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OBJECTIONABLE JURY ARGUMENT

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Note from Frank Carney-

This paper, like my other trial practice papers, is subject to periodic revision, and I suggest visiting my web site for the latest version: http://www.fjcadr.com/trial-practice-papers.html

I have no undue pride of authorship, and I welcome comments, corrections, and suggestions– if I have it wrong, I want to hear about it. I particularly wish to learn of any novel or interesting "problem arguments" that the trial judges or counsel encounter.

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INTRODUCTION

The scope of permissible closing argument is broad; after all, it is the trial lawyer's moment to shine and bring to a head what may have been years of work and preparation. Trial judges have traditionally been loath to intervene. It is well-recognized that counsel have considerable latitude in their closing arguments, and have the right to fully discuss the evidence as well as all inferences and deductions it supports. *See*, Boyle v. Christensen, 2011 UT 20, ¶ 18, 251 P.3d 810, State v. Lafferty, 749 P.2d 1239, 1255 (Utah 1988); State v. Valdez, 513 P.2d 422, 426 (Utah 1973).

However, that latitude is not unlimited. In recent years there has been increased judicial attention to improper argument, both at the trial and at the appellate level, especially in criminal trials.[1] *See*, Craig L. Montz, "Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases," 28 Ohio N. U. L. Rev. 67 (2001) (noting and lamenting that appeals involving improper arguments have greatly increased. *Id*., n. 4) The

[1]As you will read below, a court has a greater obligation to ensure fairness in a criminal trial, among other reasons due to the constitutional guarantee of *effective* assistance of counsel and the Plain Error Doctrine. Therefore, expect a much-lower level of vigilance by the trial judge on arguments in a civil trial, especially where there is no objection.

deference of trial judges towards counsels' conduct of closing argument seems to be lessening, as is the reluctance of opposing counsel to object. *See,* Anderson v. Larry H. Miller Communications, 2015 UT App 134, ¶ 6, 351 P.3d 832 (inappropriate, argumentative opening statement).

Why this rise in objectionable argument? One reason is the lack of formal education for lawyers on the bounds of proper jury argument. After all, few of us took a course on this subject in law school. If not then, where does one learn the bounds of proper argument? The answer is mostly in trial advocacy courses, where the focus is on techniques that are said to win, not on the technical rules of proper argument. According to some commentators, this leads to a general lack of knowledge of the rules which, coupled with a lack of judicial supervision, leads to out-of-control jury arguments. *See*, *e.g.*, David E. Bernstein, "The Abuse of Opening Statements and Closing Arguments in Civil Litigation," Civil Justice Memo #38, Manhattan Institute for Policy Research (August 1999).

Closing argument is designed to afford a parties the opportunity to address the jury with respect to the contentions; to comment on the credibility of the witnesses; to summarize the evidence adduced at trial; and to ask the jurors to draw inferences in their favor. Miller v. Owen, 709 N.Y.S.2d 378 (N.Y. App. 2000). But defining just what steps beyond those boundaries is sometimes difficult-- even the United States Supreme Court has observed that the line between proper and improper advocacy "is not easily drawn; there is often a gray zone." United States v. Young, 470 U.S. 1, 7 (1985) (Burger, J.)

The standard given by the appellate courts for judging improper argument is both broad and somewhat unhelpful; it is generally expressed as whether the remarks made in closing call

the jurors' attention to matters that they would not have been justified in considering in reaching a verdict. *See,* Boyle v. Christensen, *supra*; State v Alonzo, 973 P.2d 975, 981 (Utah 1998); State v. Emmett, 839 P.2d 781, 785 (Utah 1992), and Robert W. Clifford, "Identifying and Preventing Improper Prosecutorial Comment in Closing Argument," 51 Me. L. Rev. 241 (1999).

There are thousands of reported decisions on objectionable argument, and this paper cannot pretend to collect all of them, or even a significant portion of them. Rather, my goal is to survey the case law with the hope of assisting counsel and the bench in becoming more sensitive to those arguments that seem to pose recurring problems.

THE FIVE RULES OF PROPER ARGUMENT

In an attempt to bring some logical coherence to the seemingly-endless variety of objectionable arguments, I have devised what I call my "Five Rules of Proper Argument." These rules cover both criminal and civil trials, and there may well be overlap in some problem arguments, a lawyer may violate several rules at once:

1. **You May Not Refer to Matters Not in the Record**
2. **You May Not Misstate the Facts or the Law**
3. **You May Not Appeal to Emotions, Passions, or Prejudice**
4. **You May Not Mischaracterize the Job of the Jury**
5. **You May Not Act in a Way Unbefitting an Officer of the Court**

Within these Five Rules we can classify all the common varieties of objectionable jury argument.

APPLICATION OF THE RULES

I will provide some examples to sensitize the trial judge to common problem areas under the Five Rules. After that, I will address specific problem arguments in more detail.

Rule 1- Arguing outside of the record

This is the most basic of the rules, probably the easiest to understand, and the most frequently violated. Except for matters of general knowledge or reference, in argument counsel may refer only to matters that are in the record. The jury is to decide the case based on the record before it and the law as given to it, not on extra-judicial facts that are not subject to the rules of evidence and the rigors of cross examination.

This elementary principle is incorporated both in the Rules of Professional Conduct and in the ABA Criminal Justice Standards:

Rule 3.4(e), Rules of Professional Conduct:

> 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 [or] assert personal knowledge of facts in issue except when testifying as a witness . . .

ABA Criminal Justice Standard 3-6.9. Facts Outside the Record.

> When before a jury, the prosecutor should not knowingly refer to, or argue on the basis of, facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience, or are matters of which a court clearly may take judicial notice, or are facts the prosecutor reasonably believes will be entered into the record at that proceeding. In a nonjury context the prosecutor may refer to extra-record facts relevant to issues about which the court specifically inquires, but should note that they are outside the record.

Here are some examples of Rule 1 violations:

•Boyle v Christensen, 2009 UT App 241, 219 P.3d 58- defense counsel's references in personal injury trial to the "McDonald's Coffee Case" were improper.

•Jones v Carvell, 641 P.2d 105, 111-112 (Utah 1982)- in a wrongful death case where defendant did not take the stand, defense counsel's references to his client's sorrow and suffering in causing the death of the minor decedent exceeded the bounds of proper argument.

•Gilster v. PrimeBank, 747 F.3d 1007 (8th Cir. 2014)- in sexual harassment case, plaintiff's counsel reference to her own sexual harassment in law school was improper.

•Cler v. Providence Health System, 245 P.3d 642 (Or. 2010)- counsel's explanation in closing argument for his failure to call nursing expert witness were extra-judicial statements unsupported by any evidence and were improper.

•Bloch v. Addis, 493 So.2d 539 (Fla. App. 1986)- new trial ordered where plaintiff's counsel stated in closing that defendant's expert "prepared his notes in the hall" and "was part of the same country club" as the defendant. There was no trial evidence to support either one of these statements.

•State v. Thompson, 2014 UT App 14, ¶ 62, 318 P.3d 1221, 1243- prosecutor's suggestions about using a witness's body language as an impromptu lie detector test was unsworn "expert" testimony outside the record.

•Whittenburg v. Werner Enterprises, Inc., 561 F.3d 1122 (10th Cir. 2009)- plaintiff's counsel's closing argument asked the jury to imagine that, shortly after decedent had left the house the night of the subject accident, the defense delivered a letter to decedent's children. This "imaginary letter"(forewarning the children what would happen to them if they sued the defendant for killing their father) contained a range of attacks and aspersions on the defendant, its counsel, and its litigation strategy. The Tenth Circuit held that this argument lacked any foundation in the evidence and was improper.

•State v. Andreason, 718 P.2d 400 (Utah 1986)- reversed and remanded a conviction for theft of electrical services after a prosecutor made improper remarks in his closing argument. The prosecutor called the defendant's conduct "pervasive," and told the jury that it should be concerned about "how many who aren't innocent are turned loose." These remarks were improper because what others did or did not do was not in evidence, and were not relevant to defendant's guilt or innocence.

•Winschel v. Jain, 925 A.2d 782 (Pa. App. 2007)- a cardiologist's attorney in a malpractice trial could not reply in closing argument to the testimony of a forensic pathologist by urging alternate theories of death for which there was no evidence.

Rule 2- Misstating the facts or the law

Rule 2 concerns the incontrovertible proposition that counsel may not misstate the facts of the case, or the law that applies to it. Jones v. Carvell, 641 P.2d 105 (Utah 1982) ("It is as improper to misstate facts in the record as it is to state as facts propositions for which there is no evidence").

An example is found in State v. King, 2010 UT App 396, 248 P.3d 984, where a sex abuse conviction was reversed because of a prosecutor's mischaracterization of critical witness's testimony. The court noted that inferences from the facts are permissible for closing, but not "flagrant contradictions" of the testimony. *Id*. at ¶ 25.

In criminal cases, misstatements of the law sometimes appear in the guise of distorting the burden of proof, such as arguments by the prosecution that the jury "must convict" unless it finds the prosecution's witnesses were lying or that the jury "must convict" if finds that

defendant lied. Courts have found such statements to be improper. (This is also a violation of Rule 5.) *See*, State v. Pabst, 996 P.2d 321, 328-29 (Kan. 2000).

In civil cases, one occasionally will hear arguments like, "He's not just being accused of mere negligence, but of *medical malpractice* . . ." (implying that malpractice is something different and worse than mere negligence). Similarly, references to a defendant not "being guilty" of malpractice or negligence are inappropriate, as they suggest the higher criminal standard of proof should apply.

Rule 3- Appeals to emotion, sympathy, passion, or to prejudice

Surely some passion and emotion by counsel in the presentation of a closing is appropriate– but appeals that lead a jury to decide a case based on raw emotion, rather than the evidence before it, are grounds for reversal. Comments meant to inflame passion or prejudice in the jury are improper because they divert the jury from its job- to "dispassionately" reach a verdict on the evidence, and nothing else.

The foundational MUJI civil instruction that all juries are given, in one form or another, is 2 MUJI CV107:

> Jurors may not decide based on sympathy, passion and prejudice. You must decide this case based on the facts and the law, without regard to sympathy, passion or prejudice. You must not decide for or against anyone because you feel sorry for or angry at anyone.

Appeals to ethnic, racial, sexual, and other prejudices are also improper, as are appeals to regional biases. *See, e.g.*, Shemmom v. American SS Co., 280 N.W.2d 852, 858, n. 2 (Mich. App. 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).

Fehrenbach v. O'Malley, 841 N.E.2d 350, 357 (Oh. App. 2005)- improper for defense counsel to appeal to sympathy 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.

Liggett Group Inc. v. Engle, 853 So.2d 434 (Fla. App. 2003), *rev'd,* 945 So. 2d 1246- arguments of plaintiffs' counsel in a cigarette smokers' class action against tobacco companies inflamed the predominantly African-American jury panel with racial pandering and pleas for nullification of the law. Counsel compared defendant's actions with genocide and slavery, and repeatedly urged the jury to emulate civil rights heroes by fighting "unjust laws" protecting the right to sell cigarettes. These were inappropriate and improper, but the Florida Supreme Court on further appeal held that they alone did not require a reversal, given the totality of the circumstances. Engle. v. Liggett Group, 945 So. 2d 1246, 1271 (Fl. 2006).

And, of course, improper arguments to passion and prejudice are not unknown in criminal cases:

•State v. Thompson, 2014 UT App 14, ¶ 67, 318 P.3d 1221- prosecutor's comments are improper if they invoke the passion and prejudice of the jury by asking jurors to put themselves in the victim's place, stating how a victim would have testified had he or she been alive to testify, suggesting that the jury should find the defendant guilty out of vengeance or sympathy for the victim, or contending that the jury has a duty to protect the alleged victim or to become her partisan.

State v. Begishe, 937 P.2d 527, 528, n. 1 (Ut. Ct. App.1997)- prosecutor's closing argument in response to defendant's strategy of bringing twin bed into courtroom so that jury could envision crowded conditions of alleged rape with three other children in same bed was

improper comment on defendant's strategy and use of evidence for apparent purpose of inflaming jury in prosecution for sexual abuse of child; prosecutor stated that defendant "did not have to deprive children of their bed so that he could get acquitted."

State v. Campos, 2013 UT App 213, ¶ 48, 309 P.3d 1160- prosecutor's closing remarks in prosecution for attempted murder, that defendant who shot victim should be held accountable for "stealing" victim's ability to run, bike, and walk his daughter down the aisle, were improper appeals to passions, and thus prosecutorial misconduct.

State v. Akok, 2015 UT App 89,¶¶ 14-16, 348 P.3d 377- conviction for rape reversed because of a prosecutor's improper references in argument to the jury. This is the final part of the prosecutor's rebuttal closing argument:

> And when you look at the totality of the evidence it is very clear that [Defendant and the codefendant] engaged in sexual intercourse and touched her without her consent. **They took advantage of a very vulnerable victim. Don't let them take advantage . . . again**.

The appellate court found these two last bolded sentences to be so objectionable as to warrant a new trial, as they improperly appealed to the juror's emotions by suggesting that they had a duty to protect the victim (and perhaps women generally) from the defendant. In other words, the statement called on the jury to assume the responsibility of ensuring the victim's safety.

Rule 4- Misstating the role of the jury, or the burden to persuade it

Rule 4 violations are sometimes subtle. The role of the jury is to decide the facts and render a verdict upon the law given them by the court. It is not, I suggest, to act in behalf of the community as a whole. Yet this is precisely what many attorneys strive to do, and indeed are

taught to do-- to make the case "bigger than the facts." Rule 4 problems generally come in three places:

1. "Send a message" arguments

The purpose of compensatory damages is just what the term suggests: to compensate the injured party. It is not to punish the defendant, to prove a point, or otherwise send a message or punish the wrongdoer. That is the role of punitive damages. Therefore, comments about "sending a message" are generally improper unless punitive damages are at issue. Ocwen Financial Corp. v. Kidder, 950 So.2d 480 (Fl. App. 2007). *See also*, Smith v. Courter, 531 S.W.2d 743 (Mo.1976) *overruled on other grounds*, Maercks v. Birchansky, 549 So.2d 199 (Fla. App.1989) (argument on "sending a message" to the community is improper when punitive damages are not sought); R.J. Reynolds Tobacco v. Gafney, 2016 WL 1128480 (Fla. Dist. Ct. App. 3/23/16).

2. "Prevent this from happening again"

Statements suggesting that the jury should act to protect the victim or the safety of all may be inappropriate, particularly in a criminal case:

•State v Wright, 2013 UT App 142, 304 P.3d 887- prosecutor's statement that "you have the power to make that [sex abuse] stop" was improper, as it called on the jury to assume the responsibility of ensuring the victim's safety.

•State v. Thompson, *supra*- comments that the jury has a duty to protect the victim or to become her partisan are inappropriate.

•State v. Akok, *supra*- comments calling on the jury to assume the responsibility of ensuring the victim's safety are improper.

•State v. Campos, *supra*, ¶ 51- "[R]eference to the jury's societal obligation is inappropriate when it suggests that the jury base its decision on the impact of the verdict on society and the criminal justice system rather than the facts of the case."

State v. Olola, 2014 UT App 263, ¶ 11 339 P.3d 164- comments that jury should convict defendant to "nip" his conduct "before someone gets killed" were improper.

3. "Community standards" or "conscience of the community"

•Freeman v. Blue Ridge Paper Products, Inc., 229 S.W.3d 694 (TN. App. 2007)- counsel told the jury that he wished he could have brought the lawsuit on behalf of the entire county, and that it was up to the jury to act as "the conscience of the community." The court held that a cautionary instruction should be given.

•Sears v Middcap, 893 A.2d 542 (Del. 2006)- plaintiffs' counsel's appealed to the jurors as representing the community in deciding whether defendant's conduct met with community approval:

> If you stamp their conduct with your approval, it will continue. It will be the standard with which others will be guided. If, on the other hand, you find in favor of the plaintiffs, you will reject this kind of conduct by your verdict. You set the standard in this community. You can set a new and better safety standard. There is no reason for Delaware to be a second class citizen in this regard. Delaware is entitled to the same standard of safety as New York City, Philadelphia, or Pittsburgh. The size of the community makes no difference, nor does the fact that Kent County is largely rural. Delaware shouldn't have to settle for second rate standards. Don't settle for second rate safety. Put Delaware and Kent County standards up there where they belong with the first class citizens.

The Delaware Supreme Court held that this was an appeal to prejudice that strongly implied factual evidence that the defendants somehow discriminated against residents of suburban or rural counties like Kent County, Delaware. It was therefore improper.

•Maercks v. Birchansky, 549 So.2d 199 (Fl. Ct. App. 1989)- it was improper in a medical malpractice case for plaintiff's counsel to ask the jury to act as the "conscience of the community."

•Suarez v. Ashford Presbyterian Hospital, 4 F.3d 47, 51 (1st Cir. 1993)- "conscience of the community" arguments were "outrageous" and deflected the jury from deciding the case upon the law and the evidence. "It is difficult enough for a jury to decide a case involving serious suffering dispassionately upon the law and the evidence without being told that the community conscience calls to decide with the heart. The total argument was outrageous. We can only think that this experienced court, in permitting it, had a bad day." *Id*.

•Westbrook v. Gen. Tire & Rubber Co., 754 F.2d 1233, 1238 (5th Cir. 1985)- ("This us-against-them plea can have no appeal other than to prejudice by pitting "the community" against a nonresident corporation. Such argument is an improper distraction from the jury's sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial."

•Gilster v. PrimeBank, 747 F.3d 1007, 1011 (8th Cir. 2014)- counsel's rebuttal argument ended by "giving" to the jury "the power and responsibility for correcting injustices." The Eighth Circuit held that "[t]his was no different than a prosecutor urging the jury at the end of a criminal case 'to be the conscience of the community,' an improper argument that, in a close case, may warrant a new trial."

But there are some courts that disagree. For example, in Fields v. Commonwealth, 219 S.W.3d 742, 751 (Ky. 2007) a criminal defendant asserted on appeal that a reference to the jury as the "conscience of the community" constituted prosecutorial misconduct. In weighing in on

that argument, Kentucky Supreme Court held: "In so doing, he acknowledged the jury as the 'conscience of the community,' *which they truly are*." *Id. See also*, Young v. Commonwealth, 50 S.W.3d 148 (Ky. 2001) (overruled on other grounds), the court quoting with approval the following language: "[A] jury … can do little more – and must do nothing less – than express the conscience of the community…." *Id.* at 157, *citing* Witherspoon v. Illinois, 391 U.S. 510 (1968). (And see below for a discussion of the "Reptile" argument, the essence of which is an appeal to community safety standards in civil cases for damages.)

Rule 5- Conduct not befitting an officer of the Court

This rule covers a host of problems with counsel's conduct at trial. It may seem quaint to some lawyers, but after thirty-five years of practice, it occurs to me that we've lost sight of the fact that lawyers are *officers of the court*, not hired guns paid to win at all costs. Yet too many of us adhere to an anything-goes mentality, perhaps fostered by the pressures of a competitive practice, TV shows, and sometimes a lack of enforcement of professionalism standards in court.

Under Rule 5, I include such things as vouching, abusing opposing counsel, denigrating opposing parties, engaging in over-the-top courtroom conduct, instructing the jury on the law, injecting the personal opinions of counsel, commenting on the court's rulings, violating evidentiary or constitutional rules, making unseemly attempts to ingratiate oneself with the jurors, and "sandbagging" tactics in rebuttal argument.

1. Personal opinions about the merits

This a common violation. A lawyer, as an officer of the court, has the duty to present the facts from the examination of witnesses and admission of material evidence. It's entirely

inappropriate for counsel to become a witness; that is, to be an unsworn giver of facts. State v. Dibello, 780 P.2d 1221, 1226 (Utah 1989).

Expressions of personal opinion by a lawyer in trial are expressly forbidden by the Rules of Professional Conduct. Rule 3.4(e) provides that a lawyer shall not "assert personal knowledge of facts in issue except when testifying as a 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."

Some examples from the case law:

•Merryweather v. Callister, 2002 UT App 205 (unpublished opinion)- counsel improperly injected his personal opinion in his closing remarks by stating, *"I don't like these guys. You can tell I don't.*"

•State v. Lafferty, 749 P.2d 1239, 1255 (Utah 1988)- "We agree with the general proposition that a prosecutor engages in misconduct when he or she asserts personal knowledge of the facts in issue."

•But *see*, State v. Larsen, 2005 UT App 201, ¶ 7, 113 P.3d 998- prosecutor's statement that "I think our evidence is strong . . ." was not improper: "[I]n this context, the term "I think" does not operate as an assertion of testimony, and to the contrary, expresses a degree of uncertainty about the result that emphasizes the jury's discretion to reach another conclusion."

2. Instructing the jury on the law

Obviously, it is the role of the court, not the lawyer, to explain to the jury what the law is. *See*, State v. Smith, 675 P.2d 521, 526 (Utah 1983) ("It is the prerogative of the court, not counsel, to instruct the jury on the applicable law."). While some states prohibit nearly all

comment on the law by counsel, most Utah judges allow it in closing argument, especially in applying the instructions to the facts.

In that regard, where counsel believes that instructions are inadequate, the proper course is to request additional instruction by the court– 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, Ok. App. 2000).

And it is improper for counsel to criticize the law, argue policy, or ask a jury to nullify a law in the interests of justice. *See,* Boruch v. Morawiec, 857 N.Y.S.2d 103 (NY App. 2008) (improper for defense counsel to comment, during summation, that Industrial Code section governing guarding of power-driven saws was a "stupid law.")

3. Vouching

It's rarely as simple as "I believe that my client/that witness was telling the truth," but that is "vouching," and it 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 credibility of a witness by an attorney also violate Rule of Professional Conduct 3.4(e). *See*, 78 A.L.R. Fed. 23, *Propriety and Prejudicial Effect of Comments by Counsel Vouching for Credibility of Witness—Federal Cases* and 45 A.L.R.4th 602, *Propriety and Prejudicial Effect of Comments by Counsel Vouching for Credibility of Witness—State Cases.*

In Schoon v. Looby, 670 N.W.2d 885 (S.D. 2003), it was held to be improper for a defense lawyer in a medical malpractice case to remark 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".

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. Bensalem Township, 57 F.3d 253, 265 (3d Cir. 1995).

In criminal cases, a prosecutor must avoid "vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused." State v Thompson, 2014 UT App 14, ¶ 51, 318 P.3d 1221; State v. Hopkins, 782 P.2d 475, 479 (Utah 1989); State v Carter, 776 P.2d 886 (Utah 1989).

4. Infringing on evidentiary rules or constitutional privileges

It is improper for a lawyer in argument to violate procedural or evidentiary rules, or to impugn a defendant's assertion of the constitutional right against self-incrimination.

One example of violation of evidentiary rules is improper bolstering 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 under Rule 608, because 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. And Rule 608 provides that a witness's credibility may not be bolstered before it is attacked.

Very problematic on constitutional grounds– yet surprisingly common-- are prosecutors' attempts to infer culpability from the failure of a criminal defendant to testify. Wilson v United States, 149 U.S. 60 (1893). This can be a fine line, as "paucity of evidence" arguments may seem to insinuate that the defendant would have testified if were not guilty, but are often allowed. Some of the leading cases on this point are State v. Nelson-Waggoner, 2004 UT 29, ¶ 32, 94

P.3d 186 (prosecutor's comments on paucity of witnesses for the defense did not violate defendant's Fifth Amendment rights: "The constitutional line is crossed only when a remark or an accumulation of remarks present what can fairly be characterized as an overt reference to a defendant's failure to testify"); State v. Nguyen, 2011 UT App 2, 246 P.3d 535, *aff'd* 293 P.3d 236, 2012 UT 80 ("paucity of evidence" argument by prosecutor was not improper), and State v. Tilt, 2004 UT App 395, 101 P.3d 838 (prosecutor's comments about the paucity of a defendant's evidence did not offend constitutional guarantees against self-incrimination).

Of course, it's usually appropriate in a *civil* case for counsel to comment on a witness's assertion of the Fifth Amendment privilege against testifying, and for the jury to draw a negative inference from that lack of testimony. *See*, Baxter v. Palmigiano, 425 U.S. 308 (1975); Gerard v. Young, 432 P.2d 343 (Utah 1967); Robert Heidt, "The conjurer's circle—the Fifth Amendment privilege in civil cases," 91 Yale L.J. 1062 (1982); Dennis J. Bartlett, "Adverse inferences based on non-party invocations: the real magic trick in fifth amendment civil cases," 60 Notre Dame L. Rev. 370 (1985). But *see*, In re Woll, 194 N.W. 2d 835 (Mich. 1972) (disbarment action; comment on taking Fifth inappropriate).

It is also generally improper to refer to rules of procedure, legal maneuvering during litigation, or pretrial decisions of the court. *See*, Casas v. Paradez, 267 S.W.3d 170 (Tx. App. 2008) (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).

Another example is Federated Mut. Ins. Co. v. Anderson, 991 P.2d 915, 924 (Mont.1999) In Anderson, counsel made these comments: "Mr. Beers says, well, Mr. Williams didn't call any

experts to talk to you about the case. I don't think that's a fair criticism on Mr. Beers' part, because he knows full well that I had two experts listed and have had them listed for months. I was prevented from using them, because he objected to them. are improper in closing arguments." This testimony had been limited by the trial court, based on plaintiff's counsel's objection, and the Montana Supreme Court held it was improper for defense counsel to remark to the jury that the witnesses were prevented from testifying by the plaintiff.

One may occasionally see this violation in comments by counsel about discovery problems, *e.g.* "we tried to get that for six months, and they fought us . . ." This is unsworn testimony by counsel, in violation of Rule 1.

5. Abusing opposing counsel or parties

Things can get heated in trial, and we may want to strangle our opponents, but professionalism and recognition of our duties as officers of the court make attacks on opposing counsel inappropriate. Here are some examples:

•Weinberger v. City of New York, 468 N.Y.S.2d 697 (N.Y. App. 1983)- defendants' counsel made repeated attacks in his summation upon the integrity of plaintiffs' counsel by repeated references to him as one whose job it was to "build up" big cases.

•Living Centers of Texas, Inc. v. Penalver, 256 S.W.3d 678 (Tx. 2008)- improper for plaintiffs' counsel to compare the attempts of counsel for defendant nursing home to minimize compensatory damages, to Germany's World War II "T-4 Project" in which elderly and infirm persons were used for medical experimentation and murdered.

•SDG Dadeland Assos. v. Anthony, 979 So.2d 997 (Fl. App. 2008)- counsel rebuked and verdict overturned for statements in argument accusing his opponents of hiding evidence and of

fraudulently preventing the presentation of relevant evidence. Some examples included asserting that defendant refused to turn over in discovery additional photographs that would have been harmful to the defense; expressing the opinion that all defense witnesses had lied and perjured themselves; alleging that evidence had been created after the accident; stating that the 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.

•Roetenberger v. Christ Hosp., 839 N.E.2d 441 (Ohio 2005)- remarks during closing argument by defense counsel attacking the widower who had brought the action after his wife had died, and also attacking his counsel and witnesses, were "inexcusable, unprincipled, and clearly outside scope of closing argument."

•Whittenburg v. Werner Enterprises, Inc., 561 F.3d 1122, 1130 (10th Cir. 2009)- plaintiff's counsel's attacks on his defense opponent as mounting a frivolous, bad-faith defense were improper:

> Of course, there are cases where illegitimate defenses and claims are pursued. But for a party who believes his or her opponent has abused the judicial system either in bringing a frivolous lawsuit or fronting a frivolous defense, there exist other remedies, ranging from sanctions (including fees and costs), to bar referrals, to claims for abuse or malicious use of process. . . A party need not, and ought not, resort to the self-help of vituperative ad hominem attacks during the final minutes before the jury.

•Aetna Cas. and Surety Co. v. Kaufman, 463 So.2d 520 (Fla. App. 1985)- new trial ordered where defense counsel stated "I added all this up at $461,775, and the only thing I see is [plaintiff's counsel] getting rich."

•State v. Campos, 2013 UT App 213, ¶¶ 54–57, 309 P.3d 1160- conviction reversed for prosecutor's closing arguments that improperly crossed the line into attacks on the credibility of opposing counsel by, among other things, referring to the defense argument as a "red herring"

and a "ploy to confuse and distract." Calling defense counsel's theory a distraction or irrelevant is permissible, but accusing opposing counsel of using distraction as part of a purposeful ploy is not. *Id*.. *Compare*, State v. Fouse, 2014 UT App 29, ¶¶ 29-34, 319 P.3d 778 (references to defense argument as a "huge red herring" and defense theory as "asinine" were not improper because they were not an attack on defense counsel's character by insinuating that he was attempting to manipulate the jury.)

•State v. Begishe, 937 P.2d 527, 528 n. 1 (Utah. App. 1997)- prosecutor's closing argument that "three days were used for two-day trial" improperly implied that defense had delayed matters and wasted jury's time.

And see, 99 A.L.R.2d 508, *Propriety and Effect of Attack on Opposing Counsel During Trial of a Criminal Case.*

This rule also extends to unnecessarily abusive attacks on the opposing party or the defendant:

•Rodd v. Raritan Radiological Associates, P.A., 860 A.2d 1003 (N.J. App. 2004)- suggestions that doctor missed evidence of cancer in plaintiff because he cared more about making money and "living the good life" were improper.

•James v. Bowersox, 187 F.3d 866, 870 (8th Cir. 1999)- habeas corpus proceeding where defendant was called "slime." Court stated that counsel may not make remarks during opening statement which disparage opposing counsel, the opposing case, the opposing party, or witnesses.

•State v. Thompson, 2014 UT App 14, ¶ 62, 318 P.3d 1221- addressed the issue of whether it is appropriate for a prosecutor to call defendant a liar. Noting that the law was

unclear, the court allowed this here since it was clear that the prosecutor was arguing inferences from the evidence, not his personal opinion. *See also*, State v. Otterson, 2008 UT App 139, 184 P.3d 604 (calling defendant a liar was error, but harmless) and State v. Johnson, 2007 UT App 184, ¶¶ 45-46, 163 P.3d 695 (collecting cases on this issue).

6. Unprofessional conduct of counsel.

I have actually seen or heard reports of counsel in closing argument ripping up papers, throwing a wallet at defense counsel, screaming at the opposing parties, and generally engaging in an assortment of over-the-top actions. These, obviously, are inappropriate and probably prejudicial (perhaps more so to the one acting out).

7. Attempts to ingratiate oneself with the jury

There are various tactics that some attorneys will use in order to ingratiate themselves or their clients with the jury.

A. "Let me tell you about myself"

For a while, some lawyers attempted to ingratiate themselves with the jury by telling them in opening statement about their background, their family, their schools, and so on. This is improper. The lawyer isn't on trial and her personal history is irrelevant. (Think of the possibilities for cross examination were it otherwise.)

B. "Let me share my fears"

This technique is taught at seminars that strive to make a lawyer more “real” in front of a jury. So the attorney (typically in opening statement) 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.

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 stood up and objected; the judge promptly sustained it. As you might imagine, the opening statement slid downhill from there. After the trial, a few of the jurors commented to the plaintiff's lawyer on how odd they thought it was for a well-funded governmental defendant to have an attorney with so little self-confidence, and why it was that the defendant, with all its money, could not have found a better trial lawyer.

C. Addressing jurors by name

Counsel cannot make an argument like this: "Now, Mr. Smith [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 usually hold that referring to jurors by name is an improper attempt to influence the jury. *See*, 55 A.L.R.2d 1198, *Prejudicial Effect of Counsel's Addressing Individually or by Name Particular Juror During Argument*. It's appropriate in voir dire, but not otherwise.

7. Sandbagging in rebuttal

Rebuttal is supposed to be limited to addressing new matters brought up in the opponent's argument. Sometimes lawyers "sandbag" by saving the best stuff for last, when the opponent can no longer respond. This is improper.

Local federal judge Robert Shelby's stock pretrial order makes this principle clear:

> Closing argument will follow the court's final instructions to the jury. Counsel are cautioned that any closing rebuttal argument must be limited to addressing new issues raised during the defendant's closing argument. The court will sustain an objection and instruct the jury to disregard rebuttal argument that could and should have been made in the plaintiff's initial closing argument. The plaintiff's closing argument must be structured to allow the defendant a fair opportunity to address the argument in its closing.

Some examples of reported decisions on this topic:

•A reference to the amount of damages claimed, made by plaintiff's counsel for the first time in his rebuttal closing argument, was held unfair and improper in Goldstein v Fendelman, 336 SW2d 661 (Mo. 1960).

•In a strict liability products action, plaintiff's counsel request for over $3 million in damages during the final portion of his argument was prejudicial where the initial portion of closing argument only mentioned actual damages of $54,000, defendant's counsel had not even argued damages, and the jury's award was $2,850,000. Tune v Synergy Gas Corp. 883 SW2d 10 (Mo. 1994).

See, 26 A.L.R.3d 1409, *Propriety and Prejudicial Effect of Prosecuting Attorney's Arguing New Matter or Points in his Closing Summation in Criminal Case*. However, note that (for reasons not apparent to me) a prosecutor's tactic of giving brief summation in closing argument and reserving the majority of his time for rebuttal was held not to be improper in State v. McClain, 706 P.2d 603 (Utah 1985).

SPECIFIC PROBLEM AREAS

1. References to the size or wealth of party (Rules 1 and 3)

This is an obvious no-no, and there are many examples of violations. Such arguments are outside the record and appeal to prejudice. In fact, we have a standard jury instruction warning the jury that corporations are not to be treated any differently than living people:

> 2 MUJI CV111B All persons equal before the law. The fact that one party is a natural person and another party is a [corporation/partnership/other legal entity] should not play any part in your deliberations. You must decide this case as if it were between individuals.

Making references to the size or power of the opponent is an unwise thing to do. These comments cost a plaintiff's attorney a verdict in a Utah medical malpractice case:

> "It is an awesome-it is an awesome thing that you are being asked to do. 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 an even chance of success. . . suing IHC is a little like suing Mother Nature in this community. . ."

Donohue v. Intermountain Health Care, Inc., 748 P.2d 1067 (Utah 1987) (this was an inappropriate attempt to appeal to the social or economic prejudices of the jurors). It's equally wrong to point out the poverty of a party in an attempt to incur sympathy, and the only time the relative wealth of the defendant will be relevant is in any punitive damages phase of the trial under Utah Code Ann. § 78B-8-201. *See also,* 78 A.L.R. 1438, *Counsel's Appeal to Racial, Religious, Social, or Political Prejudices or Prejudice against Corporations as Ground for a New Trial or Reversal* and 68 A.L.R.2d 990, *Prejudicial Effect of Counsel's Remarks, in Opening Statement in Personal Injury Action, as to Plaintiff's Family Circumstances, Number of Children, or the Like.*

2. "Per Diem" or Unit-of-Time (Rules 1 and 3)

A favorite of the plaintiffs' personal injury bar is the unit-of-time argument made in an attempt to quantify pain and suffering damages. Typically, counsel will point to how many months/weeks/days/hours the injured party will spend with the injury and then ask the jury to award a certain sum for each such unit of time. "Just give the plaintiff the minimum wage for every hour he will spend with this pain. He's going to live another 20 years with this .... that's 175,440 hours."

Many jurisdictions prohibit this sort of argument, but Utah leaves it to the discretion of the trial court. Olsen v. Preferred Risk Mutual Ins. Co., 354 P.2d 575 (Utah 1960) held that the per diem argument was a matter for the discretion of the trial court, and could be proper with a cautionary instruction. Tjas v. Proctor, 591 P.2d 438 (Utah 1979), on the other hand, upheld the trial court's rejection of a per diem argument. (One of the many variants is the "job-offer" argument in which counsel 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.)

Then there are courts that routinely reject the "per diem" argument. *See, e.g.* DeCicco v. Methodist Hosp. of Brooklyn, 74 A.D.2d 593, (N.Y. App 1980)- "In view of the fact that there is no mechanical method by which pain and suffering may be translated into dollars and cents, the time-unit technique injects an element of false simplicity into the determination by holding out a mathematical formula by which damages may be neatly calculated. To that extent the technique tends to deflect the jury from the essential task of exercising its own sound discretion in determining the appropriate award."

See also, Joseph H. King, "Counting Angels and Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Tort Damages," 71 Tenn. L. Rev. 1 (Fall 2003) and 3 A.L.R.4th 940 , *Per Diem or Similar Mathematical Basis for Fixing Damages for Pain and Suffering*.

3. The "Golden Rule" (Rules 3 and 5)

A Golden Rule argument is one that asks the jury to put themselves into the shoes of the party, in other words, "do unto the plaintiff as you would want done onto yourself." For example, asking the jury, in closing argument, how many of them would take $12,000 or $15,000 for their father's life or $75,000 for their husband or wife. This is generally improper. Missouri P. R. Co. v McDaniel, 483 SW2d 569 (Ark. 1972).

In Utah, it's improper to argue the Golden Rule as to damages, although it *may* be allowed as to other issues in the discretion of the trial court. In Green v Louder & Murray, 2001 UT 62, 29 P.3d 638 (Utah 2001) the Court held these "Golden Rule" arguments could be permissible:

-"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 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 . . ."

A recent decision on a motion in limine by Judge Thomas Willmore in Logan held that "Golden Rule" arguments were inappropriate in a medical malpractice case:

> The Court finds that such "golden rule" arguments on the issue of liability would be improper in this matter. Unlike the case Green v. Louder, 2001 UT 62,.¶ 36, 29 P.3d 638, the "reasonable person" standard is based on the care that other qualified doctors would ordinarily use and should not be based on the juror's own experiences. In Green, the court found that it was proper to use golden; rule arguments on the issue of liability when determining fault in a car accident. In this matter, the standard of care will be presented through expert testimony and the jury should base their decision on this evidence. See Farrow v. Health Services Corp., 604 P.2d 474, 477 (Utah 1979). Although jury instructions have not been prepared, the Court also finds the Model Utah Jury Instructions persuasive in precluding such "golden rule" statements from being presented to the jury. See MUJI 2d CV3.26 ("You may not use a standard based on your own experience or any other standard of your own.).

Collier v. Grover, 2013 WL 5951254 (Ut.Dist.Ct.) (Trial Order). *See also*, 70 A.L.R.2d 935, *Prejudicial Effect of Counsel's Argument, in Civil Case, Urging Jurors to Place Themselves in the Position of Litigant.*

The "Golden Rule" argument is probably *always* inappropriate in a criminal case in Utah. *See*, State v. Todd, 2007 UT App 349, 173 P.3d 170 (Utah App. 2007) ("a prosecutor is prohibited from asking jurors to put themselves in the victim's place") and State v. Campos, 2013 UT App 213, 309 P.3d 1160, 1174 (court noted that "our courts have held that 'a prosecutor is prohibited from asking jurors to put themselves in the victim's place,' or suggesting 'that the jury has a duty to protect the alleged victim—to become her partisan").

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, 1001 (Fl. App. 2008).[2] Another example (but one that I would not have considered to be a Golden-Rule

[2]"A little boy got $8, and he wants a puppy, and he goes into a puppy store because it has a big sign that says puppies for sale. And the owner comes out, and the boy says, "I only have $8." And the owner says, "Let me show you the puppies." And he opens up the door, and five or six little white puffy

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. According to a Florida appellate court, the only purpose for this 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).

Sometimes lawyers just get too cute. In Loose v. Offshore Navigation, Inc., 670 F.2d 493, 496 (5th Cir. 1982) plaintiff's counsel told the jurors that he would *not* ask them to try to put themselves in the plaintiff's position. The Fifth Circuit held that this was essentially the same as asking jurors to put themselves in the plaintiff's position and was improper.

4. References to a "Lawsuit Crisis" (Rules 1, 3 and 5)

Comments on the existence (or non-existence) of a civil lawsuit "crisis" are matters outside the record before the jury, and always inappropriate. Some examples:

•Boyle v. Christensen, 2011 UT 20, 251 P.3d 810- allusions to the "McDonald's coffee case" by defense lawyer in closing argument were reversible error as outside the record, and an attempt to appeal to passion.

•Schoon v. Looby, 670 N.W.2d 885 (S.D. 2003)- defense counsel's comment that the lawsuit was nothing more than "playing the lottery" denigrated the plaintiff as well as the judicial system itself and merited reversal.

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puppies come running out except the one in the back. The one in the back comes limping out, and the owner goes, "Which one of these do you want?" The little boy says, "I want the one in the back that's limping." And the owner says, "Why would you want the one in the back that's limping? Take one of these healthy puppies. That one has a bad leg. He's been injected. He's had surgery. It is no good." The little boy says, "I want that one." And the owner says, "Why?" And the boy lifted up his pant leg with a brace on it. "Because," he says, "that puppy is going to need somebody that knows what it is like to feel that bad."

•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.

•Lioce v. Cohen, 174 P.3d 970 (Nev. 2008)- defense verdict was reversed and 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, and that he had "a real passion" in defending such cases. These were improper arguments based on counsel's personal opinions, were outside anything in the record, constituted a request for jury nullification and an improper public policy debate masked in closing argument.

5. "The Reptile" (Rules 1, 3 and 5)

Any trial judge trying civil cases has or soon will encounter "The Reptile" strategy of case presentation for the plaintiff. It is the hottest topic right now in personal injury litigation. It was devised by a jury consultant, David Ball, and a trial lawyer, Don Keenan, in their 2009 book, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (Balloon Press, 2009), followed by Mr. Keenan's book, THE KEENAN EDGE (Balloon Press, 2012). Both authors also teach a series of expensive and well-attended seminars, put on workshops, have a website, and sell DVDs, all exclusively for plaintiffs' lawyers.

Put in its simplest terms, the premise is that decisions on safety issues are made in our primitive "reptile brain;" therefore, plaintiff's attorneys must appeal to this primitive brain by making the case about the jurors' own safety, not about the plaintiff's problems. This is done by continually referring to community safety standards; that is, the "tentacles of danger" must be

shown to reach beyond the plaintiff to the jury and indeed to the entire community. In other words, get the jury thinking about "this could happen to me or my loved ones . . " Demonstrate to the jury that bigger verdicts will protect them, and bigger verdicts will follow.

One could write an entire paper on whether this is appropriate for jury argument or not; there are parts of it that seem improper and others that are simply creative trial tactics. I have materials from several Utah cases that have dealt with the “Reptile” issues, and these briefs and trial court orders can be downloaded on my webpage. So far I know of around ten state and federal trial judges in Utah who have been asked to limit “Reptile” arguments; a majority of them have done so, at least in some respects. But not all– and we have no appellate opinions on this subject yet.

The defense objections to "Reptile" arguments tend to focus on these themes:

•It is not the jury's job to determine “community standards.” It is the jury's job to determine whether this defendant in this case acted in a reasonable manner.

•In a medical malpractice case, the issue is whether the standard of care was met or not. That standard of care is set by the practice of reasonable physicians. It is irrelevant and inappropriate to ask jurors to set a community standard of care for themselves.

•Our evidence rules limit a jury to considering relevant evidence that is in the record. The “Reptile” arguments invite the jury to consider potential harm to the community that is irrelevant and based on speculation.

•This is simply a cleaned up version of an inappropriate “golden rule” argument that distracts the jury from the real issues; it invites the jury to decide a case based upon personal interest rather than on the evidence.

•The "Reptile" presentation is based on fear, and is a subtle attempt to get the jury to decide the case based on passion and prejudice, not careful consideration of the facts and the law. At heart, it is an inappropriate "send-a-message" argument.

One defense lawyer makes this observation:

> Although the "reptile" strategy may not specifically ask jurors to put themselves in the shoes of a plaintiff, the intent is the same: to have jurors base their verdict not on the evidence of the case but rather on the fear that they or other members of their family or community could be injured, just as the plaintiff was, by the immediate danger of other similar conduct by the defendant, and to have them view compensating the plaintiff as diminishing that danger within the community and to themselves.

David C. Marshall, LITIGATING REPTILES, in THE DEFENSE LINE (publication of the South Carolina Defense Trial Attorneys' Association). There are many other articles from the defense bar criticizing the "Reptile" strategy. *See, e.g.*, Stephanie West Allen, Jeffrey Schwartz & Diane Wyzga, "Atticus Finch Would Not Approve: Why a Courtroom Full of Reptiles Is a Bad Idea," THE JURY EXPERT: THE ART AND SCIENCE OF LITIGATION (May 2010) and Julia M. Beckley, "Keeping Jurors Human: Striking Back Against the Reptile Theory," DRI MAGAZINE-THE VOICE OF THE DEFENSE BAR, Vol 13 (12/10/14). There's now even a sub-industry of jury consultants that teach defense attorneys how to deal with "The Reptile." *See*, *Courtroom Sciences, Inc. - Reptile Revolt.*

It is too early to tell where the "Reptile" will go. I see nothing obviously improper in counsel's addressing "safety" issues with a witness and, if the proper foundation is laid, no reason that "safety"cannot be argued to a jury, at least in some fashion. However, this may be inappropriate in a medical malpractice case, where the issue is not what is necessarily "safest,"

but what is or should be the medical standard of care.[3] And I suspect that we shall continue to see restrictions on the "Reptile" to the extent it asks juries to set "community standards," or "send a message" for safety's sake, and the like. But I doubt there will be– or can be– a wholesale prohibition of the use of all of the concepts incorporated in the "Reptile" approach.

6. References to liability insurance (Rules 1 and 5)

Counsel obviously should not mention either the existence or non-existence of liability insurance. This stems from the notion that if jurors knew that a defendant were covered by liability insurance, they would be inclined to award more money in damages. It's incorporated into Utah Rule of Evidence 411:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rarely are attorneys so dense or so brazen as to raise the issue of liability insurance directly in argument. And the mere inadvertent measure of it does not warrant a mistrial. Several Utah decisions are reported on this issue:

•Robinson v Hreinson, 409 P.2d 121, 123 (Utah 1965)- liability insurance should not be mentioned but "there are some basic fallacies involved in assuming that any mention of insurance automatically results in such prejudice that a motion for a mistrial should invariably be granted." That is, jurors generally know that automobile liability insurance is compulsory. It's also insulting

[3]For example, it might be "safer" to give a CT scan to every one of the thousands of patients who come to emergency departments with a headache each year to rule out a the rare chance of a tumor ("the most dangerous possible diagnosis") but it's not standard medical care, for reasons far beyond the scope of this paper.

to the integrity of jurors to assume that they would award greater damages if insurance were known, especially when cautioned by the trial judge.

•Reeves v. Gentile , 813 P.2d 111 (Utah 1991), *overruled on other grounds*- it was error for the court to allow the mention of insurance during the opening argument and during the presentation of direct evidence, but it was harmless.

•C.R. Owens Trucking Corp. v Stewart, 509 P.2d 821 (Utah 1973)- mere mention of insurance does not lead to the conclusion that the jury was prejudiced; admonition to the jury was adequate to cure the error.

Likewise, it's improper to suggest that there is *not* insurance when there actually is: "We are talking about money that my client will have to pay out of his own pocket" was an improper argument when there was liability insurance. Priel v. R.E.D., Inc., 392 N.W. 2d 65 (N.D. 1986). *But see*, Ostler v Albina Transfer, 781 P.2d 445 (Utah 1989)- defense counsel's statement that his client "are [asked] to pay for the injuries [to plaintiff]," was not prejudicial for insinuating falsely that there was no insurance.

7. Health insurance (Rules 1 and 5)

Health insurance payment of medical bills is generally a collateral source, and it is improper to put it before a jury, either directly or by referring to "out-of-pocket" expenses for health care. *See*, Wilson v. IHC Hospitals, Inc., 2012 UT 43, 289 P.3d 369, where defense counsel in a medical malpractice action made repeated references to out-of-pocket expenses paid by the parents of a brain-damaged child. As well as making many references throughout trial to collateral sources, in closing argument defense counsel stated:

> This also isn't a case about whether Jared is happy and well taken care of. That's not what this case is about. You've heard the testimony from Dr. Janzen that Jared is doing fine.

> He's ... receiving the care that he needs. He's receiving the schooling that he needs. He's getting the therapy he needs. He's getting the hospital and medical care he needs. He has the wheelchair that he needs. He has what he needs. And you have also heard that it's not costing the parents. They're not claiming one cent of out-of-pocket expenses.

The Utah Supreme Court held this to be improper and reversible error. *See further*, Mahana v. Onyx Acceptance Corp., 2004 UT 59, ¶ 37, 96 P.3d 893 (under the common law, "a wrongdoer is not entitled to have damages for which he is liable reduced by proof that the plaintiff has received or will receive compensation or indemnity for the loss from an independent collateral source.")

Note that the collateral source rule has been somewhat modified in medical malpractice cases. Evidence of future government health benefits is admissible and, thus, is a proper subject for counsel's argument. 78B-3-405(5):

> Evidence is admissible of government programs that provide payments or benefits available in the future to or for the benefit of the plaintiff to the extent available irrespective of the recipient's ability to pay. Evidence of the likelihood or unlikelihood that the programs, payments, or benefits will be available in the future is also admissible. The trier of fact may consider the evidence in determining the amount of damages awarded to a plaintiff for future expenses.

It should likewise be improper for a plaintiff's counsel to argue about the burden of medical expenses if they are covered by private or public insurance, although I am not aware of a case on point.

8. The "first-person" argument (Rules 1, 3, and 5)

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 apparently made a career of it, taking on the role of the baby "starved for oxygen in the womb" in birth injury claims against obstetricians. But some courts hold this argument refers to matters outside the record, without any 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 as the voice 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, risked manipulating and misstating the evidence, as well as improperly inflaming the passions of the jury.

An example closer to home is State v. Todd, 2007 UT App 349, 173 P.3d 170. In Todd, a prosecutor engaged in improper closing argument 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 as well as a reference 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.)

9. The "missing witness" (Rule 1)

A particular problem in both civil and criminal trials is the reference to a witness who was not called-- the inference being that the testimony would have been unhelpful. The "missing witness" inference is that "[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it permits an inference that the testimony, if produced, would have been unfavorable." United States v. Young, 463 F.2d 934, 939 (D.C. Cir.1972). There is a foundation that must be laid: "[B]efore a defendant can properly argue that the jury can draw such an inference from the absence of a witness, the defendant must establish that the missing witness was 'peculiarly within the adversary's power to produce by showing either that the witness is physically available only to the opponent, or that the

witness has the type of relationship with the opposing party that pragmatically renders his testimony unavailable to the opposing party.'" State v. Smith, 706 P.2d 1052, 1057 (Utah 1985).

10. References to a "conspiracy of silence" (Rule 1)

Occasionally a plaintiffs' lawyer in a medical malpractice action will comment on the difficulty of obtaining expert testimony because of the reluctance of medical doctors to testify against their colleagues. This is obviously a matter for which there is no evidence in the record, and should never be allowed.

11. "The motion for directed verdict was denied for a reason" (Rules 1 and 5)

This is rare, but I have actually heard it once in trial. (That is, opposing counsel arguing that the case was not so weak as suggested by me because a directed verdict would have been granted by the judge had it been so.) It's simply 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. 10 A.L.R. 3d 1330, *Propriety and Prejudicial Effect of Counsel's Argument or Comment as to Trial Judge's Refusal to Direct Verdict Against Him.*

12. "Subpoenaed witnesses are more reliable" (Rules 1 and 5)

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 is that there isn't any such evidence before the court.

13. Settlement discussions- or the lack of them (Rules 1 and 5)

Obviously, the existence of settlement discussions is irrelevant and highly prejudicial. (Rules 1 and 5). This flows from Rule 408, which limits evidence to prove or disprove liability of settlement discussions, or any conduct or statement made in compromise negotiations. This is matter that outside the scope of the record, and it's also a subject raised in violation of an evidentiary rule.

There are very limited exceptions, such as to prove bias. Or, more commonly, when one party in a multi-defendant action has settled before trial– defense counsel is then allowed to comment on the settlement (although probably not the amount), and discuss how it might affect the credibility of certain witnesses. *See,* Slusher v. Ospital, 777 P.2d 427, 444 (Utah 1989).

Rarely will this become an issue in argument. But here's an argument made by plaintiff's counsel that resulted in a reversal: "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." Donohue v. Intermountain Health Care, Inc., 748 P.2d 1067 (Utah 1987) (References that either side should have settled the case and, therefore, not wasted the jury's time in forcing a trial, are improper.)

14. "They were the ones who asked for a jury." (Rules 1 and 5)

I attended a seminar about ten years ago where the speaker noted that some jurors were irritated at being called for service. Therefore, it was important for counsel to make it known in opening statement that the opponent was the one who asked for a jury trial-- putting the onus on them for the inconvenience. My view is that this is inappropriate– it is irrelevant to any issue in the case who asked for the jury, and it brings up matters for which there is no evidence in the

record. It violates Rule 1, and probably violates Rule 5 as well, in that it's a not-so-subtle attempt to ingratiate oneself with the jury.

15. "Experts are not to be believed because they've been paid" (Rules 1 and 5)

This is a close one. It certainly seems appropriate for counsel to comment in closing argument on the payments to expert witnesses, especially if it is a routine business for them. This clearly goes to credibility, but it can go too far. For example, in Weinberger v. City of New York, 468 N.Y.S.2d 697 (App. Div. 1983) the court stated that "[i]t is serious error to argue in summation that an expert is not to be believed because he was paid to testify."

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. It just needs to be kept within limits.

An example of an over-the-limits argument is seen in Rosario-Paredes v. J.C. Wrecker Service, 975 So.2d 1205, (Fl. App. 2008). There, defense counsel made the following comments about the opposing expert witnesses:

> [T]hey do an amazing job, they do an amazing job of trying to convince people of these injuries, but that's why they keep on hiring these doctors over and over; that's why Dr. Hoffman has testified 15 times for this Plaintiff's firm, they're good. They're good at what they do and they're paid very handsomely for it. That's why these guys are so good. I mean, there's a network of lawyers and doctors and all working together, everybody is making money. That's what these guys do for a living, they testify, they're professional witnesses. They do this for a living. And how dare they make us look like the bad guy for hiring our own doctors.

The Florida court found this to be improper:

> While attorneys are given broad latitude in closing arguments, their comments must be confined to the evidence and to issues and inferences that can be drawn from the evidence [citation omitted.] 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. [citation omitted.] In this case, Dr. Hoffman testified without objection to the number of times he had been employed by the plaintiff's law firm. 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. [citation omitted.] Arguments that go beyond bias, and instead attack opposing counsel or suggest fraud or collusion are not acceptable and will not be condoned.

Id.

16. Suggesting that the verdict would financially affect the jury (Rules 1 and 3)

It is very inappropriate for a defendant's counsel to argue or infer that insurance rates will go up, or that doctors will become less available, as a result of a verdict. For example, in Schoon v. Looby, 670 N.W.2d 885 (S.D. 2003), a doctor's counsel's 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 because the hospital was owned by a health care entity, and it 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 the hospital had to pay, the jurors as "owners" would in some way also have to pay.

17. Taxpayers will/won't pay this verdict (Rules 1 and 3)

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 (Tx. App. 1950). *See*, 93 A.L.R.3d 556, *Counsel's Appeal in Civil Case to Self-Interest or Prejudice of Jurors as Taxpayers.*

18. References to Other Cases or Verdicts (Rule 1)

It is almost universally condemned for counsel to refer to other similar cases or other verdicts in argument. *See*, 5 A.L.R.3d 1144, *Propriety and Prejudicial Effect of Reference by Counsel in Civil Case to Amount of Verdict in Similar Cases.* In Harlow v. Chin, 545 N.E.2d 602 (Mass. 1989), plaintiffs counsel in closing argument referred to the multibillion-dollar award in Pennzoil v. Texaco as a basis for his argument on lesser damages. The court held that references to the amounts awarded in other cases are not proper and are prejudicial. And, finally, we must not forget our own Boyle v. Christensen, 2011 UT 20, 251 P.3d 810 (references to "McDonald's Coffee Case" are improper).

SPECIAL CONSIDERATIONS IN OPENING STATEMENTS

Opening statements are designed to allow the advocate an opportunity to apprise the jury of what counsel intends to prove in the case in chief by way of providing the jury an overview of, and general familiarity with, the facts the party intends to prove. State v. Williams, 656 P.2d 450, 452 (Utah 1982). The purpose of an opening statement "is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole." United States v. Dinitz, 424 U.S. 600, 612. 1.

1. Argument in opening

Every lawyer knows that an opening statement should not be "argumentative." Dozens of cases reference this proposition. *See, e.g.*, State v. Perez, 946 P.2d 724, 730 (Ut. App. 1997), "It is not proper to engage in anticipatory rebuttal or to argue credibility by referring to impeachment evidence the other side may adduce." *See*, Anderson v. Larry H. Miller Communications, 2015 UT App 134, ¶ 6, 351 P.3d 832 (inappropriate, argumentative opening statement).

The distinction between an argument and a statement is the elusive thing. Some see it as merely semantics. Lawyers are sometimes taught in advocacy courses to do the same thing in opening as in closing except to make the occasional prefatory statement of "the evidence will show" or "we will prove." One law professor holds that “argumentative” has been the catch-all objection for anything seeming at all inappropriate in the opening statement. Michael J. Ahlen, “Opening Statements in Jury Trials: What Are the Legal Limits?,” 71 N.D. L. Rev. 701, 710 (1995).

The courts struggle to provide a clear and workable definition of “argument” versus “statement.” *See*, L. Timothy Perrin, “From O.J. to McVeigh: The Use of Argument in the Opening Statement,” 48 Emory L. J. 107 (1999):

> Surprisingly, this most fundamental question--“What does it mean to argue in the opening statement?”--has never been subjected to serious in-depth analysis. Despite over a hundred years of practice under its limits, the meaning of argument within the opening statement is one of the least analyzed or understood principles of trial practice. Instead of careful and precise analysis, courts have appropriated Justice Potter Stewart's obscenity test and applied it to “argument,” taking an “I know it when I see (or hear) it” approach to the prohibition. Part of the problem is that no single definitive test is used to identify argument in the opening statement. To the contrary, multiple tests (or, more accurately, rules of thumb) are used to identify argument, none of which are adequate to provide lawyers with the guidance they need. As a result, application of the rule against argument varies widely from jurisdiction to jurisdiction and even from courtroom to courtroom and judge to judge.

Id. at 112 (noting a “puzzling disparity” between the rule against argument in opening statement and what really happens in practice). Professor Perrin suggests that there are several “tests” that are used to determine what is argument and what is not:

•The “witness test,” which asks whether the advocate has a witness (or an exhibit) who can competently attest to the disputed portion of the opening statement. If the answer is “no,” the lawyer's comments constitute improper argument. “For example, the lawyer could describe a

witness's expected testimony that she saw the defendant commit the crime. However, statements that the defendant did so *intentionally* would be precluded because the defendant's mental state cannot be observed." *Id.* at 121.

•The"inference test," under which the lawyer is prohibited from drawing inferences or conclusions for the jury: "Thus, for example, the lawyer is permitted to tell the jury that "the defendant was going 50 m.p.h. in a 30 m.p.h. zone," but is precluded from telling the jury that "the defendant was speeding." In some ways, the inference and witness tests are simply opposite sides of the same coin. The witness test describes what the lawyer can say during the opening statement, while the inference test describes what the lawyer cannot say." *Id.*

•The "rhetoric" test which focuses on the lawyer's use of rhetorical devices in the opening, such as a raised voice, analogies, anecdotes, appeals to common sense, and so on. For example, a prosecutor's likening the defendants to a pack of wolves, that "all the wolves participate in dragging and slowing, wearing that deer out" was an improper analogy for opening statement. *Id.* at 122, *citing* People v. Johnston, 641 N.E.2d 898 (Ill. Ct. App. 1994).

In short, according to Professor Perrin, "[C]urrent orthodoxy limits argument in the opening statement in at least five ways: 1) counsel may present only an overview or outline of their proof, 2) the advocate must be able to identify a competent witness or exhibit in support of each statement made, 3) the attorney must not draw inferences or interpret the evidence for the jury, 4) the advocate must avoid adopting an "argumentative" tone, and 5) the lawyer must not use any techniques of argument." *Id*. at 123. I know of no Utah decision that better states the rule against argument in opening statement.

2. References to expected evidence

Another issue peculiar to opening statements is a reference by counsel to evidence or witnesses that in the end are not introduced or called. A recent example is defense counsel's statements in the Casey Anthony trial. He told jurors in opening that Ms. Anthony knew that Caylee never went missing but had actually drowned in the family pool, and also stated that Casey's father, George, knew of the drowning, and had sexually abused Casey. Neither of these claims were supported by any evidence at trial, and the question of what the attorney knew when he made these statements remains an open one.

The ethical rules obviously prohibit intentional misrepresentations by attorneys: "A lawyer may not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." Rule 3.4(e). And see, ABA Standards for Criminal Justice 3-6.5 (4th Ed. 2015),

> "(b) The prosecutor's opening statement at trial should be confined to a fair statement of the case from the prosecutor's perspective, and discussion of evidence that the prosecutor reasonably believes will be available, offered and admitted to support the prosecution case. The prosecutor's opening should avoid speculating about what defenses might be raised by the defense unless the prosecutor knows they will be raised."

And it should go without saying that misstatements in opening statement make wonderful opportunities for the opponent to point out to the jury in closing argument.

3. Using exhibits in opening

A persistent issue is to what extent counsel may use exhibits and demonstrative devices in opening statement. This is entirely a matter for the trial judge's discretion, and I recommend that the court advise counsel to get advance approval for the use of such things. An important exhibit that helps to explain the case and that is certain to be admitted would properly be allowed in

opening. But not so for an exhibit that is subject to objection– obviously, it would be error for an attorney to publish that exhibit to the jury prior to its admission.

The use of PowerPoint is entirely a matter for the court's discretion and, if it is allowed, one must be sure that no "problem" exhibits or evidence will be contained in it.

Finally, sometimes counsel wishes to read from discovery depositions in opening statement. It is my view that this is probably inappropriate, at least as to a non-party: the permitted use of the deposition is not yet established under Rule 32 and the evidence rules, as would occur if the deposition were used the examination of a witness. *See*, Hynix Semiconductor v. Rambus, Inc., 2008 WL 350643 (N.D. Cal. 2008) ("An opening statement is limited to presenting a guide to the evidence that the parties reasonably believe will be admitted into evidence. Quoting prior testimony, except that of a party, for impeachment purposes is inappropriate in an opening statement because the prior testimony may never become admissible.")

4. Addressing amount of damages in opening

It's of course typical and expected that counsel will be able to discuss a damage demand in *closing* argument. It would be unusual not to do so, and it would be unheard of for the court to prevent this. The issue is typically whether counsel can also raise the amount of damages requested in *opening*, and this is entirely a matter of the trial court's discretion. Trial attorneys discuss this issue endlessly, and the consensus now is that one should advise the jury in most cases in some fashion about the damages to be requested right at the start. But not all courts allow this-- some judges see it as argument, and a subject only for closing. I doubt that a trial judge would be reversed either way, and I know of no Utah cases addressing the issue.

There are plenty of decisions from other jurisdictions, typically in the Northeast, that prohibit discussion of damage amounts in opening statement. *See*, 14 A.L.R.3d 541, *Propriety and Prejudicial Effect of Reference by Plaintiff's Counsel, in Jury Trial of Personal Injuries or Death Action, to Amount of Damages Claimed or Expected by His Client*. If the trial court has a position against discussing damages in opening statement, that probably should be made plain to counsel in advance.

TOOLS FOR THE TRIAL JUDGE

If the court decides that an argument is improper, it has a range of possible responses. The trial judge may: (1) sustain the objection but take no further action, (2) give general instructions to the jury about the proper way to deliberate, (3) admonish or reprimand the offending attorney, (4) give a specific instruction to the jury to disregard the argument, or (5) grant a mistrial. *See*, J. Alexander Tanford, "Closing Argument Procedure," 48 Am. J. Trial Advocacy 47 (1986). The court also has options for heading off problems before they occur.

1. Standing orders

There are judges that provide prior instructions or orders to keep attorneys within bounds during argument. One of the more detailed examples that I have seen comes from Judge Nina Ashenafi-Richardson, a Florida state trial judge in Tallahassee. She has a "Standing Order on Closing Arguments in Criminal Cases" and a "Standing Order on Closing Argument in Civil Cases,"[4] that set forth prohibited arguments in her courtroom, with all relevant case citations.

Another example is Judge D. Brock Hornby of the United States District Court for the District of Maine. Judge Hornby has an online outline for counsel, "Summary of First Circuit

[4]Both can be found here: http://2ndcircuit.leoncountyfl.gov/countyManual.php

Authority and Local Rules Concerning Opening Statements and Closing Arguments." This is practically a treatise on acceptable argument for both civil and criminal cases in his court. (Note the variations from Utah practice-- such as the prohibition on disclosing the *ad damnum* to the jury, or even asking for a dollar amount for pain and suffering.)

While I am not necessarily recommending that our state trial judges copy Judge Ashenafi-Richardson's or Judge Hornby's approaches, given the sometimes low level of awareness by counsel about the bounds of proper argument, it might prove useful that some advance direction be provided by the trial judge.

2. Motions in limine

Trial courts are going to more frequently encounter motions in limine on improper closing argument; indeed, they are nearly guaranteed in civil cases if "The Reptile" strategy is being used. (Defense counsel are filing motions to restrict this in nearly all such cases.) I suggest that the judges be open to these motions, of course within limits, and within reasonable deadlines. Pretrial hearings on motions in limine can be a great way to anticipate and head off problems in argument. It also gives the court an opportunity to educate itself on the subtler points of a possibly-improper argument, rather than being forced into an off-the-cuff ruling in the middle of trial. And it's a wonderful opportunity to educate counsel of the expectations for argument and trial.

3. Precautionary instructions

MUJI contains (or did contain) standard instructions that advise the jury that the arguments of the lawyers are not evidence. The old 1 MUJI 1.3 contained this warning: "What is said in a closing argument, just as what is said in an opening statement, is not evidence. The arguments are designed to present to you the contentions of the parties based on the evidence

introduced." That language was removed in 2 MUJI- Civil, although 2 MUJI- Criminal CR203 still contains a variation of it:

> When the lawyers give their closing arguments, keep in mind that they are advocating their views of the case. What they say during their closing arguments is not evidence. If the lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions."

Present 2 MUJI CV119 provides only that "The lawyers might stipulate—or agree—to a fact or I might take judicial notice of a fact. Otherwise, what I say and what the lawyers say usually are not evidence." And 2 MUJI CV1119A (for use with a *pro se* party) goes back to the old phrasing:

> Arguments and statements by pro se [party] and [opposing] counsel are not evidence. Pro se [party] when acting as counsel and [opposing] counsel are not witnesses. What they have said in their opening statements, will say in their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way they have stated them, your memory of them controls. However, pro se [party]'s statements as a witness are evidence."

In any event, there is nothing to prevent the trial court in a civil trial from using 2 MUJI CR-203 if it ever wishes to emphasize the point.

4. Curative instructions

"[C]urative instructions are a settled and necessary feature of our judicial process and one of the most important tools by which a court may remedy errors at trial." State v Todd, 2007 UT App 349, ¶ 43,173 P.3d 170, *citing* State v. Harmon, 956 P.2d 262, 271 (Utah 1998). Indeed, the court noted that

> [i]f a trial judge could not correct errors as they occur, few trials would be successfully concluded. Moreover, our judicial system greatly relies upon the jury's integrity to uphold the jury oath, including its promise to follow all of the judge's instructions.... [V]irtually every jurisdiction, both state and federal, relies upon such instructions in curing errors during trial and in reviewing errors on appeal."

Id. Cautionary instructions can cure a variety of errors. *See*, State v. Tillman, 750 P.2d 546, 555 (Utah 1988); State v. Smith, 700 P.2d 1106, 1112 (Utah 1985); State v. Long, 721 P.2d 483 (Utah 1986). But *see*, State v. Harmon, 956 P.2d 262, 277- 78 (Utah 1998) (Durham, J., concurring, addressing ineffectiveness of curative instructions).

When improper argument does occur, it may well be insufficient for a trial judge to simply give the stock ("what lawyers say is not evidence") instruction as a curative measure. The recent case of State v. Akok, 2015 UT App 89, ¶ 25, 348 P.3d 377 illustrates this point. A trial judge was reversed for using the "stock" instruction as a curative, rather than particularly referencing the problem comments. This was a rape trial where a prosecutor's statements that "They took advantage of a very vulnerable victim. Don't let them take advantage again" were held to be improper. The appellate court stated that the trial judge should have *specifically referenced* the problem statements in its admonition to the jury, and not just restate the vanilla "what lawyers say is not evidence" instruction.

5. Admonitions to counsel

Admonitions to counsel– with the jury in hearing or at the bench– are of course useful, especially as a first step. When counsel errs, it's of course not always wilful, but due to inexperience, ignorance, nerves, or the heat of the battle. Admonitions are well-recognized and useful tool in the court's arsenal to control improper argument and will usually have the desired effect– at least for most lawyers.

6. The "invited response" doctrine

This doctrine basically says that when one counsel makes an improper argument, a response in kind by the opponent is not grounds for reversal. See, Lawn v. United States, 355 U.S. 339 (1958). This is also called the "retaliation doctrine." United States v. Young, 470 U.S. 1, 10-12. It still seems to be followed, although the tit-for-tat essence of it is heavily criticized by some. *See*, J.A. Tanford, "Closing Argument Procedure," supra.

The doctrine seems to be followed in Utah. *See*, State v. Redcap, 2014 UT App 10, ¶38, 318 P.3d 1202 ("It is well settled that prejudicial error does not result from ... improper remarks made during closing argument when such remarks were provoked by the opposing counsel." (citation omitted.) The "doctrine of fair reply" allows a prosecutor to make a "counteracting statement" after "defense counsel [opens] the door on the issue."). After the prosecutor makes an improper remark during his initial closing argument, defense counsel is said to be able to ameliorate the effects of the comment by discussing the impropriety with the jurors. State v. Dunn, 850 P.2d 1201, 1225 (Utah 1993). But *see*, State v. Smith, 675 P.2d 521(Utah 1983) (improper remarks of defense counsel in closing argument do not justify retaliatory statements by the prosecution).

7. Mistrial

A mistrial should be granted when the infraction is so egregious that an admonition to counsel and a cautionary instruction to the jury is insufficient. 88 C.J.S. TRIAL §92. This is an extreme remedy, and substantial deference is due to a trial court's decision to use a less-drastic remedy, such as a curative instruction. A court's decision to grant or deny a mistrial will not be overturned absent an abuse of discretion. First General Services v. Perkins, 918 P.2d 840, 845-46

(Ut. App. 1996); Rasmussen v. Sharapata, 895 P.2d 391, 394 (Utah App.1995). As the Utah Supreme Court remarked:

> We are able to assess only the words as they appear in the record. The trial judge, on the other hand, was able to note other relevant factors such as counsel's gestures, inflection, and expressions, as well as the jury's reactions.... Trial courts are in a much better position than are appellate courts to assess the overall effect of attorney misconduct at trial.

Donohue v. Intermountain Health Care, Inc., 748 P.2d 1067, 1068 (Utah 1987).

A mistrial should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted. State v. Harmon, 956 P.2d 262, 273 (Utah 1998). Curative instructions are useful, but they cannot fix every error in argument: "[s]ome errors may be too prejudicial for curative instructions to mitigate their effect, and a new trial may be the only proper remedy." *Id*.

Professor Tanford's article, "Closing Argument Procedure," *supra*, 101-06, contains an absorbing analysis of which errors in argument seem to require mistrial, and which do not– although he concedes there are massive inconsistencies in the reported decisions.

8. Sua sponte intervention

Perhaps the most difficult question for the trial judge is when to intervene without an objection being made. Of course, most objections to improper argument are waived if counsel does not make a timely objection. Heslop v. Bank of Utah, 839 P.2d 828, 839 (1992); State v. Ross, 782 P.2d 529, 532 (Ut. Ct. App. 1989). See also, Barrientos v. Ogden City, 2012 UT 35, 282 P.3d 50, 64, n.3 (Lee, J. dissenting). But what if a serious error is made in argument, and there is no objection?

In a civil case, the court probably needs to intervene only in the most egregious of circumstances. After all, there is no constitutional right to competent counsel in a civil case for

damages. The rules are less forgiving in criminal trials, where life and liberty are at stake, the Sixth Amendment applies, and reversals for incompetence of counsel are not unusual. In these cases, a court must intervene even without an objection generally if failure to do so would be "plain error." State v Saunders, 1999 UT 59, ¶ 30, 992 P.2d 951; State v. Emmett, 839 P.2d 781, 785 (Utah 1992) ("Plain error is error that is both harmful and obvious.") The "Plain Error" doctrine does apply in civil cases, *see*, *e.g.* The Berkshires, LLC v. Sykes, 2005 UT 526 ¶21, 127 P. 3d 1243, 1251 and Meadow Valley Contractors, Inc. v. UDOT, 2011 UT 35, 266 P.3d 671, but its scope is necessarily much more limited because the Sixth Amendment does not apply. *See*, Danneman v. Danneman, 2012 UT App 249, n. 5, 286 P.3d 309 ("We recognize that it is generally unusual for a party to raise the plain error standard in a civil matter.")

But defining exactly which improper arguments rise to the level of "plain error" is difficult to define. The court in State v. Davis, 2013 UT App 228, ¶ 10, 311 P.3d 538, struggled with this:

> It is tempting to conclude that if a prosecutor's comments constitute garden-variety misconduct, "the defendant must show that the jury was 'probably influenced by those remarks,' (citations omitted), whereas if "a prosecutor's comments constituted a constitutional violation," the reviewing court will reverse unless "the constitutional error was harmless beyond a reasonable doubt." (citations omitted.).

Id. It went on to conclude that the question of how prejudicial remarks must be in order to fit the "plain error" standard are "not readily resolvable under our current precedent," *citing* State v. Wright, 2013 UT App 142, ¶ 41 n. 6, 304 P.3d 887. *Id.* In the end, the court decided to follow the "harmless beyond a reasonable doubt standard;" that is, if prosecutorial misconduct is established, the State must show that the error was harmless beyond a reasonable doubt. *See*, State v. Ross, 2007 UT 89, ¶¶ 17, 58, 174 P.3d 628.

CONCLUSION

There is a place for a colorful, forceful, and effective argument to a jury; no one is suggesting otherwise. We don't need to be dull and desiccated in order to be fair. But treating jury argument as an unrestrained free-for-all serves none of us; indeed, it only diminishes respect for the legal system and the trial process. In my view, there is a need to educate the bar-- as well as the bench-- on the proper limits of jury argument. I hope that this paper contributes, if only slightly, to that end.

Frank Carney
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