

## 5 Traps To Avoid When Picking A Jury

By **Bibeka Shrestha**

*Law360, New York (August 25, 2014, 5:18 PM ET) --* Making a misstep in the high-stakes jury selection process is the stuff of trial lawyers' nightmares. Here, experts share some common traps to stay clear of in the hunt for jurors who are most favorable for your case.

### Trap No. 1: Overlooking the Rules

Jury selection procedures vary not only from jurisdiction to jurisdiction and from state court to federal court, but also from judge to judge.

Attorneys may run the show during jury selection in some courts, while elsewhere, lawyers will play a minor role as judges take the lead in probing potential jurors. Lawyers who don't know the rules of the road are sure to start trial off on the wrong foot.

David Marriott, a partner in Cravath, Swaine & Moore LLP's litigation department, said breaking with procedure can come with a host of negative consequences, whether it's losing a juror who could've been good for a case or simply looking bad in front of the judge and jury.

"You also lose credibility and potentially weaken your position with opposing counsel because your ignorance is exposed," Marriott said.

The last thing that lawyers want to hear on the first day of trial is the other side raising an objection because they've said the wrong thing to a juror, said Atif Khawaja, a litigation partner at Kirkland & Ellis LLP.

"That can be incredibly demoralizing, and it's certainly not the right first impression you want to make," Khawaja said.

### Trap No. 2: Holding Back from Advocating

Some attorneys go into jury selection without keeping front-and-center the themes of their clients' cases, the themes of adversaries' cases, and the strong and weak points of each, Marriott said. Though lawyers aren't allowed to argue a case at that stage of trial, they fall into a trap if they disregard these themes.

Attorneys should strike the right balance between extracting important information from potential

jurors and planting the seeds of their clients' themes, said Loren Brown, co-chair of the U.S. litigation group at DLA Piper.

As they ask questions about a potential juror's ability to serve, lawyers should also tie in a case's themes and begin indoctrinating jurors, said Tom Hall, co-head of Chadbourne & Parke LLP's commercial litigation practice.

"It's got to be a lot more subtle in jury selection, but you can still do it to a limited degree," Hall said. "You hate to waste opportunities to advocate your position."

### **Trap No. 3: Asking Pointless Questions**

Attorneys commit a common blunder by asking potential jurors leading or closed-ended questions when they should be posing questions that press jurors into providing a narrative, experts say. Every question that a lawyer asks should have a purpose.

"Too many lawyers' questions are narrow questions that are closed-ended and don't elicit information," Marriott said. "Most people when asked whether they can be fair will say, 'Sure,' and that doesn't tell people a whole lot."

Questions should hew closely to the evidence and specific issues in a case, said Valerie Hans, a professor at Cornell University Law School.

"Don't pursue overly clever and indirect lines of questioning to try to ferret out the jurors' deep psychological hopes, fears and secret prejudices," Hans said. "In a rape case, for example, I'd favor asking prospective jurors about their beliefs about common rape myths rather than asking about the last book they read or whom they most admire."

Lawyers should also not shy away from digging into answers that potential jurors do provide, rather than taking their first answers at face value, according to Hall.

"People naturally are embarrassed to say something that would make them look foolish or prejudiced or biased," Hall said. "You have to probe that. You have to really dig in [and] ask a lot of follow-up questions to see if their initial answer was the accurate one."

When and where possible, attorneys should also research individuals in the jury pool on top of asking purposeful questions.

Khawaja recounted how before a patent infringement trial in Delaware, a Google search revealed that a potential juror previously sold the product accused of infringement.

"I'm not sure you would have found that out just through ordinary questions," Khawaja said.

### **Trap No. 4: Not Empathizing With Those on Jury Duty**

Attorneys who have done all their legal homework for a case may still fall short if they don't research the locality where a trial will be held before jury selection takes place or when they don't show enough empathy to those showing up for jury duty.

During questioning, attorneys should avoid embarrassing jury members in front of their neighbors by, for instance, pushing them to publicly discuss arrests or to disclose the highest level of school they attended. These questions are best left on jury questionnaires, which lawyers don't use as well as they could, experts say.

"All of that signals to these potential jurors that you are a thoughtful person and a credible person," Khawaja said. "Professional courtesy goes a long way."

Those who are traveling to far-flung places should also avoid coming off as "city slickers" or "carpetbaggers" if they want to win over the jury from the beginning, Khawaja said. Lawyers would do well to read the local paper and learn about the local economy and the largest employers in the region before trial, he said.

Attorneys can sometimes fool themselves into thinking that their cases are as important to jurors and the court as they are to the lawyers and their clients, according to Marriott.

"Put yourself as best as you can in the shoes of people ripped out of the ordinary course of their lives ... to devote time to solving somebody else's problem," Marriott said. "If you can value their time and come to the point, you have a much better chance of not turning them off before you've had a chance to turn on the evidence."

#### **Trap No. 5: Treating the Process as a Selection**

It's best not to focus too much on the few potential jurors who seem to favor a client's cause, Brown warned. Attorneys should keep in mind that their biggest job is to uncover potential jurors who may be biased against their clients.

It can be dangerous to select jurors who do not participate in the question-and-answer process in a meaningful way, Brown said.

"You miss the opportunity to strike jurors that may be biased or predisposed against your client's case," Brown said. "Jury selection is not an opportunity to pick jurors who you like. It's an opportunity to strike jurors who may not view your client or case impartially."

--Editing by Katherine Rautenberg and Philip Shea.

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