

## UPCOMING TRAININGS & CONFERENCES

- **NDAA is making its National Courses available virtually in light of health and safety concerns over COVID-19. Check out a full list of NDAA's virtual learning sessions at <https://ndaa.org/training-courses/>.**
- **NDAA's Prosecuting DUI Cases Online Course On Demand Training**  
<https://ndaa.org/training/prosecuting-dui-cases/>
- **NDAA's Investigating & Prosecuting Economic Crimes**  
April 30, 2020 @ 2 p.m. EDT / 60-minute presentation includes Q&A session / Registration is free and exclusive to NDAA members.
- **NDAA's Human Trafficking Case Studies**  
May 12, 2020 @ 2 p.m. EDT / 90-minute presentation includes Q&A session
- **NDAA's Career Prosecutor Learning Series**  
May 18-20, 2020 @ 11:30 a.m. to 3:30 p.m. EDT each day / Each online session is 60 minutes includes Q&A
- **NDAA's Best Practices in DV, Sexual Assault & Human Trafficking** / June 23, 2020 @ 2 p.m. EDT / 60-minute presentation includes Q&A



## NDAA STAFF

**Executive Director**  
Nelson O. Bunn, Jr.

**Chief Operating Officer**  
Christine Mica

### THE NATIONAL TRAFFIC LAW CENTER

**Director**  
Joanne E. Thomka: [jthomka@ndaajustice.org](mailto:jthomka@ndaajustice.org)

**Senior Attorneys**  
M. Kimberly Brown: [mkbrown@ndaajustice.org](mailto:mkbrown@ndaajustice.org)  
Romana Lavalas: [rlavalas@ndaajustice.org](mailto:rlavalas@ndaajustice.org)

**Staff Attorneys**  
Erin Inman: [erinman@ndaajustice.org](mailto:erinman@ndaajustice.org)

**Project Coordinator**  
Metria Hernandez

The National Traffic Law Center is a division of the National District Attorneys Association. This document was prepared under Cooperative Agreement Number 693JJ91950010 from the U. S. Department of Transportation National Highway Traffic Safety Administration. Points of view or opinions in this document are those of the authors and do not necessarily represent the official positions or policies of the Department of Transportation or the National District Attorneys Association.



## Jury Selection

### *Not Part of the Trial: It Is the Trial!*

By Sarah Z. Garner

Consider this scenario: you are preparing for a bench trial. The judge comes in and before the proof even begins, you can question the judge for a few hours. If you don't like the judge's opinions or experiences, you ask him politely to leave and you can converse with another judge. You don't have to keep him either! As a matter of fact, you get to continue questioning judges until you find a judge you think will pay attention, use common sense,

follow the law, and be fair. That is known as jury selection: choosing your trier of fact.

There are no bad cases, just bad juries. We can agree if the case is unwinnable, you would not be trying it. You can't change the facts of the case. What you can control is the trier of fact: the jury. If the jury comes back with a verdict of not guilty, it is not that they were a "bad jury". The reason is you: you did not educate them, give them things to anticipate, and let them know that it's OK to say Guilty.

In what part of the county do you live? Useful. Are you employed outside the home? Married? Children? Also, useful. However, if you are not also focusing on the law and facts of your case, you are missing the opportunity to educate and indoctrinate your jurors. That leads to the disappointment of hung juries and acquittals. Here are some considerations in selecting a jury for impaired driving cases:

### **1. Reduce juror stress.**

This is done in several ways. Bear in mind that citizens that show up for jury duty have likely never been questioned as a potential juror. In fact, many may have never been in a courthouse. They arrive with the anxiety of being on time; where do I park; where is the courtroom; what will I be asked; will it be embarrassing; and many other issues that we rarely consider. You are comfortable in a courtroom and need to convey the attitude of host. Begin by explaining

*There is information you need but can ask in a fashion to reduce stress and embarrassment and still retrieve information.*

the process. Ask them "softball" questions, such as their name, occupation, etc. Look at them when they respond. Be interested. Have a *conversation*. There is information you need but can ask in a fashion to reduce stress and embarrassment and still retrieve information. For example, don't ask if they have been convicted of a crime. Ask them if they have ever had contact with law enforcement or the court system for any reason. Don't ask if they smoke marijuana or are an alcoholic. Ask them if they have ever been in a situation where drugs were used, or have their family or friends been impacted by alcoholism. Put them in a place where they can convey their experiences and attitudes without feeling judged. If they want to be forthcoming that is great. If they prefer instead to relate what they know as observations, at least you have some information.

## 2. Educate jurors.

You cannot recite what the burden of proof is enough. Jurors must understand it is not beyond a shadow of a doubt or all doubt. Use analogy to demonstrate reasonableness. Is it possible aliens dropped a crashed car in the location the officer found it? Sure: anything is possible. But is it reasonable? Explain the difference between intoxication (which is not the standard) and impairment. Use pattern jury instructions for impaired driving, expert witnesses, circumstantial evidence, and any other potential instructions to question the jurors. Explain the law, and then

### *Use analogy to demonstrate reasonableness.*

ask if they will listen to the instructions as the judge gives them, and then follow the law, even if they did not realize what the law was. This is not “staking out” jurors, since you are not asking whether they would convict. By doing this, they will anticipate what is coming and will focus on the task they have been given. Ask jurors if they have ever heard of things such as horizontal gaze nystagmus. Explain they will hear testimony regarding this. Question them as to whether they will listen to the evidence and be fair to the defendant and the State.

## 3. Indoctrinate jurors.

Get their opinions regarding the use of alcohol and drugs other than alcohol. Find out if they recognize the signs and symptoms of use. Question them as to whether they, family members, or friends have been involved in a crash or impacted by an impaired driver. Jurors tend to give more credibility to fellow jurors and their opinions and experiences than they do prosecutors, and when a fellow juror describes a family member being involved in an impaired driving crash the others will listen. Let them talk, but make sure they are not uncomfortable in doing so. If a juror says they lost a family member to an impaired driver, ask permission from them to dig deeper. These jurors are the best way to prove to others the danger of impaired drivers. Tell the jurors where the crash or stop in your case occurred. Ask them if they routinely travel this route, or their children’s school or their home is nearby. If they say yes, ask them if the fact that the defendant was charged with driving while impaired in that location puts them in a position where they can’t be fair to both sides. It is inappropriate to ask them if the fact *they could have been on the road at the same time* creates a conflict for them, but it is not a problem to imply the danger. Let your jurors teach the other jurors!



A few other ideas: be cautious as to how you handle surprise answers. For example, since law enforcement officers are witnesses in impaired driving cases, the juror's attitudes towards law enforcement are important. Most people have never had contact with law enforcement. Their perception is formed through the media, and often that portrayal is negative. There are ju-

*The best way to be good at jury selection? Watch others.*

*Spend time sitting in a courtroom watching others. It is the best way  
to see what to do as well as what not to do.*

rors that will tell you they don't like cops. These people might not be appropriate jurors for your case, but you can't leave their comments hanging without a response. You are back to the education phase of jury selection. Even knowing you will most likely excuse this juror, point out that they do not know the officer in your case. Without scolding, explain the unfairness of painting an entire profession with one brush, and that everyone should be judged on their own conduct. All jurors, whether their responses are negative or positive from your perspective, can be used to educate the remaining jurors.

If you can call the jurors by their names it will have impact. They want to connect and



personalizing the process aids in that. Once they are comfortable in their surroundings, they want to talk. Converse with them rather than interrogate them. If you see a juror looking uncomfortable with your line of questioning you should abandon and move on, even apologizing if appropriate.

We ask jurors to use their common sense. Prosecutors should do the same. In social settings you can recognize when you are offending someone. Jury selection is no different. Use your common sense and even if you are anxious do not let the jurors know. Your professionalism and courtesy will calm them.

The keys to successful jury selection could fill volumes of books and weeks of training. The best way to be good at jury selection? Watch others. Spend time sitting in a courtroom watching others. It is the best way to see what to do as well as what not to do. Practice in social settings by asking others about themselves instead of talking about yourself. Study people and learn about them. Trials are not won or lost with engaging openings and closings are brilliant witnesses. The only thing that truly matters is within your control: the jury you select. Your ability to calm, educate, indoctrinate and above all converse will also allow you to make wise choices.

## About the Author

Sarah Garner is originally from Knoxville, Tennessee and has lived in Whiteville, NC since 1995. She received her BS and JD from the University of Tennessee, Knoxville, and worked as an Assistant District Attorney General in Knoxville for five years before moving to North Carolina.

Ms. Garner worked as an Assistant District Attorney in the 13th Prosecutorial District (Bladen, Brunswick, and Columbus Counties) for 16 years. Her last year in the 13th District was devoted exclusively to the prosecution of impaired driving cases in a specialized DWI Court. During her time as an Assistant District Attorney, she tried everything from speeding tickets to capital murder, and has participated in over 100 jury trials.

Ms. Garner became Traffic Safety Resource Prosecutor for North Carolina in October, 2010, working with the North Carolina Conference of District Attorneys. She has presented on traffic safety issues at state, national, and international conferences, including Canada, Oregon, Georgia, Arizona, Missouri, Colorado, Nebraska, Nevada, Oklahoma, Texas, Kentucky, Maine, West Virginia, and Arkansas. She annually trains over 1500 law enforcement officers and prosecutors. She has also handled numerous conflict cases across the State. Ms. Garner was the recipient

of the MADD Prosecutor Hero Award in 2008, and the Governor's Highway Safety Program Director's Award in 2013. She can be reached at [Sarah.Z.Garner@nccourts.org](mailto:Sarah.Z.Garner@nccourts.org).

## WEBINAR OPPORTUNITY

---

Readers are welcome to attend the June installment of *Traffic Tuesdays*, the National TSRP Webinar Series, *Jury Selection in a DUI Case: Not Part of a Trial — It Is the Trial!* Ms. Garner will present this webinar on Tuesday, June 9, 2020 at 2:00 pm (eastern time). Not all jurisdictions have latitude in jury selection. But for those that do, jury selection in a DUI case is your only opportunity to educate the panel on the law, forecast the facts, and prepare them to reach the right verdict. This webinar will offer some ideas on how people learn and how to develop your DUI case before the jury is sworn.

There is no charge to attend this webinar, but you must register in advance. Click below to register:

<https://attendee.gotowebinar.com/register/431427877819518219>

After registering you will receive a confirmation email containing instructions on how to join the webinar. In order to ensure that you are able to log on, please register at least 4 hours in advance. Also, please make sure you retain the confirmation email sent to you. Please be careful to enter your email address correctly. You will not be able to join the webinar if you do not receive a confirmation email.

If you will be unable to attend this webinar at the scheduled time but would still like to watch it, please go ahead and register as indicated. Everyone who is registered will receive a link to the recording of the webinar regardless of whether they attended.

If you have any questions or need any assistance registering for the webinar, please feel free to contact Vin Petty at [VinPetty@FloridaTSRP.com](mailto:VinPetty@FloridaTSRP.com).

*This webinar is being conducted on the National TSRP Program webinar account. The account is funded through the NAPC/NHTSA Cooperative Agreement, Project Number DTNH22-15-0049.*