Objectionable Jury Argument
Francis J. Carney

Just because a jury argument is objectionable doesn’t mean you must object. Many technically objectionable statements should pass without objection: after all, a trial is a struggle to persuade, and not a demonstration of your knowledge of evidence law. Bouncing out of your seat at every provocation to voice a strident objection hardly endears you to the jury, especially if the judge overrules your objection, leaving everyone with the impression that you should sit down, shut up, and stop annoying people.

Misstatements of the facts are often better dealt with in your own argument, rather than by objection. If you have the chance to respond, you may want to hold your objections and skewer your opponent with his every inaccuracy in your response. Jurors tend to view the message as no better than the messenger. Exaggerations, claimed facts that weren’t facts at all, promises that weren’t kept, are all meat for the stew of your closing argument.

Professionalism also allows a bit of latitude in argument to the other side, especially in summation, although this is now thought quaint in some quarters. And there are a few trial judges who will let nearly anything pass in closing argument and consider it rank manners for counsel to ever interrupt.

Don’t misinterpret me. You shouldn’t hesitate to object when it’s necessary, because objections not timely made will waived. (This means immediately, and not at the conclusion of the argument.) If the objection isn’t made you’ll have no basis to claim error before the appellate

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1This is a revised and updated version of my article originally published in of Voir Dire (Winter 1997).

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If your objection is sustained, you should then follow it up with a request for a cautionary instruction to the jury or, if the offending argument was especially egregious, with a motion for a mistrial. (Made at the bench and not in front of the jury.)

Improper argument may lead to a reversal, but you will have to show “prejudice,” which means showing that it made a difference to the outcome, always a tough burden. Here’s a checklist of the more common objectionable arguments you may expect to hear sooner or later in your trial career, to be used, as suggested, with much discretion.

1. "Argument" in the Opening Statement

   This is often more a matter of tone than substance. Argument is difficult to define, but most judges claim to know it when they hear it. The opening statement is supposed to be an outline of the evidence to come and not about how the evidence should be interpreted.

   The purpose of an opening statement is to apprise the jury of what counsel intends to prove in his own case in chief by way of providing the jury an overview of, and general familiarity with, the facts the party intends to prove . . . an opening statement should not be argumentative. It is not proper to engage in anticipatory rebuttal or to argue credibility by referring to impeachment evidence the other side may adduce.

   State v. Williams, 656 P.2d 450, 452 (Utah 1982).

   In other words, we’re supposed to stay away from inference, deductions from the evidence, and the like, and just "state the facts" as they are expected to come in. I think the

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2 See e.g. Boyle v. Christensen, 251 P.3d 810, 2011 UT 20 (reversal for inappropriate closing argument on the “McDonald’s coffee case.”)

3 See e.g. Jones v. Carvell, 641 P.2d 105, 112 (Utah 1982) (“Although the argument was improper, we do not think that it affected the fundamental fairness of the trial, and reversal is not, therefore, called for because we do not believe a different result would have occurred” and Reeves v. Gentile, 813 P.2d 111, 121 (Utah 1991) (counsel’s mention of insurance in argument was in error but “harmless.”)
distinction between what is argument and what is not is a thin one.

2. **Misstating the Law or the Facts**

*Jones v. Carvell*, 641 P.2d 105 (Utah 1982) stated: “It is as improper to misstate facts in the record as it is to state as facts propositions for which there is no evidence.” Some courts in other states prohibit all comment on the law by counsel on the ground that it invades the court’s province in instructing the jury. Most Utah judges allow some comment by counsel on the law, but require it to be limited to the instructions as given by the court. It’s certainly an appropriate and standard practice for counsel to discuss the application of the instructions given by the court to the facts in closing argument in state court, where closing argument is given after the jury is instructed.

3. **Appeals to Passion or Prejudice and Inflammatory Statements**

Appeals to ethnic, racial, sexual, and other prejudices are obviously improper, as are appeals to regional biases. *See e.g., Shemmom v. American SS Co.*, 280 N.W.2d 852 (Mich. 1979) (counsel’s argument that “defense attorneys were a bunch of New York lawyers trying to pull the wool over the eyes of Midwestern folks” was improper). Home-towing happens, but it’s got to be kept subtle.

Several recent cases have addressed the phenomenon in personal injury cases inserting remarks about "tort reform" or the "lawsuit crisis" in an attempt to inflame the jury against plaintiffs. See *e.g., Schoon v. Libby*, 670 N.W. 885 (S.D. 2003) (defense counsel's comment that the action was nothing more than “playing the lottery” denigrated the plaintiff and the judicial system itself and merited reversal); *Anderson v. Johnson*, 441 N.W. 2d 675 (S.D. 1989) (defense lawyer's invective about the country being "over-lawyered, litigious, and sue-happy" and
referring to a "litigation industry" were unprofessional, offensive, and exceeded the proper bounds of advocacy).

A must-read for all is Lioce v. Cohen, 149 P.3d 916 (Nev. 2006) in which a defense verdict was reversed and the defense lawyer referred for ethics violations based on arguments made in three personal injury cases to the effect that the lawsuits wasted taxpayers' money and jurors' time, that America had become a "society of blamers," that people were looking for excuses to sue at the drop of a hat, that he had a real passion in defending such cases. These were improper arguments based on counsel's personal opinions and nothing in the record, and constituted a request for jury nullification and an improper public policy debate masked in closing argument. The case also discusses the reverse-Golden-Rule argument.

4. References to Matters Outside the Record

It’s permissible to argue general knowledge and common sense, but it’s not proper to argue material facts not in the record. Some examples:

• "I am sorry that we did not have Dr. Jones here to testify. He could have told you exactly why he performed the procedure that way and why it was necessary for him to do it in that manner."

• "We all know that there is a conspiracy of silence among doctors not to testify against each other and that's why we have to get out-of-state experts . . . ."

This recently came to the fore in Utah in Boyle v. Christensen, 251 P.3d 810, 2011 UT 20. In Boyle, the Supreme Court held that allusions to the “McDonald’s coffee case” by the defense lawyer in closing argument were reversible error:
The facts in the McDonald's coffee case were not in evidence before this jury and were also utterly irrelevant. Indeed, the one attempt counsel made to make her reference seem relevant was a misrepresentation because the high punitive damages award in the McDonald's coffee case had nothing to do with a per diem analysis. It is certainly unfair to require the other party to clarify all the misconceptions about this irrelevant case in the limited time allotted for closing argument. The great latitude provided in closing arguments regards reasonable inferences about evidence properly before the jury and does not extend to misrepresentations or efforts to appeal to a jury's passions. Thus the reference to the McDonald's coffee case in closing argument was improper.

251 P.3d at 818.

5. Lawyers' Vouching, Opinions, and Personal Knowledge

“I believe that my client was telling the truth.” This is vouching and is improper. The lawyer isn’t sworn and cannot give testimony, except on certain limited issues, such as fees. Unsworn statements of personal knowledge of the facts or statements of personal knowledge of the credibility of a witness by an attorney also violate Rule of Professional Conduct 3.4(e). Some other examples of vouching:

• If you knew Lizzie Borden like I have for the past twenty years, you’d know that she couldn’t hurt a fly.

• I tell you that Dr. Mengele was a good doctor. Maybe his methods were unusual, but his motives were honorable, in my humble opinion as an officer of this court.

• In twenty years of practice, I have never seen a case that more demands a verdict for the plaintiff than this one . . .

Better to stay entirely away from “It is my opinion,” “I believe,” “I think,” and the like in argument. You can demonstrate your commitment to your client's cause without stepping over the ethical line. These are trigger words which may well prompt a response. Here's another example: one lawyer's characterization of his witness's cross-examination performance as showing that the witness had "answered honestly, candidly, accurately. His testimony is excellent" was held to be improper, and contributed to a mistrial in Blanch Road Corp. v.
And in Schoon v. Looby, 670 N.W. 885 (S.D. 2003) a defense lawyer's comments in a medical malpractice case that the defendant doctor delivered his second child, and that he knew him to be a "quiet, professional person. And to have these allegations made against him troubles me" was improper.

6. References to Insurance Coverage

Generally improper, but possibly acceptable if relevant to agency, ownership, bias, and so on. Review Utah Rule of Evidence 411 and Reeves v. Gentile, 813 P.2d 111 (Utah 1991).

7. Let Me Tell You about Myself

In the past, a few of our colleagues attempt to ingratiate themselves with the jury by telling them in opening statement about their background, their family, their schools, and so on. The lawyer isn’t on trial and her personal history is irrelevant. Think of the possibilities for cross examination were it otherwise.

8. Come, Let Us Grovel Together

The attorney shares his fears with the jury in a transparent attempt to garner empathy. He wants them to know how he fears his own limitations. How that gnaws at him. How he’s worried that they won’t like him and, thus, not like his client and his case. How that worries his wife. And so on.

Object to this drivel in argument, and don't start your opening argument by apologizing. What the lawyer fears has no bearing on any issue in the case. It’s as ineffective and obvious an attempt at manipulation as wearing a placard that says: “Please Love Me.” Here’s an actual example taken from the transcript of an opening statement in a civil action tried in Salt Lake some years ago. The defense lawyer began with this:
Ladies and Gentlemen, I would like to just tell you for a minute about how I feel about this case. I’m extremely nervous right now, and didn’t sleep at all last night. And I’m afraid. And I’m afraid that I’m going to fail these three men who have been accused of some pretty serious things, and I’m afraid for myself. I’m afraid that I won’t be adequate to defend them in what they deserve . . . .

At this point, the plaintiff’s lawyer objected and the judge promptly sustained it. As you might imagine, the opening statement slid downhill from there. After the trial, some of the jurors commented to the plaintiff’s lawyer on how odd they all thought it was for a well-funded defendant to have an attorney with so little self-confidence, and how odd it was that the defendant, with all its money, could not have found a trial lawyer a bit more sure of himself. There’s a lesson here, and it seems to be that we shouldn’t believe everything we learn at seminars.

9. Reference to Wealth, Size, or Social Status of Parties

This comment cost a plaintiff’s attorney a verdict in a Utah medical malpractice case:

In our system, a small, but an injured party, is allowed, through the jury system, to take on the strong and the mighty, and have even a chance of success...suing IHC is a little like suing Mother Nature in this community.

References to the relative wealth of the parties are improper. Donahue v. Intermountain Health Care, Inc., 748 P.2d 1067 (Utah 1987) held these remarks were an inappropriate attempt to appeal to the social or economic prejudices of the jurors. Even rich people and big corporations are supposed to get a fair shake and you can’t brazenly appeal to the underdog instincts of a jury.

10. Attacks on Opposing Counsel or Parties

“We don’t call that law firm ‘Dumb & Dumber’ for no reason. Even grinning moronic geeks like them know that this was a matter of medical judgment, and not of malpractice . . . .”
This remark was held to be an appropriate and accurate comment in closing argument by defense counsel in a medical malpractice action. Not really. Despite the temptations we all sometimes feel, personal attacks on opposing counsel are improper and objectionable. Not that they work anyway; a jury expects to see professionals at work, not kids on a playground.

Even something as mild as “[Plaintiff’s attorney is a member of a] “very large law firm. . . whose job it is to build up big cases . . .” won’t fly. *Weinberger v. City of New York*, 468 N.Y.S.2d 697 (App. Div. 1983).

In *SDG Dadeland Assos. v. Anthony*, 979 So.2d 997 (Fl. App. 2008), counsel was rebuked and his jury verdict overturned for statements in argument accusing his opponents of hiding evidence and of fraudulently preventing the presentation of relevant evidence. Some examples of the misconduct:

- Asserting that defendant refused to turn over in discovery additional photographs that would have been harmful to the defense;
- Alleging misconduct in discovery;
- Expressing opinion that all defense witnesses had lied and perjured themselves;
- Alleging evidence had been created after the accident in issue;
- Stating that defense counsel “knew” defendant was liable, but had a duty to protect the corporate wallet;
- Asking jurors about “frivolous defenses” and then pursuing that theme throughout his case.

In *State v. Campos*, 2013 UT App 213, ¶¶ 54–57, 309 P.3d 1160 a conviction was reversed for prosecutor’s closing arguments that improperly crossed the line to attacks on the
credibility of opposing counsel. (“Arguing that the evidence does not support the
defense theory and that the theory is thus a distraction from the ultimate issue is fundamentally
different from arguing that defense counsel is intentionally trying to distract and mislead the
jury.”) Id.

11. Mathematical Damage Formulas

“Just give the plaintiff a dime for every hour he will spend with this pain . . .” This, the
“per diem” argument, is borderline. Olsen v. Preferred Risk Mutual Ins. Co., 554 P.2d 575 (Utah
1960) held that the per diem argument was a matter for the discretion of the trial court and proper
with a cautionary instruction. Tjas v. Proctor, 591 P.2d 438 (Utah 1979) upheld the trial court’s
rejection of a per diem argument. A variant is the “job-offer” in which plaintiff’s attorney asks
the jury to “assume” the job of being injured as the plaintiff is, and to then determine what an
acceptable daily “salary” would be.

12. The Golden Rule

This is asking the jury to put themselves into the shoes of the plaintiff, in other words,
“Do unto the plaintiff as you would want done onto yourself.” It’s generally held to be
inappropriate as to damages, although it may be allowed in the discretion of the trial court. In
Green v Louder & Murray, 29 P.3d 638 (Utah 2001) the Court held that the “Golden Rule”
argument can be acceptable if not used to argue damages:

• “Look how close those cars are to having a head on collision and then ask yourself if
  you would do the same thing.”

• “Before you impose standards on Lloyd Louder higher than you pose [sic] on yourself,
  you must realize that he is only held to be the reasonable person, not the perfect person.”

• “How many of you, the standard of the reasonable person, would stay that close to a
  head on collision with a car coming in your own lane without trying to get somewhere

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else?"

- "[A] verdict that Louder was even partially at fault for this accident is to say in your heart, well I have never been seconds from an imminent head on collision . . . ."

As acknowledged by Green in her brief to this court, the use of golden rule arguments is improper only "with respect to damages." Shultz v. Rice, 809 F.2d 643, 651-52 (10th Cir. 1986) (citing Burrage v. Harrell, 537 F.2d 837, 839 (5th Cir. 1976)). The statements cited above were not directed to the issue of damages. In addition, the use of golden rule arguments "is not improper when urged on the issue of ultimate liability." Id. at 652 (citing Stokes v. Delcambre, 710 F.2d 1120, 1228 (5th Cir. 1983)). Therefore, the statements were not improper.

70 A.L.R.2d 935 has an annotation on this issue. An entertaining example of a quasi-Golden Rule argument that forced a reversal is the cloying “Puppy Story.” See SDG Dadeland Asso. Inc. v. Anthony, 979 So.2d 997 (Fl. App. 2008). Another example (one I would not have considered to be a Golden-Rule argument) was a plaintiff’s lawyer in a wrongful death case telling a jury that if his clients had the chance to push a button and bring their child back, they would quickly do so. The only purpose for the argument was to suggest that the jurors imagine themselves in the place of the grieving parents. Bocher v. Glass, 874 So.2d 701, 703 (Fla. App. 2004).

13. Send Them a Message

An appeal for the jury to “send a message” or “let them (the defendant corporation) hear you” is improper if punitive damages are not in issue.

14. The Motion to Dismiss Was Denied for a Reason

It’s improper to advise the jury that a motion for summary judgment or for directed verdict was denied by the judge, or to suggest that the case would have been thrown out if it had been lacking in substance. Propriety and Prejudicial Effect of Counsel’s Argument or Comment as to Trial Judge’s Refusal to Direct Verdict Against Him, 10 A.L.R. 3d 1330 (1966).

15. This Case Should Have Been Settled

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“It is a case that really shouldn’t be here. This is a case that should have been resolved without coming to trial. But it just wasn’t possible to do it. It is not my idea that we are here.”

Donahue v. Intermountain Health Care, Inc., 748 P.2d 1067 (Utah 1987) held this to be improper. Of course, settlement discussions themselves are not admissible. But neither are references to the notion that either side should have settled the case and, therefore, not wasted the jury’s time in forcing a trial.

16. The Pleadings Tell the Story

Generally held improper, if the pleadings are not in evidence. (And they aren’t, unless you have put them there.) Taylor v. Missouri Natural Gas Co., 67 S.W.2d 107 (Mo.App. 1933).

17. Addressing Jurors by Name

Counsel cannot make an argument like this: “Now, Mr. Spencer [a juror], you wouldn’t think the defendant was such a bad guy if you knew these things, would you?” The courts that have considered it mostly find referring to jurors by name to be an improper attempt to influence the jury. Prejudicial Effect of Counsel’s Addressing Individually or by Name Particular Juror During Argument, 55 A.L.R.2d 1198 (1957 and later case service).

18. An Insured Defendant Will Have to Pay the Verdict

“We are talking about money that my client will have to pay out of his own pocket” was an improper argument when there was insurance. Priel v. R.E.D., Inc., 392 N.W. 2d 65 (N.D. 1986). Cf. Ostler v. Albina Transfer Co., 781 P.2d 445 (Utah App. 1989).

19. The “Missing Witness”

It may or may not be proper in closing argument to comment upon the failure of a party to call certain witnesses. Usually, one must first show that the witness was available, that the
witness was more easily available to the non-calling party, that the party failed to explain the absence of the witness, and that the testimony would not have been immaterial or cumulative.

20. **The Taxpayers Will/Won’t Pay This Verdict**

It is objectionable to appeal to the self-interest of jurors as taxpayers when a governmental entity is the defendant. *Byrns v. St. Louis County*, 295 N.W. 2d 517, 521 (Minn. 1980). Likewise, a plaintiff’s attorney shouldn’t be allowed to argue that his client will become a burden on the taxpayers if a verdict in his favor isn’t returned. *Trinity Universal v. Chafin*, 229 S.W. 2d 942, 947 (Tex. Civ. App. 1950).

21. **Experts Are Not to Be Believed Because They’ve Been Paid**

*Weinberger v. City of New York*, 468 N.Y.S.2d 697 (App. Div. 1983): “It is serious error to argue in summation that an expert is not to be believed because he was paid to testify.” I suppose the gist of it is the fiction that the expert was paid for his time away from his practice, and not paid for his opinions. On the other hand, it is common, appropriate, and necessary to argue against the credibility of hired experts who derive a substantial income from testifying, and counsel nearly always asks about compensation.

22. **Subpoenaed Witnesses Are More Reliable.**

Several cases hold that this is a misleading argument because it incorrectly presumes that “volunteer” witnesses are more likely to have been coached. *See Hoffer v. Hurd*, 49 N.W.2d 282 (N.D. 1951). Although we know this presumption is often correct, the point of the cases is that there isn’t any such evidence before the court.

23. **The "First-Person Argument"**

The first-person argument (in which the lawyer imagines herself aloud in the role of a witness, party, or decedent) is a powerful one and has been used more frequently in recent years. John Edwards made a career of it, taking on the role of the baby starved for oxygen in the womb.
But some courts hold this argument refers to matters outside the record, without foundation in the evidence, and is therefore improper.

For example, in *Drayden v White*, 232 F.3d 704 (9th Cir. 2000) the court held that a prosecutor engaged in misconduct during a murder trial when he sat in the witness chair and delivered a soliloquy on the role of the victim, thereby inappropriately obscuring the fact that his role was to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim, and risking manipulating and misstating the evidence, as well as improperly inflaming the passions of the jury. Nevertheless, the conduct, although improper, did not merit a new trial.

An example closer to home is *State v. Todd*, 2007 UT App 349, 173 P.3d 170. A prosecutor engaged in improper argument during closing by visualizing what the murdered victim might have said, had she been alive to speak to the jury. The appellate court held that this was both an improper appeal to passion and referred to matters not in evidence. But the improper argument did not likely change the outcome, as there was substantial evidence of guilt, and therefore the guilty verdict stood.

These mistakes can get expensive. A few years ago, a John Edwards-like first person "suffocating baby" closing argument led to the reversal of a $30,000,000 jury verdict.

24. **Improper Bolstering in Opening Statement Before Impeachment**

*State v. Perez*, 946 P.2d 724 (Ut. App. 1997) held that a prosecutor's opening statement remarks on the credibility of his witness were improper bolstering under Rule 608. The prosecution is not supposed to refer to evidence it may introduce on rebuttal based on its expectation that the defense will introduce certain impeaching evidence. In addition, Rule 608
clearly provides that a witness's credibility may not be bolstered before it is attacked.

**CONCLUSION**

There is a certain sloppiness in our trials about the bounds of appropriate closing argument, perhaps because so many think it rude or improper to object. That's still the rule I follow with an opponent who is experienced and professional. But not all are so. Some will engage in any tactic in order to win. Failure to object—right at the time the argument is made, not later—will likely mean your objection is waived.

I therefore recommend that, if you have an unknown opposing counsel, ask others about her track record in arguments. If you have is cause for concern, get the transcripts of argument in prior trials and make a motion in limine to prevent improper arguments or, at the least, educate the judge on the issues. As was the case in the *Lioce* matter, lawyers tend to argue from formulas that have worked for them in the past.

The courts are now more attuned to improper argument, especially in personal injury cases, and it’s wise to preserve your record through a motion in limine. Once filed, the opponent may well claim that she stands wrongly accused, and would never dream of making such an argument. So be it—if that turns out to be the case, then all the better.

FJC
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