77-DEC Fla. B.J. 36

Florida Bar Journal
December, 2003

Column
Trial Lawyers Forum

AVOIDING PITFALLS IN CLOSING ARGUMENTS

Tucker Ronzetti [a1] Janet L. Humphreys [a2]

The closing argument is an integral component of the entire trial presentation. It is the lawyer's last opportunity to summarize the evidence, tie together key themes, and convince the jury why his or her position should prevail. It is the third and final time—after voir dire and the opening statement—for the lawyer to address the trial's decision makers directly. At that point, the jurors have already heard the opening statements, listened to the testimony, seen the witnesses, and have likely formed opinions about who should win and why. Thus, perhaps the most important purpose of the closing argument is to provide jurors sympathetic to your side with points that will enable them to persuade other, undecided or doubting jurors. It is an opportunity to explain how the promises you made in the opening have been fulfilled, and conversely, how the other side's promises have been neglected.

With these principles in mind, the purpose of this article is to provide an overview of the legal limitations involved in the final argument in jury trials, and to provide practical examples, from both the plaintiff's and the defendant's perspective, of common pitfalls in closing arguments.

General Rules Governing Closing Arguments

Because the final argument is the pinnacle of the trial presentation, it is crucial that the lawyer prevent any interruptions, much less an admonition from the court, based upon the failure to follow the legal requirements for the closing. Despite the legal limitations, lawyers enjoy broad scope in their closings. [1] They may discuss any theory reasonably supported by the evidence, provide their interpretations, and suggest that the jury draw inferences or conclusions from the evidence. Lawyers may also ask the jury to resolve conflicting evidence in favor of their clients, and can attack witnesses' credibility. Finally, lawyers can discuss the applicable law, accurately and in a manner consistent with the jury instructions.

At the same time, several forms of conduct are prohibited in closing argument. Violations of those prohibitions may lead, at a minimum, to an objection by the opponent which interrupts the flow of the presentation, but also to admonition by the court, a corrective instruction by the court, a mistrial, or a preserved error for appeal. Some violations also constitute grounds for professional discipline. [2] Advocates, whether for the plaintiff or defendant, must therefore be careful to avoid the following problems: [3]

Providing Improper Statements of the Law. The law of the case is that instructed by the court. Those instructions should be used exclusively. An incorrect statement of the law may warrant a new trial. [4]

Attacking the Law or the Court's Rulings. It should be obvious that it is improper to attack any court ruling before the jury, including the court's rulings on evidence. Beyond reversible error, this is simply a strategic gaffe that pits the lawyer against the credibility of the court. [5]

Misstating the Evidence. Although counsel may argue regarding inferences from evidence in the record, counsel may not create evidence without factual support. [6] Misstating the record in such a way is a strategic error in any event, because it harms the lawyer's credibility.

Vouching for Witnesses. A lawyer may not personally endorse a witness's credibility during closing argument. By presenting purported first-hand knowledge of a witness's character, a lawyer would effectively become a witness who has never been subjected to cross examination. That would be improper. At the same time, a lawyer may argue ***37** from the evidence itself, as opposed to providing a personal voucher, that the witness is credible.

Stating Personal Beliefs. Lawyers may not advocate their personal beliefs during the closing. Strictly interpreted, this rule is violated essentially every time a lawyer utters the words "I think" or "I believe." Thankfully, courts do not place form over substance, and instead consider whether counsel is providing inferences and interpretations from the evidence. [7] Nevertheless, personal references may needlessly raise a red flag, drawing an objection and creating a distraction. The easiest way to avoid the problem is to scrutinize your language. Practice and review what you plan to say, paying special attention to any references to yourself.

Improperly Exciting Prejudice, Passion, or Sympathy. Inflammatory language is improper and may be grounds for mistrial. [8] Avoid any derogatory remarks about opposing counsel or the opposing party, or improper stories or descriptions designed to provoke sympathy for the client or prejudice against the opponent. Along the same lines, arguing an impermissible inference is improper by, for example, implying that the defendant is wealthy or has insurance coverage and so can afford the judgment. [9] Also beware "conscience of the community" arguments, appealing to policy objectives divorced from the law or the facts of the case. [10]

Advocating the Golden Rule. In closing argument, do not suggest that the jurors put themselves in the place of one of the parties. A Golden Rule argument is rarely expressed as "do unto others as you would have them do unto you." If it were that simple, no one would ever violate the rule against such arguments. You must avoid implying the Golden Rule, by asking the jury to put itself somehow in the shoes of a party. Although a Golden Rule argument is not per se reversible error, [11] even alluding to how "you" (the jury) would like to see an issue resolved in the plaintiff's or defendant's position is a red flag which may raise serious appellate problems.

Particular Pitfalls for Plaintiffs

There is nothing more abhorrent for a plaintiff's lawyer (or the lawyer's malpractice carrier) than to obtain a winning jury verdict, then lose it because of improper arguments in closing. Typically, the type of arguments that causes such an unthinkable event results from overly emotional arguments— often from arguments which rely on emotion because of lack of preparation as outlined above. Of course, the plaintiff's attorney wants to excite the sympathies of the jury, to encourage them to award a large verdict, but courts increasingly circumscribe the limits of appropriate argument, and if you believe you have won the case, it makes no sense to even come close to these lines and risk your verdict. The following are common pitfalls that result in the reversal of plaintiffs' verdicts:

Arguments Made Just to Appeal to Sympathy. Plaintiffs' lawyers certainly want to stress to the jury the theme that their clients have suffered a real injury deserving recompense. That argument, however, has limitations. For example, *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156 (Fla. 5th DCA 1994), involved a 10-year-old child who had lost a finger. Plaintiff's counsel encouraged the jury to consider that the defendant's conduct could have resulted in a much worse injury to a much younger child—the loss of a hand or a "smashed head" of a three-or four-year-old. The plaintiff's argument, which had nothing to do

with the facts of the case and was made only to inflame the jury, constituted fundamental error and required reversal of the plaintiff's verdict. [12]

Asking the Jury to "Send a Message" to the Defendant When Punitive Damages Are Not an Issue in the Case. In a case without punitive damages it is improper to argue for a recovery intended to punish the defendant rather than compensate the plaintiff. Such an argument can lead to reversal. In *Erie Ins. Co. v. Bushy*, 394 So. 2d 228 (Fla. 5th DCA 1981), a case without a punitive damages demand, plaintiff's counsel asked the jury to "send a message to Erie, Pennsylvania." That argument required reversal of the plaintiff's verdict because part of the award may have been punitive. [13]

Expressing Personal Opinions About the Merits of the Case or the Credibility of Witnesses. The Florida ***38** Supreme Court has made clear that characterizations supported by the record are permitted. [14] At the same time, counsel's pure opinion is not permitted. Thus, in *Pippin v. Latosynski*, 622 So. 2d 566 (Fla. 1st DCA 1993), plaintiff's counsel's comment that he was "outraged by the defense of State Farm and Mr. Pippin" required reversal of the plaintiff's verdict. [15]

Accusing Defendants of "Hiding the Ball" or Withholding Evidence. While calling a witness a liar, with good reason, is permitted, calling opposing counsel a liar remains off-limits. In *Owens Corning Fiberglass Corp. v. Morse*, 653 So. 2d 409 (Fla. 3d DCA 1995), counsel committed the fundamental error of commenting in closing that opposing counsel was "excellent at confusing issues ... at hiding the ball," and was "a master of trickery," and that the opposing party gave testimony that "he had to have been told by his attorneys." Because the argument was tantamount to calling opposing counsel liars and accusing them of perpetrating fraud on the court and the jury, a new trial was granted. [16]

Contrasting the Wealth of the Defendant and the Poverty of the Plaintiff. Even where punitive damages are at issue, the plaintiff's lack of wealth is not, and therefore cannot serve as the basis of argument. In *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234 (Fla. 5th DCA 1991), plaintiff's counsel argued that his client "basically sacked his entire life savings" to make the investment at issue in the case. The court held that argument improperly contrasted the poverty of the plaintiff and the wealth of the defendant, and required reversal of plaintiff's verdict. Although punitive damages were an issue in the case, the financial status of the plaintiff was irrelevant to punitive damages.

Appealing to the "Conscience of the Community." Even though the jury represents the community, case law forbids appealing to the "conscience" of the community. In *Maercks v. Birchansky*, 549 So. 2d 199 (Fla. 3d DCA 1989), the plaintiff's verdict was reversed, in part, because counsel asked the jury to be the "conscience of the community" and "send a message with its verdict."

Making the "Us Against Them" Argument. It is improper to argue that the jury should reach its decision because the defendant is simply different, such as from a different locale. In *S.H. Investment & Dev. Corp. v. Kincaid*, 495 So. 2d 768 (Fla. 5th DCA 1986), a plaintiff's judgment was reversed, in part, because of an "us against them" appeal pitting the local community against an out-of-state corporation, by asking the jury to "speak with a voice so loud ... that it will reach from ... Miami, Florida, ... to the heart of ... those corporations in New York City ...."

Injecting the Plaintiff's Attorney's Personal Experience, Commitment to the Case, or Sacrifices for the Case. If evoking pure sympathy for the plaintiff is improper, evoking sympathy for plaintiff's counsel is obviously worse. An extreme example of this occurred in *Russell, Inc. v. Trento*, 445 So. 2d 390 (Fla. 3d DCA 1984). There, the plaintiff's verdict was reversed because his counsel argued that he had "lived with ... and carried the burden of this case for three years ...," and faked an emotional breakdown during closing. This case falls within the category of statements made purely to evoke sympathy, but is a more egregious variety. Even though an attorney in fact may make great sacrifices to represent the client, the case is not about the attorney or about rewarding the attorney, and the statements are thus even more objectionable than sympathetic statements about the plaintiff.

Encouraging "Comparative Awards." A jury may not be persuaded to reach an award in one case based on another jury's award in a different case. In *Wright & Ford Millworks, Inc. v. Long*, 412 So. 2d 892 (Fla. 5th DCA 1982), a foot injury case, plaintiff's counsel discussed a recent award to Carol Burnett of $2.5 million in a libel case. Mentioning this irrelevant verdict encouraged the jury to give a "comparative verdict" and required a new trial.

Justifying a Large Award With the Promise of Judicial Remittitur. It is improper to persuade a jury to increase an award based on the possibility that the court may reduce it later. In *City Provisioners, Inc. v. Anderson*, 578 So. 2d 855 (Fla. 5th DCA 1990), the plaintiff's counsel argued that the jury should not worry about "giving too much" because, if they did, the judge could reduce it. That argument required the reversal of the plaintiff's verdict. The argument ignored the converse possibility of additur, perhaps making the jury think the deck was stacked against the plaintiff, and improperly invited the jury to shift responsibility of the verdict to the judge.

Pitfalls for Defendants

Some of the pitfalls previously discussed also present parallel risks for defense counsel in closing argument. Giving personal opinions regarding the veracity of witnesses or the merits of the case, for example, is forbidden to either side. Below are case examples of selected closing argument mistakes that are common to defense arguments:

Personal Attacks on Witness Credibility. Witness credibility is obviously prone to attack based on evidence, but not based on counsel's opinion or experience. In *Silva v. Nightengale*, 619 So. 2d 4 (Fla. 5th DCA 1993), defense counsel improperly ***39** remarked about, among other things, the plaintiff's alleged inability to work as a housekeeper, stating, "To be frank I have made beds myself and I have vacuumed and I don't find it to be a debilitating experience."

"*Conscience of the Community" Arguments about Frivolous Claims*. Just as with the plaintiff, the defendant cannot appeal to some overarching policy in arguing to the jury. For example, in *Stokes v. Wet 'N Wild, Inc.*, 523 So. 2d 181 (Fla. 5th DCA 1988), defense counsel argued that the plaintiff's damages were "absolutely ridiculous"—in itself nonproblematic—but then stated: "This is why we're here. This is why our courtrooms are crowded and this is why we read articles in the paper, because of things like that."

Improper "Empty Chair" Arguments Implying Third Party Settlements or Lawsuits. In the appropriate case defense counsel may argue that some third party caused the plaintiff's harm, but that argument has limitations. In *Ricks v. Loyola*, 822 So. 2d 502, 508 (Fla. 2002), defense counsel suggested that the jury ask why a third party was not a defendant, in violation of the trial court's order in limine. That suggestion warranted a new trial. This was not a traditional "empty chair" argument because counsel emphasized that there had been a prior lawsuit against the third party, and so violated the statute forbidding notifying jurors of releases or covenants not to sue. [17]

Arguing the Award Can be Reinvested. Because damages are already brought to present value, courts reason that the argument that damages will produce a stream of income is improper because it leads the jury to further discount damages. [18]

Closing Thoughts

When your opponent violates these rules, you are faced with the excruciating spur-of-the-moment decision of whether to object. An objection, at a minimum, is typically required to preserve the offensive matter for appellate review. [19] An overruled objection can convey the impression that the objecting lawyer fears that the jury will hear opposing counsel's view of the evidence. Accordingly, it is wise to ask for a side bar to present objections graciously. Objections must also include a motion for mistrial to preserve certain issues on appeal.

At the same time, objecting is risky because of its effect on jurors' perceptions. The jury may consider the objection an effort by counsel to obfuscate, and the objection itself is likely to highlight the point at issue, especially if the objection is overruled. In lieu of an objection, counsel can point out the misstating of evidence in the defendant's closing or the plaintiff's rebuttal. In doing so, counsel should carefully provide a clear and correct recitation of the evidence, and remind the jurors that their own collective memory is controlling.

A good closing argument must be passionate and heartfelt while avoiding the pitfalls of an objection or, worse yet, an admonition or mistrial. Using the principles illustrated in this article should help avoid those pitfalls, setting the stage for the smooth delivery to the climax of your case.

Footnotes

a1 ***Tucker Ronzetti*** *is a partner at Kozyak, Tropin and Throckmorton, P.A. He concentrates his practice in commercial fraud, professional liability, and class action litigation. Previously he served as an assistant county attorney for the Miami-Dade County Attorney's office, handling trials and appeals in labor, employment discrimination, and commercial cases. He obtained his B.A. in economics from Duke University, and his J.D. from the University of Miami School of Law,* magna cum laude.

a2 ***Janet Humphreys*** *is of counsel with the Miami firm of Kozyak, Tropin & Throckmorton, where she handles plaintiff's litigation including product liability, RICO and securities fraud class actions, and asbestos-related bankruptcy litigation. Ms. Humphreys graduated first in her class from the University of Alabama School of Law.*
This column is submitted on behalf of the Trial Lawyers Section, Kelly G. Hamer, chair, and Thomas P. Barber, editor.

1 *Murphy v. International Robotic Sys.*, 766 So. 2d 1010, 1028 (Fla. 2000) ("Attorneys should be afforded great latitude in presenting closing argument, but they must confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence.") (quoting *Knoizen v. Bruegger*, 713 So. 2d 1071, 1072 (Fla. 5th D.C.A. 1998)).

2 Rule 4-3.4(e) of the Rules Regulating The Florida Bar states: "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, 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." Florida courts invoke this ethical limitation in evaluating closings for impropriety. *See, e.g.*, *Murphy v. International Robotic Sys.*, 766 So. 2d 1010, 1028 (Fla. 2000); *Bosch v. Hajjar*, 639 So. 2d 1096, 1097-98 (Fla. 4th D.C.A. 1994) (Alvarez, J., concurring).

3 For a helpful further overview of these principles, see generally Robert S. Warren et al., *Final Arguments in Jury and Bench Trials*, 3 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 37.2 (Robert L. Haig ed.) (West Group & ABA 1998).

4 *See City Provisioners, Inc. v. Anderson*, 578 So. 2d 855 (Fla. 5th D.C.A. 1991) (reversed in part because in closing counsel told the jury the court can "order remittitur or cut [their verdict] down.").

5 *See Liggett Group Inc. v. Eagle*, 2002 WL 21180319, at * 13-14 (Fla. 3d D.C.A. 2003) (condemning a closing argument that "the law has been used as an instrument of oppression and exploitation.").

6 *See City Provisioners, Inc. v. Anderson*, 578 So. 2d 855, 855-56 (Fla. 5th D.C.A. 1991) (reversed in part because in closing in the personal injury case plaintiff's counsel referred to facts not in evidence regarding prescription costs).

7 *See Murphy v. International Robotic Sys.*, 766 So. 2d 1010, 1028 (Fla. 2000); *Forman v. Wallshein*, 671 So. 2d 872, 874-75 (Fla. 3d D.C.A. 1996).

8 *See Airport Rent-A-Car, Inc. v. Lewis*, 701 So. 2d 893 (Fla. 4th D.C.A. 1997).

9 *See Nicaise v. Gagnon*, 597 So. 2d 305, 306-07 (Fla. 4th D.C.A. 1992) (affirming new trial on the grounds that plaintiff's counsel argued "[y]ou are not to worry whether the defendant will contribute a dime of money," because that unfairly implied the defendant had insurance, even if that term was not used).

10 *See, e.g.*, *Stokes v. Wet 'N Wild, Inc.*, 523 So. 2d 181, 182 (Fla. 5th D.C.A. 1988) (defendant counsel's comment that the plaintiff's demand was ridiculous and is "why our courtrooms are crowded" led to reversal because it "appeal[ed] to the conscience of the community and matters far afield from the evidence admitted in the case.").

11 Recent case law applies the "harmless error" test to Golden Rule arguments. *Cleveland Clinic Florida v. Wilson*, 685 So. 2d 15 (Fla. 4th D.C.A. 1996) (en banc); *see Grushoff v. Denny's, Inc.*, 693 So. 2d 1068 (Fla. 4th D.C.A. 1997) (reversing grant of a new trial because the single reference to "you" (*i.e.*, the jurors) in the course of the closing was not highly prejudicial). Nevertheless, this sort of argument is a blatant red flag to be avoided.

12 *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156, 1157-58 (Fla. 5th D.C.A. 1994); *see also Eastern Steamship Lines, Inc. v. Martial*, 380 So. 2d 1070 (Fla. 3d D.C.A. 1980) (comments about the biblical story of Job, and a comment that plaintiff's counsel "went to Vietnam" and "thought he had seen it all" were made simply to evoke sympathy and required reversal of plaintiff's verdict).

13 *Erie Ins. Co. v. Bushy*, 394 So. 2d 228 (Fla. 5th D.C.A. 1981); *see also School Board of Palm Beach County v. Taylor*, 365 So. 2d 1044 (Fla. 4th D.C.A. 1978) (counsel's argument that the jury should set an example to prevent future similar incidents was similar to a request for a punitive damages award rather than for compensatory damages, and furnished an improper motive for the jury to award damages outside a reasonable compensatory range. Plaintiff's verdict was reversed.)

14 *See Murphy v. International Robotic Sys.*, 766 So. 2d 1010, 1028-29 (Fla. 2000) (allowing counsel to characterize a witness as a "liar" as long as there is record support).

15 *Pippin v. Latosynski*, 622 So. 2d 566, 568-69 (Fla. 1st D.C.A. 1993); *see also Kaas v. Atlas Chemical Co.*, 623 So. 2d 525 (Fla. 3d D.C.A. 1993) (plaintiff's counsel calling a defense witness a liar was fundamental error, requiring new trial); *Maercks v. Birchansky*, 549 So. 2d 199 (Fla. 3d D.C.A. 1989) (plaintiff's verdict reversed, in part, because attorney asserted personal opinions about the credibility of witnesses, the justness of his client's cause, and the perfidy of defendants).

16 *Owens Corning Fiberglass Corp. v. Morse*, 653 So. 2d 409, 411 (Fla. 3d D.C.A. 1995); *see also Emerson Elec. Co. v. Garcia*, 623 So. 2d 523 (Fla. 3d D.C.A. 1993) (plaintiff's verdict was reversed because plaintiff's counsel accused defendant's counsel of fraud and hiding evidence).

17 *Ricks v. Loyola*, 822 So. 2d 502, 508 (Fla. 2002); *see also* FLA. STAT. § 768.041; *Muhammad v. Toys R Us, Inc.*, 668 So. 2d 254, 256 (Fla. 1st D.C.A. 1996) (the court reversed partly because defense counsel violated the § 768.041 prescription by arguing: "Does everyone realize they could have—they may have—already settled with the manufacturer?").

18 *Green v. USAA Gas Inc. Co.*, 754 So. 2d 774, 775 (Fla. 1st D.C.A. 2000) (citing the line of authorities on this point, including *Braddock v. Seaboard Air Line R.R. Co.*, 80 So. 2d 662, 668 (Fla. 1995)).

19 *See Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). In Florida, absent contemporaneous objection, relief for improper closing argument is available only where the party has timely moved for a new trial and established the opponent's closing argument was improper, harmful, incurable, and so damaged the fairness of the trial that public interest in the system of justice requires a new trial.

77-DEC FLBJ 36

End of Document