TORT TRIAL & INSURANCE PRACTICE

Committee News

Defending Liberty Pursuing Justice

Summer 2013

# Trial Techniques Committee

## OPENING STATEMENTS & CLOSING ARGUMENTS: WHAT CONSTITUTES IMPROPER ARGUMENT AND THE IMPORTANCE OF PRESERVING ERROR

By: Alina Alonso Rodriguez[1]

Jury trials are supposed to be a forum within which the parties, represented by competent, professional and zealous counsel, present their positions in a coherent, thoughtful and respectful manner to their fact-finding peers. At times, however – usually while caught in the moment – counsel can cross the boundaries of appropriate argument.

**Many states have very specific procedures for preserving error in opening statements or closing arguments**

When that happens, the practical considerations are many: Was the argument actually improper? If so, when is it necessary to object? What are the consequences of not objecting? When is the appropriate time to make a motion for mistrial based on improper argument? Below you will find some guidance on these issues.

While attorneys are usually given latitude in making their arguments to the jury, the remarks must be confined to the evidence and reasonable inferences therefrom. *See, e.g.,* Model Rules of Prof'l Conduct R 3.4(e) (stating that counsel 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 a

*Continued on page 12*

1 Alina Alonso Rodriguez is a Shareholder in the Appellate and Trial Support practice group at *Carlton Fields, P.A.* This article is a condensed version of a lengthier piece which can be found at http://www.carltonfields.com/tips-for-opening-statements-and-closing-arguments/. Thanks to Paul Borr and Jamie Bigayer for their assistance with these materials.

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# MESSAGE FROM THE CHAIR

I am honored and excited to be the 2014 Chair of the Trial Techniques Committee. As the new Chair, I want to thank Elizabeth (Beth) Shirley for her leadership this past year. Beth was a terrific Chair and we thank her for her hard work.

One of the initiatives the Trial Techniques Committee intends to implement is the Educational Awareness Project for 2013-2014. This is a project that focuses on outreach to high school students to encourage them to become attorneys. The project will kick-off on October 9th during the fall meeting in Minneapolis.

This year, we will continue to offer Continuing Legal Education (CLE) programs and publish several newsletters throughout the year for our members. We are also working on bringing back The Brief's Blue Pages, which will provide trial practice tips from experienced attorneys who have tried fifty (50) or more trials throughout their legal careers.

If you would like to get involved with the Trial Techniques Committee at the leadership level, please let me know. I can be reached at eanderson@frenchlawpc.com. Thank you for this opportunity to serve as the Chair of this committee. I think it is going to be a great year! ⚖

*Erika Anderson is an attorney at French & Associates, P.C. in Albuquerque, New Mexico. She is a civil litigation attorney and her practice areas include civil rights, personal injury, general tort liability and employment.*

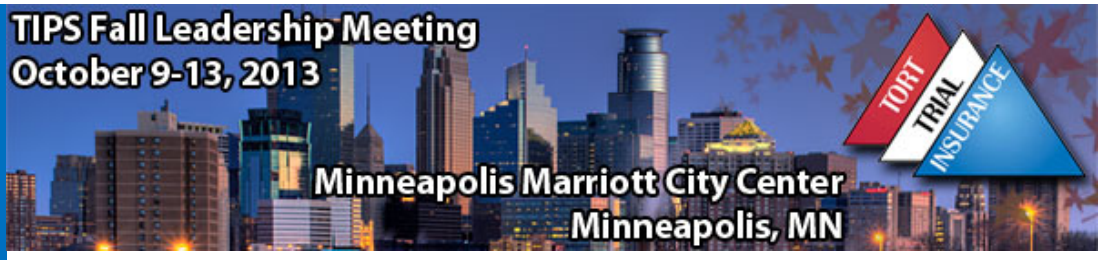
# EDITOR'S COLUMN

It has been an honor to serve as Newsletter Editor for the Trial Techniques Committee's 2012-2013 year, during which our committee has published four issues packed with information on a variety of trial-related topics. This final issue is no exception.

In our first article, Alina Rodriguez provides an in-depth analysis of what may constitute improper argument during opening and closing statements. Next we have practical pointers for the second-chair trial attorney from Roger Slade. Finally, George Wray provides a discussion of civility in the law, as prompted by a recent decision out of Ontario.

I want to thank these authors, as well as every author who contributed to prior issues, for their valuable contributions. Their work has generated much interest and discussion among our members, and their efforts do not go unnoticed. Now, I turn over my duties as Newsletter Editor to a very talented attorney, Rebecca L. Bush of Borden Ladner Gervais LLP in Toronto. I know we can look forward to even more interesting reading under Rebecca's leadership! ⚖

*Amy Hurwitz is a shareholder at Carlton Fields, P.A. in Miami, Florida. She is a civil litigation attorney whose practice includes product liability, class action and commercial disputes.*

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Register today for the Tort Trial & Insurance Practice Section's Fall Leadership Meeting. Offering valuable CLE programming, various networking events and public service opportunities, this is a meeting you won't want to miss!

## Fall Meeting CLE Programs

**Wednesday, October 9, 2013**

- Commercial Transportation: Four Hot Topics for the Trucking Lawyer
- Electronic Data Recorders or the Proverbial "Black Box": Questions Concerning Admissibility Preservation and Ownership of the Data After a Motor Vehicle Accident

**Thursday, October 10, 2013**

- When Passing the Bar is a Lifelong Challenge
- More Diligence is Due: What Every Lawyer Must Know About Insurance
- 2014 Health Insurance Market: New Challenges
- Dialog with General Counsel

**Friday, October 11, 2013**

- Advanced Theories of Recovery and Subrogation 201

## Hotel Reservations

Please call the hotel directly at 612/349-4000 or toll free at 800/229-8280 to make your room reservation. The room block will be held until exhausted or until **Tuesday, September 17, 2013 at 5:00pm (CST).**

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# 10 THINGS YOU SHOULD DO WHEN YOU ARE THE SECOND CHAIR AT TRIAL

By: Roger Slade[1]

For litigators, trials can bring out both the best and worst in people. It is usually a circumstance of high tension, short tempers, conflict and, in some circumstances, exhilaration. The run up to trial often presents the Second Chair with substantial challenges related, primarily, to his or her efforts to decipher what it is the First Chair actually wants in order for the case to be ready. Despite the best laid plans, mishaps often occur. Nonetheless, there are several common sense items which the Second Chair can manage which are necessary in virtually all trials. Here is a representative list.

## 1. Depose All Disclosed Witnesses

Not all witnesses show up on the witness list right away. Some witnesses are added later. Sometimes, an "Amended" witness list contains the name of a newcomer, someone who is not previously known. The First Chair will often miss this. He needs the wise Second Chair to bring this to his or her attention and send out the deposition subpoena, if appropriate, prior to the discovery cutoff to ensure that the testimony is preserved prior to the trial.

## 2. Prepare And Timely File Motions In Limine

Prior to the trial, the Second Chair should be thinking about what irrelevant and/or prejudicial evidence the other side is likely to present at the trial. The Second Chair should know what this is because the Second Chair sat in or has read the deposition transcripts. Sometimes, it is easy to see where opposing lawyers are coming from and what irrelevancies and inflammatory statements they will likely raise. It is the wise Second Chair that identifies the issue, researches it and proposes that a timely Motion in Limine be filed in order to prevent this evidence from being considered by the Court.

## 3. Serve Subpoenas

Non-party witnesses do not show up at trial by magic. Most often, they have been subpoenaed. It is the wise Second Chair that identifies who those witnesses are and prepares and timely serves trial subpoenas on them. This will prevent further tension and conflict at the trial when the First Chair turns to the Second Chair and says something like: "How come John Smith did not receive a trial subpoena?" More often then not, the First Chair will presume that the Second Chair knows or has done this.

## 4. Coordinate The Appearance Of Trial Witnesses

Every trial should have a game plan in which the order of witnesses to be presented is discussed in advance. The Second Chair should have a list of witnesses and their phone numbers so that a determination can be made as to when these witnesses will be contacted and at which point in the trial they will be required to appear. It is wise to have schedule and a best estimate of when witnesses will arrive to testify. This is the job either of the Second Chair or his or her paralegal. This will make the Judge happy too when he or she does not have to adjourn the trial because you have run out of witnesses.

## 5. Gather The Case Law

You have been litigating the case for three (3) years. During the course of that time, there have been substantial research projects conducted regarding the Motion to Dismiss, the Motion for Summary Judgment and various discovery issues. The case law has been thrown haphazardly into files. Your job as Second Chair is to gather the case law, determine what might be relevant for the trial and place it into files in a manner designed for easy retrieval. Do not leave the case law back at the office.

## 6. Anticipate Objections

The well-versed Second Chair will be able to anticipate the frivolous, irrelevant and hearsay testimony the other side will seek to elicit which has not been eliminated by a motion in limine (*see* Point #2 above). The Second Chair who is well prepared will be ready with case law armed to argue against the admission of this evidence and will be able to seek to exclude it during the trial. Throughout the depositions, both parties have likely elicited substantial hearsay which may or may not be subject to an exception. These issues should be considered by the Second Chair before he or she enters the courtroom on the morning of the trial.

1 Roger Slade is a commercial trial lawyer at the law firm of David B. Haber, P.A. He specializes in international family litigation and commercial litigation involving real estate, foreclosures, business disputes of all kinds and collections.

### 7. Make Extra Copies Of Your Exhibits

It is always the important exhibits that seem to get lost. The irrelevant documents are usually easy to find. Therefore, the wise Second Chair should make multiple copies of the exhibits and avoid giving your only copies to your First Chair who may lose them.

### 8. Be Prepared to Show That All Of Your Exhibits Have Been Produced & Are On Your Exhibit List

Once the trial starts, your opposing counsel will act like he or she has never seen or heard of the exhibits you are offering into evidence. They will pretend that they did not attend the deposition, that they did not move to compel production of the very same documents or that they have not analyzed or scrutinized the exhibit you are offering months in advance. They will plead ignorance. They will feign surprise. The only sure fire way to shut them up is to make sure that you can point to the bates stamp number in your production of documents and to the exhibit on your exhibit list which you have hopefully served well in advance of the trial.

### 9. Coordinate The Delivery Of Boxes

In some trials, the lawyer is able to walk into the Court holding a single file. In others, transportation is required. The Second Chair should make an adequate assessment of the volume of documents necessary to bring to the trial and make arrangements for those documents to be delivered there before opening statements. The careful trial lawyer almost never leaves documents behind at the office. It is always the documents that you leave behind at the office that you will need. Accordingly, it is a wise practice to bring almost everything space permitting.

### 10. Keep Track of the Exhibits

Trials tend to move quickly because some judges are impatient and some juries have other things to do. Sometimes, exhibits can be marked into evidence at a furious pace. The confident Second Chair will keep track of the exhibits by keeping a list of them and ultimately obtaining copies to take home after the completion of the trial. The First Chair is usually consumed with the testimony coming out of the witness' mouth; that is understandable. It is, however, the job of the Second Chair to keep track of the exhibits because these are important during the course of the trial to show to other witnesses and to argue in closing and later on appeal.

### Conclusion

Depending upon who is your First Chair, being the Second Chair at a trial can be an unpleasant and sometimes harrowing experience. This is because litigators sometimes lose their ability to communicate with junior lawyers as they age. This causes junior lawyers to sometimes comment: "Does she expect me to read her mind?" The answer to that question is, unfortunately, yes. However, since that is likely impossible for most people, following the simple rules set forth above will make it seem to the First Chair like that is precisely what you have done. ⚖

American Bar Association

Tort Trial and Insurance Practice Section

FREE PROGRAM

# ABA TIPS DIVERSITY SERIES: A View from the Trenches

**Presented by the TIPS Diversity in the Profession Committee**

On Thursday, October 10th at 11:45 AM, the TIPS Diversity Committee will present a multi-series hour-long program *TIPS Diversity Series: A View from the Trenches*.

This program will highlight the strides and advances within the Minnesota Court System, a large law firm, the Minnesota State Bar Association and the Minneapolis Legal Aid Society involving the full and equal participation by minorities, women, persons with disabilities and persons of differing sexual orientations and gender identities. The program will feature interactive panelists who hope to further educate and promote the ABA's Trial Tort and Insurance Practice Section's commitment to justice.

**TIPS 2013 Fall Meeting**

**October 9 - 12, 2013**

**Minneapolis Marriott City Center**

**Minneapolis, MN**

For additional information, please contact Jennifer LaChance at jennifer.lachance@americanbar.org

# PROFESSIONALISM AND THE LAW – A CIVILITY MOVEMENT? *A COMMENT ON LAW SOCIETY OF UPPER CANADA V. JOSEPH PETER PAUL GROIA*

By: George R. Wray[1]

Is there such a thing as a "civility movement" within the law? Such a question implies a move or shift from one point to another – from some standard of civility to another. Or perhaps from a norm of non-civility to a norm of civility. True, lawyering has not enjoyed a great (or even good) reputation over the years, and this may in part result from a perceived lack of civility. But has there not always been an expectation of civility in the profession? If so, how does a 'civility movement' really differ from the expectation of civility that has always existed, and how do we reconcile civility with the duty to advocate vigorously for one's client?

**How do we reconcile civility with the duty to advocate vigorously?**

The idea of a civility movement has gained attention recently in Ontario following disciplinary proceedings by the province's legal self-regulating body, the Law Society of Upper Canada ("LSUC") against Joe Groia, a prominent securities litigator, for failing to adhere to the rules requiring lawyers to be civil while defending a client on charges of insider trading. By way of background, in the mid-1990s Bre-X was engaged in the exploration of gold deposits in Indonesia. Inflated reports of Bre-X's gold resources sent its shares from under $1 in 1993 to over $280 per share by May 1996. In February 1997, Bre-X entered into a joint venture agreement with Freeport, which carried out its own testing which showed almost no gold. A few days later a Bre-X exploration manager fell to his death from a helicopter, and the trading of Bre-X shares was halted. Further testing confirmed the negative results, and Bre-X was de-listed from the Toronto Stock Exchange and became bankrupt in 1997. In May 1999, the Ontario Securities Commission ("OSC") charged John Felderhof, a senior vice-president and vice-chair of the Bre-X Board of Directors, with eight counts relating to insider trading and of authorizing misleading press releases. Mr. Groia successfully defended Mr. Felderhof.

By all accounts the OSC proceedings were contentious and difficult. During the first 70 days of trial, only two witnesses were called, and neither completed their testimony. At one point during the proceedings, the OSC brought an application to have the trial judge removed in part for the alleged failure to restrain Mr. Groia's conduct. This application was rejected. Ultimately, although Mr. Groia successfully defended Mr. Felderhof against all the OSC charges, Mr. Groia's conduct during the OSC proceedings became the subject of a LSUC disciplinary proceeding. The LSUC alleged that Mr. Groia had failed to comply with the Rules of Professional Conduct regarding civility as a result of his "unrestrained attacks" on the integrity of the OSC prosecutor and his "rhetorical excess and sarcasm" which were "unseemly and unhelpful" and "negatively impacted the administration of justice."

In a decision released June 28, 2012, the LSUC disciplinary panel found that Mr. Groia "failed to treat the Court with courtesy and respect due to a consistent pattern of rude and improper or disruptive conduct, failed to act in good faith [and] undermined the integrity of the profession by communicating…in an abusive, offensive and otherwise inconsistent manner with the proper tone of professional conduct…"

In short, the LSUC disciplinary panel found Mr. Groia's conduct to violate the principle of civility and found him guilty of professional misconduct. His license to practice law was suspended for 2 months, and he was ordered to pay costs of almost $250,000.

The decision is presently under appeal.

## Civility Requirements in Ontario

In Ontario, lawyers are expected to behave in a civil manner. Rule 4 of the Rules of Professional Conduct, set by the LSUC, states that "a lawyer shall represent the client resolutely and honorably within the limits of the law while treating the tribunal with candor, fairness, courtesy and respect." The same rule also requires lawyers to "be courteous, civil, and act in good faith." The Commentary to Rule 4 explains that a "lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question,

1 George Wray is an associate in the Insurance and Tort Liability group at Borden Ladner Gervais LLP in Toronto.

however distasteful, which the lawyer thinks will help the client's case and to endeavor to obtain for the client the benefit of every remedy and defense authorized by law." However, the lawyer "must discharge this duty by fair and honorable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candor, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing where justice can be done."

Rule 6 of the Rules of Professional Conduct also requires a lawyer to be "courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice."

Similar requirements of civility are set out in the Model Code of Professional Conduct adopted by the Counsel of the Federation of Law Societies of Canada, the Advocates' Society in its publication entitled *Principles of Civility for Advocates*, as well as the Canadian Bar Association. In particular, the *Principles of Civility for Advocates* notes that "Advocates should always be courteous and civil to counsel engaged on the other side of the lawsuit or dispute." In practice, trials and other hearings in Canada are generally characterized by a level of formality and restraint, with some exceptions of course.

## Conflicting Duties – of Civility and Vigorous Advocacy

According to the decision of the LSUC disciplinary panel, in cross-examination Mr. Groia spoke of what he described as the sweeping ambit of the "civility movement." The LSUC disciplinary panel noted that a lawyer's obligation of civility and courtesy is not new.

This case raises the issue of how we reconcile the requirement of civility with the obligation to advocate vigorously for one's client.

Mr. Groia argued that the duty of civility can compromise a lawyer's duty to defend a client vigorously and zealously. This argument was echoed in comments following the decision of the LSUC disciplinary panel by the Criminal Lawyers' Association, which stated that it was "most concerned about the potential chilling effect upon defense counsel who day in and day out perform their professional duty fearlessly advocating for their clients." The LSUC disciplinary panel was not persuaded that a requirement of civility would have such a chilling effect. The LSUC disciplinary panel noted that civility "serves to ensure that a client's rights are protected," and that "animosity between lawyers does not interfere with proper resolution of the matter before the court." They stated that there was "no evidence that these long-standing obligations have fettered or encumbered the lawyer's duty to defend her client resolutely within the limits of the law." In fact, the requirement of civility in the courtroom ensures that decisions are made in an "environment of calm and measured deliberation, free from hostility and emotion, and other irrational or disruptive influences." The LSUC disciplinary panel further noted that "civility enhances, rather than detracts from, a more efficient justice system, prevents unfair outcomes and promotes greater access to justice for accused persons."

The LSUC disciplinary panel effectively found that a lawyer can be both a civil and vigorous advocate.

Whatever the outcome of Mr. Groia's appeal, the discussion surrounding a lawyer's civility obligations will certainly continue. ⚖

# Volunteers NEEDED!

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**Volunteers will meet for this on-site project on Friday, October 11th, from 10 AM to 1 PM in the TIPS 2013 Fall Meeting Hotel, the Minneapolis Marriott City Center.**

**For more information on the organization, click here.**
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**To sign-up and volunteer, please contact ABA Staff Liaison Jennifer LaChance at jennifer.lachance@americanbar.org.**

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# OPENING STATEMENTS...

Continued from page 1

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.").

It is critical that an attorney be familiar with the jurisdiction's requirements for preserving an issue of improper argument for appellate review. Many states have very specific procedures for preserving error in opening or closing arguments. In Florida, for example, the Florida Supreme Court has explained that "when a party objects to instances of attorney misconduct during trial, and the objection is sustained, the party must also timely move for a mistrial in order to preserve the issue for a trial court's review of a motion for a new trial." *Companioni v. City of Tampa*, 51 So. 3d 452, 453 (Fla. 2010). This requirement stems from "practical necessity and basic fairness in the operation of a judicial system." *Id.* at 455. Moving for a new trial immediately after an objection is sustained affords the judge "an opportunity to correct [the error] at an early stage of the proceedings" thus avoiding "[d]elay and an unnecessary use of the appellate process." *Id.* Conversely, not moving for a new trial immediately "results in delay and wastes judicial resources, especially if the error complained of occurs early on in the proceedings." *Id.* at 456. After an objection is sustained, if no motion for a new trial is made, the judge "is not put on notice that any further action is needed" and will "presume[] that the objecting party has been satisfied and that the error has been cured." *Id.*

When a party does not make a motion for mistrial after an objection is sustained, or when a party does not make any objection at all, the trial court will apply a much more rigorous four-prong standard before granting a new trial. *Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010 (Fla. 2000). First, the party must establish the comment was improper. *Id.* at 1028. An improper comment goes beyond the facts and evidence presented to the jury and the logical deductions therefrom or inflames the jurors so that their verdict reflects an emotional rather than a logical response. *Id.* Second, the party must establish the comment was harmful. *Id.* at 1029. However, not every improper comment is harmful since "there are other ways to address [a] transgression than reversal of a jury verdict." *Id.* For a comment to be harmful it must be "so highly prejudicial and of such collective impact" that it "gravely impair[s]" the jury's ability to fairly decide the case. *Id.* Third, the party must establish the comment was incurable. *Id.* at 1030. Meeting this "extremely difficult" prong requires proof that "curative measures could not have eliminated the probability that the unobjected-to argument resulted in an improper verdict." *Id.* Finally, the party must establish the comment "so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial." *Id.* This category "necessarily must be narrow in scope," however, and encompasses such comments as "appeals to racial, ethnic, or religious prejudices." *Id.* Since the Florida Supreme Court notes this route to a new trial should be used only in "very limited situations," it is best to move for a mistrial immediately after an objection is made. *See id.* at 1027.

It would appear that *Companioni* did not disturb the Florida Supreme Court's earlier precedent allowing a trial lawyer to request that the court reserve ruling on a timely motion for mistrial. *See Ed Ricke & Sons, Inc. v. Green*, 468 So. 2d 908 (Fla. 1985). One rationale supporting this ruling is the recognition that the trial court's superior vantage point allows it to "determine whether it is the best use of judicial resources to let the case go to jury to see if the verdict cures the need for a new trial, or whether it is best to rule on the motion at an earlier stage in the proceedings." *Ricks v. Loyola*, 822 So.2d 502, 506-07 (Fla. 2002). This rule is also intended to prevent a situation where a "litigants who may be unhappy with the jury that has been selected will not be rewarded when they purposely engage in conduct intended to cause a mistrial." *Id.* at 507.

In the Eleventh Circuit, "a contemporaneous objection to improper argument is certainly the preferable method of alerting the trial court to the error and preserving such errors for review." *McWhorter v. City of Birmingham*, 906 F.2d 674, 677 (11th Cir. 1990). The purpose of this preference is twofold. First, "the requirement fosters judicial economy. By bringing an error to the trial judge's attention, the court has a chance to correct it on the spot. Requiring timely objection prohibits counsel from 'sandbagging' the court by remaining silent and then, if the result is unsatisfactory, claiming error." *Woods v. Burlington N. R.R. Co.*, 768 F.2d 1287, 1292 (11th Cir. 1985), *rev'd on other grounds*, 480 U.S. 1 (1987). Second, a lawyer may strategically choose not to object to an improper comment. For example, "an argument that looks highly improper[,] in a cold record may strike counsel as being wholly lacking in effect." *Id.* "[C]ounsel may think that the improper argument may offend and in effect backfire." *Id.* Or "the improper argument may open the door to a response that will be of more value than a sustained objection." *Id.*

Yet, even if no objection has been raised, if a party can demonstrate that "the interest of substantial justice is at stake," a court may still grant a new trial for improper argument. *McWhorter*, 906 F.2d at 677. In these situations, the court will look for an error that is plain, that affects the substantial rights of the party, and that seriously affects the fairness, integrity, or public reputation of a judicial proceeding. *Brough v. Imperial Sterling Ltd.*, 297 F.3d 1172, 1179 (11th Cir. 2002) (citations omitted). But, such plain error review "is seldom justified in reviewing argument of counsel in a civil case." *Woods*, 768 F.2d at 1292. Therefore, in the Eleventh Circuit, as in Florida state courts, it is especially important that a lawyer timely object to any improper statements made by opposing counsel.

Because the issue of improper argument has surfaced in numerous appeals, below you will find a sampling of what certain courts have found constitutes improper comments. Even if you find yourself in a jurisdiction other than those involved in the examples below, the comments found improper in these decisions may serve as guiding parameters or triggers for objections the next time you find yourself preparing your opening statement or closing argument or listening to your opponent's.

## Comments attacking the opposing party, counsel, or the opponent's theory of the case.

- *DeAngelis v. Harrison*, 628 A.2d 77 (Del. 1993) (finding reversible error where defense counsel argued that the plaintiff was exaggerating her injuries and compared the plaintiff winning the case to her winning a lottery ticket).
- *Chin v. Caiaffa*, 42 So. 3d 300 (Fla. 3d DCA 2010) (finding reversible error where plaintiff attacked character of every person associated with defense, including counsel; painted defense as "frivolous" and as designed to "add [ ] insult to injury;" accused defense counsel of "try[ing] to fool you," and stating "[w]e all make mistakes. But you make a bigger one when you don't admit it; and you make a bigger one to try to avoid responsibility. And you make a bigger one when you call in witnesses that don't tell the truth. Anything to win. Anything to save the day.").
- *McArdle v. Hurley*, 51 A.D.3d 741 (N.Y. App. Div. 2008) (finding reversible error where defense counsel argued the plaintiff's husband, who was receiving pension as a retired police officer on disability pay, "maxed out on the NYPD system" then argued the plaintiff's claims were "all designed for her to max out in the civil justice system.").
- *Pesek v. Univ. Neurologists Ass'n, Inc.*, 87 Ohio St. 3d 495 (Ohio 1999) (finding reversible error where defense counsel told the jury it "fits [opposing counsel]'s personality" to lie, threaten witnesses, and suppress evidence then accused opposing counsel of finding any "second-class expert . . . to screw over these good doctors.").
- *Schoon v. Looby*, 670 N.W.2d 885 (S.D. 2003) (holding that doctor's counsel's accusations that plaintiff's lawsuit was nothing more than playing the lottery was only meant to inflame jury and were beyond bounds of proper final argument).
- *Cf. Cassim v. Allstate Ins. Co.*, 94 P.3d 513 (Cal. 2004) (stating that counsel's right to discuss the merits of the case in argument to the jury is very wide as to both law and facts, that counsel may state his views as to what the evidence shows and the conclusions to be fairly drawn therefrom, and that opposing counsel cannot complain if the reasoning is faulty and deductions illogical, as such matters are for the jury).

## References to counsel's own experience and personal belief.

- *Grant v. Ariz. Pub. Serv. Co.*, 652 P.2d 507 (Ariz. 1982) (holding that counsel's comments during closing argument that counsel "knew" testimony was not true constituted improper comment regarding counsel's personal belief).
- *Mercury Ins. Co. of Fla. v. Moreta*, 957 So. 2d 1242 (Fla. 2d DCA 2007) (concluding that remarks regarding what counsel's 14-year-old son would have thought about insurer's defense of case were improper).
- *Reynolds v. Burghezi*, 227 A.D.2d 941 (N.Y. App. Div. 1996) (finding reversible error where plaintiff's attorney accused defendants of illegal conduct, commented on the manner in which bus drivers generally drive and the purpose of "no stopping" signs, discussed irrelevant evidence in an effort to appeal to the jury's sympathy, and asked the jury to "provide" for the plaintiff).

## Comments asking the jury to serve as the conscience of the community.

- *Du Jardin v. City of Oxnard*, 38 Cal. App. 4th 174 (Cal. Ct. App. 1995) (finding reversible error

where defense counsel for a public entity warned jurors if they found for the plaintiff they would "have to sit back and start counting the public services that w[ould] disappear).

- *Kiwanis Club of Little Havana v. de Kalafe*, 723 So. 2d 838 (Fla. 3d DCA 1998) (reversing and remanding for new trial where plaintiff's counsel repeatedly appealed to jury's "community conscience" and "civic responsibility" during closing).
- *Pleasance v. City of Chicago*, 396 Ill. App. 3d 821 (Ill. App. Ct. 2009) (finding reversible error where, during a damages trial, plaintiff's attorney repeatedly described how the victim was "gunned down by a Chicago police officer" and told the jury "[y]our verdict is going to tell your entire community whether you're willing to accept a police officer's willful and wanton killing of a member of our society.").
- *Texas Emp'rs Ins. Ass'n v. Guerrero*, 800 S.W.2d 859 (Tex. App. 1990) (holding that defense counsel's plea "by golly there comes a time when we have got to stick together as a community" was an impermissible appeal that the jury feel solidarity with the defendant because of race or ethnicity).

## Comments in violation of the "Golden Rule."

- *Cascanet v. Allen*, 83 So. 3d 759 (Fla. 5th DCA 2011) (finding reversible error when defense counsel asked the jury if it was fair to burden the young defendant with a substantial damage award and reminded them it was a bad day for her too).
- *Cf. McNally v. Eckman*, 466 A.2d 363 (Del. 1983), *overruled on other grounds by Wright v. State*, 953 A.2d 144 (Del. 2008) (stating that while phrases such as "suppose you had just one of the elements," "suppose that was all you had to deal with," and "suppose all you had to do was" are ill-advised, the remarks were *de minimis* and the trial court's instruction cured any possible prejudice).

## References to the wealth or poverty of a party.

- *Gordon v. Nall*, 379 So.2d 585 (Ala. 1980) (holding that plaintiff's counsel's remark that the defendant corporation "doesn't have a heart, it doesn't have a soul, it has a board of directors" was so highly prejudicial that reversal was warranted).
- *Intramed, Inc. v. Guider*, 93 So. 3d 503 (Fla. 4th DCA 2012) (finding reversible error when plaintiff's counsel urged the jury to punish the defendant corporation by arguing "[The defendant] will get off cheap. [The defendant] will sweep it under the rug. [The defendant] will move on.").
- *Lenz v. Julian*, 276 Ill. App. 3d 66 (Ill. Ct. App. 1995) (holding that defense counsel's statement "I don't think that it's fair that [the defendant] for the next 50 years should have to pay" warranted a new trial on the issue of damages).
- *Reetz v. Kinsman Marine Transit Co.*, 330 N.W.2d 638 (Mich. 1982) (finding reversible error when plaintiff's counsel remarked that the defendant "can afford the best of everything" and repeatedly made mention of George Steinbrenner III, owner of the New York Yankees and chairman of the board of the defendant's parent company but not a party to the case, because "the effect of these comments was to create in the minds of the jurors an image of [the defendant] as an unfeeling, powerful corporation controlled by a ruthless millionaire.").
- *Cf. Olson v. Richard*, 89 P.3d 31 (Nev. 2004) (holding that counsel's remarks informing the jury that his clients were not wealthy people were improper, but concluding that trial court did not abuse its discretion in denying motion for new trial where there was no evidence that jury reached its verdict solely on the basis of passion and prejudice).

## References to matters outside the evidence.

- *Enter. Leasing Co. v. Sosa*, 907 So. 2d 1239 (Fla. 3d DCA 2005) (finding that court did not abuse discretion in sustaining objections to statements by counsel during closing as to other possible causes of accident where argument was based on facts not in evidence).
- *Rush v. Hamdy*, 255 Ill. App. 3d 352 (Ill. App. Ct. 1993) (holding that defense counsel's statement that the defendant's professional reputation was on the line was an improper appeal to the sympathy of the jury because there was no evidence introduced at trial of the impact a negative verdict would have on the defendant's professional reputation).
- *Hunt v. Freeman*, 550 N.W.2d 817 (Mich. Ct. App. 1996) (holding that comments during

closing argument that plaintiff could have avoided "drinking and then driving" after plaintiff acknowledged drinking part of a wine cooler before driving were improper and injected a false issue into the case where there was no testimony showing that consuming part of a wine cooler could affect a person's ability to perceive and react).

- *Gerow v. Mitch Crawford Holiday Motors*, 987 S.W.2d 359 (Mo. Ct. App. 1999) (holding that defense counsel's mentioning how the plaintiff was nodding off at the wheel warranted reversal because the issue of comparative fault was irrelevant to the issue of whether the design of the vehicle and the placement of the fuel tank contributed to the fuel-fed fire).
- *Green v. Charleston Area Med. Ctr. Inc.*, 215 W. Va. 628 (W. Va. 2004) (holding that defense counsel's remark that "[the other doctors] *alone* knew that the blood being donated to them was coming primarily from homosexuals and drug addicts, the suspected carriers of the new unknown disease [AIDS]" when the record did not support such an allegation was an attempt to divert the jury's attention from the actual defendants in the case and warranted a mistrial) (emphasis added).

## Comments on lack of evidence or failure to call a witness.

- *State Farm Mut. Ins. Co. v. Thorne*, 110 So. 3d 66 (Fla. 2d DCA 2013) (reversing and remanding for new trial where plaintiff's counsel argued the defense did not call a single witness or expert because the defense could not find such evidence).
- *In re Quinn*, 763 N.E.2d 573 (Mass. App. 2002) (stating that, while witness may assert privilege against self incrimination if called upon to testify, privilege does not prevent opposing counsel from commenting on defendant's choice not to testify or the fact finder from drawing a negative inference therefrom, both of which protections attach in a criminal case).
- *Kampe v. Colom*, 906 S.W.2d 796 (Mo. Ct. App. 1995) (finding reversible error where defense counsel argued in closing "Dr. Wisner saw [the plaintiff]. . . . Right after they had [the plaintiff] examined by Dr. Wisner, they decided to use Dr. Fayne. Why didn't they call Dr. Wisner? Because Dr. Wisner would not help them in this case.").
- *Huff v. Rodriguez*, 64 A.D.3d 1221 (N.Y. App. Div. 2009) (finding reversible error where defendant's attorney argued that the plaintiff did not call any accident reconstruction expert "because his testimony would not support [plaintiff's] claim that . . . [defendant] caused [the] accident.") (alteration in original).

## Comments regarding pretrial litigation.

- *Christopher v. Florida*, 449 F.3d 1360 (11th Cir. 2006) (holding the trial court did not abuse its discretion by ordering a new trial where plaintiff's counsel's unobjected-to improper comments during rebuttal closing were contrary to the trial court's pretrial grant of qualified immunity to defendants).
- *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 921 So. 2d 43 (Fla. 3d DCA 2006) (concluding that defendant sued by apparel company for misrepresenting textile company's financial health could not disclose to jury, at trial for breach of fiduciary duty and negligent misrepresentation, that apparel company had voluntarily dismissed claims against textile company and its two principals because such dismissal was irrelevant).

## Otherwise highly inflammatory comments.

- *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (condemning comments comparing tobacco industry to Holocaust and slavery).
- *Allstate Ins. Co. v. Marotta*, No. 4D11-2574, 2013 WL 2420451 (Fla. 4th DCA June 5, 2013) (finding reversible error when plaintiff's counsel argued "Allstate denied the undisputed medical evidence. . . . I ask you, is that what it means to be in good hands?," stated that Allstate's doctors were "enlisted as part of an effort to manufacture a defense," and urged the jury to "make Allstate repent.").
- Chesapeake & Ohio Railway Co. v. Shirley's Administratrix, 291 S.W. 395 (Ky. 1926) (holding that it was improper for an attorney to state: "You killed their Santa Claus [pointing to defendant's counsel]. In the name of God, I ask you to fill their stockings on Christmas Eve night, and I ask it for Jesus' sake.").
- *Nemet v. Friedland*, 273 Mich. 692 (Mich. 1953) (holding that defense counsel's statement in closing "this man, like the Jew Shylock, was after

the last pound of flesh and last drop of blood" was intended to create prejudice against the Jewish plaintiff and warranted reversal).

- *Johnson v. Amethyst Corp.*, 120 N.C. App. 529 (N.C. Ct. App. 1995) (finding reversible error where defense counsel's statements not only disparaged the entire judicial system but also questioned the fairness of female judges presiding over sexual misconduct trials).
- *Living Ctrs. of Texas, Inc. v. Penalver*, 256 S.W.3d 678 (Tex. 2008) (reversing and remanding for a new trial where plaintiff's counsel compared defendants' counsel's attempts to minimize damages to a World War II German program in which elderly and infirm persons were used for medical experimentation and killed).

While at times improper comments may constitute an isolated reference, more often than not, they become a running theme throughout counsel's argument. Because of this, it is important to point out to the trial judge the cumulative effect of these arguments, even if an objection originally was overruled, and to move for a mistrial based on the cumulative prejudicial effect of the arguments. *See, e.g.*, *Bocher*, 874 So. 2d at 704 (quoting *Manhardt v. Tamtom*, 832 So. 2d 129, 133 (Fla. 2d DCA 2002) ("there is a point where the 'totality of all errors and improprieties' are 'pervasive enough to raise doubts as to the overall fairness of the trial court proceedings.'")).

In short, it is important that counsel remain vigilant and properly object to improper comments. These are more and more becoming an issue in appellate decisions and resulting in reversals of otherwise "fair" trials.

# 2013-2014 TIPS CALENDAR

## October 2013

**8-13** **TIPS Fall Leadership Meeting** — **Minneapolis Marriott Hotel**
Contact: Felisha A. Stewart – 312/988-5672 — **Minneapolis, MN**
Speaker Contact: Donald Quarles – 312/988-5708

**13** **Symposium: Animal Shelter and Rescue Law** — **Hyatt Regency Jacksonville**
Contact: Ninah F. Moore – 312/988-5498 — **Jacksonville, FL**

**17-18** **Aviation Litigation Fall Meeting** — **Ritz-Carlton, Washington, DC**
Contact: Donald Quarles – 312/988-5708 — **Washington, DC**

## November 2013

**6-8** **Fidelity & Surety Committee Fall Meeting** — **The Fairmont Copley Plaza**
Contact: Donald Quarles – 312/988-5708 — **Boston, MA**

## January 2014

**16-18** **40th Annual Midwinter Symposium on Insurance Employee Benefits** — **The Driskoll**
Contact: Ninah F. Moore – 312/988-5498 — **Austin, TX**

**21-25** **Fidelity & Surety Committee Midwinter Meeting** — **Waldorf~Astoria Hotel**
Contact: Felisha A. Stewart – 312/988-5672 — **New York, NY**
Speaker Contact: Donald Quarles – 312/988-5708

## February 2014

**5-11** **ABA Midyear Meeting** — **Swissotel Chicago**
Contact: Felisha A. Stewart – 312/988-5672 — **Chicago, IL**
Speaker Contact: Donald Quarles – 312/988-5708

**20-22** **Insurance Coverage Litigation Committee Midyear Meeting** — **Arizona Biltmore Resort & Spa**
Contact: Ninah F. Moore – 312/988-5498 — **Phoenix, AZ**