



Alternative Facts Don't Fly in the Jury Room

Alexis Knutson & Laura L. Dominic

701 Fifth Avenue, Suite 2450

Seattle, Washington 98104

(888) 452-8019

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Alternative facts seem to be getting in the way a lot these days. Sean Spicer's representation that President Trump's January 20 inauguration audience "...was the largest audience ever to witness an inauguration, period, both in person and around the globe," was quickly discounted given the aerial photograph posted by [the Vox](#) showing the opposite to be true. Kellyanne Conway's attempt to explain that what Spicer claimed was not a "falsehood," but rather simply "an alternative fact," only made matters worse.

The phrase "alternative facts" riddled headlines Monday morning, highlighting just how little tolerance the public has for twisting the truth. Trial consultants see the same lack of trust for alternative facts in the courtroom and the deliberation room. Jurors are ultimately tasked with judging the credibility of the evidence presented in trial. While it is sometimes true that the probative value of evidence is subjective (e.g., whether or not the decision to waterski without a life jacket is a failure to exercise ordinary care is open for debate), other times, the evidence speaks for itself.

Photos, email, phone records, and of course an aerial video of the National Mall on inauguration day, fall into the second category. There is little grey area. Most jurors will accept these undeniable facts as true on face value alone. In a construction defect case, for example, the jury need only see photos in order to accept the claim that the workmanship was "shoddy." In a race discrimination case, one will be hard-pressed to explain that an email referencing "eating ants in Uganda" is about anything other than national origin. Trying to explain this type of evidence as "alternative facts" almost never works. Jurors don't want to feel they're having the wool pulled over their eyes, and an explanation that flies in the face of common sense will do just that.

This is not to suggest that facts don't need to be refuted or that you shouldn't create a framework through which jurors should view your case. But you need to pick your battles. It's better to create a framework that results in jurors dismissing black-and-white evidence rather than trying to explain it away. In a recent breach of contract case, the defendant was marred by the presence of an email in which he invited the plaintiff's clients to attend the open house of his new

business. In an attempt to deflect guilt, the defendant wanted to explain to the jury that he wasn't stealing customers; he was merely inviting "friends" to celebrate his new venture. Knowing that common sense would tell jurors otherwise, the better strategy was to focus on the absence of economic damage caused by the breach. This strategy made the email irrelevant. In fact, in the mock trial, jurors wrote off the evidence as, "A dumb move on the part of the defendant, but not proof of damage."

Of course, it's not always the lawyer who presents an alternative fact. More often than not, it's a juror who pulls a Kellyanne Conway. Take for an example, the juror who was unwilling to give an award to a law firm damaged in an office building fire. She rationalized her bias by suggesting that the cause of the fire was spontaneous combustion, not faulty wiring as both experts agreed. Another juror who wanted to protect a corporate executive argued that someone probably hacked into the exec's work server and created the incriminating email. Yet another suggested to the jury that the photos showing water damage had been digitally manipulated. (For even more on this topic, read about [how some jurors evaluate statistics in trial](#)). To assuage the panic these examples may produce, in each of these fact-twisting attempts, fellow jurors saw the "alternative facts" as acts of motivated reasoning and quickly returned to a common-sense evaluation of the case.

In trial, an attempt to provide an alternative fact is likely to at best, fall flat, or at worst, to put undue focus where it doesn't belong. That's because incredulous attempts to explain away "bad facts" can have a boomerang effect and actually raise that evidence's level of importance. Look what happened after last weekend's *Meet the Press* interview. Spicer's over-exaggeration could have faded away like the tabloid headlines about Brangelina's breakup, but the characterization of Spicer's comment as an alternative fact will give the attendance stat a memorable and permanent spot in our history books.