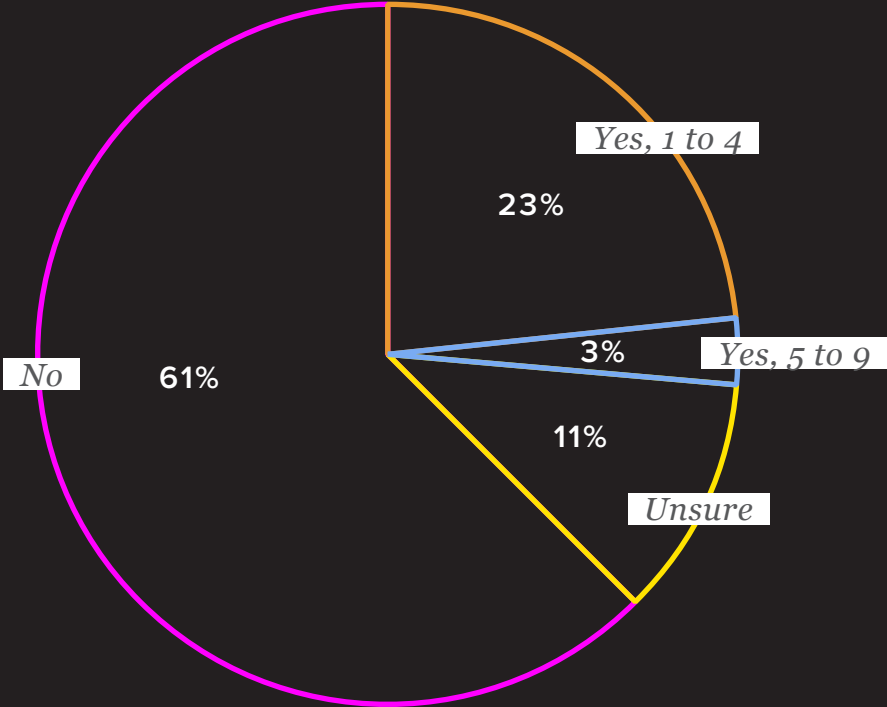
When asked about their own organizations, however, most editors said things were different. A majority **61%** of the editors, irrespective of how they felt about the industry at large, said they did not fail to pursue a single case because of a lack of resources.⁷

Yet some editors **27%** admitted that their own organizations could not afford to take every case. Most of those **23%** said they could not file between one and four legal actions due to a lack of resources. For a few **3%**, the number of abandoned cases was higher, ranging from five to nine cases not pursued. When probed on the specific nature of these cases, multiple news organizations pointed to Freedom of Information Act **FOIA** requests that involved high fees, heavily redacted information or other barriers to obtaining information. Said one editor: ***“We routinely run up against Freedom of Information Law denials that we would challenge in court if we had unlimited resources. I don’t know of any news organization that doesn’t feel somewhat constrained by the cost of litigation.”***

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⁷ “Is there a legal action in 2014 or 2015 you decided not to pursue because your organization lacked resources? If yes, how many cases? 1 to 4; 5 to 9; 10 to 15; more than 15; unsure.”

Legal Action Not Taken Due to Resources



Survey of News Editors. Beck Research, commissioned by the American Society of News Editors, Reporters Committee for Freedom of the Press, the Associated Press Media Editors, and the John S. and James L. Knight Foundation. December 2-21, 2015. Numbers may not sum to 100% due to rounding.

Editors say First Amendment law is not settled

Editors were offered a series of statements around the state of First Amendment law in the digital age, and the consensus was clear—case law and legal practice have not kept up.

The greatest agreement was around emerging challenges to understanding and interpretation of the First Amendment in an era defined by digital communications. An overwhelming majority **88%** agreed with the statement that *“In the digital age, there are many unsettled legal questions about the scope of free expression.”* A strong majority **71%** agreed with the statement that *“First Amendment law has not kept up with technological developments.”* And a smaller, but still solid, majority **59%** disagreed with the statement that *“First Amendment law is largely settled.”*



Agreement Statements

Survey of News Editors. Beck Research, commissioned by the American Society of News Editors, Reporters Committee for Freedom of the Press, the Associated Press Media Editors, and the John S. and James L. Knight Foundation. December 2-21, 2015. Numbers may not sum to 100% due to rounding.

Agree

Neutral

Disagree

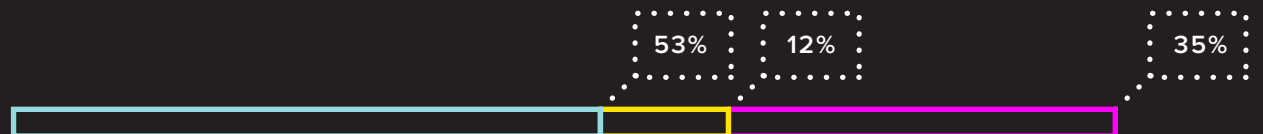
In the digital age, there are many unsettled legal questions about the scope of free expression



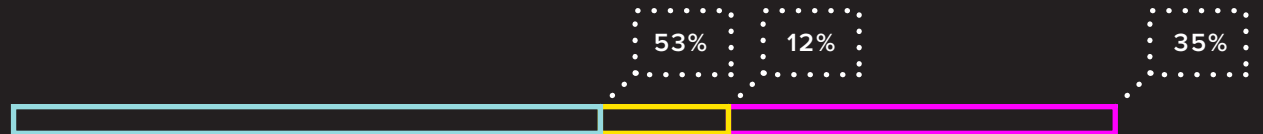
First Amendment law has not kept up with technological developments



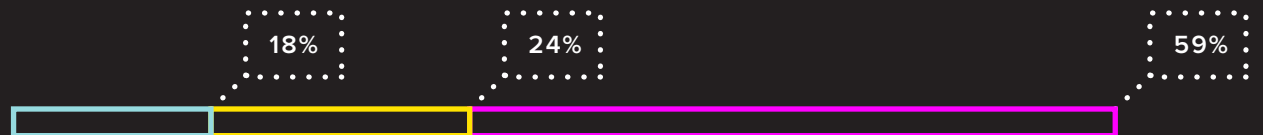
News organizations are prepared for occasional legal issues that may arise



News organizations are no longer prepared to go to court to preserve First Amendment freedoms



First Amendment law is largely settled



The public is generally aware of freedom of information laws



Most news leaders cite recent court action

While there was no clear trend in the pace of legal activity, its character may be changing. Two-thirds **65%** of the editors who responded to the poll said they filed a lawsuit, went to court or settled a lawsuit in 2014 or 2015. Larger newsrooms may be more likely than smaller ones to file First Amendment-related lawsuits. Said one editor: *“Many of the access issues are happening at a micro local level, where denying records and closing meetings is happening at a greater rate . . . and small papers don’t have the resources to contest illegal denials or meeting closures. The problem is less with the major organizations than the small communities where, arguably, it matters most.”*

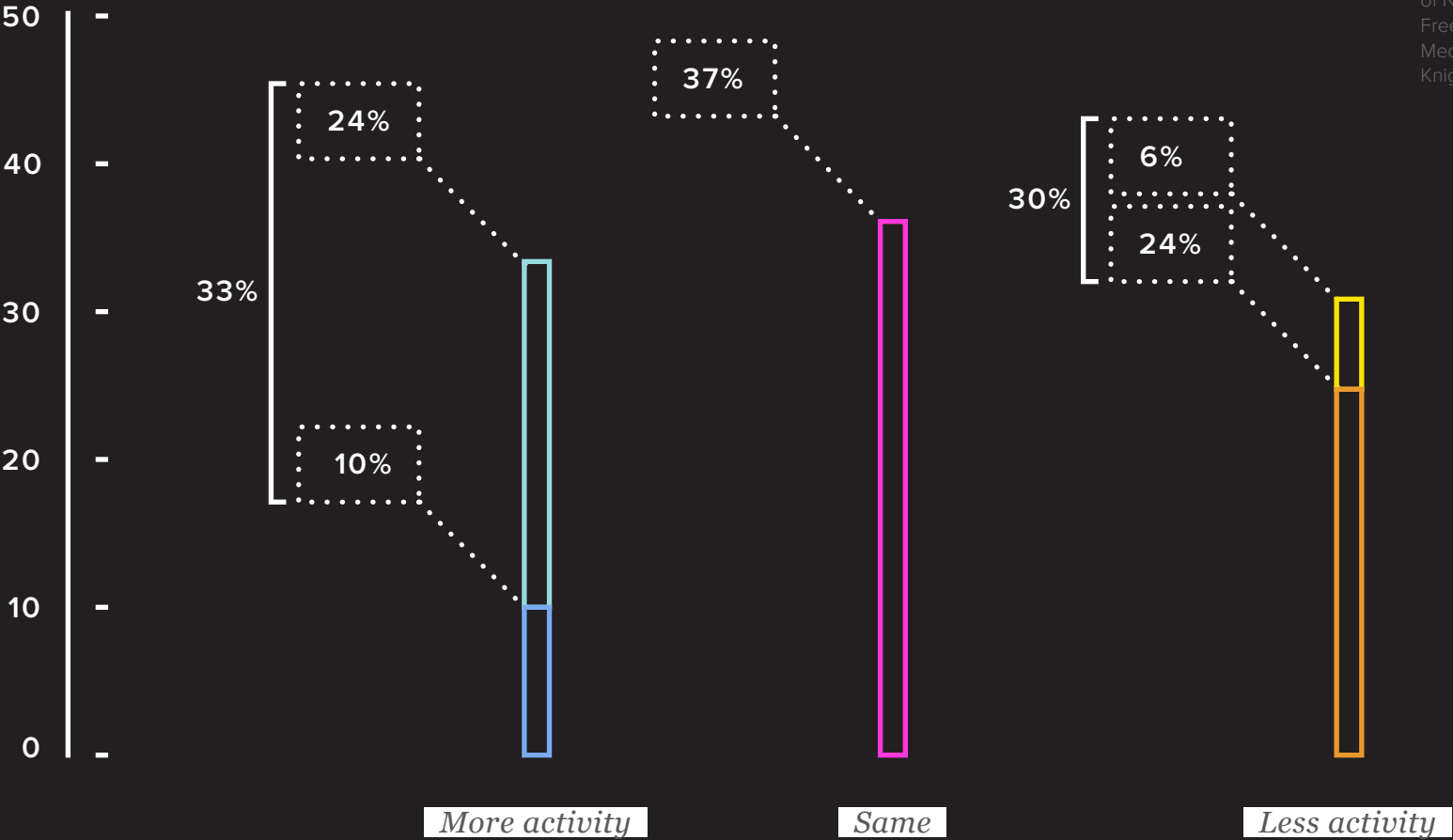
When it comes to their own news organizations, editors are split about the level of legal activity now compared with 10 years ago. A third **33%** of the news leaders said their organization’s experience more legal activity than a decade ago but almost that many said their organization’s experience less legal activity **30%**. Editors offered varying explanations, including the size of the organization and a changing calculus around the costs vs. perceived benefits. A respondent noted: *“It varies by company and by the mission of the newspaper,”* said one. Added another: *“In the 1980s, our news organization vigorously contested all First Amendment cases—often regardless of costs. In this era, our in-house lawyer is acutely aware of the cost of litigation and other issues that require hiring outside counsel.”*



Their Organization's Level of Legal Activity

- *A lot more activity*
- *Somewhat more activity*
- *Same amount of activity*
- *Somewhat less activity*
- *A lot less activity*

Survey of News Editors. Beck Research, commissioned by the American Society of News Editors, Reporters Committee for Freedom of the Press, the Associated Press Media Editors, and the John S. and James L. Knight Foundation. December 2-21, 2015.



Editors perceive loss in ability to pursue proactive cases

Editors were asked about their experiences with **“defensive”** vs. **“offensive”** cases, which tended to vary. **“Defensive”** cases were defined as, for example, **“defending against a libel lawsuit, a lawsuit charging invasion of privacy, government subpoenas, etc.”** and offensive cases were defined as, for example, **“seeking access to information, public meetings or court proceedings, challenging statutes or policies that hamper newsgathering, etc.”** News leaders said not much has shifted in their ability to defend themselves—a strong majority **71%** rated their ability to pursue these cases as **“about the same”** as 10 years ago.⁸ When it comes to going on offense, however, a plurality **44%** said they were somewhat or much less able to pursue cases.⁹ In addressing how decisions are made, one editor reported: **“We just have a slightly tougher bar because of costs, even as we continue to take on the most important cases/issues.”**

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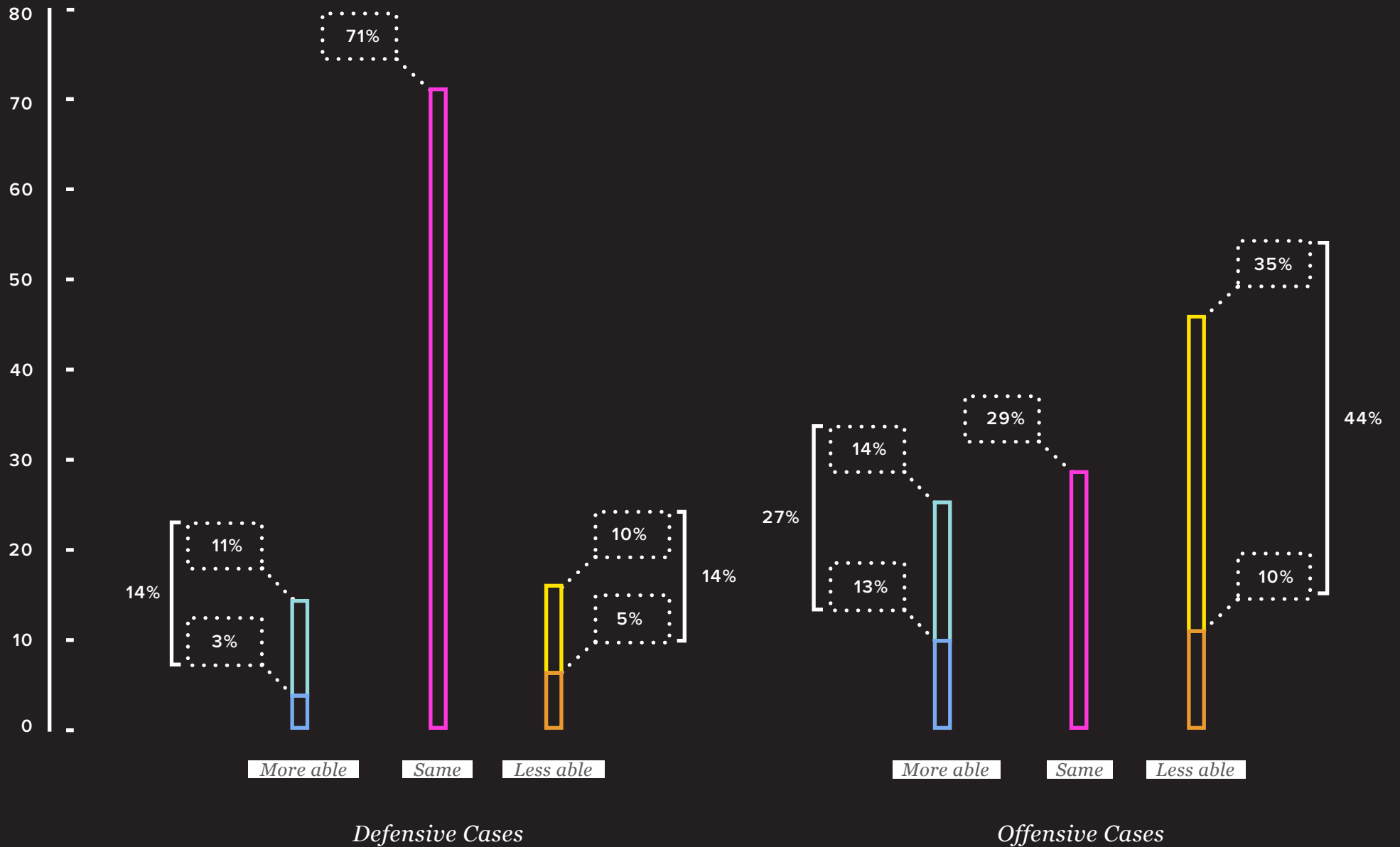
⁸ “Specifically, how would you rate your ability to pursue ‘defensive’ cases, such as defending against a libel lawsuit, a lawsuit charging invasions of privacy, government subpoenas, etc.? Compared to 10 years ago you are: Much more able, somewhat more able, about the same, somewhat less able, much less able.”

⁹ “Specifically, how would you rate your ability to pursue ‘offensive’ cases, such as seeking access to information, public meetings, or court proceedings, challenging statutes or policies that hamper newsgathering, etc.? Compared to the past, you are: Much more able, somewhat more able, about the same, somewhat less able, much less able.”

Ability to Pursue Defensive and Offensive Cases

Survey of News Editors. Beck Research, commissioned by the American Society of News Editors, Reporters Committee for Freedom of the Press, the Associated Press Media Editors, and the John S. and James L. Knight Foundation. December 2-21, 2015.

- *Much less able*
- *Somewhat less able*
- *About the same*



Mixture of types of legal engagement

News organizations were asked about types of legal activity they pursued over a two-year period **2014-2015** and provided a range of responses. Overall, a majority of news organizations **72%** had some legal activity related to the First Amendment over the period in question—including filing a lawsuit, going to court or settling a lawsuit.¹⁰

72% had some legal activity



¹⁰ “Now we’d like to ask some specific questions about past legal activity. First, to ask you again, did your news organization file a lawsuit, go to court or settle a lawsuit in 2014 or 2015 for any issue involving the First Amendment, newsgathering rights or access to information?”

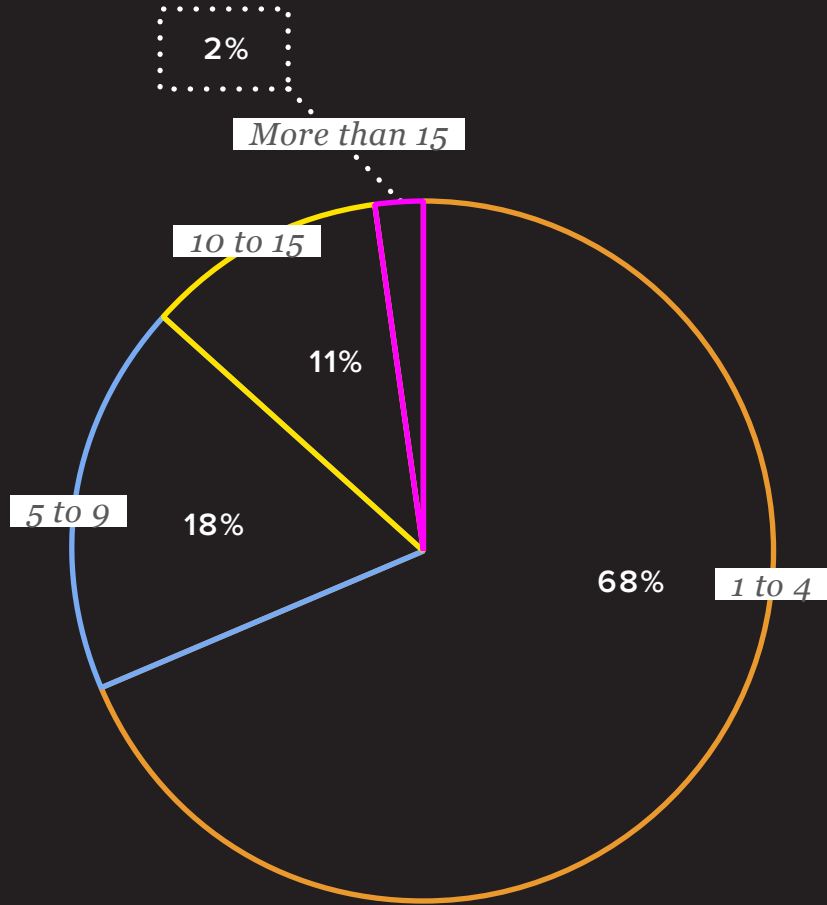
Respondents were then asked about **“offensive”** vs. **“defensive”** legal matters. Most respondents **68%** involved in efforts to expand press freedom or access were involved in one to four cases.¹¹ Of those organizations not in court over offensive matters, **35%** still took some legal action. The most common times of legal action outside of a lawsuit included prepublication legal review of a story **57%**, co-signing a coalition letter **48%**, pursuing administrative action **48%**, joining amicus briefs or lobbying **43%**, or negotiating outside of court **43%**.¹² In total, a majority **52%** that took some other legal action did so one to four times. Fewer court cases is not an absolute indicator of First Amendment distress. Commented one survey participant: **“We are extremely proactive with our First Amendment lawyers. . . . We typically handle subpoenas outside of court.”**

In terms of **“defensive”** cases, active participation in a lawsuit was more common. A much higher **79%** of news organizations were involved in one to four cases in 2014-2015 to defend their reporting and newsgathering practices.

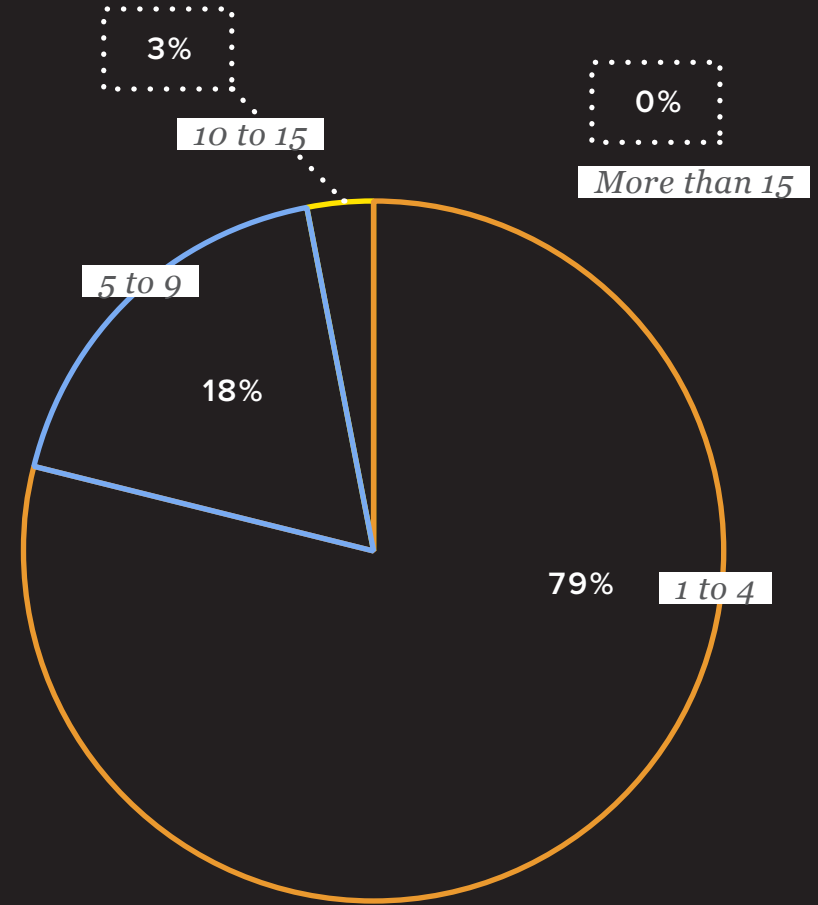
¹¹ “How many separate cases in 2014 and 2015 were there in all?” (in reference to offensive cases).

¹² “If yes, please indicate what type of legal action was taken. Pre-publication legal review of a story; Co-signing a coalition letter: e.g. on access to information, to protest restrictions to newsgathering, etc.; Pursuing administrative action: e.g. filing agency appeals over an open records request; Joining amicus curiae briefs or other advocacy, such as lobbying for legislative change; Yes, negotiating outside of a court: e.g., over the scope of a subpoena, over a demand letter alleging libel, etc.; Other (please specify). (Multiple responses allowed).”





2014-2015 Offensive Cases



2014-2015 Defensive Cases

Survey of News Editors. Beck Research, commissioned by the American Society of News Editors, Reporters Committee for Freedom of the Press, the Associated Press Media Editors, and the John S. and James L. Knight Foundation. December 2-21, 2015. Numbers may not sum to 100% due to rounding.

Representation in legal matters

Private law firms dominate the legal work for these leading news organizations. Most report that they employ private law firms in some capacity—four out of five **80%** said that they have used a private law firm paid by the organization.

Organizations also use in-house counsel for legal action. A majority **61%** of these news leaders have turned to in-house counsel for help.

“Almost all our legal work is handled through our parent company’s general counsel office, which has a strong cadre of First Amendment lawyers,” said one respondent. *“We are lucky.”*

Pro bono legal services were reported at much lower rates. Only **6%** used a private firm’s pro bono services and another **6%** split between using the legal services of a nonprofit or law school.



Access to records tops court docket

A majority sought access to public records

Of the news organizations that did go to court in an **“offensive”** capacity, editors who responded to the poll said their most common cases during the past two years concerned gaining access to public information. Nearly 9 in 10 **88%** sought access to public records, and a majority **55%** sought access to sealed court records. New technologies, such as seeking to cover trials via social media or cameras, drove legal action for about one-fifth **20%** and one-quarter **26%**, respectively, of the news organizations.¹³

These are precisely the proactive court case the news leaders say they are increasingly less able to pursue. Said one editor:

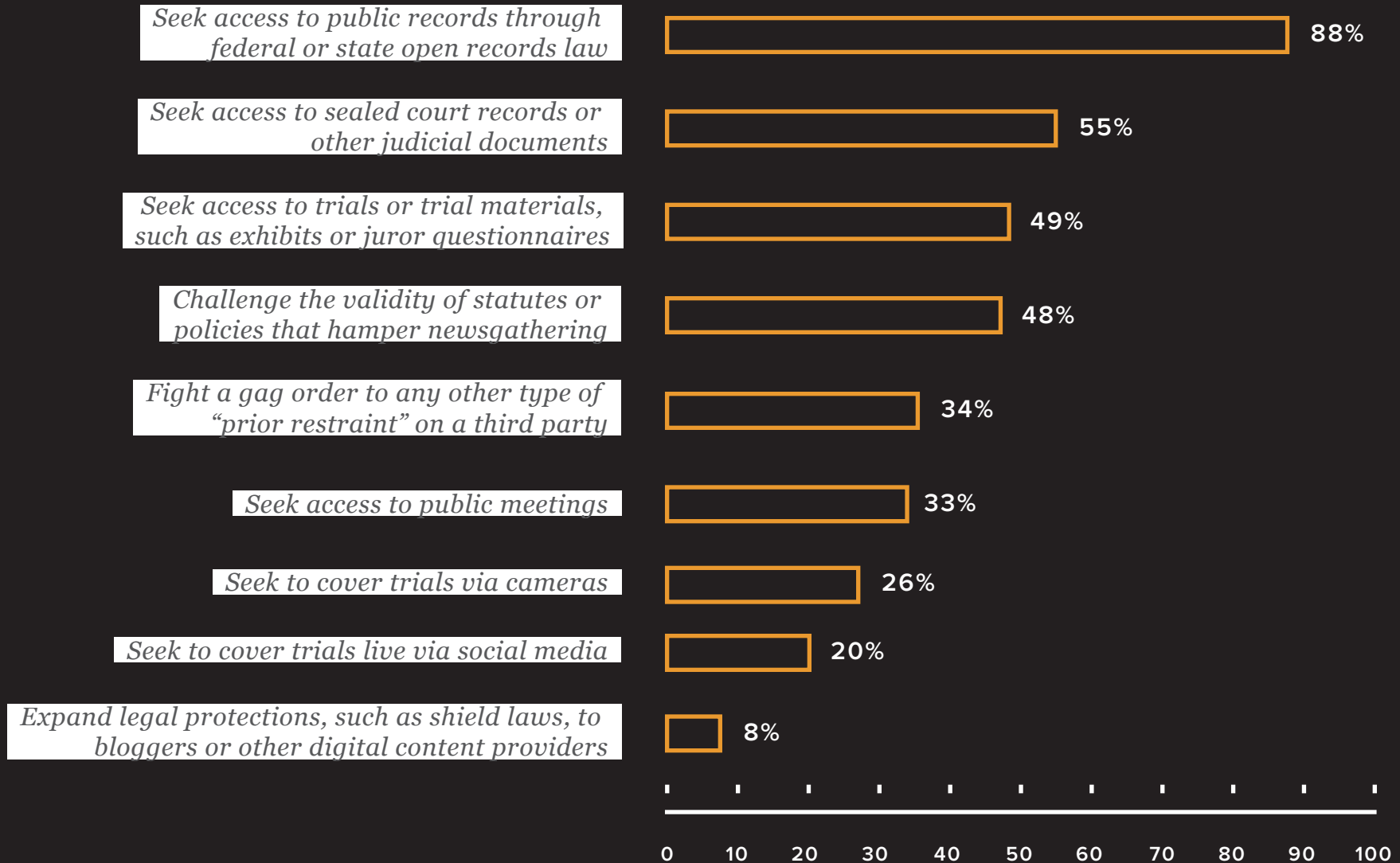
“Government agencies are well aware that we do not have the money to fight. More and more, their first response to our records request is ‘Sue us if you want to get the records.’”

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¹³ “The following questions concern whether your news organization sought to expand its ability to access or provide information. Did your organization file a lawsuit, settle a lawsuit, or go to court during 2014 or 2015 to . . . ?”

Lawsuit Actions in 2014 or 2015

Survey of News Editors. Beck Research, commissioned by the American Society of News Editors, Reporters Committee for Freedom of the Press, the Associated Press Media Editors, and the John S. and James L. Knight Foundation. December 2-21, 2015. Respondents could select multiple answers.



Subpoenas, libel lead attacks on newsrooms

For those in court to defend themselves, editors responding to the poll said the most common attack came in the form of a subpoena seeing access to unpublished materials. Almost half **46%** had faced this situation. Second, at **29%**, were libel lawsuits, followed by fighting prior restraint and protecting confidential sources.¹⁴

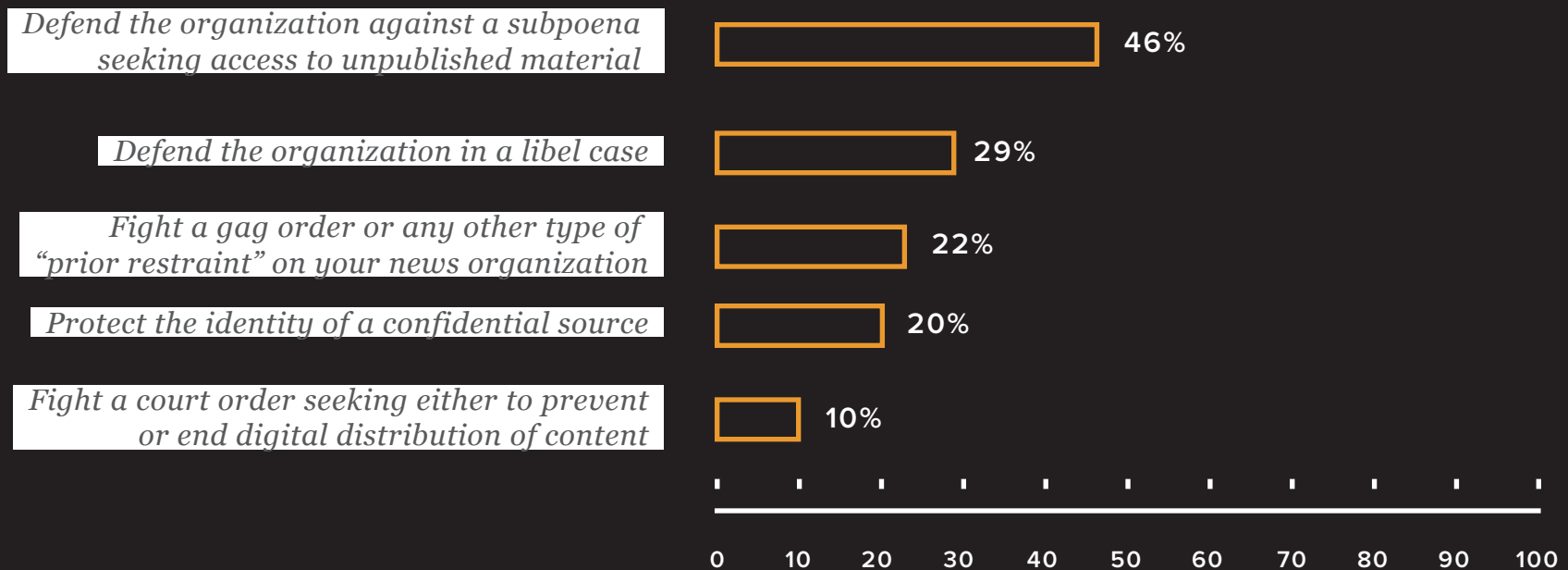
46% had faced this situation

10

¹⁴ "The following questions concern whether your news organization has defended cases in court, such as a libel lawsuit or an effort to compel you to reveal information pursuant to a subpoena. Did your organization defend a lawsuit, settle a lawsuit or go to court during 2014 or 2015 to . . . ?"

Leading Causes of Defensive Cases

Survey of News Editors. Beck Research, commissioned by the American Society of News Editors, Reporters Committee for Freedom of the Press, the Associated Press Media Editors, and the John S. and James L. Knight Foundation. December 2-21, 2015. Respondents could select multiple answers.



Conclusion

This informal survey suggests that serious problems are looming for upholding the free speech and press rights enshrined in the First Amendment. Leading editors from daily newspapers say the industry is becoming less able to fulfill its historic role as First Amendment champions. They see money as the main reason; they cite cases they wanted to pursue but could not; they view freedom of information and access as the most likely victims of the growing weakness.

At the same time, though, these news leaders—many from larger news organizations that are still taking on cases—have not given up. They may not represent the traditional news industry as a whole, but they are pushing onward. America's top news editors think First Amendment law, though unsettled, continues to be important. But, with limited resources, they see themselves taking on proportionately more defensive cases than proactive cases that blaze new First Amendment ground.

While not a scientific sample, this quick poll shows the need for a great deal more study and understanding of the changing First Amendment landscape. Free expression is, after all, the right upon which all other rights depend. When representatives of one of its most important historic defenders say they are worried, all Americans should be worried.

*becoming less
able to fulfill
its historic role*

Methodology

This poll is a joint project of the American Society of News Editors, Reporters Committee for Freedom of the Press, Associated Press Media Editors, and the John S. and James L. Knight Foundation. An online survey link was emailed to leaders at 286 top digital and print newspapers and completed by 66 top editors from Dec. 2 to 21, 2015.

The universe was created by combining the ASNE membership list with the APME membership list. Retired members, academics, researchers, foundation staff, or other “Friends of . . .” were excluded. Each news organization’s top editor was chosen, and other staff members were excluded. Participants were allowed to forward the survey to another senior editor at their organization for completion.

The questionnaire was distributed via email by the ASNE and fielded through Survey Monkey. Participants received three reminder emails to complete the survey. Editors from **23%** of the news organizations that were contacted completed the survey.

Description of the respondents and their organizations

The 66 respondents represented the following characteristics:

Print versus Online: **89%** work at print and online organizations, while **11%** are at online-only news sources.

Circulation/Reach: **69%** work at organizations with print circulations of less than 100,000 and **31%** are from organizations with circulations exceeding 100,000.¹⁵ A plurality **44%** represent organizations with 1 million to 10 million unique views to their digital content a month, but a range of online organizations are represented.

Role: **80%** of the participants are at the editor-in-chief level, while **9%** are managing editors.

Editorial Experience: Participants represented a range of years of experience. More than half **53%** have worked as a top or senior editor for more than 15 years, while **47%** have been an editor for less than 15 years.

News Experience: **60%** have worked in the news industry for more than 30 years.

¹⁵ The share of large newspapers in this survey—31 percent—is far out of proportion to their presence in the population. The Newspaper Association of America in 2014 cites 1,331 daily papers, <http://www.naa.org/Trends-and-Numbers/Circulation-Volume/Newspaper-Circulation-Volume.aspx> but those with daily circulation of 100,000 and greater number no more than 70. <http://www.thepaperboy.com/usa-top-100-newspapers.cfm>. That puts large U.S. newspapers at about 5 percent of the total. The overrepresentation of large newspapers was expected in a survey of news leaders. Historically, these are the organizations within the traditional news community that are more likely to take on costly First Amendment lawsuits.

