

JURORS SAY THE DARNDEST THINGS: THE RISE IN EXTREME OPINIONS, WHERE THEY COME FROM, AND WHAT TO DO ABOUT THEM

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I. The rise of extreme opinions—the psychology behind and the possible role of alternative facts

The veracity of a fact is no longer enough for people to accept it. Instead, the accessibility of information and the plethora of possible facts available are allowing people to pick and choose which “facts” they want to accept.

The growing opinion is that the more facts out there the better, because this gives people the opportunity to be more informed. If people are empowered to believe what they choose to believe because they can find facts to support their beliefs, then they are much less likely to change their opinion. This also means the more extreme their opinions could become.

Instantaneous access to information has not made people more fact-focused than before. It has made people more fact-selective than before. It is easier than ever before to avoid disagreement and find evidence to support almost any opinions. Hence, extreme opinions can be perpetuated, rather than properly challenged, and potentially altered.

II. The general impact of extreme opinions—polarization

The public is now both a consumer and source of news. If the public consumes as well as generates news, then people feel more empowered to believe what they want to believe. This makes it more difficult for people to evaluate new information, especially if it does not fit within their belief system. As a result, strongly held opinions become more so, and eventually they can become extreme.

The idea that people filter information through their attitudes, values and beliefs and seek out narratives that confirm how they view their world is not new. What is different today is the accessibility to widely-differing information that is purported to be true.

According to a 2016 Pew Research Poll, only 39 percent of American adults are confident they can differentiate between fake and real news. This means that about two-thirds of adults do not feel confident making the distinction. It is easier than ever for people to access evidence that confirms what they want to believe, regardless of how unreasonable that belief may be. This leads to people holding and keeping extreme opinions without the motivation to change them.

III. What do extreme opinions do to lawsuits?

The increasing ease of confirming whatever beliefs people want to hold has led to people living in ideological bubbles. People are less accepting of being able to hold different opinions and debate them. Indeed, some believe they are entitled to have and consider separate facts, which may support extreme opinions that people are more and more comfortable expressing.

This is especially dangerous in lawsuits when jurors are tasked with evaluating evidence and rendering evidence-based verdicts. We know that people filter information through their world views to confirm beliefs. But if they draw on facts that are not true, but they believe they are, this problem highlights the challenge of convincing jurors who may hold extreme opinions.

In product liability cases, how will jurors react to evidence that does not comport with beliefs they hold, and are regularly confirmed? Will they evaluate the evidence, the scientific evidence with an open mind, or will they dismiss scientific principles and hold on to their beliefs?

IV. Examples of how extreme opinions may affect processing of information in a lawsuit

People often latch on to facts that have been confirmed for them because they do not want to feel manipulated by new information. Deep down, we all want to feel empowered to focus on whatever information we choose to focus on. But what do we do when extreme opinions that jurors hold ultimately lead to diametrically opposed conclusions?

For example, in an automotive product liability case, one steadfast plaintiff-oriented juror dismisses the impact of clear defense-friendly evidence and statistics in favor of her expectation that the defendant should just fix any problems with the product. The statements of this juror demonstrate the potential impact of a juror's rejection of scientific evidence. This highlights the importance of identifying such jurors during voir dire. To that end, it is integral to ask such questions as "how many of you have a general distrust of scientific evidence", "who here believes that scientific data is often manipulated to fit a party's conclusions".

In another example, a premises liability case, one juror wants to make the defendant pay, and was motivated to carve a path to doing so regardless of how the evidence leaned. This juror's comments highlights the importance of identifying jurors who are highly motivated to send a corporate defendant a "message" by making them pay high damages. To identify such jurors, attorneys can consider asking such questions during voir dire as "does anyone here believe damages in lawsuits have been too low?", "who here believes that the best way to send corporate defendants a message is to make them pay a lot of money", "how many of you believe that regardless of the evidence, corporate defendants should pay some money to someone who is hurt on their property/by their product?".

V. How do we tackle the impact of extreme opinions?

Personal biases have always been a part of how people process information and its relevance in their lives. It is a good idea to remind jurors that it is ok to have strongly held personal beliefs. In the courtroom, however, they have to test whether the beliefs of the parties are supported by evidence.

In areas with known bias, the task of correcting the bias starts with the Answer. Pay attention to the details of the Complaint and respond to them. Know the product and its history. Make sure that you address the bias in discovery. Ask detailed questions of the witnesses. Usually, details expose extreme opinions. You should know how the equipment works – the injured party generally does not.

If possible, look for prior expert reports of your opponents' experts, as they may reuse them. If likely, then this will provide a basis for understanding how the other side is approaching the case.

Try to address what you think the extreme opinions will be in preparing your own witnesses for deposition. Remember to do direct exams addressing these issues if the deposition is videotaped and you do not want the witness at trial, or you do not want them deposed more than once.

Another approach with witnesses might be to just get them to acknowledge there may be other ways to view certain issues and they understand that.

Use social media to understand witnesses and jurors before you address them at deposition or in voir dire. Newspaper articles and television news may give you a sense of how the incident was perceived.

It is best always if you can just talk to people in voir dire. That is the most effective way to begin to identify those with extreme opinions that may be harmful to your case. The bigger challenge is to identify these same people if the attorneys do not get to conduct voir dire. If you are faced with the latter, you will need to rely on a very carefully prepared and well thought out questionnaire, as well as carefully conducted research on individuals. You can ask about sources of information and how they use them and how often they use them. Remember that jurors tend to write down their true beliefs in response to questions on a questionnaire. They are not put on the spot like they might be in court. Do not be a hero and think you are going to change their beliefs.

If you know you have too many of those people to strike, work hard to get them off for cause. Absent that, pick those who seem to be "the best of the worst." Then, develop tactics as to how to get commitments from them if you get to conduct voir dire. Also, begin to construct ways in which you can discuss the evidence that might be more appealing to a person with those extreme opinions. Hopefully, you have done focus groups and/or mock exercises to figure out how best to discuss the issues and evidence.

If possible in voir dire, it is essential to identify people who have a general distrust of scientific evidence, as they may believe that scientific findings can and are manipulated to fit a particular party's narrative. Questions might possibly be designed to get to this issue.

Do mock trials or focus groups. Test the biases and extreme opinions of local jurors. Use questionnaires that go specifically to the concerns, so you can find out what characteristics you may want to look for in designing questionnaires, preparing voir dire questions, and exercising preemptory strikes.

It is also important to recognize that all people want to feel empowered to make informed decisions. However, we can no longer expect people to follow, much less even accept the evidence, in this "alternative facts" world. It is essential to remind, and empower, jurors that they

have to determine whether the beliefs and conclusions of the parties are supported by the evidence presented to them in court.

Use demonstrative evidence to defeat the bias. Use models, videos, or other visual aids, to show the operation of the machine, or difficult scientific or engineering concepts. Force the plaintiffs' expert to do the same. If the bias is demonstrably untrue, show them.

Your personal style at trial will be important as to how jurors view the facts and their willingness to adhere to or embrace extreme opinions. Your style of questioning in confronting plaintiffs, their experts and other witnesses and your style of argument in openings and closings will shape the jury's view of the facts and their opinions about those facts.