Over the Top

Violating the law of closing argument

By Brian J. Benner and Ronald L. Carlson

Most lawyers endeavor to sum up their cases in a manner that comports with established law and local practice. However, every now and then we have the misfortune of running into the outrageous, over-the-top opponent. Before his ratings are complete, he has prejudiced the jury by violating half a dozen trial norms. All too frequently, the unjust tactics inure to the benefit of the perpetrator. He wins the case.

Applying antidotes to this sort of poison requires a checklist of argument "do's" and "don't's." Unless counsel knows the rules, it is impossible to forge an effective objection strategy, one with the potential to break the opponent's stream of improprieties. In addition to interrupting the outrageous opponent in a legally appropriate way, there is another advantage. The well-placed contemporaneous objection usually provides the only avenue for a successful appeal.

This article is about supplying tools for the foregoing job. Several objections have been isolated for treatment and analysis. Hopefully their inclusion will provide the needed ammunition the next time an overly dramatic opponent resorts to an improper tactic.

Personal Beliefs of Counsel

What if counsel discredits opposing witnesses by telling the jury his belief that they lied when they testified? It might come out something like this: "Ladies and gentlemen, don't follow the path laid out by plaintiff's experts on damages. I have investigated this case, and I know things about them. I believe those two 'experts' were lying when they swore there were permanent injuries here." Such an argument merits objection on more than a single ground, but certainly one of them should be: "Objection, improper opinion by counsel."

While a few "I believe" statements mark the arguments of most attorneys, they only become inappropriate when they refer to the guilt or fault of an opposing party or the credibility of witnesses, as illustrated in the foregoing paragraph. A prosecutor cannot announce to the jury that he believes the accused is guilty.[1] In Michigan, expression of personal belief is especially damaging when coupled with a reference to matters outside the record or when counsel implies he knows more about the case than the facts presented at trial.[2]

Argument Outside the Record

In closing argument, counsel is allowed to draw reasonable inferences from the testimony. In doing so, the attorney may enrich the argument with references to matters of common public knowledge. It is here that verbal techniques such as references to the Bible or lines from well-known literary works play a role. However, when counsel takes the limited license to embellish an argument to extremes, an objection based upon "matters outside the record" should be sustained. Prohibited are references to factual data never produced at trial or argument of excluded matter stricken by the court. In a criminal case, for example, a prosecutor may not argue the effect of testimony that was not entered into evidence at trial.[3]

The rule applies in civil cases as well. Reversal is required where the prejudicial statements of an attorney reflect a studied purpose to deflect the jury's attention from the issues. Where an argument is not supported by the evidence, such an argument can inject a false issue into the case and amount to reversible error.[4]

Golden Rule Arguments

When a trial lawyer invites the jury to step into the shoes of the party she represents, the lawyer may have violated the "Golden Rule" prohibition.[5] In a products liability or personal injury case a plaintiff's attorney might tell the jury: "Remember my client's pain as he sits next to me. Vote a substantial money verdict in this case. Please do unto my client as you would have him do unto you, if you were in his chair as the plaintiff and he were in yours, sitting in judgment." In another sort of civil case, a defense attorney might tell the jury to "imagine you were in the defendant's position. Would you want to be bankrupted by a big judgment, like the one the plaintiff has requested? Don't do to the defendant what you would not want done to yourself!"

Encouraging juror self-identification with one of the parties has drawn appellate court criticism. Most decisions condemn such arguments as improper distractions from the jury's sworn duty to decide cases based on logic and reason, not emotion.

As with many forms of objectionable argument, counsel for the party against whom the Golden Rule argument is used must object. Under most cases, the right to complain that opposing counsel made a Golden Rule argument is lost if an objection is not made.[6]

Name-Calling

As incivility at trial increases, so does the incidence of improper personal attacks. In one closing argument, counsel remarked that the opposing party was "a cheapskate, a low-down pup, cheating and swindling, stealing and waiting like a snake in the grass." An

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objection that counsel's argument partakes of improper name-calling will sometimes lie when unduly colorful characterizations are employed.

This is a field where fine lines divide the proper from the improper. While reversal may be required where the prosecutor's remarks disparage a defendant,[7] it is legitimate to discuss the character of a witness and to characterize his testimony.[8]

Ethnic References

The Supreme Court of Michigan reviewed Michigan jurisprudence in a 1995 appeal wherein a party's ethnic heritage was commented upon. "At trial, several references were made to Arab ethnicity, the first occurring during the prosecutor's opening statement."[9] Other references came up during witness examination. The Supreme Court was asked to decide whether use of the terms "Arab" and "Iraqi" at a trial conducted during the Persian Gulf War deprived defendant of a fair trial.

Along the way, the court reviewed prior Michigan cases wherein clearly intentional comments were designed to arouse prejudice against parties who were Jewish. After remarking that the court abhors the injection of racial or ethnic remarks into any trial because it may arouse prejudice, the court pointed to reversals on this ground. However, not all references fall into this category, as the court next turned to other cases wherein ethnic references did not rise to the level of error requiring reversal.

In one, a 1989 case, the prosecutor's summation stated: "This man comes from the Middle East, and he's not content to make his money from the gas station. He needs more. He gets into the cocaine, nontaxable income life-style." Finally, the court returned to the 1995 appeal. The opinion concluded: "In the instant case, most of the comments were improper and possibly irrelevant. Nonetheless, we find the comments, viewed in context, to be innocuous, unintended, and not of a degree that prejudiced defendant's right to a fair trial."

Thus, no intent to inflame was found. However, the court sounded an alarm for future cases wherein prejudicial intent is manifest, stating that "[w]hen an attempt is made to arouse ethnic prejudices, the rule of reversal appears universal."

Vouching

An objection made on the ground of improper vouching takes the opposite stance from the objections discussed in the last two sections. Instead of counsel improperly disparaging an opposing witness by name-calling or making ethnic references, he improperly bolsters his own witness by vouching for the witness' truthfulness. The Supreme Court of Michigan has made clear that a prosecutor may not vouch for the character of a witness.[10] Promising or assuring the jury that counsel knows that a witness testified truthfully does this and abridges the rule.[11]

Wealth of Party

When a plaintiff suggests to the jury that the defendant can afford to pay and this alone justifies a verdict against him, the argument can be stopped by objection. Conversely, a corporate or other plaintiff with resources cannot be denied recovery on a just claim on the ground that "they don't need the money, so why give them an award." Comments upon the wealth of a party are often disapproved.[12]

There are exceptions. Punitive damage cases often provide an example. In a case, or during the phase of a case, wherein information regarding the defendant's resources is relevant to a judgment that will adequately punish and deter, counsel may appropriately refer to those resources in closing.[13]

Other Objections

The foregoing nonexhaustive list highlights numerous practical objections. There are others. Addressing jurors by name, improper references to insurance, inflammatory appeals based upon religion, and inspiring fear of crime on the part of the jury to prejudice them can all be resisted by prompt objections.[14] While a few argument violations are so serious that they will be reviewed in the absence of a timely challenge,[15] appellate relief from an alleged argument error almost invariably requires that an objection appear in the record.[16] Other remedies can also be considered depending upon the violation, such as a jury instruction to disregard counsel's remark[17] or a request for a mistrial.[18]

Checklist of Objections

The foregoing sections have pinpointed numerous objections to improper summations. A list of relevant objections to final argument may be helpful at this point.

- addressing jurors by name
- appeal to prejudice
- arguing matter outside the record
- comment on defendant's failure to testify in a criminal case
- disparaging party in a prejudicial manner
- evidence misstated
- excluded matter argued
- Golden Rule
- insurance
- misstating the law
- name-calling
- personal attack on counsel, party, or witness

- personal opinion on merits of case
- racial, religious, ethnic, or regional bias
- vouching personally for witness
- wealth of party pilloried[19]

Conclusion

The network of guidelines for closing argument provide objections capable of controlling the overzealous courtroom orator. This list must be readily at hand at the end of a case. Swiftness and accuracy must be the hallmarks of counsel's challenges to improper argument.[20] ✦

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FOOTNOTES

1. *People v Bigge*, 297 Mich 58, 297 NW 70 (1941). See *People v Swartz*, 171 Mich App 364, 429 NW2d 905 (1988).
2. See discussions in *In the Matter of Miller*, 182 Mich App 70, 451 NW2d 576 (1990); *People v Bahoda*, 448 Mich 261, 277 n 26, 531 NW2d 659 667 n 26 (1995), citing *People v Quick*, 58 Mich 321, 25 NW 302 (1885) (counsel stated "I believe they not only lied, but I believe they committed willful and deliberate perjury"). There is a sharp distinction between vouching that a witness lied, which is prohibited, versus asking the jury to view a witness' testimony as untruthful, which is permissible. *People v Coddington*, 188 Mich App 584, 470 NW2d 478 (1991).
3. *People v Stanaway*, 446 Mich 643, 686, 521 NW2d 557, 578 (1994) (however, appellate review of improper remarks generally precluded absent objection by counsel, unless a curative instruction could not have eliminated prejudicial effect).
4. *Hunt v Freeman*, 217 Mich App 92, 550 NW2d 817 (1996).
5. Carlson, *Argument to the Jury: Passion, Persuasion, and Legal Controls*, 33 St LU LJ 787, 803 (1989).
6. *Phillips v Mazda Motor Mfg Corp*, 204 Mich App 401, 516 NW2d 502 (1994). See *Anderson v Harry's Army Surplus, Inc*, 117 Mich App 601, 324 NW2d 96 (1982).
7. See, e.g., *People v Fredericks*, 125 Mich App 114, 335 NW2d 919 (1983). Negative characterization of defendant by prosecutor in summation, see Annot., 88 ALR 4th 8. Not all such references are error. Description of defendant as "monster," see *People v McElhaney*, 545 NW2d 18 (Mich App 1996).
8. *Wilson v General Motors Corp*, 183 Mich App 21, 454 NW2d 405 (1990).
9. *People v Bahoda*, 448 Mich 261, 531 NW2d 659 (1995).
10. *People v Reed*, 449 Mich 375, 535 NW2d 496 (1995) (improper vouching not found in this case). A prosecutor may not place the prestige of his office behind a witness, nor vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' credibility.
11. Some Michigan cases also refer to vouching in a negative sense, as when a prosecutor vouches for a defendant's guilt. In this article, the latter problem is treated in the section on personal beliefs of counsel.
12. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 330 NW2d 638 (1982).
13. *Rodgers v Fisher Body Div, Gen Motors Corp*, 739 F2d 1102, 1105 (CA 6, 1984), cert denied, 470 US 1054 (1985).
14. Telling jurors that they have a civic duty to convict the defendant often injects issues broader than the relevant issue of defendant's guilt or innocence of the charges. Usually a "civic duty" argument, in one of its various forms, must be objected to in order to be grounds for reversal. *People v Swartz*, 171 Mich App 364, 429 NW2d 905 (1988).
15. *Hunt v Freeman*, 217 Mich App 92, 95–96, 550 NW2d 817, 819 (1996); *People v Fredericks*, 125 Mich App 601, 335 NW2d 919 (1983) (prosecutor may not burden defendant's right to be present at trial).
16. *People v Ullah*, 550 NW2d 568 (Mich App 1996); *People v Mooney*, 549 NW2d 65 (Mich App 1996). In the absence of an objection, the appellate court will review only for a miscarriage of justice.
17. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 556 NW2d 528, 536 (1996); *People v Swartz*, 171 Mich App 364, 429 NW2d 905 (1988).
18. See *Anderson v Harry's Army Surplus, Inc*, 117 Mich App 601, 324 NW2d 96 (1982).
19. R. Carlson, *Successful Techniques for Civil Trials*, § 7:15 (2d ed 1992).
20. Carlson, supra note 5, at 820.