

How to alienate a jury (without even trying)

By Lynn A. Kappelman and Dawn R. Solowey

(*Massachusetts Lawyers Weekly*, June 4, 2013) - Winning a jury trial requires effective presentation of the evidence and argument. But let's face it: You're a lot more likely to win if the jurors like and trust you.

Some lawyers get so focused on the exhibits and witnesses that they forget their audience. But jurors are evaluating you and your case at every stage of the trial. Here are the top 10 ways to alienate the jury and place your case in peril:

- **Be disrespectful in voir dire.** Trial counsel often thinks about voir dire as a means to an end — picking the right jury — and as a precursor to the main action of the trial. Remember that this is the first time you are meeting the people who may end up on your jury. Be polite and warm. When delicate issues must be discussed, as they sometimes must in voir dire, tread carefully.

For example, voir dire might require a prospective juror to answer questions, in front of complete strangers, about medical issues, religion or having been fired from a previous job. If you show respect and empathy with your words and body language, you'll be off to a good start.

- **Speak legalese.** If you speak legalese, you will lose your jurors entirely. Remember that the jurors have varying levels of education, and of facility with English, and many have never been in a courtroom. Even something seemingly elemental as referring to the "plaintiff" and the "defendant" may lose the jury. Use the parties' names. Translate legal terms into plain English. Use shorter words in place of longer ones. The jury has to be able to understand you to identify with you and to hear your argument.

- **Waste their time (with repetition).** The jurors do not want to be in the courtroom. If you were paying attention during voir dire, you know why: They had planned to be at work, or school or caring for children. The fastest way to alienate the jury is to waste their time.

Do not make the identical point over and over with multiple witnesses; establish it firmly and move on. Keep your opening and closing arguments tight; practice so that you are well within the court's time limits. Efficiency telegraphs competence.

- **Waste their time (fumbling with exhibits).** Agree to as many stipulated exhibits as feasible with opposing counsel before the trial. Practice with courtroom technology so that you can work the technology without any hiccups. Ask the clerk if you can come to the courtroom to view the set-up the week before, or attend the training offered periodically by many courts. If your budget allows, hire a consultant to run the technology for you, which ensures a fluid presentation and allows you to focus on the substance.
- **Insult them.** As you question your witnesses and make your arguments, be careful that you do not inadvertently insult your jurors. For example, in one recent employment trial, opposing counsel derisively asked a management witness if she expected an employee

with “nothing but a high school education” to have understood a certain workplace policy. The courtroom went silent, as the insult sunk in with the jurors, most of whom did not have a college degree. If the jurors feel you are looking down on them, they will not be open to your arguments.

- **Be boring.** If the jury is bored to tears by your dry presentation, they will have a hard time paying attention, let alone finding your argument persuasive. Tell a story. Use humor — in small doses — to wake people up.

Use technology to put exhibits on their screens in the jury box and highlight or enlarge a section that you want them to focus on. Mix it up with the visuals by offering an exhibit on the screen, a blown-up chalk on an easel and a flip-chart on which, with the judge’s permission, you record key aspects of the testimony.

- **Incur the judge’s wrath.** The jurors respect the judge, not only for her position, but because she is a neutral. If the judge rebukes you — for wasting time, for disregarding a motion in limine, for being argumentative with a witness — the jury will take note. If it happens repeatedly, and/or the rebuke is strongly worded, you will lose credibility with the jury.
- **Bully the witnesses.** There is a fine line in cross-examination between being appropriately assertive and acting like a bully. If you cross that line, you may lose your jury’s respect and trust.

You can communicate with deft questioning and examination style that a witness’s story does not add up, without belittling or sneering at the witness and damaging your own reputation in the process.

Male lawyers have to be particularly careful cross-examining female witnesses, though the anti-bullying principle holds true regardless of gender.

- **Make the jury uncomfortable.** People don’t like to go outside their comfort zone, and jurors are no exception. Be sensitive about gruesome medical or explicit sexual evidence, or asking highly private questions of witnesses.

An odd but true example of how making jurors uncomfortable can backfire: At one trial, opposing counsel used a metaphor in a closing about a violent car crash into the jury box, causing the jury visibly to squirm. That was not a path to success.

- **Act like a jerk when you think they’re not looking.** If you speak harshly to your paralegal at counsel table or roll your eyes at a ruling, the jury will probably see it — and may hold it against you. Present yourself at all times as if the jurors are watching, because they are. The rule applies at the elevators, in the hall in the courtroom cafeteria and in the restroom.

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