of something or if it's needed on cross-examination to rebut or rehabilitate the witness. At least you've got all the information right in front on you.

Step 3: PREPPING FOR CROSS

The same practice carries over for cross-examination. If you've really done your homework while preparing the case, you'll know where the other side is going with their case and you've hopefully asked all the appropriate questions regarding those contentions or opinions.

But with cross-examination, and especially impeachment, this is where some powerful trial work can occur. Not only do you have your questions prepared, with cites to their previous answers and any corresponding exhibits noted, along with the four copies of the exhibits as above, you also have each answer in the deposition transcript tabbed. The faster and more accurately you can flip to the page to impeach, the less time you waste and the more emphatic the impeachment is. You look like the incredibly prepared lawyer who was just waiting for that witness to misspeak.

I think you'll find that after a while, when you just reach for the tabbed transcript, the witness' story may change because they know what's coming! But you can't get that reaction if you're not prepared. So take the time to make sure you're ready at trial. Everyone involved will appreciate it. ⚖

CLOSING ARGUMENTS – NOT JUST A "FREE-FOR-ALL"

By: Christopher G. Floreale, *Goldberg Segalla LLP*, Buffalo, NY

Most if not all courts provide a jury charge which instructs the jury that "what is said by the [attorneys] in summation, like what is said by them in their opening statements, or in the making of objections or motions during trial, is not evidence." NYS PJI 1:5. Does that mean that attorneys are free to say whatever they want in their closing arguments? Clearly, the answer to the question is no. The following is a guideline of issues you should be cognizant of when drafting your closing statement.

IN GENERAL

The requirement that trial counsel confine their argument strictly to the evidence and to the arguments of opposing counsel does not mean that jury arguments must be sterile or nondescript; instead, counsel has great latitude in discussing the facts and issues, and may discuss the environments or circumstances of the case, the reasonableness or unreasonableness of the evidence, and the probative effect, or lack thereof, of the evidence. In jury argument the facts of the case may be related to history, fiction, personal experience, anecdotes, Bible stories, or jokes. *Living Centers of Texas, Inc. v. Penalver, 217 S.W.3d 44, Tex.App.San.Antonio, 2006.* Great latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice, or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice, or mislead the jury. *Green v. Charleston Area Medical Center, Inc., 600 S.E.2d 340, W.Va., 2004.* As a general matter, counsel is allowed broad latitude in summation and counsel may draw conclusions even if the inferences that the jury is asked to make are improbable, perhaps illogical, erroneous or even absurd. *Bender v. Adelson, 901 A.2d 907, N.J., 2006.* The right of counsel to discuss the merits of a case in argument to the jury, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn there from. An adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury. *Cassim v. Allstate Ins. Co., 94 P.3d 513, Cal., 2004*

ARGUMENTS ABOUT FACTS AND EVIDENCE

Argument must generally be confined to facts in the record.

Though the law indulges a liberal attitude toward argument, particularly where the comment complained of responds to prior argument of opposing counsel, the court will not condone knowingly false statements to a jury in closing argument. *Hoskins v. Business Men's Assurance, 116 S.W.3d 557, Mo.App.W.Dist., 2003.* The law forbids introduction into case, by way of argument, facts which are not in the record and are calculated to prejudice party and render trial unfair. *McConnell v. Akins, 586 S.E.2d 688*

Ga.App.,2003

Counsel may also argue facts of common knowledge.

It is not error to refer during closing argument to matters within common knowledge. *Irwin County v. Owens, 568 S.E.2d 578, Ga.App., 2002*

Any evidence admitted without objection may be argued regardless of whether it was otherwise admissible.

See *Schmidt v. Shearer, 995 P.2d 381 (Kan. App.,1999),* wherein defense counsel's comments referring to evidence of widow's settlement with other defendants did not constitute misconduct where the widow's attorney failed to object to trial testimony regarding the settlement.

Counsel may draw inferences from the facts but may not ask the jury to speculate.

See *Hoffman v. Oakley, 647 S.E.2d 117, N.C.App.,2007*, wherein a van owners' attorney could argue the issue of speed in his closing argument in a negligence action arising out of collision between his client's van and an automobile, in light of the accident reconstruction expert's testimony about skid tests he performed at the accident scene and stopping distances at various speeds, which would allow jury to infer the automobile driver was exceeding the speed limit.

Drawing adverse inference from missing witnesses.

An instruction and comment by counsel on an absent witness are proper only when, without reasonable explanation, a party fails to call a person of whom the party is aware, can bring to trial, and who is friendly to, or at least not hostilely disposed toward the party, and who can be expected to give testimony of distinct importance to the case. *Hoffman v. Houghton Chemical Corp., 751 N.E.2d 848, Mass.,2001*

It is reversible error to allow reference in closing argument to a party's failure to produce a witness equally available to both parties. The question of whether there is "equal availability" of a witness to both parties at trial, as would disallow a closing argument reference to the failure to produce such a witness, depends on several factors: (1) one party's superior means of knowledge of the existence and identity of the witness; (2) the nature of the testimony that the witness would be expected to give in the light of his previous statements or declarations, if any, about the facts of the case; and (3) the relationship borne by the witness to a particular party as the same would reasonably be expected to affect his personal interest in the outcome of the litigation and make it natural that he would be expected to testify in favor of the one party against the other. *Campise v. Borcherding, 224 S.W.3d 91, Mo.App.E.Dist.,2007*

Arguing the credibility of expert witnesses.

A closing argument may focus on an expert's response to permissible areas of inquiry, including the scope of employment in the pending case and compensation, the percentage of income derived from litigation-related matters, and the percentage of work performed for plaintiffs and defendants. A party is entitled to argue to the jury that a witness might be more likely to testify favorably on behalf of the party because of the witness's financial incentive to continue the financially advantageous relationship. *Rosario-Paredes v. J.C. Wrecker Service, 975 So.2d 1205, Fla.App.5.Dist.,2008*

ARGUMENTS ABOUT DAMAGES

In general.

During summation in personal injury action, plaintiff's counsel may ask for specific amount for pain and suffering in form of lump-sum figure as stated in the ad damnum clause of complaint, or figure based on evidence as matter of fair comment. *Miller v. Owen, 184 Misc.2d 570, 709 N.Y.S.2d 378 (NY Co. 2000)*

Golden rule arguments.

Urging the jurors to place themselves in the position of one of the parties to the litigation, or to grant a party the recovery they would wish themselves if they were in the same position constitutes a "golden rule argument," which is improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. *A.C. ex rel. Cooper v. Bellingham School Dist., 105 P.3d 400, Wash.App.Div.1,2004*

ARGUMENTS CONCERNING THE LAW

Arguments must be based on the jury instructions.

Where counsel believes that instructions are inadequate, the proper course is to request additional instruction by the court and not for counsel to undertake such additional instruction by way of argument to the jury. *Lawson v. National Steel Erectors Corp., 8 P.3d 171, Okla.Civ.App.Div.4,2000*

Counsel must discuss the law accurately.

While as a general rule, counsel is prohibited from instructing the jury on the law, the rule not only does not prohibit counsel from discussing the law as set forth in the court's instructions, but encourages it, as long as the discussion states the law fairly and accurately. *Rice v.*

Bol, 116 S.W.3d 599, Mo.App.W.Dist.,2003

It is improper to criticize the law, argue policy, or ask a jury to nullify a law in the interests of justice.

See Boruch v. Morawiec, 51 ad3d 429, 857 N.Y.S.2d 103 (1st Dept 2008), wherein the Court held it was improper for defense counsel to comment, during summation, that Industrial Code section governing guarding of power-driven saws was a "stupid law."

See also Liggett Group Inc. v. Engle, 853 So.2d 434, Fla.App.3.Dist.,2003, holding that arguments for nullification of the law have absolutely no place in a trial and violate state and federal due process by exposing defendants to liability and punishment based upon lawful conduct.

It is generally improper to refer to rules of procedure, legal maneuvering during litigation, or pretrial decisions of the court.

See Casas v. Paradez, 2008 WL 2517135, Tex.App. San.Antonio,2008, holding that the implication by plaintiff's counsel that plaintiff's relative was unable to testify because the defendant's attorney had invoked a rule allowing him to keep the family members out of the courtroom was improper.

See also Federated Mut. Ins. Co. v. Anderson, 991 P.2d 915, Mont.,1999, holding that comments upon the trial court's exclusionary rulings are improper in closing arguments.

Comments on role of the jury.

An appeal to the jury to act as the community's conscience is not necessarily improper in a closing argument. That is their role. *Freeman v. Blue Ridge Paper Products, Inc., 229 S.W.3d 694, Tenn.App.,2007*

Comment on verdict form.

As long as closing arguments are based on the evidence, attorneys may suggest the correct way to fill out the verdict form. *Clark v. Bres, 217 S.W.3d 501, Tex. App.Houston.14.Dist.,2006*

EMOTIONS

Being emotional is allowed.

See Watkins v. Cleveland Clinic Found., 719 N.E.2d 1052, Ohio.App.8.Dist.Cuyahoga.Co.,1998, holding that a medical malpractice plaintiffs' rebuttal closing argument, stating, "If you are inflamed, it's because the facts inflame you. It inflamed me. But I'm not here asking you to punish these people," was a fair comment on the evidence; to prohibit jurors, and counsel, from having strong feelings in the case was asking the impossible, considering the uncomplicated nature of the medical procedure that led up to the patient's injury, and the tragically severe injuries that followed, leaving the patient in a persistent vegetative state.

Appealing to sympathy is generally improper if not based on the evidence at trial.

See Tentoni v. Slayden, 968 So.2d 492, Miss.App., 2006, holding that statements made by defendant's attorney during closing argument of personal injury lawsuit, that 1) the lawsuit had been going for six years and that the defendant driver had been carrying this burden along with the uncertainty, insecurity and stress that went along with the case, 3) had survived two heart attacks and was taking heart medicine, and 4) had been the object of plaintiff's fixation and her obsession for six years, were neither relevant nor based on the evidence, and, on their face, appeared to have been intended to ignite the jury's passions in favor of motorist.

See also Fehrenbach v. O'Malley, 841 N.E.2d 350, Ohio.App.1.Dist.Hamilton.Co.,2005, holding that it was improper for defense counsel to appeal to sympathy for pediatrician, e.g., by asking for a verdict that would allow pediatrician to "continue to practice" and implying he would be forced out of practice if the jury returned a large verdict.

Appeals to prejudice and other negative emotions are improper.

When the purpose of a reference to race, nationality, or religion by trial counsel is to inflame the passions of the jury, the reference is improper and prejudicial. *Tierco Maryland, Inc. v. Williams, 849 A.2d 504, Md.,2004*

See also McArdle v. Hurley, 51 AD3d 741, 858 N.Y.S.2d 690 (2nd Dept. 2008), holding that the inflammatory conduct of defense counsel in the personal injury action of a pedestrian who was struck by car while in crosswalk, including defense counsel's comments on the disability retirement of plaintiff's husband as evidence that her entire family was seeking to "max out in the civil justice system," so contaminated proceedings as to deprive pedestrian of fair trial, warranting new trial on issue of damages.

See also Liggett Group Inc. v. Engle, 853 So.2d 434, Fla.App.3.Dist.,2003, holding that arguments of plaintiffs' counsel in a cigarette smokers' class action lawsuit against tobacco companies seeking damages for injuries allegedly caused by smoking, which inflamed

the predominantly African-American jury panel with racial pandering and pleas for nullification of the law, were improper. Plaintiffs' counsel juxtaposed companies' conduct with genocide and slavery and counsel repeatedly urged the jury to emulate civil rights heroes by fighting "unjust laws" protecting the right to sell cigarettes.

Comments on a party's wealth or poverty are generally improper.

See Werneck v. Worrall, 918 So.2d 383, Fla. App.5.Dist.,2006, wherein the court held that references during argument to sales generated by the defendant's furniture store and to the number of truck trailers owned by the furniture delivery service were improper comments on defendant's wealth.

See also Olson v. Richard, 89 P.3d 31, Nev.,2004, holding that the remarks of counsel for the defendants informing the jury that his clients were not wealthy people, were improper, in plaintiff homeowners' construction defect action.

Contrast the above with *Target Stores v. Detje, 833 So.2d 844, Fla.App.4.Dist.,2002*, holding that references by plaintiff's attorney in slip and fall action against the store that the store was a "big corporation" was not improper as, taken in context, the comments were not an invitation to decide the case based upon the financial status of parties.

Comments about vengeance and sending messages are generally improper unless punitive damages are being claimed.

See Ocwen Financial Corp. v. Kidder, 950 So.2d 480, Fla.App.4.Dist.,2007, wherein closing argument made by two former employees in their action against employer alleging sexual harassment and other claims, in which they urged the jury to send a message to employer, was not improper, where claims for punitive damages were submitted to the jury.

Contrast the above with the case of *Nishihama v. City and County of San Francisco, 112 Cal.Rptr.2d 861, Cal. App.1.Dist., 2001,* which found that any suggestion in counsel's argument that the jury should send a message by inflating its award of damages would be improper where punitive damages may not be awarded.

Suggesting that verdict will have a personal impact on the jurors is improper.

See Schoon v. Looby, 670 N.W.2d 885, S.D., 2003, herein a doctor's counsel's final argument statement in a malpractice trial that the hospital was a nonprofit corporation owned "by all of us" was found to be a misstatement of fact in that the hospital was owned by a health care entity and was also found to be an attempt to persuade by improper means in that it could only be interpreted as an attempt to convince jurors that if hospital had to pay, jurors as "owners" would in some way have to pay.

See also Thibodeau v. Slaney, 755 A.2d 1051, Me.,2000, wherein an plaintiff's closing argument that if jury did not award plaintiff damages, then the burden for payment of his medical expenses would fall upon the public and the taxpayers was found to be improper.

PERSONALIZATION

Prohibition against attorneys injecting their own personal experiences, knowledge and opinions.

See Lingle v. Dion, 776 So.2d 1073, Fla. App.4.Dist.,2001, wherein it was found that an attorney's expression of his personal opinion as to the credibility of a witness, or his personal knowledge of facts, is entirely improper. The court stated that while an attorney is given broad latitude in closing argument, his remarks must be confined to the evidence, the issues and inferences that can be drawn from the evidence.

Personal attacks on the opposing party and counsel are improper.

See SDG Dadeland Associates, Inc. v. Anthony, 979 So.2d 997, Fla.App.3.Dist.,2008, holding that the argument of plaintiff's counsel in slip-and-fall case that implied that defense counsel was hiding evidence was egregious and prejudicial to defendant shopping mall, given absence of any evidence showing that shopping mall or defense counsel hid evidence or acted improperly.

See also Roetenberger v. Christ Hosp., 839 N.E.2d 441, Ohio. App. 1. Dist. Hamilton. Co.,2005, holding that remarks during closing argument by counsel for physician in medical malpractice and wrongful death action, attacking the husband who had brought the action after his wife had died, and also attacking husband's counsel and his witnesses, were inexcusable, unprincipled, and clearly outside scope of closing argument. The court found that the remarks were clearly designed to arouse the jury's passion and prejudice and that defense counsel made various assertions and drew inferences that were not supported by the evidence. Defense counsel painted the husband, his attorney and plaintiff's witnesses as greedy, empty-hearted people without souls who were manipulating the lawsuit and "branding" a good doctor all for sake of money.

See also *Johnnides v. Amoco Oil Co., Inc., 778 So.2d 443, Fla.App.3.Dist.,2001*, wherein it was found that a gas station owner's counsel's closing argument, boldly and unashamedly accusing counsel for the neighboring property owner of conspiring with the neighboring owner's expert to commit a fraud on the jury warranted reversal of judgment for gas station owner in the neighboring owner's action for ground contamination and remand for new trial.

See also *Schoon v. Looby, 670 N.W.2d 885, S.D.,2003*, in which the court held that a doctor's counsel's accusations in a trial for malpractice and intentional infliction of emotional distress that the plaintiff's lawsuit was nothing more than playing the lottery was only meant to inflame jury and were beyond bounds of proper final argument.

USE OF RHETORIC

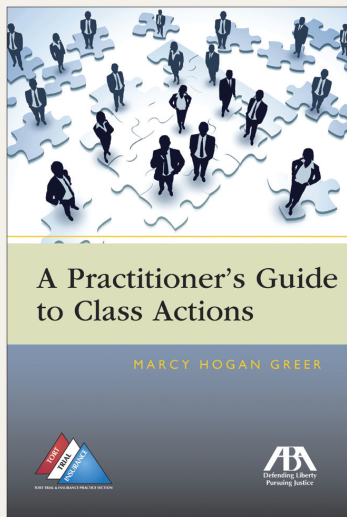
Epithets and colorful characterizations can be made.

See *People v. Parson, 79 Cal.Rptr.3d 269, Cal.,2008*, which found that although prosecutorial arguments may not denigrate opposing counsel's integrity, harsh and colorful attacks on the credibility of opposing witnesses are permissible.

See also *Burrows v. Union Pacific R. Co., 218 S.W.3d 527, Mo.App.E.Dist.,2007*, in which the court denied the defendant railroad's motion for a mistrial based on the argument of the employee's counsel that the employer and railroad were "more concerned about their profits than they were about safety," was not an abuse of discretion. It found that the argument was within counsel's latitude and discretion to argue.

See also *Becht v. Palac, 740 N.E.2d 1131, Ill. App.1.Dist., 2000*, in which the court held that a statement by plaintiff's counsel during closing arguments in medical negligence action, that the defendant physician handed out steroidal medication which allegedly caused plaintiff to develop bone disease like "candy," though inflammatory, was a fair comment on the evidence and thus statement was not improper.

See also *Clark v. Bres, 217 S.W.3d 501, Tex.App. Houston.14.Dist., 2006*, holding that a homeowners' closing argument that referred to a contractor as a liar, a thief, and a fraud did not constitute an improper jury argument. The court found that the argument discussed matters in evidence that supported the argument that the contractor was a liar, thief, and a fraud and during defendant contractor's closing argument his attorney denied that contractor was a liar, thief, or a fraud.



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