Tips for Effectively Picking and Persuading a Jury

by John Matson and Trevor Lee

A jury trial is the culmination of months, if not years, of hard work and advocacy. In preparing for and conducting a jury trial, attorneys often become so focused on proving all the elements of their claims or affirmative defenses, getting exhibits received into evidence, and preserving the record for appeal, that they may forget or downplay the importance of a bigger-picture consideration of effective trial advocacy—persuasive, strategic, and credible advocates are more likely to secure a favorable verdict than unorganized, dull, or disinterested ones. This article highlights a few methods that attorneys may utilize before, during, and after the trial to improve their persuasiveness with Nebraska juries.

1. Set Yourself Up for Success Through Stipulated Evidence and Motions in Limine

Attorneys can improve how persuasive a jury finds them months in advance through stipulations on the admissibility of certain evidence, and through the effective use of motions in limine. Stipulations on the admissibility of evidence are highly useful and streamline trial presentation and avoid distracting the jury. However, reaching stipulations on evidence is usually not achieved with respect to all trial exhibits. In such cases, motions in limine can be a useful tool for critical evidence.

A motion in limine is a procedural step by which an attorney requests the court make a preliminary determination on the admissibility of evidence before trial.[1] While a court does not make a final ruling on the admissibility of evidence on such a motion, it is arguably an uphill battle for an attorney to convince a judge during the trial to reverse its previous ruling on a motion in limine. A successful motion in limine can help prevent prejudicial evidence from reaching a jury.[2] Further, objections at trial can be distracting, and there is sometimes a perceived risk that an attorney that objects too much will be seen as rude or attempting to secure an unfair advantage by frequently interrupting the other side (even though the trial court will admonish the jury not to take such matters into consideration, the risk likely remains). Effective use of motions in limine can decrease material interruptions to trial presentation and, accordingly, is a helpful tool in persuading juries.

John Matson

John Matson is a 2013 *magna cum laude* graduate of Creighton University School of Law. He has been a member of the Litigation Department (currently serving as Chair) at Koley Jessen since 2013, and clerked for the firm for two years during law school. John and his wife Whitney have three kids and a Mini Goldendoodle that keep them busy in their spare time.

Trevor Lee

Trevor Lee graduated from the University of Nebraska College of Law with high distinction in 2020. He is an Associate in the Litigation Department of Koley Jessen. Prior to joining Koley Jessen, Trevor served as a law clerk for Justice William B. Cassel of the Nebraska Supreme Court.

2. Increase Your Odds for Success Through the Jury Selection Process

Good trial lawyers know that a jury trial does not really begin with opening arguments—it starts long before through juror questionnaires and in jury voir dire.

a. Jury Questionnaires

Before the trial starts, attorneys are often provided with prospective jurors' answers to jury questionnaires collected by the trial court. The prospective jurors' experience, sophistication, preferences, and potential biases can oftentimes be investigated through these questionnaires.

b. Jury Voir Dire

Once the trial has officially started, jury voir dire is conducted. Voir dire is the process whereby prospective jurors are questioned to determine (1) whether they are qualified under Nebraska law to participate in the trial,[3] and if so, (2) whether the trial attorneys believe they would be a good fit to serve on the jury in question. Prospective jurors can be stricken for cause or through attorneys' use of peremptory challenges.[4]

c. Strikes for Cause

Nebraska case law fleshes out challenges for cause as follows:

> At common law it is good cause for challenge that a juror is next of kin to either party; that he has an interest in the cause; that there is an action pending between him and the party; that he is the party's master, servant, counselor, or attorney. And the common law in that regard is in force in this state. Jurors must be indifferent between the parties and have neither motive nor inducement to favor either. The fact that the defendant is a corporation does not change the rule nor render an employee eligible to sit on a jury in an action where the corporation is a party.[5]

d. Peremptory Challenges

Peremptory challenges are not to be exercised until prospective jurors have been passed for cause.[6] Nebraska case law also provides guidance on peremptory strikes as follows:

> In Nebraska, the number of peremptory challenges allowable in civil actions is governed by case law and "unwritten rules of court." A party can exercise the peremptory challenge to remove a potential juror on the basis of that party's belief that the juror's status as a member of some cognizable group will prejudice his or her attitude toward that party's case. We have said that under these rules, where there are multiple parties on the same side of a lawsuit, each side of the lawsuit is entitled to a total of three peremptory challenges, unless the multiple parties' interests are adverse to each other.[7]

e. Restrictions on the Jury Voir Dire Process

There are several restrictions and rules placed on attorneys while conducting jury voir dire. Specifically, during voir dire:

> (1) Questions are to be asked collectively of the entire panel whenever possible[;] (2) [t]he case may not be argued in any way while questioning the jurors[; and] (3) [p]rospective jurors may not be questioned concerning anticipated instructions or theories of law and may not be asked for promises or commitments as to the kind of verdict they would return under any given circumstance.[8]

Counsel are also prohibited by law from striking prospective jurors based on their race,[9] religion,[10] and potentially their status as a person in any other constitutionally protected class of persons.[11]

f. Strategic Questions Can Make All the Difference in Picking the "Right" Jury

Assuming attorneys act within the restrictions set forth above, attorneys have latitude in questioning a jury panel to determine how peremptory strikes should be used, subject to the trial judge's right to control his or her courtroom and the trial process.

As an example, in a case involving a party who had, many decades ago, immigrated to the U.S. illegally, but had since become an U.S. citizen, one of the authors of this article asked a prospective jury panel whether they would hold that fact against the party. One particular potential juror raised their hand and said they would. When asked whether other prospective jurors shared a similar opinion, several prospective jurors confirmed they did. These individuals were stricken from the jury via peremptory strikes. Had such questions not been asked, the jury could have included jurors that started the case with an unfair bias against the above-referenced party, which would have been a meaningful disadvantage in the case.

As the foregoing analysis demonstrates, careful selection of a jury is a critical part of your effectiveness as a trial attorney.

3. Effective Use of Technology Can Boost Your Persuasiveness

Technology has become a critical tool for attorneys to utilize in jury trials. In the age of smartphones and related tools, jurors expect attorneys to embrace technology and use it to present them with evidence that is easy to understand. For example, jurors want to be able to visually follow-along and view evidence in real-time with a witness; an attorney's questioning of a witness regarding inconsistencies between the witness's testimony and an email without the attorney using technology to display the email to the jury in real-time is not overly helpful to the jury.

The Nebraska Judicial Branch has invested significant time and effort into improving the technology that is available in Nebraska courtrooms.[12] While not all courtrooms feature the same technology,[13] attorneys that fail to utilize technology available to them are disappointing jurors and self-sabotaging their ability to effectively advocate for their client in a jury trial. However, if an attorney struggles utilizing, or has technical difficulties with, the technology available in a courtroom, a jury may perceive the attorney as incompetent or not well-prepared. Effective use of technology is key.

4. Remember Primacy, Frequency, and the Power of a Strong Theme

Many attorneys remember trial advocacy classes in law school or judging a mock trial round for high schoolers, college attendees, or law school students. Professor R. Collin Mangrum of Creighton University School of Law often teaches his trial advocacy students that the first thing and last thing that a jury hears is what they remember. They also remember what they hear repeatedly. Consistent with such practice, a good theme presented to the jury at the beginning of trial, during the trial via early and frequent questions posed to each witness, and during closing arguments, can help focus the jury on the crux of an attorney's case. For example, in a recent construction defect trial, one of the authors of this article used the theme, "if it's not broke, don't fix it," which proved to be a simple, yet very effective, theme for the jury trial.

5. Remember the "Rhetorical Triangle" and be Authentic

Aristotle taught that a presenter's ability to persuade an audience is based on how well the presenter appeals to that audience in three different areas: logos (logic), ethos (credibility and character), and pathos (emotion). Considered as a whole, these tools form what is known as the "rhetorical triangle." All are critical. To draw on another of Professor Mangrum's maxims, an attorney's credibility will have a tremendous impact on whether jurors believe the arguments the attorney is presenting to them. Specifically, Professor Mangrum uses the phrase, "class, coherency, and control" to make this point. An attorney's effectiveness as a trial advocate is based in large part on his or her ability to harness the power of the three keys of persuasion mentioned above.

6. Remember the Power of Impeachment

Demonstrating that a witness is not credible is an extremely powerful tool in persuading a jury.[14] For example, one of the authors of this article recently tried a case and questioned a key executive of the counter-party. The counter-party had alleged that there were material construction defects that were caused

by a general contractor's allegedly unworkmanlike construction. This issue was stressed during opening statements, during the presentation of evidence, and during closing arguments. However, during questioning of the key executive, it was shown that (a) the exact same purported defect had existed at the project site in question for years before the work was completed by the general contractor; (b) the counter-party had never done anything about said purported defect; and (c) the purported defect had not affected the facility's productivity in any way. This impeachment of the key executive proved important in persuading the jury that the counter-party's claims of unworkmanlike construction were unmeritorious.

7. Do Not Waste the Jury Instructions Conference with the Trial Judge Before Closing Arguments

At a recent trial, one of the authors of this article had a great experience working with opposing counsel and the trial judge to work through multiple iterations of the jury instructions and verdict forms before closing arguments. Active preparation and participation in crafting effective, concise, and clear instructions and verdict forms can greatly ease the burden on the jury and reduce the risk of reversible error as well.

8. Walk the Jury Through the Verdict Forms and Show Them How to Complete the Forms

At a recent trial, one of the authors of this article observed a very effective presentation method used by opposing counsel. Specifically, opposing counsel put the jury verdict forms up on the screens in the courtroom, walked the jury through the forms, and then checked the boxes on the forms electronically in real time—suggesting how the jury should complete the forms after deliberations. In the author's opinion, this presentation was very persuasive and helped the jury understand exactly what the party was asking them to do following deliberations.

9. After Trial is Concluded and Jury Released, Inquire of the Jury and Learn What Worked and What Did Not

Following the conclusion of the trial, attorneys can gain many insights from calling individual jurors to determine the reasons why the juror made the decisions that he or she did. This should be done with discretion and respect for a juror's time and only if he or she consents to speak with an attorney. Information learned during the post-trial interview process of jurors can be used to improve attorneys' persuasive efforts at the next trial.

10. Conclusion

There are many methods that attorneys can utilize to persuade a jury. The foregoing list are just examples, but the authors of this article have found meaningful success in utilizing these tools in their practice and hope other attorneys can do so in future jury trials as well.

Endnotes

1 *See BCL Properties, Inc. v. Boyle*, 314 Neb. 607, 992 N.W.2d 440 (2023).

2 *See State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

3 *See* Neb. Rev. Stat. § 25-1650 (Supp. 2022) (setting forth the qualifications and disqualifications to serve as a juror).

4 *See Dick v. Koski Professional Group, P.C.*, 307 Neb. 599, 635, 950 N.W.2d 321 (2020).

5 *Kusek v. Burlington N. R. Co.*, 4 Neb. App. 924, 929–30, 552 N.W.2d 778, 781 (1996) (cleaned up).

6 *See Fetty v. State*, 119 Neb. 619, 230 N.W. 440 (1930).

7 *Dick v. Koski Pro. Grp., P.C.*, 307 Neb. 599, 635, 950 N.W.2d 321, 351–52 (2020), *opinion modified on denial of reh'g*, 308 Neb. 257, 953 N.W.2d 257 (2021) (quoting *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 912, 613 N.W.2d 440, 448 (2000)).

8 Neb. Dist. Ct. R. § 6-1516 (2023).

9 *See, e.g., Behlmann v. Century Sur. Co.*, 794 F.3d 960 (8th Cir. 2015).

10 *See, e.g., United States v. Stafford*, 136 F.3d 1109 (7th Cir. 1998).

11 *See, e.g., Jacox v. Pegler*, 266 Neb. 410, 665 N.W.2d 607 (2003) (stating a prospective juror cannot be stricken based on her gender).

12 See William B. Cassel, *Court Technology in Nebraska: In a Pandemic and Beyond*, Nebraska Lawyer (May/June 2022 edition) [https://cdn.ymaws.com/www.nebar.com/resource/resmgr/nebraskalawyer_2017plus/2020/mayjune/tnl-0520b.pdf].

13 *See* State of Nebraska Judicial Branch, *County Court Technology Availability* (last visited December 13, 2023) [https://supremecourt.nebraska.gov/courts/county-courts/tech.].

14 *See* Neb. Rev. Stat. §§ 27-607 through 27-613 (Reissue 2016).

2024 Judicial Evaluation Poll

The Nebraska State Bar Association's 2024 Judicial Evaluation Poll will be made available as an online survey. You will receive an email link to the survey on April 5, 2024. Please make sure the NSBA has your current email on file before this date. The deadline to respond to the survey is May 17, 2024.