



*Helping Jurors Avoid Alternative Facts*

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## Helping Jurors Avoid Alternative Facts

Kellyanne Conway has introduced the concept of “alternative facts” into the political discourse with her defense of President Trump’s Press Secretary Sean Spicer’s assertions about crowd size at the presidential inauguration. Of course, this isn’t the first time this concept has been present in political discussions; in fact, the sales of George Orwell’s *1984* have skyrocketed since the inauguration as Americans reflect on some of the literature that introduces concepts like this.

Laura Dominic and Alexis Knutson [recently wrote](#) about the potential presence of “alternative facts” in trials. Although these “facts” might not be appropriate, I have seen the introduction of “alternative facts” on a frequent basis.<sup>1</sup> There is some check on the use of these facts in the trial itself, as the opposing attorneys and judge can step in and correct information that is inaccurate and lacking substantiation. In deliberations, however, jurors are free to say what they want, unshackled from the constraints of the court. During mock trials, I frequently see jurors introduce facts that have no basis in reality, and the other jurors often have a difficult time dismissing these arguments. As a result, verdicts are often based not on the evidence introduced in trial, but on “alternative facts” presented in deliberations.

This sobering outcome is not inevitable, however. There are some techniques an attorney can use in closing to ward off the introduction and acceptance of “alternative facts” in deliberations. Jurors need to be armed to dismiss these facts and focus the attention of their peers on the evidence presented in the case.

### Use Visual Advocacy

One way to inoculate jurors from letting these facts play a role is to visually depict a box with the key facts inside during closing and emphasize that these are the only facts to be considered in the case. Remind jurors that this is what was established in the evidence and they should not allow other facts to penetrate this box. It is helpful to establish for jurors that it is appropriate for

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<sup>1</sup> It is beyond the scope of this blog to try to define what Conway really meant in her comments. For the sake of clarity I will be assuming “alternative facts” are those not based in reality.

them to reject asserted facts from other jurors, so they will be armed to consider only the evidence in the case in their decision.

Seeing the box and the facts contained within is more likely to stick with jurors than just a verbal reminder. According to Dr. Lynell Burmark, an education consultant who writes and speaks about visual literacy: "...unless our words, concepts, ideas are hooked onto an image, they will go in one ear, sail through the brain, and go out the other ear. Words are processed by our short-term memory where we can only retain about seven bits of information (plus or minus 2) [...]. Images, on the other hand, go directly into long-term memory where they are indelibly etched."

### **Call out Specific Jury Instructions**

The propriety of ignoring facts brought into deliberations by other jurors can also be reinforced by displaying and referring to jury instructions. For example, one of the Washington Pattern Jury Instructions reads, "It is your duty to decide the facts in this case based upon the evidence presented to you during this trial...The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial." If the judge allows, it can be emphasized in closing that only the evidence presented in trial should be considered, and not "alternative facts" offered by other jurors.

### **Prevent "Common Sense" from Being Used Against You**

Another important consideration is to clarify for jurors the difference between "common sense" and "alternative facts." Jurors are usually instructed to use their common sense when assessing the facts and evidence in the case and some jurors will use this as an excuse to introduce "alternative facts" instead. Common sense should be defined to jurors as a way to reason about the information they have been presented. For example, if they looked outside and saw that the ground, road, etc. were all wet, it would be common sense to assume it had rained recently. However, it would not be common sense to assume, absent any evidence, that climate change is happening. This is a fact that needs to be established with evidence, such as temperature data and historical trends. Facts are objective truths that need to be proven, not ways of thinking. Jurors

need to be warned of this distinction so they do not let someone get away with claiming that their “alternative fact” is just common sense.

### **Suggest Helpful Ways *How* the Jury Should Deliberate**

One of the biggest frustrations jurors cite is a lack of knowledge about *how* to deliberate. This is a novel concept for most participants, and they are just not sure what they can and cannot do, and what they should and should not do. Providing jurors with guidance in closing is an effective way to help jurors feel more confident in deliberations and better armed to reject approaches that do not fit with the instructions or strays from the facts in the case. These techniques will help confine jurors to the facts and evidence that has been presented and to stay away from the pesky “alternative facts” that can derail a reasoned, evidence-based verdict.