

PRACTICE POINTERS

Objectionable Jury Argument

by Francis J. Carney

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

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

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

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

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

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Improper argument may lead to a reversal but you will have to show "prejudice," which means showing that it made a difference to the outcome. This is always a tough burden. See e.g. *Jones v. Carvell*, 641 P.2d 105, 112 (Utah 1982) ("Although the argument was improper, we do not think that it affected the fundamental fairness of the trial, and reversal is not, therefore, called for because we do not believe a different result would have occurred"); *Reeves v. Gentile*, 813 P.2d 111, 121 (Utah 1991) (counsel's mention of insurance during argument was in error but was "harmless").

Here's a checklist of the more common objectionable arguments you may expect to hear sooner or later in your trial career, to be used, as suggested, with much discretion.

1. Argument in the Opening Statement.

This is often more a matter of tone than of substance. Argument is difficult to define but most judges claim to know it when they hear it. The opening statement is supposed

to be an outline of the evidence to come and not about how the evidence should be interpreted.

2. Misstating the Law or the Facts.

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." *Id.* at 112. Some courts in other states prohibit all comment on the law by counsel on the ground that it invades the court's province in instructing the jury. Most Utah judges allow some comment by counsel on the law but require it to be limited to the instructions as given by the court. It's certainly an appropriate and standard practice for counsel to discuss the application of the instructions given by the court to the facts in closing argument in state court, where closing argument is given after the jury is instructed.

3. Appeals to Passion or Prejudice.

Appeals to ethnic, racial, sexual, and other prejudices are obviously improper, as are appeals to regional biases. See e.g. *Shemman v. American S.S. Co.*, 280 N.W.2d 852, 858 (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). Hometowning happens, but it has got to be kept subtle.

4. References to Matters Outside the Record.

It is permissible to argue general knowledge and common sense, but it's not proper to argue material facts that are not

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in the record. Some examples:

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

"We all know that there is a conspiracy of silence among doctors not to testify against each other"

5. Vouching.

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

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

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

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

Better to stay away from "It is my opinion," "I believe," and the like in argument. They are trigger words that may well prompt a response. They are verbal fluff that weakens the power of your words and shouldn't be used for that reason alone.

6. References to Insurance Coverage.

Generally improper, but possibly acceptable if relevant to agency, ownership, bias, and the like. See UTAH R. EVID. 4.11; *Reeves v. Gentile*, 813 P.2d 111 (Utah 1991).

7. Let Me Tell You About Myself.

A few of our colleagues attempt to ingratiate themselves with the jury by telling them in opening statement about their background, their family, schools, and so on. The lawyer isn't on trial and her personal

history is irrelevant. Think of the possibilities for cross-examination were it otherwise.

8. Come, Let Us Grovel Together.

A recent favorite, especially with those who've been to seminars conducted by lawyers in fringed jackets. The attorney shares his fears with the jury in a transparent attempt to garner empathy. He wants them to know how he fears his own limitations. How that gnaws at him. How he's worried that they won't like him and, thus, not like his client and his case. How that worries his wife. And so on.



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Object to this drivel in argument. What the lawyer fears has no bearing on any issue in the case. It's as ineffective and obvious an attempt at manipulation as wearing a placard that says: "Please Love Me." Here's an actual example taken from the transcript of an opening statement in a civil action tried in Salt Lake City about three years ago. The defense lawyer began with this:

Ladies and Gentlemen, I would like to just tell you for a minute about how I feel about this case. I'm extremely nervous right now, and didn't sleep at all last night. And I'm afraid. And I'm afraid that I'm going to fail these three men who have been accused of some pretty serious things, and I'm afraid for myself. I'm afraid that I won't be adequate to defend them in what they deserve

At this point, the plaintiff's lawyer objected and the judge promptly sustained it. As you might imagine, the opening statement slid downhill from there. After the trial, some of the jurors commented to the plaintiff's lawyer on how odd they all thought it was for a prominent defendant to have an attorney with so little self-confidence and how

odd it was that the defendant, with all its money, could not have found a trial lawyer a bit more sure of himself. There's a lesson here, and it seems to be that we shouldn't believe everything we learn at seminars.

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

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

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

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

10. Attacks on Opposing Counsel.

"We don't call that law firm 'Dumb & Dumber' for no reason. Even grinning moronic geeks like them know that this was a matter of medical judgment, and not of malpractice"

This remark was held to be an appropriate and accurate comment in closing argument by defense counsel in a medical malpractice action. Not really. Despite the temptations we all sometimes feel, personal attacks on opposing counsel are improper and objectionable. Not that they work anyway; a jury expects to see professionals at work, not kids on a playground. Even something as mild as "[Plaintiff's attorney is a member of a] very large law firm . . . whose job it is to build up big cases" won't fly. *Weinberger v. City of New York*, 468 N.Y.S.2d 697 (N.Y. Sup. Ct. App. Div. 1983).

11. Mathematical Damage Formulae.

"Just give the plaintiff a dime for every hour he will spend with this pain" This, the "per diem" argument, is border-

line. *Olsen v. Preferred Risk Mut. Ins. Co.*, 554 P.2d 575 (Utah 1960) held that the per diem argument was a matter for the discretion of the trial court and proper with a cautionary instruction. *Tjas v. Proctor*, 591 P.2d 438 (Utah 1979) upheld rejection of a per diem argument by the trial court. A variant is the "job-offer" in which plaintiff's attorney asks the jury to "assume" the job of being injured as the plaintiff is, and to then determine what an acceptable daily "salary" would be.

12. The Golden Rule.

This is asking the jurors to put themselves into the shoes of the plaintiff, in other words, "Do unto the plaintiff as you would want done onto yourself." It's generally held to be inappropriate. Here are some variants:

"How much would you want if you lost your arm?"

"How much pain would being in a wheelchair the rest of your life cause you?"

It's not something used only by plaintiff's counsel:

"What would you have done if you were the defendant in this situation?"

Lopez v. Langer, 761 P.2d 1225 (Idaho 1988) held this to be improper.

13. Send Them a Message.

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

14. The Motion to Dismiss Was Denied for a Reason.

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

15. This Case Should Have Been Settled.

"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, 1068 (Utah 1987) held this improper. Of course, settlement discussions themselves are not admissible. But neither are references to the notion that either side should have settled the case and, therefore, not wasted the jury's time in forcing a trial.

16. The Pleadings Tell the Story.

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

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17. Addressing Jurors By Name.

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

18. An Insured Defendant Will Have to Pay the Verdict.

"We are talking about money that my client will have to pay out of his own pocket" was an improper argument when there was insurance. See *Priel v. R.E.D., Inc.*, 392 N.W.2d 65, 67 (N.D. 1986); cf. *Ostler v. Albina Transfer Co.*, 781 P.2d 445 (Utah Ct. App. 1989).

19. The "Missing Witness."

It may or may not be proper in closing argument to comment upon the failure of a party to call certain witnesses. Usually, one must first show that the witness was available, that the witness was more easily available to the non-calling party, that the party failed to explain the absence of the witness, and that the testimony would not have been immaterial or cumulative. See R.C. Park, TRIAL OBJECTIONS HANDBOOK § 10.16 (1991).

20. The Taxpayers Will/Won't Pay This Verdict.

It is objectionable to appeal to the self-interest of jurors as taxpayers when a governmental entity is the defendant. See *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 to the taxpayers if a verdict for him isn't rendered. See *Trinity Universal Ins. Co. v. Chafin*, 229 S.W.2d 942, 947 (Tex. Civ. App. 1950).

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

Weinberger v. City of New York, 468 N.Y.S.2d 697, 699 (Sup. Ct. App. Div. 1983) held that, "It is serious error to argue in summation that an expert is not to be believed because he was paid to testify. I suppose that the gist of it is the fiction that the expert was paid for his time away from his practice, and not paid for his opinions. On the other hand, it is common, appropriate, and necessary to argue against the credibility of hired experts who derive a substantial income from testifying.

22. Subpoenaed Witnesses Are More Reliable.

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

Update to "Objectionable Argument" paper

1. The Golden Rule

Green v Louder & Murray, 29 P.3d 638, (Utah 2001)- "Golden Rule" argument not improper when not used as to damages:

¶36 Green specifically considers the following closing statements improper:

- 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

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

See also, 70 ALR2d 935.

2. "First-Person" Argument

Drayden v White, 232 F.3d 704 (9th Cir. 2000)- Prosecutor engaged in misconduct during murder trial when he sat in witness chair and delivered a soliloquy in the role of the victim, thereby inappropriately obscuring the fact that his role was to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim, and risking manipulating and misstating the evidence, as well as improperly inflaming the passions of the jury, but the conduct did not violate petitioner's due process rights, so as to warrant habeas relief, where the prosecutor's statements were supported by the evidence and reasonable inferences that could be drawn from the evidence, the court instructed the jury that statements made by the attorneys are not evidence, and evidence of petitioner's guilt of first-degree murder was very strong.

3. Improper Bolstering Before Impeachment

State v. Perez, 946 P.2d 724 (Ut. App. 1997): prosecutor's opening statement remarks re credibility of his witness was improper bolstering under Rule 608. "The purpose of an opening statement is to apprise the jury of what counsel intends to prove in his own case in chief by way of providing the jury an overview of, and general familiarity with, the facts the party intends to prove." *State v. Williams*, 656 P.2d 450, 452 (Utah 1982). This does not mean that the State can refer to evidence it may introduce on rebuttal based on its expectation that the defense will introduce certain impeaching evidence. As the Utah Supreme Court stated in *Williams*, "an opening statement should not be argumentative. It is not proper to engage in anticipatory rebuttal or to argue credibility by referring to impeachment evidence the other side may adduce." *Id.* . . . further, based on both the express language of Rule 608, which clearly provides that a witness's credibility may not be bolstered before it is attacked, and the Utah Supreme Court's language in *Williams* expressly stating that anticipatory rebuttal is improper in opening statement, we conclude that this error should have been obvious to the court."