CLOSING ARGUMENT

HOW FAR WILL THE COURT LET YOU GO???

By

Richard F. Wall
and
Viktoria Collins
Hartley, Wall & Norman
Orlando, Florida

I. INTRODUCTION

In closing argument an attorney pretty much can say whatever he or she wishes to say however he or she wishes to say it as long as it is fair comment on evidence actually admitted during trial. This is caveated by a few important things an attorney must know before trial or must develop an appreciation of during trial. First, know opposing counsel. That attorney may allow great latitude through inexperience, a tactical decision, or a host of other reasons. Second, know your trial judge. Different judges view closing argument in different ways. Some will not act unless your opponent objects; some will intervene without an objection. Third, understand how the district court of appeal feels about closing argument. Last, appreciate what may alienate your jury. No one should prepare closing argument with a fine eye to what is ethically and legally permissible and ignore offending the six persons sitting in the jury box.

II. ETHICAL REQUIREMENTS

Closing arguments in Florida are governed by Rule 4-3.4(e) of the Rules Regulating The Florida Bar. This rule states that:

> A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

is described by the Supreme Court as "the comments are so highly prejudicial and of such a collective impact as to gravely impair a fair consideration and determination of the case by the jury." Although the Court does not provide any examples of such harm, the Court does warn the lower courts to avoid the temptation of labeling all ethical violations of Rule 4-3.4 (e) as harmful. To meet the threshold of "harmful" the court must find that the improper but unobjected to closing statement puts into question the validity of the verdict itself.

The third prong which must be determined is that the "argument must be incurable." The Court explains that an argument is incurable if once it is made "neither retraction nor rebuke may entirely destroy its sinister influence." The complaining party would have to show that even if he or she had objected to the improper argument and even if the court had sustained the objection and instructed the jury to disregard the improper remark, the damage would have already occurred.

The last prong that must be met is that the "argument be such that it so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial." The Court explains that unobjected to closing arguments appealing to racial, ethnic or religious prejudices are the type of argument that falls within the fourth category of improper but unobjected to closing arguments.

It is only after all these prongs have been met that the trial court can grant a new trial based on unobjected to closing arguments. It is only after these prongs have been satisfied that such conduct amounts to fundamental error and a new trial is warranted despite opposing counsel's failure to make a timely objection. The trial court must also specifically identify the improper but unobjected to arguments. Should the case be appealed, the appellate court must apply the "abuse of discretion standard" and apply the "reasonableness test" to determine whether the lower court abused its discretion.

IV. EXAMPLES OF IMPROPER ARGUMENT

Having analyzed the Murphy decision, the question to be asked and answered is whether lawyers now know what is permissible and what isn't when making their final argument. Similarly, when must lawyers object in order to preserve their ability to request a new trial and when will their silence still afford them a new trial. Unfortunately, Murphy still does not provide definitive answers to these questions. The four prong test although useful does not provide sufficient illustrations as to what constitutes an improper closing argument. A useful approach in helping lawyers know how far to go in making closing arguments is to look at what their colleagues have done and said in the past. Through this folly and fortune lawyers can attempt to discern how far the courts are willing to let them go when making their own closing arguments.

A. GOLDEN RULE

In an attempt to get the jury's attention lawyers seem prone to insist that jurors put themselves into a similar situation as that of the witness, the victim or even the lawyer. Asking the jurors to do this is considered a violation of the "Golden Rule". The "Golden Rule" prohibits counsel from asking jurors questions such as "how much would you like to receive, or like to pay, if you were the plaintiff or the defendant". Similarly the "Golden Rule" prohibits counsel from asking the jury "if the shoe was on the other foot, would you wear it?" City of Belle Glade v. Means, 374 So. 2d 1110 (Fla. 4th DCA 1979). These arguments are highly improper and violate the "Golden Rule". The reasoning behind this rule is that such an appeal tends to "inflame the jury by inviting them to become personally involved in the question of damages." Bew v. Williams, 373 So. Fla. 2d 446 (Fla. 2d DCA 1979) (citing Stewart v. Cook, 218 So. 2d 491 [Fla. 4th DCA 1969]). The fear is that if the jurors become personally involved, there is the likelihood that their objectivity will be compromised. Instead of basing their decision on the evidence before them they may insert their own personal motivation into their verdict. One of the biggest traps seems to be that lawyers when

making their closing argument often speak using the word "you". For instance, in Bew the attorney was reviewing the day's events leading up to an accident and began his argument "you drove the car along Main Street." Objection was made and the trial court granted the defendants a new trial. However the district court reversed, holding that the use of "you" was in reference to the plaintiff and not the jury. Similarly, in Shaffer v. Ward, 510 So. 2d 602 (Fla. 5th DCA 1987), the district court reversed the trial court and allowed counsel to ask the jury to use their everyday experience in deciding the case. In Shaffer, counsel was permitted to say "you all drive ... you know how far you can see . . . you've all had close calls . . . ." Although the district court mentions that this closing argument was not objected to by opposing counsel, that court and the Bew court hold that to trigger the inflammatory nature of the "Golden Rule" there must be an appeal for monetary compensation. The determining factor in these cases is whether the jury is being asked to hypothetically decide how much they would wish to receive. If the jury is not put at such risk these district courts do not consider such closing arguments improper.

B. COMMUNITY CONSCIENCE

Another area often approached by counsel when making closing argument is to appeal to the "community conscience". This argument is consistently rejected as its sole purpose is nothing more than an attempt to provoke the "impassioned and prejudicial pleas intended to invoke a sense of community through common duty and expectation." Kiwanis Club of Little Havana, Inc. v. Kalafe, 723 So. 2d 838 (Fla. 3rd DCA 1999). In this case counsel compared the manner in which plaintiff was excluded from performing to those practiced in Cuba. Plaintiff's counsel warned that we should be careful so as not to bring Cuban style politics with its problems to these shores. The district court reversed and remanded for a new trial and held that counsel's closing argument came "dangerously close to constituting reversable error" and therefore did not require opposing counsel's objection.

In Airport Rent-A-Car, Inc. v. Lewis, 701 So. 2d 893 (Fla. 4th DCA 1997), the district court held that it was reversible error for counsel to tell the jury that he wanted them to "tell everyone about this case and what you get in Broward County if a taxi runs a red light and injures someone." This argument was aimed at instigating the "community conscience" and was considered especially egregious when counsel made reference to the fact that the taxi driver was Jamaican. Most courts have little tolerance for such arguments and in both Kalafe and Lewis such appeals were considered severe enough to constitute fundamental error and an objection was not needed in order to demand a new trial.

Illustrating the potential conflicts within the districts is Blue Grass Shows, Inc. v. Collins, 614 So. 2d 626 (Fla. 1st DCA 1993). In this case counsel in his closing argument argued "you folks . . . become the conscience of the community . . . you decide the protection you want for citizens of your town . . . you are the conscience of the community". The district court recognized the impropriety of the argument but made specific mention that due to opposing counsel's silence the court was to assume that such silence was a tactical decision. As such, the court will not correct opposing counsel's mistake on appeal. The court recognized other cases where reversals were granted based on improper "community conscience" arguments. However, the court differentiated this case from others due to opposing counsel's failure to object to the improper remarks and, unlike the other cases, counsel did not conclude with a request to punish the defendants.

The above referenced cases involved direct appeals to the community conscience. There are also cases which are more subtle in their "community conscience" appeal but nonetheless are still intended to inflame the community's social and political interests. In Stokes v. Wet 'n Wild, Inc., 523 So. 2d 181 (Fla. 5th DCA 1988), defense counsel concluded that the present case was the reason why "our courtrooms are so crowded". This was objected to by opposing counsel. The district court

reversed and granted plaintiff a new trial stating that defense counsel's argument was highly improper and "may have been grounds for a new trial even absent the objection". Interestingly, the court in Blue Grass Shows, Inc. acknowledged this language but held that this was merely dictum as the opposing counsel in Stokes did in fact object.

Another indirect "community conscience" and "civic responsibility" appeal held improper is seen in Superior Industries International, Inc. v. Faulk, 695 So. 2d 376 (Fla. 5th DCA 1997). Counsel in his closing argument told the jurors "you have taken on the most important civic responsibility, the most powerful position within our government that there is." The district court held that this, including other improper statements, amounted to reversible error and the "absence of repeated objections was not fatal to the defendant's position."

Community conscience arguments are highly improper and courts are very sensitive to any attempt intended to invoke a prejudicial and impassioned response from the jury. Such appeals to prejudice "gravely impair the calm and dispassionate consideration of the evidence and the merits by the jury" and will not be condoned in any courtroom. Kiwanis Club of Little Havana, Inc., 723 So. 2d at 841.

C. JURY COMPLIMENTS

Another strategy that lawyers employ in an attempt to coax a favorable verdict from the jury is to compliment them on being such a fine and respectable jury. Such remarks are considered unprofessional and should not be encouraged, however very rarely does it warrant a new trial. In Kelly v. Mutnich, 481 So. 2d 999 (Fla. 4th DCA 1986), counsel in his closing argument expressed that "he picked the jury and liked the jury". The court held that although such a comment is inaccurate and improper and should be met with rebuke it did not possess the elements needed to stir the "passion, prejudice or sympathy" of the jury. As such there was not a miscarriage of justice.

Although the comment was inappropriate it was not sufficiently improper to warrant a new trial.

D. ATTORNEY CREDIBILITY

Just as it is improper for counsel to make reference to the jury's credibility, it is equally improper for counsel to make reference to his or her own. In Seguin v. Hauser Motor Company, 350 So. 2d 1089 (Fla. 4th DCA 1977), the court concluded that the attorney committed reversible error by expressing his personal opinion as to his and his witness' credibility. The attorney made reference to his status as an officer of the court and explained to the jury that if he lied to them then his license to practice law would be taken away. He emphasized that the practice of law and justice meant so much to him that he would never risk losing it. He then proceeded to tell the jury what his witness had told him and he knew for certain that the witness' story was credible. The court found that the closing argument was highly prejudicial and reversed and remanded the case for a new trial.

In a more recent opinion, Davis v. South Florida Water Management District, 715 So. 2d 996 (Fla. 4th DCA 1998), the district court held that although highlighting one's status as an officer of the court is offensive it did not constitute fundamental error. In Davis, the attorney announced that he was an officer of the court and was "proud to represent South Florida Water Management District." The court recognized the inherent risks involved when lawyers bolster their own credibility. However, the court was not of the opinion that such language as presented in this case constituted reversible error. The court noted that it arrived at its decision in light of opposing counsel's failure to object and without such objection the court did not find such language to constitute fundamental error.

Considering both cases in light of their decisions one is assured that it is improper for an attorney to bolster his or her own credibility. However the result of such impropriety is questionable. It would appear that by itself such language if unobjected to does not constitute

reversible error. However, if it is compounded by improper personal opinions in regards to what the witness allegedly told the attorney then the court may consider this highly prejudicial and sufficient to qualify as reversible error.

It is equally improper for counsel to bolster his or her own family's credibility. Comments making reference to what his or her family would or would not do in a situation and then comparing their response to that of a witness or a witness' family is highly improper. In Muhammed v. Toys "R" Us, Inc., 668 So. 2d 254 (Fla. 1st DCA 1998), the court held that counsel's anecdotal commentary of his family's shopping experience and their dramatic response to a situation compared with the plaintiff's lack of response to a similar situation was highly improper. The court held that such an illustration was impermissible and "irrelevant familial rhetoric must not be condoned". Although such commentaries are prejudicial and impermissible the court held that these comments alone did not warrant reversal. However, the comments compounded with other improprieties such as the interjection of the attorney's personal beliefs and opinions were enough to warrant a new trial.

The above cases provide illustrations of where attacking a person's credibility by way of bolstering one's own or one's family is considered improper. Although such impropriety by itself does not usually constitute reversible error attorneys must be extremely careful as courts have been willing to find reversible error if such improper conduct is compounded with other forms of impropriety.

E. APPEAL TO JURY SYMPATHY AND PREJUDICE

Another tactic employed by lawyers when making their closing argument is the blatant appeal for sympathy from the jury. Lawyers often portray their client as the victim whether they be a victim of society, of another, or of themselves. When lawyers attempt to economize on the jury's sympathy they run the risk of arguing facts not supported by the evidence and also risk appealing

to the prejudices of the jury.

An area where lawyers find it advantageous to tweak the sympathy and prejudices of the jury is by comparing the financial status of the parties. Lawyers know that jurors are far more sympathetic to the financially challenged party and lawyers make every attempt to refer to the inequalities that exist. Such remarks can be so inflammatory and prejudicial that the general rule in Florida is that references to party's wealth or poverty is absolutely prohibited. The courts worry that if such comparisons were permitted the jury would be more likely to apply the deep pocket theory of liability. Sossa v. Newman, 647 So. 2d 1018 (Fla. 4th DCA 1994). Although reference to a party's financial ability or inability generally is not permitted and could constitute reversible error, it is permitted in some very limited circumstances. In Sossa, the court allowed the attorney to make references to plaintiff's financial inability as the defendants had opened the door by referring to the plaintiff's failure to return for treatment and putting into question the validity of her injury. Such failure to seek treatment was directly related to her inability to afford treatment and the court permitted her explanation. The court warned that only in such very limited situations would reference to one's economic status be permitted.

It is also improper for counsel to suggest that any award the jury might render would ultimately come out of their pockets as taxpayers. In Davis, 715 So. 2d 996 (Fla. 4th DCA 1998), the court held that it was "patently improper" for counsel to suggest to the jury that any award it may render would in effect be coming out of their pockets as taxpayers. The court sustained opposing counsel's objection and directed counsel to correct the impression he may have given. The court held that counsel's comment "they are asking you to pay" was inappropriate and it would have been far better for counsel to say "they are asking you [the jurors] to award". However, in light of counsel's clarification the court held that it was not so prejudicial as to warrant a new trial.

There are other blatant types of closing arguments which are used for the sole purpose of eliciting sympathy and provoking prejudice. In Fowler v. Goldring, 582 So. 2d 802 (Fla. 1st DCA 1991), the court held that defense attorney's closing argument about the "new American dream" was a "blatant appeal to sympathy and prejudice". The court held that this remark was not based on any facts entered into evidence and was of such a prejudicial nature that it reversed in favor of the plaintiff and granted a new trial on the damages.

Another method used to invoke sympathy and to encourage prejudice among the jury is to use colorful or sinister terminology to describe past events. In Superior Industries International, Inc. v. Faulk, 695 So. 2d 376 (Fla. 5th DCA 1997), the court held that references to the decedent's life being "snuffed out" would prejudicially insinuate infliction of a deliberate injury and were impermissible. Counsel also evoked a "parade of imaginary horribles" and alternative death scenarios involving other potential victims. Other improper comments were also made by counsel and the court held that the degree of prejudicial conduct was so extensive that a new trial was necessary. The court also noted that the absence of repeated objections to these improper arguments was not fatal to opposing counsel's request for a new trial.

Language which has no other purpose but to inflame the jurors and attempt to trigger and economize on their sympathy or prejudice has no place in a proper closing argument. Lawyers must not stray from the facts entered into evidence. As officers of the court lawyers have a duty to ensure to the best of their ability that the jury arrives at its verdict based on the evidence before it. A verdict is not just if it is based on evidence hors de record and if it is cloaked by sympathy or prejudice. Although some courts may differ in imposing various penalties for such inappropriate comments, one fact remains: arguments which appeal to the jury's sympathy or prejudice are always considered improper.

F. US VERSUS THEM

Another area where lawyers routinely tap into the jury's likely prejudices is the typical "us versus them" argument. The argument usually pits the resident jurors against some out of state conglomerate and begs the jury to "send a message". Needless to say these types of closing arguments are extremely prejudicial and are clearly improper. In S.H. Investment and Development Corp. v. Kincaid, 495 So. 2d 768 (Fla. 5th DCA 1986), counsel, despite opposing counsel's numerous objections, urged the jurors by way of their verdict to "speak so loud that it will be heard from here . . . to heart of Chase Manhattan Bank and to those corporations in New York City . . . and all corporations that have some collateral dealings here. This is your opportunity." The court reversed and remanded the case for a new trial and reasoned that "us against them" pleas serve no other purpose than to "pit the community against a non-resident corporation".

A similar "us versus them" argument was made in Superior Industries International, Inc., 695 So. 2d 376 (Fla. 5th DCA 1997). Counsel's repeated reference to the fact that Superior Industries was a California corporation was made for the sole purpose of promoting the jury's bias against the non-resident company. The court held that such comments were highly inappropriate and this impropriety compounded with other improper commentary constituted sufficient error to warrant a new trial. Arguments that promote the "us versus them" mentality have no place in a courtroom. Such commentary is inflammatory and threaten the effective and partial administration of justice. Courts condemn such tactics and have granted new trials based on such impropriety.

G. SETTLEMENT

Although "empty chair" arguments are permissible, arguments disclosing settlements or court ordered dismissals are not. The courts routinely find such arguments highly prejudicial and improper. See, Ed Ricke and Sons, Inc. v. Green, 468 So. 2d 908 (Fla. 1985); Henry v. Beacon

Ambulance Service, Inc., 424 So. 2d 914 (Fla. 4th DCA 1983). Settlement disclosures do not appear to rise to the level of fundamental error but instead require objection and a motion for mistrial.

H. EVIDENTIARY SUPPORT

The final area to be discussed is the absolute need for lawyers when making their closing argument to constrain their arguments to matters sustained by the evidence. In Borden, Inc. v. Young, 479 So. 2d 850 (Fla. 3rd DCA 1985), counsel in his closing argument asserted that he had "personal knowledge of nefarious activities engaged in by the defendant". There was absolutely no evidence to support such as assertion. The court held that such a statement was so prejudicial that it constituted fundamental error, and no objection was needed.

A similar decision was upheld in Owens Corning Fiberglass Corporation v. Morse, 653 So. 2d 409 (Fla. 3rd DCA 1995). Counsel made inflammatory remarks during closing argument accusing opposing counsel of being a "master of trickery" and "hiding the ball". Counsel argued that the witness had to be "proded" into giving answers and that such answers were orchestrated by opposing counsel. The court reasoned that such comments implied that opposing counsel was perpetrating a fraud upon the court and the jury. The court held that counsel's comments were extremely derogatory in nature as they specifically attacked the integrity of opposing counsel. The court held that counsel's argument amounted to fundamental error and deprived plaintiffs of a fair trial. Counsel's conduct was held to be of such a prejudicial nature that opposing counsel's failure to object during closing argument did not deprive plaintiffs of their right for a new trial.

Another example is Venning v. Roe, 616 So. 2d 604 (Fla. 2nd DCA 1993). In this case counsel in his closing argument attacked the integrity of opposing counsel's medical expert. Counsel argued that the expert was "nothing more than an unqualified doctor who prostitutes himself . . . for the benefit of lawyers." Counsel also referred to the expert's testimony as "magic

testimony". Counsel compounded his inappropriate remarks by stating that the expert and opposing counsel had a "special relationship" and that opposing counsel's work represented a "work of fiction". Attorneys must confine their arguments to reflect the evidence submitted before the court. When lawyers stray from this fundamental premise they run the very real risk of jeopardizing their credibility with the court and jeopardizing the outcome of their case. In the instant case the court held that counsel's improper comments "essentially accused the medical expert of perjury and accused opposing counsel of committing fraud upon the court." Although no objection appears to have been made, the court found these comments highly prejudicial and inflammatory and a new trial was ordered.

The cases above illustrate situations were counsel's comments were so egregious and prejudicial that to preserve justice a new trial had to be granted. However, not every improper remark that questions an attorney's integrity is highly prejudicial. In Hyster Company v. Stephens, 560 So. 2d 1334 (Fla. 1st DCA 1990), counsel characterized opposing counsel's trial preparation phase as a "cover-up". There was no objection to this and opposing counsel responded to the accusation of "cover-up" and questioned whether the other side was the true party involved in a "cover-up". The court clarified that improprieties from both sides do not eliminate the impropriety, but added that in this particular case these references to a "cover-up" were minor and did not unduly prejudice the jury.

The majority of courts do not tolerate unsubstantiated comments which question either opposing counsel's integrity or that of their witnesses. Comments such as "opposing counsel is just trying to mislead and confuse you" and accusing opposing counsel of conspiring with its expert are extremely prejudicial. Courts in the past have not been hesitant to consider such impropriety as

amounting to fundamental error. Johnnides v. Amoco Oil Company, Inc., 778 So. 2d 443 (Fla. 3rd DCA 2001).

V. CONCLUSION

The above illustrations are meant to provide a tangible grasp on what courts consider appropriate and inappropriate closing arguments. These specific instances are by no means an attempt to provide an exclusive list of such arguments. Instead these illustrations highlight the more frequently encountered trouble spots faced by attorneys when making their closing arguments. So how low can you go when making your closing argument? Unfortunately, this question cannot be answered in a definitive manner.

A closing argument should not appeal to the passions and sympathies of a jury. Closing arguments which ask the jurors to put themselves into the shoes of the victim are improper and this impropriety is compounded when an appeal for monetary compensation is made. Similarly, closing arguments should never appeal to the community conscience. The courts have routinely held that "us versus them" arguments have no place in a closing argument. It is also highly inappropriate for counsel to interject personally held feelings, opinions and beliefs when making a closing argument. Ultimately, closing arguments must always be based on the evidence before the court. The courts have no patience for arguments which are not substantiated by the evidence.

Closing argument is a very powerful and persuasive element of a trial. A good closing requires work and much thought. All lawyers have seen cases won by an effective closing. Unfortunately, many lawyers do not spend enough time when preparing for closing argument. Instead the temptation is to take illusionary shortcuts. These shortcuts often produce arguments which appeal to the jury's sympathy or an attempt to stir the jury's prejudices. These closing arguments are not in the best interest of the client and certainly not in the best interest of the legal

system. They violate a lawyer's ethical obligations.

Closing argument should be a summation of the evidence before the court. Closing argument helps the jury tie up loose ends and gives them a clearer picture of the entire case. Each attorney must zealously represent his or her client's position. However this zeal must not be tainted by impropriety.

As a result of the doctrine of unintended consequences it may well be that Murphy proves to encourage improper argument. The Supreme Court's four prong test for fundamental error is so stringent that there is a substantial risk that the existing case law examples are now meaningless. This will put the burden of timely intervention even more on counsel. Juries historically have not liked attorneys continuously objecting. The dilemma between tactical silence or routine objection will likely heighten. Perhaps new lows can be reached. That would be a disgrace.

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