

Combatting Plaintiff's Attempts to Convince Judges That Fairness Requires Asking for Millions of Dollars in *Voir Dire* and the Rise of Extreme Opinions in the Jury Room

Sponsored by IADC Product Liability Committee and Trial Techniques and Tactics Committee

Wednesday, April 8, 2020

Welcome! The Webinar will begin promptly at 12:00 pm CDT. Please read and follow the below instructions:

- If you have not already done so, please join the conference call.
- *When you join the conference line, there will not be a 'beep' or music - it will be silent.* Announcements will be made periodically by IADC Staff.
- For you information, this Webinar presentation is being recorded.
- **Mute your phone line.** If you do not have a mute button or are on a cell phone, press *1 to mute your phone.
- **If you are on a conference phone,** please move all cellular or wireless devices away from the conference phone to avoid audio interference.
- **Questions during today's presentation?** Utilize the Q&A pod on the upper-right-hand side of your screen. You may type questions here and it will be sent to the presenter for response. If your question is not answered during the presentation, our presenter will answer questions at the end of the webinar.
- **Would you like a copy of today's power point slides?** Visit the "Files" pod in the lower-right-hand corner to download a copy.

The screenshot shows a web browser window displaying an Adobe Connect meeting. The address bar shows the URL: https://iadc.adobeconnect.com/_a1101933513/r13152pj8pi/?launcher=false. The browser's address bar also shows several tabs: "Warning! Slippery Experts", "Google Maps", "Time Zone Converte...", "Microsoft Office Liv...", "IADC - International ...", "Campaigner Email ...", "iadclaw | Home", "Anywhere Conferen...", "Adobe Connect Cen...", and "CB435A | Staples®".

The Adobe Connect interface includes a top navigation bar with "Meeting", "Help", and icons for audio and video. The main content area is divided into two sections:

- Share:** A large grey area with a blue callout box that says "Type your questions for presenters here in the Q&A Pod". A blue arrow points from this callout to the Q & A Pod.
- Q & A:** A white area for questions and answers, with a blue callout box below it that says "Click on the file name to download this Power Point or any referenced documents". A blue arrow points from this callout to the "Files" section.

The "Files" section is a table with columns for "Name" and "Size". It contains several rows of placeholder text. Below the table is a "Download File(s)" button.



IADC Webinars are made possible by a grant from The Foundation of the IADC.

The Foundation of the IADC is dedicated to supporting the advancement of the civil justice system through educational opportunities like these Webinars. For more information on The Foundation, visit www.iadcfoundation.org.

Presenters



Aref Jabbour

*Trial Behavior Consulting
San Francisco, California USA*
ajabbour@trialbehavior.com



William A. Ruskin

*Law Office of William A. Ruskin, PLLC
Rye Brook, New York USA*
wruskin@wruskinlaw.com



John L. Tate

*Stites & Harbison PLLC
Louisville, Kentucky USA*
jtate@stites.com

OVERVIEW

- Impact of damage demand in voir dire
- Tactics to combat these demands
- What do extreme opinions do to lawsuits?
- Examples of extreme opinions on lawsuits
- How do we tackle preconditioning and rise of extreme opinions?

Damages in Voir Dire—Plaintiff Justification

- Testing damages early essential to get a fair/impartial jury
- Jurors appreciate hearing potential damages early on
- Identifies those unwilling to award damages
- Identifies those willing to award high damages
- Can be done without pre-conditioning

Damages in Voir Dire—Key Risks

- Preconditioning difficult to avoid
- Anchors on amount
- Plants bias against defendant
- Implies that trial should result in damages

Preconditioning Case Law Varies by Jurisdiction

- **Texas:** *K.J. v USA Water Polo, Inc.*, 383 SW3d 593 [Tex Ct App 2012]
 - Sexual assault of minor by teammates as part of hazing initiation. Appellate court held that it was not an abuse of discretion for trial court to direct plaintiff's counsel not to ask in voir dire a "commitment question", which commits a prospective juror to resolve or refrain from resolving an issue a certain way after learning a particular fact.
- **California:** *Fernandez v Jimenez*, 40 Cal App 5th 482, 253 Cal Rptr 3d 236 [2019]
 - Wrongful death action for mother of four children against drunk driver resulted in jury verdict of \$11,250,000 in non-economic loss for each child. During *voir dire*, plaintiff said they were seeking hundreds of millions of dollars. Appellate court did not find prejudice and affirmed.

Counteractive Measures

- Motions *in limine*
- Voir dire strategy
- Know safety history of defendant

Rise and Genesis of Juror Extreme Opinions

What are extreme opinions?

- Expectation of absolute safety of a product
- Complete distrust of corporations → Profit motive
- Burden of proof is relative???
- Hiding and manipulating information
- Dismissal of sound science

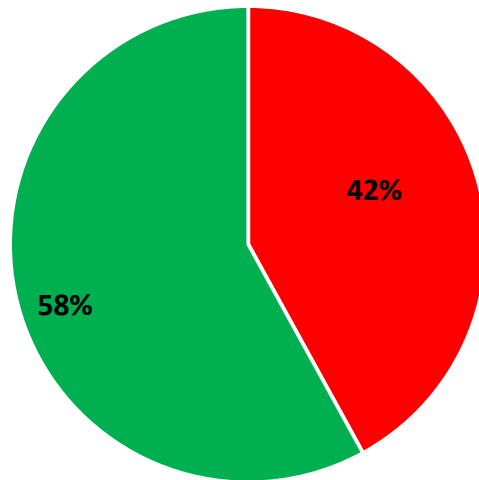
Information Accessibility and Extreme Opinions

- Fact-focused v. fact-selective
- Pick and choose which fact to accept
- Pick and choose scientific evidence
- Politicization of science

What is Feeding Extreme Opinions?

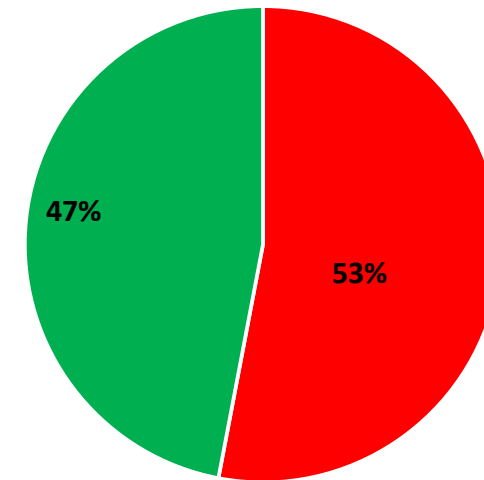
- More than ever, Americans prefer leaders who stick to their guns

July 2017



■ Stick to positions ■ Compromise

March 2018

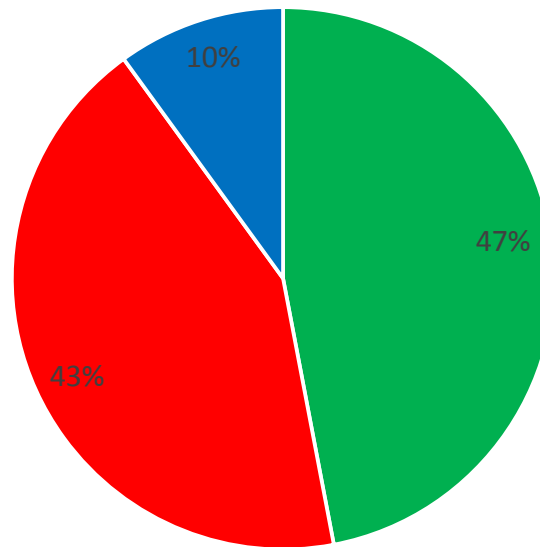


■ Stick to positions ■ Compromise

What is Feeding Extreme Opinions?

- Skepticism of scientific understanding

Medical Scientists Understand Health Effects of MMR Vaccine

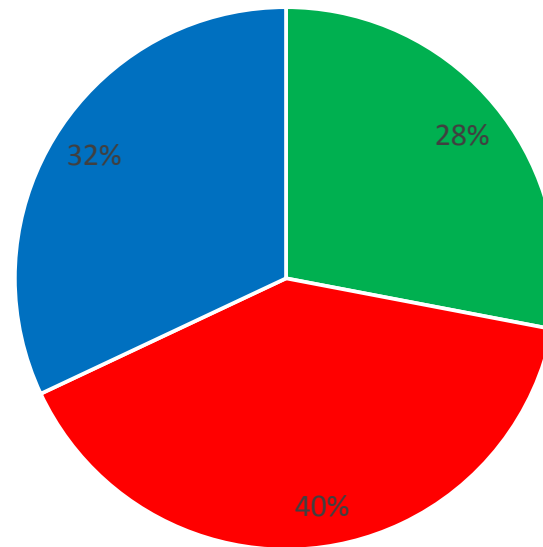


■ Very well ■ Fairly well ■ Not well at all

What is Feeding Extreme Opinions?

- Skepticism of scientific understanding

Climate Scientists Understand the Causes of Climate Change

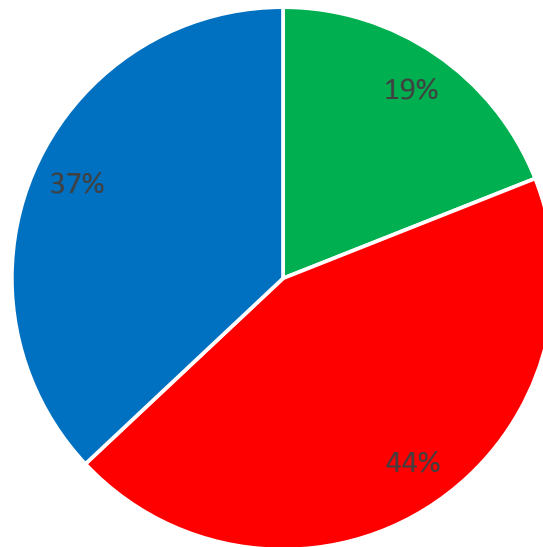


■ Very well ■ Fairly well ■ Not well at all

What is Feeding Extreme Opinions?

- Skepticism of scientific understanding

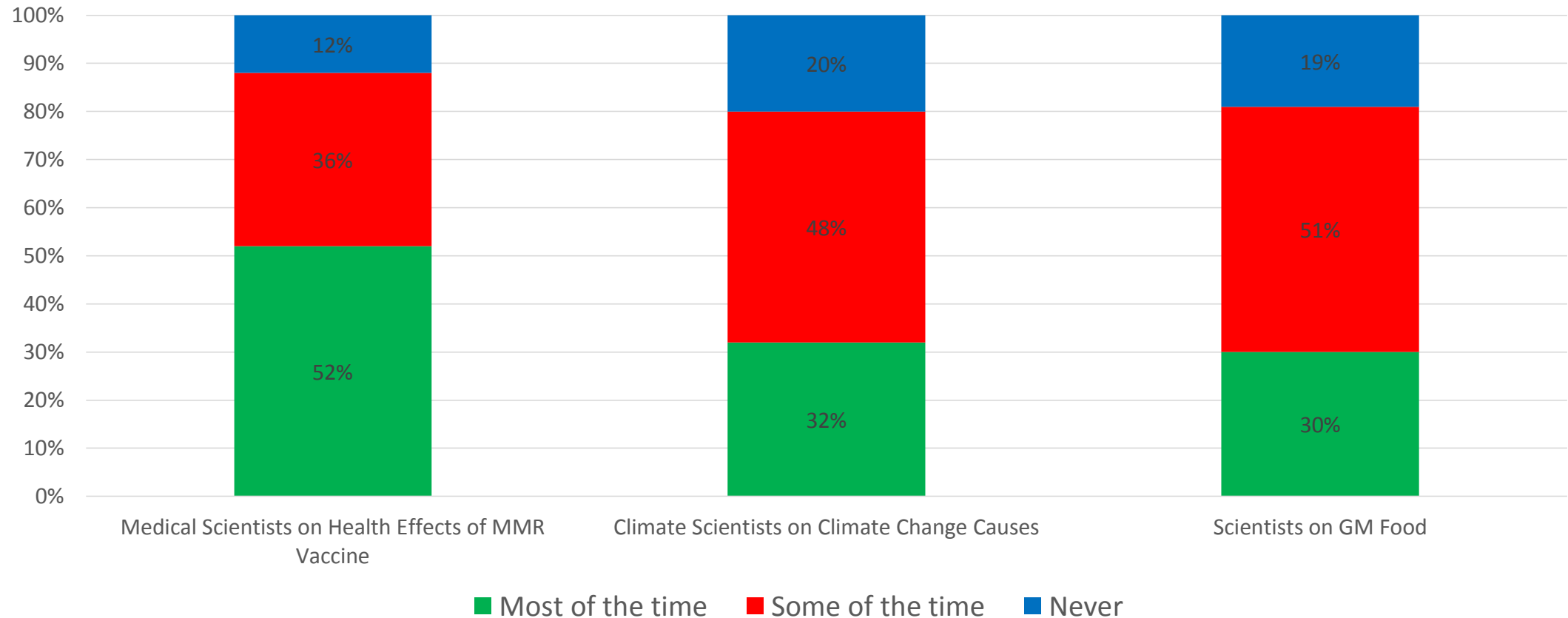
Scientists Understand the Health Effects of Eating GM food



■ Very well ■ Fairly well ■ Not well at all

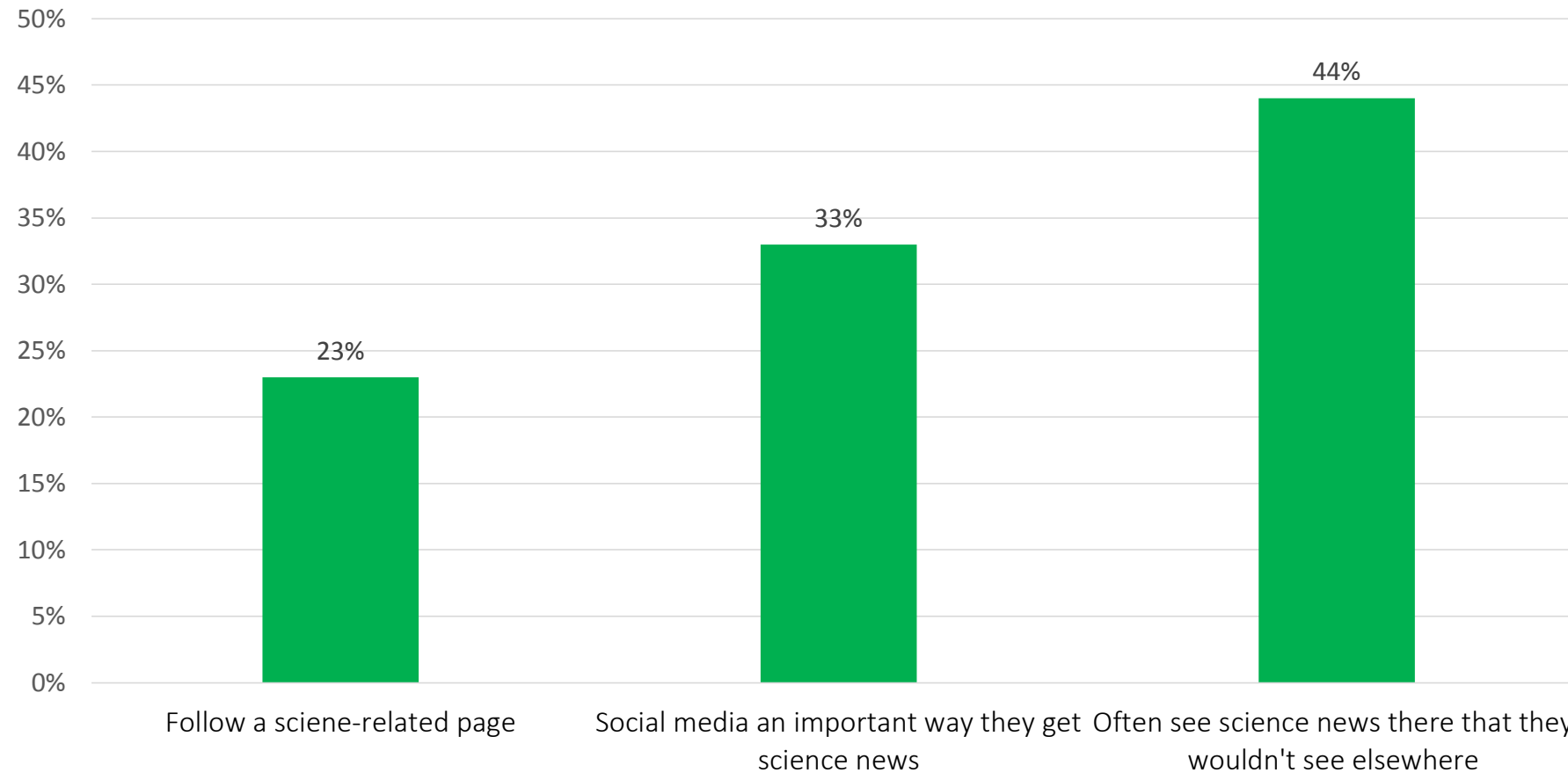
What is Feeding Extreme Opinions?

- U.S. adults who say the best available scientific evidence influences research findings of:



What is Feeding Extreme Opinions?

- Social media users and science news



Physics?

Who Can Become an Expert...

What is Feeding Extreme Opinions?

- Reliance on pop science?
- Multiplatform Organizations on social media—e.g. Nat. Geo., Discovery
- Facebook-primary pages
- Millions of people follow science-related pages on Facebook
 - Whether from Multiplatform Orgs. Or Facebook-primary

What is Feeding Extreme Opinions?

- How easy is it to get science from social media? Takeaways:
 1. 29% of Facebook posts from science-related pages are about “new scientific discoveries”
 2. Since 2014, multiplatform Facebook pages increased production of posts by 115%
 3. Higher engagement with Facebook-primary “science pages” than multiplatform pages
 4. **Higher engagement on posts with mostly visuals**

What do extreme opinions do to lawsuits?

The Cost of Extreme Opinions

- Difficulty evaluating evidence
- Refusal to evaluate evidence
- Cherry picking
- Heightened quest for confirmation
- Because different “facts” are available

How Extreme Opinions Get in The Way

- Empower
- Embolden
- Increase cognitive laziness
- Confirmation bias heightened
- Dying art of disagreement

How Extreme Opinions Get in The Way

- How will jurors react to evidence that does not comport with **beliefs** they hold, and are regularly confirmed?
- How will jurors react to scientific evidence they have concluded is false?
- Will they evaluate the evidence, the scientific evidence with an open mind, or will they dismiss **scientific principles** and hold on to their **beliefs**?

Extreme Opinions and Impact on Lawsuits

Product Liability

Premises Liability

Catastrophic Injury

Why Are We Facing This?

- People do not want to feel **manipulated**.
- Want to feel **empowered to focus** on whatever information we choose to focus on.
- More access = more options for information
- Truth and veracity compromised
- Yet some more emboldened

Let's Focus On Solutions

First Steps

- In areas with known bias
 - *Pay attention to details of the Complaint and respond to them.*
 - *Know the safety history of the client*
 - *Address bias in discovery. Ask detailed questions to expose potential for alternative facts.*
 - *Get expert reports before the plaintiff's deposition. May expose biases*

First Steps

- In areas with unknown bias:
 - Consider social media to understand witnesses and jurors before depositions and voir dire
 - Newspaper, TV, articles, etc... may give a sense of how the event(s) in question were perceived
 - Preliminary issue research—talk to people in the venue → Focus group



Before Trial

- Research the case risks
- Mock trial or focus groups
- Evaluate presence, extent, and impact of extreme opinion in venue
- Understand what could mitigate them in the venue

Jury Selection

- In voir dire, identify people who have a general distrust of scientific evidence.
 - Get people to talk as freely as possible
- Use of a juror questionnaire (JQ) can identify what media outlets, and social media outlets they rely on and use, and how frequently they do so.
 - Jurors more likely to write down true/extreme beliefs

Jury Selection

- Prioritize most important strikes
- Tactics to get commitments from them
- Tactics to get them to admit they are biased, and be comfortable with it
- Determine who is most receptive to scientific evidence, and what kind

During Trial

1. Remind and empower jurors that they have to determine if the beliefs and conclusions of the parties are supported ONLY by the evidence presented to them in court.
2. Use demonstrative evidence to defeat the bias.
 1. Use models, videos, to show the operation of machinery, gas lines, power lines etc....
3. If the bias is demonstrably untrue, show them.
 1. Video the plaintiff's deposition.
 2. Video rendering of how accident happened
 3. Help them decipher how it happened one way and not another

Takeaways—Preconditioning

1. Preserve issues for appeal—key battle at trial court level
2. File comprehensive motions *in limine* prior to trial
3. Preconditioning as first step—PL attorneys may seek cause strikes for those who would not award astronomical amounts
4. Defendant *voir dire* should anticipate PL tactics

Takeaways—Extreme Opinions

1. Firm handle on reputational issues for your client—in each venue
2. Know experts' communication styles
3. Ensure science can be made accessible to lay persons
4. Research early (and often)

Questions?



Aref Jabbour

*Trial Behavior Consulting
San Francisco, California USA*
ajabbour@trialbehavior.com



William A. Ruskin

*Law Office of William A. Ruskin, PLLC
Rye Brook, New York USA*
wruskin@wruskinlaw.com



John L. Tate

*Stites & Harbison PLLC
Louisville, Kentucky USA*
jtate@stites.com

Combatting Plaintiff's Attempts to Convince Judges That Fairness Requires Asking for Millions of Dollars in *Voir Dire* and the Rise of Extreme Opinions in the Jury Room

Wednesday, April 8, 2020

Thank you for Participating!

To access the PowerPoint presentation from this or any other IADC Webinar, visit our website under the Members Only Tab (you must be signed in) and click on “Resources” → “Past Webinar Materials,” or contact Melisa Maisel Vanis at mmaisel@iadclaw.org.